No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

FLOYD M. CHODOSH, SUE EICHERLY, and OLE HAUGEN,

PETITIONERS,

v.

PALM BEACH PARK ASSOCIATION,

a California non-profit mutual benefit corporation,

RESPONDENT.

On Petition for a Writ of Certiorari to the
California Fourth District Court of Appeal, Division 3

After California Supreme Court Denied Petition for Review

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted: 6/11/19

/s/ Patrick J. Evans, Sup Ct. #110535
Attorney for Petitioner
16897 Algonquin St., Suite F
Huntington Beach, CA 92649
pevans@pevanslawoffice.com
714-594-5722 fax:714-840-6861

QUESTION PRESENTED

The Justices of the California Court of Appeal, Fourth District, Div. 3 refused to recuse themselves from the appeal of a judgment against Petitioners in which they lost their homes and were saddled with six figure obligations for supposed unpaid rent. The Judgment came about in a scenario where, during the litigation, Petitioners had sued the ADR company where Div. 3 Justices have routinely retired post bench to a lucrative employment as a "neutral." Petitioners also sued the co-founder of the ADR company, who was also the first and founding Div. 3 Presiding Justice. In addition, based on alleged unlawful acts and rulings by the trial court judge and the appellate justices, Petitioners sued two (2) of the Div. 3 appellate justices who despite having been sued by Petitioners, and although the federal lawsuit was later dismissed without prejudice, entered and made rulings and wrote the Opinion in Petitioners' appeal. (Appendix A) The question presented is whether the Div. 3 Justices' failure to recuse themselves from participation in the appeal violated the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

STATE COURTS

California Supreme Court (denied review 3/13/19)
350 McAllister Street, Room 1295
San Francisco, CA 94102-4797 tel. 415-865-7000

Fourth District Court of Appeal–Div.3 (Opinion issued 12/17/18)
601 W. Santa Ana Blvd.
Santa Ana, CA 92701 tel. 714-571-2600

Orange County Superior Court (judgment 4/14/16) tel. 657-622-6378
700 Civic Center Drive West
Santa Ana, CA 92701

PETITIONERS AND PLAINTIFFS / APPELLANTS BELOW NOT PETITIONERS

Floyd M. Chodosh, Sue Eicherly, Ole Haugen (plaintiffs/appellants below)
c/o Patrick J. Evans (USSC Bar #309160)
Law Office of Patrick J. Evans tel: 714-594-5722
16897 Algonquin St., Suite 600 fax: 714-840-6861
Huntington Beach, CA 92649-3832

Note: Plaintiffs/Appellants below in the case and appeal, Rodger Kane, Jr., Myrle Moore, trustee, Kathleen Schowalter, and Todd Peterson, are <u>not</u> Petitioners.

RESPONDENT:

Palm Beach Park Association (defendant/respondent below)

c/o Jeffry Smith, Attorney of Record tel: 619-233-1006
Lewis Brisbois Bisgaard & Smith LLP
701 B St., Suite 1900 fax: 619-233-8627
San Diego, CA 92101-8198

-and-

c/o Allan Weiss, Attorney of Record tel: 562-421-6333
Allan B. Weiss & Associates
5001 Airport Plaza Suite 240 fax: 562-421-6903
Long Beach, CA 90815-1280

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JURISDICTION

The Orange County Superior Court entered judgment against Petitioner on 4/14/16. The Fourth District Court of Appeal (Div. 3) affirmed the trial court on 12/17/18. The California Supreme Court denied a discretionary petition to review on 3/13/19. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 872 (2009) states: "Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Extreme and outrageous facts and appearances satisfy the objective standard and vitiate due process. There are constitutionally prohibited appearances of impropriety and bias. The court stated "As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal." This case is an additional instance.

The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated due to the trial judge's and justices' refusals to recuse in the face of pecuniary interests and conflicts arising from their post-bench retirement employment opportunities at JAMS, Inc., recognized as the world's largest provider of alternative dispute resolution ("ADR") services. Several times, Petitioners sought to disqualify the trial judge and justices based on their ability and incentive to work at JAMS after retirement. (Appendices D, F-J, L, M) Petitioners also argued for recusal because they had sued the trial judge and justices in federal court, a case later dismissed without prejudice, leaving intact its claims against the justices.

The appearance of justices with pecuniary interest in the ADR company the litigants had sued, along with the litigants having sued the justices in federal

court, are undisputed facts. In the fact of these and other facts, the justices refused to recuse. Their refusal denied Petitioners due process.

Petitioners were plaintiffs and appellants in a consolidated, multi-case litigation against their homeowners association concerning real property ownership rights to their homes in a seniors' (age 55+) "resident owned" mobilehome park located on a prime ocean view real estate parcel in the City of San Clemente in Orange County, California (the "Park"). Respondent Palm Beach Park Association, a homeowners association, ("PBPA" or "HOA"), managed and held the seniors' title to the Park land and improvements.

***Chodosh v. PBPA*, Phase I Trial – Original Trial Judge Ruling**

PBPA purchased the Park land to form a statutorily defined "resident owned park" ("ROP"). Calif. Civil Code §799(c). Regardless of the size of a member's lot or location, ocean view or flatland, and without member approval, PBPA assessed each HOA member $200,000 dollars of the purchase price. For members that could not pay, PBPA, not a licensed lender, loaned $200,000. The ROP illegal transactions spawned litigation.

Petitioners filed consolidated complaints (the "Chodosh" complaint) against PBPA in November 2010 in Orange County Superior Court. In April 2013, Hon. Nancy Wieben Stock (Ret.) ("Judge Stock") in the Phase I trial, ruled and observed that the fiduciary HOA transactions when the Park had converted to ROP were illegal. The $200,000-member assessment was invalid, with finding that the HOA loans were "an illegal loan by an illegal lender". In a related action, Judge Stock

ruled that Petitioners' ROP rights were real property and that PBPA engaged in unlawful strict foreclosure when it took Petitioners' homes for alleged non-payment of rent and assessment.

A plethora of proven violations plagued PBPA. Among the many breaches, PBPA issued "HOA" memberships without a securities permit, made residential mortgage loans without a lender's license, which loans violated truth in lending ("TILA").

Mediation with Justice Trotter at JAMS – World's Largest ADR Firm

After the Phase I trial, Judge Stock recommended the parties mediate with Hon. John K. Trotter, (ret.) at JAMS, Inc. (Judicial and Arbitration and Mediation Services.) Justice Trotter was the first presiding justice of the California Court of Appeal, Division 3. After his bench service, Justice Trotter retired and co-founded JAMS. Headquartered in Orange County, JAMS became the largest ADR" service provider in the world.

At mediation the HOA proposed sale of Petitioner's homes to it, at six figure prices but not for cash. Instead, PBPA offered a small down payment and sign an HOA unsecured promissory note. Plaintiffs rejected the offer.

Mediator Justice Trotter (Ret.) instructed the parties to meet alone, without attorneys. In the meeting, after Petitioners again rejected the HOA promissory note proposal, Justice Trotter entered the room. He told Petitioner Chodosh, and his then co-plaintiffs, in front of the HOA Board Directors, that the offer was a "gift" and if the homeowners did not accept the HOA promissory note settlement

proposal, “he would personally tell their trial Judge (Judge “Nancy”) that they had refused to settle . . . and that they were “the reason why settlement was not reached."

Petitioners became afraid that Justice Trotter had or would malign him to their trial judge. Knowing his background influence with the Orange County courts, they feared that Justice Trotter would turn the courts against Petitioners. Six (6) weeks after Justice Trotter stated he would besmirch Petitioners to their trial judge Hon Nancy Wieben Stock, who had recommended Petitioners mediate at JAMS with Justice Trotter, and without having made any prior disclosure, retired from the bench and joined JAMS as a private, for hire “neutral”.

New *Chodosh v. PBPA* Judge Reverses Original Judge Phase I Rulings

The presiding judge assigned Hon. Robert J. Moss to replace Judge Stock. Judge Moss ignored Judge Stock’s Phase I trial findings and rulings. He reversed them, including rulings that ROP was real property and PBPA engaged in strict foreclosure, along with other findings of illegality. Judge Stock ruled Petitioners owned real property. Just Moss, contrary to law, demoted them to tenants having only “personal property”.

Before Judge Moss were the undeniable facts and documents proving PBPA’s fiduciary breaches and violations of consumer protection and other statutes. Judge Stock had granted Petitioners leave to amend to add the illegality. Judge Moss denied Petitioner’s motion to amend the complaint and answer to HOA cross-complaint to add the illegality claims and defenses. Judge

Stock originally had calendared a multi-phase bench trial. Judge Moss calendared a jury trial. Later, there would be no jury, but a four (4) phase bench trial lasting four (4) years.

Alarmed by the complete turn-around in trial court rulings, in 2014 (Appendix L and M) Petitioners moved to disqualify both the (already retired) original trial judge Nancy Weiben-Stock and the new trial judge, Judge Moss and to vacate their orders. Motion to disqualify the original trial judge was made on the basis of California statute which provided for disqualification where the challenged judge was under contract or discussions for an arrangement with the ADR company that the judge recommended. Code of Civil Proc. §170.1(a) 8(A)(iii) Disqualification for new judge was based on contacts with the original judge.

Judge Moss denied the disqualification motions. (Appendix L) Petitioners took a writ on the disqualifications to the Div. 3 Appellate Court. The court denied the writ with one justice stating Petitioners' counsel should be sanctioned for a "frivolous" writ. (Appendix M)

Petitioner Sues JAMS and Justice John K. Trotter (Ret.)

Because Judge Moss reversed Judge Stock's rulings and made rulings contrary to case facts and applicable law, Petitioners believed that Justice Trotter had, as he threatened and promised, maligned them to their trial court judges. Petitioners sued JAMS and Justice Trotter in the Orange County Superior Court, on several claims, including the contention that under the California Evidence Code, a mediator's promise and threat to malign a mediating party to the trial

judge for refusal to settle on the mediator's recommended terms was unlawful and obstructed justice. California Evidence Code §1119 makes inadmissible mediator statements at a subsequent trial or proceeding. Section 1121 provides that a mediator shall not communicate with mediating parties' "decision maker" without the parties' consent. Its legislative history indicates it was enacted out of concern of mediator coercion by threat to malign litigants to their trial judge.

The trial court ruled that Justice Trotter's statement at mediation was inadmissible evidence for the JAMS case, despite statutory prohibition of mediator – judge contact. Petitioners appealed to the Court of Appeal, Div. 3. On appeal Petitioners objected to the Div. 3 appellate court website containing biographies for justices that included information promoting JAMS. As a result, Presiding Justice Hon. Kathleen O'Leary was forced to remove references to JAMS from the Div. 3 court website justices' bios'.

Petitioners objected to the appeal being heard by justices on the Div. 3 court where Justice Trotter, defendant and appellee, had his picture on display in the courthouse as former justice, was the first presiding justice of that appellate court, and because he was the co-founder and majority owner of defendant JAMS that historically hired Div. 3 justices for lucrative post-bench JAMS employment.

Denial of Motion in JAMS case to Disqualify Div. 3 Justices; No Recusal

In the JAMS case Petitioners moved to disqualify all nine (9) Div. 3 justices for their personal collegiality with their court's founding presiding justice and more importantly, because the justices had pecuniary conflicts of interest because

historically most of their predecessors, post-bench retirement, had gone to work at JAMS with Justice Trotter.

The Div. 3 Presiding Justices denied the disqualification motion, (Appendix J and I) stating that, under California law, which borrows federal law of disqualification, an appellate justice must decide whether to recuse. *Kaufman v. Court of Appeal* (1982) 31 Cal. 3d 933. Under *Kaufman*, the only recourse for improper non-recusal being appeal of the challenged justices' decision on the basis of bias and failure to recuse.

California legal periodicals reported the motion to disqualify the Div. 3 justices based on the justices' personal and financial shared interests with JAMS and Justice Trotter. No Division 3 justice recused. The same day Presiding Justice O'Leary denied the disqualification of Div. 3 (Appendix J) the California Supreme Court ordered (Appendix K) transfer of Petitioners' appeal in the JAMS and Justice Trotter appeal to the First District Court of Appeal, Div. 1, San Diego.

Mediator Threat to Malign Litigants to Trial Judge Upheld

On appeal JAMS argued that the statement and threat to malign mediating parties to their trial judge was a "classic" mediator technique, that it was inadmissible speech that occurred in a mediation, and that no harm had been shown stemming from any such mediator – trial judge ex parte contact. The Div. 1 Appellate Court, in an unpublished opinion, (*Chodosh, et al. v. J. Trotter and JAMS*, 4th Dist. Court of Appeal, Div. 1, Case No. D070952 (9/13/17), held that Justice Trotter's statement and threat that he would malign Petitioners and their

co-appellants' to their trial judge, while "discouraged" under Evid. Code §1121, was not prohibited and was protected as inadmissible under §1119. The California Supreme Court denied review.

JAMS Actively Recruits Orange County Superior and Appellate Courts

Orange County retiring appellate court justices consistently become highly paid JAMS neutrals. Three (3) out of four (4) living Div. 3 Justices are JAMS neutrals. A score of retired Orange County Superior Court Judges have joined JAMS. Retired California Supreme Court Justices have joined JAMS, as have had retired District Court judges.

JAMS clients are the wealthy worldwide, including international companies that have their contract arbitration at JAMS. A successful JAMS "neutral" can earn twice or more the salary of a sitting justice or judge. Average annual earnings reportedly exceed $500,000 with some over $1,000,000. (See, e.g., 72 Albany Law Review, "*Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*", by Urska Velikonja (2009) p. 268)

For three decades JAMS has hired dozens of former Orange County Superior Court judges, including Hon. Nancy Weiben-Stock who joined JAMS in 2014 and (Ret.) Hon. Gail Andler (Ret.), the duly assigned judge on the related *Haugen* Park Sale case whom Judge Moss unseated and replaced by "self-re-qualifying" himself. During the litigation, two of three trial judges retired to JAMS.

This Case in Prior Appeals During and After *Chodosh v. JAMS*

The JAMS case was on appeal starting April 2015. The Div. 1 Appellate Court unpublished opinion for *Chodosh v. JAMS* issued Sept. 13, 2017. Meanwhile, this case, *Chodosh v. PBPA*, had proceeded to trial in phases, followed by appeal starting July 2016 with Opinion issued Dec. 17, 2018 (Appendix A).

Petitioners' suit included PBPA violation of truth in lending ("TILA"; 15 U.S.C. §1635) for the HOA $200,000 residential mortgage loans. *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. ___, 135 S. Ct. 790 (2015), mandated that the trial Judge Moss, in his Phase III decision, correctly rule that the PBPA loans violated TILA. Judge Moss denied the express holding that the TILA violating lender had to refund to the borrower payments made on the TILA violating loan. Several times, Petitioner appealed and made motions to District Court of Appeal, Div. 3 seeking its intervention on trial judge R. Moss upholding of illegal contracts, contrary to California law. Div. 3 always promptly denied relief.

Chodosh v. PBPA concluded December 2015 with the Phase IV trial. Judge Moss issued incorrect rulings finding that Petitioners had no real property interest and that the HOA could take their rights, as the HOA President put it, "for nothing" upon an HOA Board vote. Judge Moss ignored the panoply of PBPA real estate, securities, and other violations, including subdivided lands law, subdivision map act, the residential mortgage lender's act, and TILA.

Judge Moss entered judgment for PBPA on April 14, 2016 (Appendix B). He awarded PBPA Petitioners' homes "for nothing", and adjudged that they owed PBPA six figure back rent for the taken homes.

Petitioners appealed July 2016. The Appeals Court unpublished decision was issued December 17, 2018 (Appendix A), held that PBPA had illegally charged rent for homes without certificates of occupancy, and that the $200,000 assessment was invalid. But the Opinion did not return Petitioners' homes, on which the HOA had strictly foreclosed for rent and assessment non-payment.

Petitioners raised the anomaly of the Opinion holding they never owed rent or assessment (Appendix A at pgs. 2, 14, 17, 22), but not holding that PBPA would have to return Petitioners homes to them because the PBPA strict foreclosures were based on non-payment of rent or assessment. The Div. 3 court denied relief, wrongly categorizing Petitioners as mere tenants, (Appendix C) when they were ROP real property owners that purchased their homes.

Related Case *Haugen v. PBPA*, Trial Judge Self "Re-qualifies"

In 2015, as *Chodosh v. PBPA* approached Phase IV conclusion, Petitioners became aware of the fiduciary fraudulent scheme whereby the Park was to be sold for millions below market value to an undisclosed affiliate of the Board President, a real estate broker. With false statements and fraud, members were convinced that the Park was not financially sustainable and bankruptcy imminent. The Board President pressed for sale of the Park's valuable ocean view parcel in San Clemente, California to a particular buyer. The fraudulent scheme was to sell the

Park at millions under market to an undisclosed third party affiliated with the Board President. No appraisal was commissioned, the property was not listed or advertised, competing bids were not sought. Fiduciary HOA would sell off its land in a fraudulent and self-dealing transaction that Judge Moss would soon enable and the Justices uphold.

Petitioner Ole Haugen filed a new lawsuit to stop the fiduciary fraudulent sale. As a related case, *Haugen v. PBPA* was initially assigned to *Chodosh v PBPA* trial judge R. Moss. Mr. Haugen exercised his peremptory right to disqualify Judge Moss, which was granted by the Supervising judge. (Appendix F) On November 30, 2015, Judge Moss was disqualified, removed as the trial judge, and the case reassigned to Hon. Gail A. Andler (Ret.) (Appendix F)

Three weeks later, in late December 2015 it was learned that the Park sale was scheduled to close. Mr. Haugen filed an ex parte application for a temporary restraining order ("TRO") to halt the sale set to close the next day. At the ex parte hearing, Judge Andler's clerks said that case had been transferred back to disqualified Judge Moss.

Judge Moss was not in his court room. He had previously stated on the record in trial of this case that he would be away from court on vacation. His court clerk advised the parties that disqualified Judge Moss had called in from vacation to enter an order postponing the TRO hearing. Only after entering the TRO order did disqualified Judge Moss enter two (2) orders re-qualifying himself, putting himself back on to the case. (Appendix F) That same day, just four hours

after the vacationing and disqualified Judge Moss called into the court to thwart the TRO and self-re-qualify, the deed for the fiduciary fraudulent sale recorded.

In early 2016, after trial in *Chodosh v PBPA* concluded and with judgment pending, Petitioners ascertained that Judge Moss had unlawfully "self-re-requalified". Determining that his "self-re-qualification" was unlawful took time because, among other things, Judge Moss' clerk had not served the first self-requalification order. Judge Moss' other orders issued at the time of the TRO hearing incident were improperly entered on the court docket.

Based on the wrongful "re-qualification" and the actual bias it demonstrated, Petitioners filed a motion to disqualify Judge Moss and retroactively nullify his judgment in *Chodosh v. PBPA*. Judge Moss denied the disqualification motion. (Appendix G) Petitioners took a writ to Appeals Court Div. 3, which it promptly denied. (App. H) The Appellate court upheld disqualified Judge Moss' "re-qualification", or as Judge Moss put it, his "re-assumption of jurisdiction." (Appendix K) They allowed a fraudulent mobilehome park sale that siphoned millions in real estate equity from the resident owner seniors.

Judge Moss' self-re-qualification was blatantly illegal, constituting willful judicial misconduct under California law. There is no provision that allows a judge to "self-re-qualify." Petitioners also contend it was a crime, because although Judge Moss denied it under oath, (Appendix G) he must have had ex parte contact alerting him to the TRO hearing. It is inconceivable that, absent someone asking him, that Judge Moss would suddenly call into court from vacation early in the

morning, on a case not before him, on which he was disqualified, and that he would do so just in time to thwart the TRO so the fiduciary fraudulent sale could close that same afternoon.

Petitioner Sues Trial Judge and Appellate Justices in Federal Court

In December 2016 in a 42 U.S.C. §1983 action, Petitioners sued trial Judge Moss and the Div. 3 Appellate Court Justices that, to that point, had made decisions in *Chodosh v. PBPA* and related cases. The District Court dismissed the complaint with prejudice on *Rooker-Feldman*. Petitioners appealed to the Ninth Circuit. It affirmed *Rooker-Feldman* dismissal, but reversed the District Court's dismissal with prejudice to correct it to without prejudice. *SUE EICHERLY; et al., v. KATHLEEN O'LEARY, individually, and in her capacity as Presiding Justice of the California Court of Appeal, Fourth District, Div. 3; William Bedsworth, individually, and in his capacity as Associate Justice of the California Court of Appeal, Fourth District, Div. 3, et al., Defendants-Appellees* No. 17-55446 (D.C. No. 8:16-cv-02233-CJC-KES)(filed 12/9/16; dismissed 1/8/18, Memorandum Decision) During pendency of the District Court action and Ninth Circuit appeal, *Chodosh v. PBPA* remained before the Orange County Div. 3 Court of Appeal.

Disqualification Motions Against Div. 3 Justices

Based on the JAMS-Justices connections and the federal lawsuit, Petitioner filed a motion to disqualify all Div. 3 Justices from hearing the *Chodosh v. PBPA* appeal. (Appendix D and I) Later, because Div. 3 Presiding Justice O'Leary issued rulings and orders that were unlawful and against Petitioners, they moved

to Disqualify Presiding Justice O'Leary. No Justice recused. The Opinion did not mention disqualification. Following Petition for Rehearing, the Div. 3 court issued a terse denial of the disqualification motions. (Appendix D)

The motion to disqualify Presiding Justice O'Leary was supported by her instant denial of Petitioners' discovery motion to take the deposition of Judge Moss. Justice O'Leary denied the motion three hours after it was docketed, in violation of Court rule which prohibited motion ruling until after expiration of the time for the opposing party to respond. In the disqualification, Petitioners argued that Justice O'Leary had acted to benefit Judge Moss who was her co-defendant and alleged co-conspirator in the federal case.

In or about May 2018 the three (3) justice panel assigned to the *Chodosh* appeal was constituted. All three panel member justices had previously sat for oral argument on appeals or writs in *Chodosh* or related cases. The panel included Justice William Bedsworth a defendant in Petitioners' federal case later dismissed but leaving its viable claims. Despite Petitioners suing him in federal court, Justice Bedsworth, who would author the appeal panel's Opinion, joined the panel for Petitioners' appeal. Petitioners' objection that they were being judged by a judge they had sued in federal court went unheeded.

Justice Bedsworth threatens Petitioner's Counsel with Contempt Charge

Oral argument for the Chodosh appeal case was set for July 20, 2018. Three (3) days before, by letter to Presiding Justice O'Leary copied to all justices, PBPA sought to have Petitioners' counsel held in contempt for having stated that

Judge Moss had "fixed" the give-away sale of the Park and for statements made in the motions to disqualify all justices and Presiding Justice O'Leary.

At oral argument Justice Bedsworth stated that the proceeding would include hearing on PBPA's request that Petitioners' counsel be held in contempt. Petitioners counsel argued the case and the contempt charge. He stood by what he had stated and proved, that Judge Moss had called in from vacation to thwart the TRO and by that action had "fixed" the fiduciary fraudulent sale of the Park enabling it to close a mere four (4) hours later.

Justice Bedsworth interjected to ask if counsel was declaring that the trial judge had "fixed' the case. Counsel stated he had already so declared in pleadings. Justice Bedsworth asked if he was making the "fix" charge in open court on the record. Counsel said "yes". Justice Bedsworth stated that it sounded like "direct contempt." Counsel stated that if so, the court should issue an order to show cause regarding contempt, and conduct a hearing.

Justice Bedsworth stated that the court would consider an OSC. Counsel replied that to the OSC proceeding he would subpoena Judge Moss to question him about his "call in" from vacation just in time to thwart the TRO to stop the Park sale. Following oral argument, Petitioners filed Offer of Proof for the Judge Moss "fix". There was no response. The court did not hold counsel in contempt.

The Appellate Decision and Opinion (Appendix A)

The Opinion holds that PBPA had no valid claim against Petitioners and their co-Appellants for unpaid rent or for the invalid assessment. (pgs. 2, 14, 17, 22) The monetary judgments against Petitioners were reversed and remanded.

The Opinion left intact the PBPA illegal "strict foreclosure". PBPA had taken Petitioners' homes with a Board vote that Petitioners had not paid rent or assessments. The Opinion upheld the strict foreclosure while ruling the underlying obligations, for unpaid rent and assessment, were unlawful and unenforceable. The appellate court nullified the underlying illegal transactions, but allowed the HOA to keep Petitioners' homes.

As far as contempt, Justice Bedsworth, declared that while Petitioners counsel had stated "calumny" against Judge Moss, there would be no contempt order. (Id. p. 20) The Opinion charged Petitioners' counsel had not adequately briefed illegality. But substantial briefing in the record had addressed illegality.

Petition to Rehear the Opinion

On petition for rehearing, Petitioners argued that, as the Opinion held Petitioners did not owe rent or assessment, the HOA had to return their homes the HOA had taken by Board voted strict foreclosure for non-payment of rent and assessment. Without rent or assessment owed, the HOA had no right to strictly foreclose. Petitioners paid a lot of money for their homes. Petitioner Chodosh paid $525,000; Petitioners Eicherly and Haugen paid around $200,000. They asked for their homes back.

The Rehearing petition also argued that because there had not been an order to show cause against Petitioner's Counsel's for his written and open court declarations that Judge Moss "fixed" the PBPA real estate Park sale, that the court had factually determined that the "fix" was true. If it were not true, counsel would have been in direct contempt for his calumny in the untrue statement that the Judge "fixed" a case. *In re Koven* (2005) 134 Cal.App.4th 262, 272.

The Order Denying Rehearing stated the law that a tenant, while not liable for rent, can be evicted. Petitioners were not tenants, but owners in a "resident owned park", having paid up to $525,000 for the home in the Park.

The Rehearing Order opined that the court had discretion to not pursue contempt against Petitioner's counsel for his statement that Judge Moss, a sitting judge, had "fixed" a case. According to the court, not holding counsel in contempt did not mean that the court had found the "fix" accusation to be true.

JAMS Recruits Orange County Superior and Appellate Courts

Three out of four living Div. 3 Justices have been JAMS neutrals for years. Many Orange County Superior Court Judges have joined JAMS. Orange County retiring appellate court justices have consistently gone to JAMS. At JAMS, a successful "neutral" can earn double, triple or more the salary of a sitting justice.

Petitioners Stop Div. 3 Court Website JAMS Promotion

In the appeal, Petitioner objected to the Div. 3 appellate court website having biographies for the three justices that included information about JAMS

which had promotional terms. As a result, Presiding Justice O'Leary was forced to remove the court website justices' bios' references to JAMS.

In *Chodosh v. PBPA*, Two of Three Trial Judges Retired to JAMS

The original trial judge, Hon. Nancy Wieben Stock (Ret.) retired and went to JAMS. The Presiding Judge replaced her with sitting Judge Moss; his judgment is on appeal. In the related *Haugen* case to stop the Park sale, Judge Moss was disqualified and replaced with Hon. Gail Andler (Ret.) Judge Moss, by his "self-re-qualification, took the case back from Judge Andler. About a year later Judge Andler retired and went to JAMS. Thus, in both cases the original trial judge retired and went to work for JAMS. Two out of three trial judges in the Park cases retired to JAMS. Judge Moss has not yet retired.

Due Process Denial Theme– Extreme Facts and Appearances

With regard to Supreme Court Rule 14 (i), Petitioners regularly and repeatedly raised the federal questions in this Petition, but discussion of the questions was wholly omitted from appellate court rulings and trial judge disqualification pleadings. The Opinion says nothing about disqualification motions for Div. 3 Justices. Appellate Court denials were blunt. (Appendix D, I, M) Judge Moss denials included his verified statements. (Appendix G, L) The Appellate Court tersely denied writs on Judge Moss' denials. (Appendix H, M)

Going back to 2016 (Appendices G, H), Petitioners repeatedly briefed and argued disqualification, including federal law that extreme facts of alarming appearances of impropriety makes for denial of due process. See, e.g., Petitioners'

Motion to Disqualify Judge Moss, Memorandum, pg. 53 (4/22/16)("In cases with "extreme" facts showing or strongly implying judicial bias, misconduct or appearance of bias against a party may deny the party a fair judge to the point of a constitutional breach of due process" citing *Caperton*); Motion to Disqualify Div. 3, Order denying 5/3/18; Motion to Disqualify Presiding Justice O' Leary, 7/6/18; Reply (3/1/19) to Answer to Appellants' Opening Brief (12/17/18) pgs. 7, 13, pg. 15, fn. 4, pg. 39)("intolerable appearance of impropriety"; Petition for Review To California Supreme Court, (1/28/19), pg. 3 "The Opinion was made . . . . on facts, events and circumstances that give rise to intolerable appearance of impropriety"; Reply to Answer to Petition for Review (3/1/19), pg. 26 "Moreover, the extreme appearance of impropriety points to actual bias that need not be proven to find due process violation." In the state courts below Petitioners raised and argued the questions now before this Court, but the trial court rulings and Appellate decisions do not treat or reflect such questions and argument.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to establish guidance on circumstances in which due process requires the recusal of a justice in a case where the litigants sued the ADR company where the justice has prospect for future employment and where the litigant sued the justice in federal court. Judicial integrity and public confidence mandates attention to situations where a judge is under financial influence and temptation of a large ADR company. The intersection of sitting judge and retired judge that offers the sitting judge post-bench rewarding retirement

position raises issues with weighty implications for the Due Process Clause's guarantee of judicial neutrality and for the legitimacy of state judicial officials' decisions. Due Process is vulnerable to judges tempted and influenced by an outside company owned by retired judges from the same court that can award them position for lucrative post retirement income. The influence and temptation, like that in this case, make for extreme facts and appearance such that due process is denied.

The Orange County, California Appellate Div. 3 Justices refusal to recuse and instead hear and rule on the Chodosh v. PBPA and related cases and litigation, transgress this Court's holdings that "a judge must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l. Cas. Co.*, 393 U.S. 145, 150 (1968) Justices who have financial opportunity from their court's first and former Presiding Justice, where the party sued the former justice and his ADR company (Orange County Superior Court Case No. 30 - 2014 – 00722371) appear biased because of their pecuniary interest to enhance securing a JAMS post-retirement lucrative job opportunity.

This court has found constitutionally unacceptable bias appearance in several cases, for financial or pecuniary direct interest, or where there was motive or temptation. In this case all those factors overwhelming apply based on objective facts. In *Caperton* this Court stated: "Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of

the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U. S. 35, 47 (1975)"

This Court stated almost a century ago that it "violates the Fourteenth Amendment . . . to subject [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Here the Justices had financial incentive to rule against Appellants. The Justices' prospects for post – retirement positions as paid neutrals at JAMS which historically and currently hires Orange County California retired Superior Court and Appellate Court Div. 3 Justices motivated them to ingratiate themselves with JAMS and its founder Justice John K. Trotter. (Ret.) first presiding justice of the California Court of Appeal, 4th District, Div. 3.

The Justices that Petitioner sued in Federal Court, the Presiding Justice and the author of the Opinion (Appendix A) had direct financial interests in the outcome of Petitioners' case and related cases. They had to recuse. The Justices insistence on participating in this case offends this Court's decisions specifying the circumstances in which due process requires recusal.

Justices' refusal to recuse appears grounded and initiated by a failed JAMS ADR session held before mediator retired justice John Trotter who owns a majority interest in the ADR company and offers post bench employment. This case involves the conflicting law of the states and federal courts as to when and how facts,

statements, events and communication at mediation can or cannot be basis for claim of due process violation.

The California Supreme Court ruled that statutory right to keep inadmissible mediation made statements overrides litigant's due process right to use the statement as evidence in malpractice lawsuit against the attorney. *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011) Conversely, *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. 4th Dist. Ct. App. 2001), and other cases, have affirmed that due process overcomes inadmissibility of mediation statements and conduct.

Vitakis had the facts of this case, the mediator stated and threatened that he would malign the mediating party to their judge, unless the party settled on the mediator's dictated terms. The court held the statement was admissible to show due process violation. In federal court, mediation rules give way to due process. See, e.g. *Milhouse v Travelers Commercial Ins. Co.* (C.D. Cal. 2013) 982 F.Supp.2d 1088, 1104. ("[T]o finds evidence of statements made at the mediation proceeding inadmissible at trial would violate the due process right of Travelers.") In contrast California rejects the principle of *Milhouse* that due process surmounts mediation confidentiality.

In this case, Petitioners were denied due process under the United States Constitution; because such rights were made denied by California statutory "mediator confidentiality". After the mediation, the judge and justices refuse to recuse despite overwhelming appearance of impropriety, but the core evidence of

mediator misconduct that drove the refusal to recuse stance was inadmissible as mediation protected.

The retired justice mediator's promise to harm Petitioners by communication with their trial judge is a mediation tactic the ADR company's neutrals employ in their effort to achieve settlement desired by one party against the other. The original trial judge in this case intentions of imminently retiring to join JAMS was not disclosed to Petitioners before or at mediation by the trial judge or JAMS.

The deliberate court rulings in this case that ignored the law culminated in Petitioners losing their homes "for nothing" as verified by their HOA Board President, and being ejected from the Park. There is appearance of a continuum from mediator retired Justice Trotter dictating a settlement, which the aggrieved litigant Petitioners refused, with the dire consequences the mediator promised to place in motion by negative communication about them to their trial judge.

There are few cases where the connection between sitting judges and the ADR company and its former Justice owner-operator are at issue and alleged to be the reason or motive for denial of due process. See, e.g. *Great Western Mining & Minerals v. Fox Rothschild* (3rd Cir. 2010) 615 F.3d 159, 161 ("Great Western alleges that its state-court losses were the result of a 'corrupt conspiracy' between the named defendants and certain members of the Pennsylvania state judiciary to exchange favorable rulings for future employment as arbitrators with ADR Options, Inc., an alternative dispute resolution entity.")

This is a case where ADR – sitting judge connections have the appearance of creating and influencing the sitting justices' decision making. This case will allow this Court to clarify the circumstances in which due process mandates recusal where there is ADR influence. The judiciary cannot tolerate appearances that an outside, private company can influence court decisions. The public will lose confidence in the judiciary if overwhelming facts, documents, and events, create the appearance that the outside ADR company directs judicial decisions by tempting the sitting judges with future job and financial opportunities.

In *Caperton,* 556 U.S. at 876, this Court stated:

> As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U. S., at 47.

The co-existence of the courts and "private" ADR firms was not discussed at common law; it did not exist. This is another modern judicial situation that calls for inquiry into the connections, conflicts, and recusal that must be part of the ADR network in order to preserve due process rights.

In *Caperton*, supra, at 887-888, this Court surveyed that:

> In each [recusal] case the Court dealt with extreme facts that created an unconstitutional probability of bias that " 'cannot be defined with precision.' " *Lavoie*, 475 U. S., at 822 (quoting *Murchison*, 349 U. S., at 136). Yet the Court articulated an objective standard to protect the parties' basic right to a fair trial in a fair tribunal. The Court was careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level. (citations omitted). In this case we do nothing more than what the Court has done before.

Reversing in this case will be "what the Court has done before"; rectified Due Process breaches on extreme facts and events, not known at common law, that give rise to intolerable appearances of bias. This case is an "additional instance which, as an objective matter, requires recusal."

I. JUSTICES REFUSAL TO RECUSE VIOLATES DUE PROCESS PRECEDENT

In *Caperton* this court stated: "It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Murchison*, supra, at 136. As the Court has recognized, however, "most matters relating to judicial disqualification [do] not rise to a constitutional level." But in this case, Petitioners made multiple disqualification motions which the Justices denied (Appendices D, H, I, J, M). The Justices refused to recuse despite multi-layered and over-shadowing appearance of bias that made impartiality improbable and undermined due process, such that recusal was obligatory to preserve public confidence in the judiciary.

A. The future post bench JAMS job pecuniary interest specifically implicates *Tumey v. Ohio*, 273 U. S. 510 (1927) where this court held that "the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case." The justices, with solid prospects and promise of a post-bench-retirement job at JAMS, each had "direct, personal, substantial, pecuniary interest" in this case's outcome.

That the financial compensation will not be immediate, but received in the future, does not mean there is no disqualifying financial interest. This Court stated

that the pecuniary conflict "need not be as direct or positive as it appeared to be in *Tumey*." *Gibson v. Berryhill*, 411 U. S. 564, 579 (1973) Like in *Tumey*, in this case the justices had "a "direct, personal, substantial, pecuniary interest" which required recusal.

This Court also looks to prevent the "probability of unfairness" *Murchison*, 349 U.S. at 136, so as to maintain the appearance of justice. Considering the high probability that an Appellate Court Div. 3 Justice will, Post-retirement, join JAMS, and realize substantially higher compensation than that earned by a sitting judge or Justice, creates a "direct, personal, substantial, pecuniary interest" financial incentive. *Tumey v. Ohio*, 273 U. S. 510 (1927) The product of probable JAMS employment and the attendant substantial financial reward creates a pecuniary interest that disqualified the Justices from this case and Petitioners' related cases.

B. This Court held that recusal is mandatory where a judicial officer is "cruelly slandered" causing loss of the "calm detachment necessary for fair adjudication." *Mayberry v. Pennsylvania*, 400 U.S. 455, 465. In *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) The Court observed that "experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable" in cases in which the judge "has been the target of personal abuse or criticism from the party before him".

Petitioner and their counsel did not slander the Justices, but Petitioners, through counsel, have repeatedly alleged and plead in disqualification motions (Appendices D, H, I, J, M) their belief and contention that the Justices were biased

and wrongfully refused to recuse. Petitioner sued the Appellate Div. 3 Presiding Justice, Kathleen O'Leary and Chodosh v. PBPA Opinion Author Justice Bedsworth in federal court before either chose to participate as jurists in Petitioners' appeal. Justice, Kathleen O'Leary proceeded to make rulings on their appeal case. Justice Bedsworth was selected to sit on the panel and authored the Opinion in Petitioners' Chodosh v. PBPA appeal. A party's lawsuit against a justice is the highest form of legitimate criticism. There is appearance that the lawsuit allegations impaired Presiding Justice O'Leary and author Justice Bedsworth from employing the "calm detachment necessary for fair adjudication. (Id.) It is basic that a person sued resents the person suing. The person sued, if a judge, should not sit on a case determining the rights and property interest of the person that sued that judge.

C. The Justices that Petitioners sued in federal court would clearly be tempted to decide against those Petitioners in their case in order to obtain advantage for themselves as defendants on claims Petitioner asserted against them in the federal case. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) held that it violated due process for a state supreme court justice to participate in a bad-faith insurance case because the justice was pursuing his own bad-faith suit against an insurance company.

The legal principles the justice was to decide would directly impact the justice's own case. Id. at 825. This Court explained that it was "not required to decide whether in fact the Justice . . . was influenced, but only whether sitting on the [bad faith] case would offer a possible temptation to the average . . . judge to . . .

lead him not to hold the balance nice, clear and true." Id. The pursuit of money damages through a cause of action identical to the one pending before him was such "temptation."

In this case, Presiding Justice O' Leary, sued in the federal case, utilized her position to immediately, upon docketing, deny Petitioner's motion to depose the disqualified trial judge, Judge Robert Moss who in a *Chodosh v. PBPA* related case, *Haugen v. PBPA* "called in" from vacation to unlawfully self-requalify and take back the Haugen case. (Appendix H). Judge Moss was, at that time, Presiding Justice O' Leary's co-defendant and alleged co-conspirator in the federal case. Presiding Justice O' Leary was tempted and misused her judicial power to undermine the Petitioners who sued her in federal court which case was still active.

Opinion author Justice Bedsworth wrote the Opinion that upheld the HOA's legal right to keep Petitioners homes that the HOA strictly foreclosed on for owed rent and assessment obligations that the Opinion held invalid. The Opinion wrongfully denied and defeated all Petitioners' real property rights and remedies. Justice Bedsworth was very critical of Petitioners' counsel, both in the Opinion and the Rehearing Order. (Appendices A and C) The record belies that the critiques were misplaced. Certainly a judge could be "tempted" to malign counsel that caused him to be sued in federal court.

D. The Justices that Petitioner sued in federal court should have recused as they were defendants on claims adverse to Petitioner. The claims were made in the federal lawsuit which was dismissed without prejudice, leaving the claims intact.

Kaufman v. Court of Appeal supra, holds that the federal law of recusal applies to California appellate justices. Thus, the many appearances of impropriety in this case must be viewed through federal recusal law. Generally, a frivolous lawsuit against a judge is not disqualifying, but a legitimate lawsuit is cause for recusal.

Both Federal and California courts summarily dismiss tactical, frivolous lawsuits disgruntled litigants bring without any basis as a way to "judge shop". For example, when a litigant sues all the judges in the district or on the panel, the "rule of necessity" allows one sued judge to decide the blanket disqualification and the case. See, *Glick v. Edwards*, 803 F. 3d 505 (Ninth Circuit 2016)(all judges sued, one judge must still decide); *Andersen v. Roszkowski*, 681 F. Supp. 1284, 1289 (N.D. Ill. 1988), aff'd without opinion, 894 F.2d 1338 (7th Cir. 1990) (adding District Court judge as defendant in case improper; recusal not mandatory); *In re Martin Trigona*, 573 F. Supp. 1237, 1242 (D.Conn.1983) and *First Western Devt. Corp. v. Superior Court* (1989) 212 Cal. App. 3d 860, 866-867.

In the usual case the parties in court sue their sitting judge. Petitioners' federal case was not a maneuver to force disqualification of judges already assigned, as in *First Western Dev. Corp. v. Superior Court* supra. Petitioners sued justices not yet on the case who could and should have not taken the case. Justice W. Bedsworth and Presiding Justice K. O'Leary adjudicated Petitioners' cases months after Petitioners had sued them in federal court.

In this rare type of case, while the Justices had ruled on other Park proceedings, Petitioners sued Justice W. Bedsworth and Presiding Justice O'Leary

more than a year before they empaneled themselves or ruled in this case. In the usual case, the litigant tries to inject the judge into the case by suing the judge. In this case, the justices inject themselves into the case; they take on a case where the parties in the case had already sued them. A judge cannot prevent a disgruntled litigant suing. However, a judge can and must refuse to sit on a case where the parties sued the judge are contemporaneously entwined in a federal court case.

Petitioners sued the justices in December 2016. Presiding Justice O'Leary's rulings began in 2016, on a writ arising out of this case (Appendix H) and continued through 2017-2018 (Appendix I). Justice Bedsworth assigned himself to the panel around March 2018. On January 3, 2018, the Ninth Circuit had dismissed the federal case, without prejudice. While Justices Bedsworth and O'Leary acted in this case they were federal case defendants on Petitioners' lawsuit and after dismissal without prejudice, they were still subject to Petitioners' viable claims asserted in the federal lawsuit.

Where there is legitimate lawsuit against a judge, federal law is that the sued judge must recuse. "Thus, courts have refused to disqualify themselves under Section 455(b)(5)(i) [on facts where the party sues the judge] unless there is a legitimate basis for suing the judge." (*Andersen*, supra, 681 F. Supp. 1284, 1289, emphasis added) See, also, *Turner v. American Bar Association* 407 F. Supp. 451, 483 (N.D. Ind. 1975)("With respect to disqualification in civil actions where the trial judge to which the case happens to be assigned is also a defendant in the same action, 28 U.S.C.A. § 455 would require that the judge disqualify himself.")

When the lawsuit against the judge has merit, the judge must recuse. Petitioners' federal lawsuit was not dismissed with prejudice; its claims were not barred. The Ninth Circuit reversed the District Court ruling that Appellants' federal lawsuit was dismissed with prejudice, i.e. barred. The Ninth Circuit ordered the dismissal "without prejudice", thereby allowing the claims. Because Petitioners could pursue the claims against the sued justices, they had to recuse.

E. A judge hearing a case in which a party sued and has claims against the judge makes for appearance of impairment of impartiality both because the judge will be personally offended by the lawsuit. It also makes for pecuniary motive to rule against the parties so as to enhance judge's defense of the parties' claims against the judge.

Whether the lawsuit against the judge is legitimate can invoke question of conflicting pecuniary interest. In *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 859 n.8 (1988) the court held that 28 U.S.C. §455(b)(4) "requires disqualification" of a judge who has a financial interest in a case "no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety"). JAMS is a for profit enterprise. See, *JAMS, Inc. v. Superior Court (Kinsella)* 1 Cal. App. 5th 984 (2016) fn. [1]

[1] *Kinsella* held that JAMS was a profit making business. "The statements about JAMS are not mere promises, but representations of fact about the neutrals it employs and how it conducts its business. These representations published on a Web site to induce litigants to engage in ADR services offered by JAMS. "The statements that JAMS ensured " 'the highest ethical standards,' "that " '[e]verything we do and say will reflect the highest ethical and moral standards'"

Facts and events show that Opinion Author Justice W. Bedsworth appeared to enhance his prospects of obtaining post bench lucrative employment at JAMS. It is understandable that he would ingratiate himself with his potential future employer by punishing with wrong rulings parties that had sued JAMS and its co-founder Appellant Court Div. 3 former Presiding Justice Trotter (Ret.).

Presiding Justice K. O'Leary has a personal and pecuniary interest. As presiding justice, she has elevated judicial credential to secure a lucrative post bench retirement job at JAMS. Also she is known to be a personal friend of Div. 3 first and former presiding justice, Justice John Trotter, JAMS co-founder. By ruling against Petitioners, who sued Justice Trotter and JAMS for mediator misconduct, the appearance is that she seeks to better her opportunity of joining JAMS post retirement.

It is common knowledge in the legal community that JAMS "neutrals" potentially can earn double, triple or more than the state salary for a sitting justice.

The lawsuit or claim that parties filed or have against their judge or justice should assure recusal. The Supreme Court succinctly stated: "justice must satisfy the appearance of justice." *Offutt v. U.S.*, 348 U.S. 11, 14 (1954) "The standard for recusal under 28 U.S.C. Secs. 144, 455 is 'whether a reasonable person with

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and that JAMS is " 'dedicated to neutrality, integrity, honesty, accountability, and mutual respect in all our interactions' " are . . . . specific statements representing how JAMS conducts its operations with neutrality, integrity, honesty and accountability. They are certainly intended to be relied upon by customers of its services, otherwise they would serve no legitimate purpose."

knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned., (citations omitted)" *United States v. Studley* 783 F.2d 934 (9th Cir. 1986) In this case, the array of appearances, each based on documents and fact, lead to the inescapable conclusion that Justices had to recuse to maintain due process.

II. JUSTICES REFUSAL TO RECUSE DISPLAYS LAW NEEDED

California borrows federal law to govern Justices' recusal decisions. Other states utilize federal law or its cognate, or similar state law. Regardless of recusal law, in all states there are ADR companies. The former judicial officials that own and operate the ADR companies may and often do retain ties and communication lines with judicial officers still sitting on the court. The use of mediation and other outside court process has and will continue as a lucrative for-profit business.

This case is about due process debasement by justices' failure to recuse in the face of an array of extreme appearances of impropriety arising at the intersection of the courts, private contract ADR companies and the financial opportunities those companies offer to sitting judicial officers. This Court has not spoken on the level of appearances of impropriety that undermine due process in the context of retired judicial officers that own and operate ADR companies communicating with sitting judges. This is a vital area both for federal recusal law, and the law of "intolerable" appearance of bias that defeats due process.

Supreme Court Rule 10(c) calls for review where "a state court . . . . . has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." Petitioners bear the burden resulting from state courts that uphold decisions made by judicial officers that should have recused to avoid the extreme facts and appearances that nullify their decisions for failure to recuse where facts and circumstances require recusal.

In this case federal disqualification law is an analogue to the *Caperton* "extreme facts" inquiry. The facts and appearance of impropriety dictated that the Justices recuse under federal disqualification statute and case law. That they did not recuse creates an overall appearance of deliberate refusal to apply the law, the judge's decision to take on the case of the petitioners that sued and publicly criticized them, demonstrates deliberate retaliatory purpose.

California has failed to apply federal recusal law so as to allow the results delineated with particularity herein. In Petitioners' case extreme facts and appearances of impropriety demonstrate that the Appellate Court Div. 3 Justices should not have participated in or ruled on their case considering the legally mandated recusal requirements. California case law conflicts with federal law on the question of whether mediation inadmissibility overrides due process rights. Compare, *Cassel v. Superior Court*, supra and *Milhouse v Travelers Commercial Ins. Co.* supra).

III. OPINION, RULINGS AND ORDERS ADD IMPROPRIETY APPEARANCES

Under federal disqualification law, judgments and orders can be used as evidence of judge bias where there is also "extrajudicial source." Generally, "judicial rulings alone almost never constitute valid basis for a bias. . ." *United States v. Grinnell Corp*., 384 U.S. 563 (1966). There is a presumption that a judicial officer correctly makes dispassionate decision based on what was presented in court. *Liteky v. United States*, 510 U.S. 540 (1994). *United States v. Grinnell Corp*., at 583, holds and explains that "the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (citation omitted)."

In this case, because there are extrajudicial sources, the Justices' Opinion, orders and rulings can be considered as evidence to show and prove actual bias. The Opinion and rulings can be seen as additional appearances of impropriety.

The facts of appearance of impropriety are numerous. A person knows or readily understands that a disqualified judge cannot "self-requalify." A person knows that an HOA cannot take a member's real property with just a vote of the HOA's Board of Directors, that there must be a foreclosure or legal action. A person apprised of the fact that the Appellate Opinion in this case and the ruling on Petitioners' request for rehearing (Appendix A, C) did not make their HOA return Petitioners' homes to them, even though the HOA had strictly foreclosed for breach of rent and assessment that the Opinion found unlawful, immediately recognizes the appearance of impropriety.

It is apparent to a person that ruling Petitioners' owed no rent or assessment, the basis for the trial court's judgment, against Petitioners. then failing to require return of Petitioners' homes by their HOA creates appearance of impropriety and raises a valid question as to the justices' impartiality.

A person would be concerned that the Justices, sued by Petitioners in federal court and subject to Petitioners' repeated calls for their disqualification because of that suit, would resent Petitioners.

A person would understand that California law mandates a court to hold in contempt an attorney that assails a judge as having "fixed" a case – if the charge is false. *In re Koven* supra, 134 Cal.App.4th at 272. If Petitioners' counsel "fix" accusation were untrue, the court had to find him in contempt.

A person could infer from the fact that counsel was not held in contempt for declaring a judge had entered a "fix" means the appellate court determined the "fix" occurred and under *In re Koven* had no discretion. The Court either had to charge counsel with contempt, or find that the judge "fix" charge was true.

There are three (3) distinct extrajudicial sources. First, it is proven and adoptively admitted that representatives of the Park buyer made ex parte contact with *Chodosh v. PBPA* trial Judge Moss to thwart the related *Haugen* case TRO. Second, there are familiarity and collegiality influences between the Orange County Appellate Court's first presiding judge, Hon. John K. Trotter (Ret.) and the judicial officer defendants in Petitioners' federal case. Third, JAMS' financial influence by

its open offer of lucrative, post-bench employment generated economic incentive for the judicial officers named in this Petition to rule against Petitioners. In this case the Justices' opinion, rulings and decisions can be used to prove actual bias and serve as backdrop of total appearance of impropriety because of extreme facts.

IV. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO THE PRESERVATION OF PUBLIC CONFIDENCE IN THE COURTS

In the legal community it is common knowledge that ADR and private mediation use has increased. Attorneys and the courts expect and require that clients and litigants engage in mediations outside the court with a private contract ADR company mediator. Litigants choosing to participate in private dispute resolution must be aware of and consider personal and financial ties between retired judge "neutrals" and their former colleagues still on the court.

Judges and Justices must recuse where the appearance of potential financial post retirement careers with a private dispute company could impair their impartiality. In this case, Petitioners sued JAMS and its co-founder, Justice J. Trotter (Ret.) the first presiding justice of Orange County Court of Appeal, Div. 3 in a federal action. Petitioners sued their trial judge, Judge Robert Moss and three Div. 3 court of appeal justices who ruled in *Chodosh v. PBPA* and the related cases.

Due Process is denied where the overall appearance and extreme facts demonstrate high probability that a litigant did not have an impartial judicial officer as happened in *Chodosh v. PBPA* and the related cases.

Supreme Court Rule 10(c), in relevant part, calls for review where "a state court . . . . . has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." The California courts have ruled in ways that give rise to extreme and intolerable facts that indicate bias. In this case, the California courts held that California law can trump this Court's decisions that establish extreme facts and give rise to an intolerable appearance of impropriety that denies due process.

CONCLUSION

The petition for writ of certiorari should be granted.

/s/ Patrick J. Evans, USSC Bar#309160
Attorney for Petitioners
Law Office of Patrick J. Evans
16897 Algonquin St., Suite F
Huntington Beach, CA 92649
pevans@pevanslawoffice.com
714-594-5724 fax:714-840-6861

APPENDIX A

Chodosh v. PBPA, Opinion, (not published)
by Justice W. Bedsworth 12/17/18 (24 pages)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLOYD M. CHODOSH et al., Plaintiffs and Appellants, v. PALM BEACH PARK ASSOCIATION, Defendant and Respondent.	G053798 (Super. Ct. No. 30-2010-00423544) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed in part, reversed in part and remanded with directions.

Law Office of Patrick J. Evans and Patrick J. Evans for Plaintiffs and Appellants.

Lewis Brisois Bisgaard & Smith, Jeffry A. Miller, Cary L. Wood and Allison A. Arabian; Allan B. Weiss & Associates, Allan B. Weiss, Allen L. Thomas and Allison A. Arabian for Defendant and Respondent.

I. INTRODUCTION

A group of seven appellants who have resided in the Palm Beach mobilehome park in San Clemente appeal from a single judgment in which each is held individually liable to the Palm Beach Park Association (PBPA) for unpaid rent on their spaces. Each appellant faces liability in varying amounts, ranging from $82,000 to about $160,000.

Regulations issued by California's Department of Housing and Community Development require mobilehome park operators to assure that every unit in a mobilehome park is properly installed, as evidenced by (as the case may be) either a certificate of occupancy or a "Mobilehome Installation Acceptance." (See Cal. Code Regs., tit. 25, §§ 1102, 1366.) However, there is an exception for recreational vehicles (RV's). (See Health & Saf. Code, § 18008, subd. (a) [RV's not within definition of mobilehome]; Cal. Code Regs., tit. 25, § 1320(d) [regulatory installation requirements do not include RV's].[1]) In this case, it is undisputed that there is no certificate of occupancy or mobilehome installation acceptance showing any of the units owned by the seven appellants were properly installed. However, we do not know, on the trial court record, whether the appellants' units are "mobilehomes," as distinct from RV's, within the definition of the Health and Safety Code. That depends on an issue of fact: Whether those units exceed 320 square feet. (See § 18008, subd. (a) [defining mobilehome as structure exceeding 320 square feet.)

Assuming appellants' units *do* exceed 320 square feet, under this court's decision in *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393 (*Espinoza*) the absence of either a certificate of occupancy or a statement of mobilehome installation acceptance is a defense to the PBPA's claim for unpaid rent. We thus must reverse the judgment against the seven appellants and remand this case for further proceedings to determine the

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[1] In this opinion all "section" references are to the Health and Safety Code unless otherwise indicated. All references to any "regulation" will be to title 25 of the California Code of Regulations.

applicability of the regulations cited above. If it turns out that a unit does not exceed 320 square feet, the judgment against that unit owner must be reinstated.

We affirm the rest of the judgment without qualification. That judgment declares the seven appellants have no real property interest in the park.[2]

II. BACKGROUND

This litigation is now in its eighth year. Trial involved no less than four separate phases spread over six years, handled by two different judges. This court, on appeal, has made two separate requests for supplemental briefing.

During the pendency of this appeal appellants have filed numerous requests for judicial notice and to take evidence. We are not, however, a trial court. The normal function of a *trial* court is to find facts – it was never intended that appellate courts find facts in the first instance. (E.g., *Comerica Bank v. Runyon* (2017) 16 Cal.App.5th 473, 483.) If, in a case involving so sensitive a topic as whether an adoption in a dependency proceeding was working out, our Supreme Court admonished appellate courts not to take evidence on appeal (see *In re Zeth S.* (2003) 31 Cal.4th 396, 407-410), how much less should we indulge in appellate fact finding here. This is a real property case that was tried over a period of more than half a decade resulting in a record too voluminous as it is. We therefore deny *all* outstanding motions brought by appellants seeking to expand what is already an oppressively large record. These include all outstanding motions to take judicial notice, motions to augment, and motions for discovery or for evidentiary hearing in this court.

We now proceed to outline the essential facts of this case from the trial court record: The Forster family acquired what would eventually become the

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[2] There are seven appellants in this appeal. We cannot say whether each appellant remains a resident of the park at this late date, and in any event their current status turns out to be irrelevant in light of our determination that they have no real property interest in the park. We will refer to them as "appellants" because there was a group of nine plaintiffs at the trial level, but only seven of those plaintiffs are parties to this appeal. When we refer to "plaintiffs" it is in the context of what happened at the trial level or in the pleadings.

mobilehome park land in the 1840's, and by the 1950's trailers were being parked on the property. In 1958, the Forsters leased the land to the Ketchesons for 60 years, which meant the lease would expire in 2018. The Ketchesons turned the property into a mobilehome park known as Palm Beach Park. The park is on a slope near the ocean, and has 126 spaces. Not all spaces are equally situated. There is a group of very small spaces at the bottom of the park known as the "bungalows."

In 1965, the Ketchesons subleased the property to the Corrells. In 1979, tenants in the park formed the PBPA. That very year the PBPA purchased the Correll's sublease, with both the Forsters and the Ketchesons consenting. As part of the Forsters' consent, the Forsters granted to the PBPA a right of first refusal, on 30 days notice, should the Forsters ever elect to sell the property. Formal articles of incorporation of the PBPA filed in 1997 declared that the PBPA was a nonprofit mutual benefit organization. Those articles also expressly restricted the park to residents 55 years of age or older.

In August 2007, a real estate holding company offered the Forsters $24.75 million for the property. The offer triggered the need for PBPA to act on its right of first refusal.

The terms of the right of first refusal required the PBPA to give the Forsters notice *and* – within 30 days – execute the same terms and conditions as the offer. Events thus unfolded rapidly in August and September 2007. Added pressure to consummate the purchase came from the knowledge the Ketcheson's 60-year lease on the property would be up in 2018, which meant the residents of the park faced potential eviction if the Forsters' buyers decided to do something else with the land in 2018 other than use it for a mobilehome park.

The real estate holding company's offer was effective August 13, 2007. The PBPA received notice of it two days later on August 15. The members of the PBPA voted to exercise the right of first refusal on August 25 (119 yes, 0 no, 2 abstentions). Five days later, the PBPA directors voted to assess each member on a per capita basis the

cost of buying the park, i.e., assess each member 1/126th of the cost. That figure turned out to be $200,000 each. On September 12, 2007, PBPA formally accepted the offer under the right of first refusal and opened escrow.

Most of the money for the purchase came from a third party lender, Thrivent Financial for Lutherans, which lent directly to the PBPA. The balance came from members who could pay the $200,000 immediately. Those who could not – and that included all the appellants – were given the opportunity to borrow the money directly from the PBPA by signing a promissory note. The collateral was the respective borrower's membership in, and member lease with, the PBPA. The note would be paid back in installments of $1,330.61 over 48 months. In the event of a default the entire balance would become due and payable.

At the time each member was paying a "base rent" to the association. In the period from September through December all members were required to sign new leases. Those leases continued the base rents but the obligation of repaying the note added $1,330.61 for those who had to borrow the money for the assessment. The new leases also had an addendum to the effect that the nonpayment of the loan was a material breach of the lease.

The new higher payments proved difficult for some of the members, most of whom lived in the bungalow region of the park. The member who would later become the lead plaintiff (and appellant) in this litigation, Floyd Chodosh, stopped paying by February 2008, and the PBPA suspended his membership in November 2009.

By 2010, all the appellants had ceased making their payments, and eventually all would have their memberships suspended. But the association did not commence eviction proceedings. In November of 2010 a group of nine residents filed the original complaint. This appeal is from a judgment based on their fourth amended

complaint (the 4AC), filed in June 2012, asserting eleven causes of action.[3] The 4AC charged that under their original member leases, the plaintiffs were entitled to have the PBPA become a common interest development under former Civil Code section 1353, part of the Davis Stirling Act. (The Davis Stirling Act is now found at Civil Code section 4000 et seq.) Their theory was that they had been promised they would be owners of their own spaces, but instead ended up as mere residents in a resident-owned mobilehome park governed by Civil Code section 799 et seq.

For its part, in September 2012, the PBPA filed a verified cross-complaint against all nine plaintiffs – who were now living on the land without paying the PBPA – seeking unpaid rent and ejectment. The plaintiffs filed a verified answer, asserting no less than 32 separate affirmative defenses (not counting the defense of reserving the right to add any additionally discovered defenses). However, neither the lack of certificates of occupancy or statements of mobilehome installation, nor any breach of the implied warranty of habitability, were among the affirmative defenses listed.

In 2013, the first of four separate phases of trial began. Phase 1 was tried in April 2013 before Judge Nancy Wieben Stock, and concerned three issues: (1) What was the nature of the park? – a Davis Stirling Common Interest Development, or a "resident-owned" mobilehome park? Judge Stock ruled it was a "resident-owned" park. (2) Did the PBPA have the "legal authority" to impose the $200,000 assessment? Judge Stock ruled it did not.[4] And (3), did the PBPA have the "authorization and authority" to obtain the $16.1 million loan from Thrivent? Judge Stock said yes.

Judge Stock retired in late 2013 and was replaced by Judge Robert J. Moss, who heard phase 2 in September 2014.

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[3] The causes of action in the 4AC were: (1) breach of contract; (2) violation of governing documents, articles and bylaws; (3) violation of statutes; (4) negligent misrepresentation; (5) breach of fiduciary duty; (6) negligence; (7) declaratory relief; (8) violation of the Truth in Lending Law or TILA; (9) quiet title; (10) wrongful eviction; and (11) slander of title.

[4] The minute order did not say anything more than "No."

Phase 2 concerned these issues: (1) What was the nature of the plaintiffs' ownership interest in the park's real property under section section 799, subdivision (c)? Judge Moss said each plaintiff only owned a "fractional interest" in the PBPA. (2) Did the plaintiffs have any real property interests, and if so what was the nature of those interests? Judge Moss said no: The membership interest was "personal property" and while each plaintiff's lease may "technically" have been an estate in real property, those interests were governed under rules applicable to personal property. (3) Could the PBPA grant Thrivent any right, lien, or interest in the real property underneath the park, and if it could, did it? Judge Moss ruled that while the PBPA could and did convey an interest to Thrivent, given that the plaintiffs had no interest in the park property, they had no standing to challenge the PBPA's ability to convey that interest. (4) Were the new member leases subordinate to Thrivent's deed of trust? As to those issues, the court noted that everybody agreed the plaintiffs did "not own the land under the[ir] mobile home at this time." Judge Moss thus concluded the issue was not "ripe for determination" because Thrivent had not foreclosed on its loan.

Phase 3 was tried in April 2015. It focused on plaintiffs' causes of action for breach of contract, violation of governing documents by the $200,000 assessment, violation of statutes, violation of the federal Truth in Lending or TILA, quiet title and slander of title.

As to the breach of contract, the court found no promise by the PBPA that plaintiffs would ever receive a fee interest in the space they rented. The articles of incorporation had only promised that the purpose of the PBPA was to "facilitate the purchase and operation" of the park "by its residents" and that is what the PBPA did.

Also in that regard, the court recognized that Judge Stock had earlier ruled the PBPA did not have the authority under the bylaws to have authorized the assessment, but noted that in the interim (in 2013) the members had voted to ratify that assessment, curing "the problem found by Judge Stock." The court added that while the original

leases could not be terminated just because the PBPA acquired the land ("the leases specify the grounds for early termination and land acquisition is not one of them"), each of the plaintiffs consented to the new leases, thus extinguishing any claim of breach of contract.

As to the violation of governing documents, the court ruled there was no actual promise to convert the park to a common interest development under the Davis-Stirling Act, only a statement of anticipation to do so *if* the membership voted to approve such a conversion, and, to date, the membership had not voted to do that. In fact, in 2010, the membership had voted *against* converting the property to a common interest development.

On the violation of statutes cause of action, the court went through them one by one. Of these, only Civil Code section 799.1 is complained of in the opening brief. Civil Code section 799.1 is a general provision to the effect that where there is no recorded subdivision declaration or condominium plan, the rights of tenants in a mobilehome park are to be governed under the rights afforded in the Mobilehome Residency Law (MRL) found in Civil Code sections 798 et seq. Judge Moss ruled Civil Code section 799.1 was not violated because the plaintiffs had failed to explain *how* it was violated.

On the causes of action for quiet title and slander of title, the judge ruled that because those claims had not been mentioned in either opening statements or arguments, they had been abandoned.

However, in phase 3 the plaintiffs prevailed on their cause of action for violation of the federal TILA. Judge Moss held TILA had been violated and declared the loans made by the PBPA to each plaintiff rescinded. Thus the plaintiffs were entitled to restitution for any sums they had *already* paid to the association. However, the amount of that restitution was deferred to the next phase of trial to see what the plaintiffs might owe on the association's cross-complaint for unpaid rent.

Finally, phase 4 was heard in December 2015. Phase 4 focused on the two remaining plaintiffs' causes of action – negligent misrepresentation and breach of fiduciary duty by the PBPA qua a homeowners' association. Phase 4 also dealt with the PBPA's cross-complaint.

The theory of the negligent misrepresentation cause of action was that the plaintiffs should have been told about the PBPA's right of first refusal when they bought into the association. The court ruled that it wouldn't have made any difference – the plaintiffs still would have become members, particularly since they all knew the leases were set to expire in 2018.

As to the breach of fiduciary duty, Judge Moss concluded the plaintiffs had failed to meet their burden of proof because they never actually specified "precisely what acts by defendant constituted a breach of fiduciary duty." Rather, plaintiffs had taken a "shotgun approach" which had failed to show a breach.

The court also briefly noted that plaintiffs had argued there were "numerous violations of law," including violation of the Subdivision Map Act, the Subdivided Lands Act, and the absence of "required" certificates of occupancy. Judge Moss ruled that the plaintiffs had failed to specify what provisions of the first two acts had been violated, but in any event noted the court had already found there was no subdivision of the park in the first place, i.e., it was but one parcel. The association owned that parcel; the plaintiffs in turn owned part of the association. As to the certificates of occupancy, the plaintiffs had failed to explain how it would "translate into a cause of action" even if the court found such certificates were necessary. Essentially the court said the absence of certificates of occupancy was irrelevant.

Then the court addressed the cross-complaint. The plaintiffs, had, after all, not paid rent for "varying periods of time." The court awarded damages against each accordingly, giving credit for amounts paid on the TILA-violative loans. The amounts

ranged from $81,172.09 against Chodosh himself to $159,327.77 against plaintiff Todd Peterson.

A judgment was filed in April 2016, specifying the amounts owed by each one of the plaintiffs on PBPA's cross-complaint. It also awarded the PBPA writs of possession directing the Orange County Sheriff to remove the plaintiffs from their various spaces. Seven of the nine plaintiffs filed this appeal in July 2016.

III. DISCUSSION

A. *The Absence of Certificates of Occupancy or Mobilehome Installation Acceptances*

1. *Should We Even Consider the Issue?*

Normally, affirmative defenses not raised in the answer to a cross-complaint are waived. (E.g., *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813.) As related above, appellants did not include, as an affirmative defense to the PBPA's cross-complaint, the absence of certificates of occupancy (or statements of mobilehome installation acceptance) for their units. So it is not surprising that appellants' counsel, in his opening brief, hastens to assure us several times that illegality can be raised at any time," i.e., it should make no difference that the defense of the appellants' leases being illegal was not pleaded in the answer to the cross-complaint. Appellants' authority for the idea that illegality can be raised "at any time" is the oft-cited *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 147-148 (*Lewis & Queen*).[5]

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[5] In *Lewis & Queen*, the state awarded a contract for construction of part of what would later become the Hollywood Freeway. The general contractor hired a subcontractor for certain work, but the subcontractor was not licensed for that work. The subcontractor sought compensation from the general contractor for the "reasonable rental value" held beyond the term of one of the subcontracts, but the issue was not raised in the general contractor's answer. That made no difference, said our Supreme Court: "Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and duty to ascertain the true facts in order that it may *not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids.* [Citations.] It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality. [Citation.] *It is not too late to raise the issue* on motion for new trial [citation], in a proceeding to enforce an arbitration award [citation], or *even on appeal*. [Citation.]" (*Lewis & Queen, supra*, 48 Cal.2d at pp. 147-148, italics added.)

But the rule is not as unqualified as appellants' counsel thinks. Two California Supreme Court cases decided after *Lewis & Queen – Fomco, Inc. v. Joe Maggio, Inc*. (1961) 55 Cal.2d 162 (*Fomco*), and *Apra v. Aureguy* (1961) 55 Cal.2d 827 (*Apra*) – both *rejected* posttrial defenses of illegal contract because the illegality defense had not been raised in the trial court. (See *Fomco, supra*, 55 Cal.2d at p. 166; *Apra*, *supra*, 55 Cal.2d at p. 831.) In fact, language in *Fomco* suggests that the high court actually rejected *Lewis & Queen's* dicta that the issue of illegal contract could be raised for the first time on appeal.[6]

That said, in this case the issue of the absence of certificates of occupancy *was* raised at trial – even if obliquely as part of a shotgun blast of allegations of illegality. Indeed, the trial judge found as a matter of fact there were no certificates of occupancy, he just didn't think that absence could translate into a judgment in appellants' favor. The issue having been raised at the trial level, its consideration at the appellate level comes within *Lewis & Queen* and outside the rule of *Fomco* and *Apra*. (Accord, *Yoo v. Robi* (2005) 126 Cal.App.4th 1089 (*Yoo*).[7]) Of course, appellants' tardiness in raising the issue means at least one more evidentiary hearing at the trial level. As we said, *we* aren't triers of fact.

2. *The Merits*

One of our requests for supplemental briefing asked the parties about the absence of any certificates of occupancy for the appellants' units. In particular, we asked whether the PBPA was ever required to have or obtain such certificates for the spaces

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6 Said *Fomco*, referring to *Lewis & Queen*: "In that case [*Lewis & Queen*] the issue of illegality was first raised *during the trial* and not for the first time on a motion for new trial." (*Fomco, supra*, 55 Cal.2d at p. 166.)

7 There, an unlicensed talent agent sought to recover under a management contract from one of the original members of the Platters. Even though the defense of lack of license had not been pleaded as an affirmative defense, the appellate court said the case fell "squarely within the well-settled rule a defense of illegality based on public policy is not waived by the defendant's failure to include it as an affirmative defense in the answer to the complaint." (*Id*. at p. 1103) *Yoo* then went on to quote from the same passage from *Lewis & Queen* we have quoted above.

occupied by each appellant's unit. The supplemental briefing revealed two undisputed facts regarding each of the appellant's units: (1) All appellants purchased their units from prior owners whose units were already on PBPA property; and (2) none of appellants' units have been attached to permanent foundations.[8] We may also note here that it was established at trial that the PBPA did not have any certificates of occupancy for any of the appellants' units, though there were a handful of such certificates for other units in the park.

The Legislature has required, in section 18551, that the state Department of Housing and Community Development issue regulations governing, among other things, the installation of mobilehomes.[9] Section 18551 is quite clear that mobilehomes may be permanently attached to the land in which case they become a "fixture" of that land, i.e., become real property themselves. Alternatively, mobilehomes may be left free standing, in which case they remain as "chattel," i.e., personal property.[10] The statute is also clear that mobilehomes do not need be placed on a foundation system.[11]

Even so, the installation of mobilehomes is the subject of considerable regulation by the state Department of Housing and Community Development. These regulations are found in chapter 2 of division 1 of title 25 of the California Code of Regulations. These regulations provide for things like proper water outlets (regulation

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8 For a discussion of the sort of effort required to permanently attach a mobilehome to a foundation, see *Escondido Union School Dist. v. Casa Suenos De Oro, Inc.* (2005) 129 Cal.App.4th 944, 955-956.

9 The statute provides in part: "The department shall establish regulations for manufactured home, mobilehome, and commercial modular foundation systems that shall be applicable throughout the state. When established, these regulations supersede any ordinance enacted by any city, county, or city and county applicable to manufactured home, mobilehome, and commercial modular foundation systems. The department may approve alternate foundation systems to those provided by regulation if the department is satisfied of equivalent performance. The department shall document approval of alternate systems by its stamp of approval on the plans and specifications for the alternate foundation system. . . ."

10 Section 18551 goes on to say: "A manufactured home, mobilehome, or commercial modular may be installed on a foundation system as either a fixture or improvement to the real property, in accordance with subdivision (a), or a manufactured home or mobilehome may be installed on a foundation system as a chattel, in accordance with subdivision (b)."

11 Section 18551, subdivision (e) provides: "No local agency shall require that any manufactured home *or mobilehome located in a mobilehome park be placed on a foundation system*." (Italics added.)

1308), provisions for basic plumbing (regulation 1246), utility connections (regulation 1333.5), supports (regulation 1337), leveling of the chassis of the unit (regulation 1348), water connectors (regulation 1356), and drains (regulation 1358).

Most important for our purposes is that a *permit* must be obtained from the relevant "enforcement agency" every time a mobilehome unit is installed "on any site for purpose of human habitation" (regulation 1324).[12] Proper installation is reflected by the issuance of either a "Mobilehome Installation Acceptance" or the more traditional "Certificate of Occupancy" (regulation 1366).[13] The difference is that installation acceptances are used when the unit remains chattel (see § 18551, subd. (b)), while certificates of occupancy are used when the unit is affixed to a foundation and becomes a fixture of the real property. Because both sides agree that since the units in this case were never affixed to permanent foundations, statements of mobilehome installation acceptances, as distinct from certificates of occupancy, were required.

To be sure, as PBPA reminds us, under section 18551, the responsibility to obtain an installation permit is on the owner of the mobilehome unit or that owner's installation contractor.[14] But that is not the end of the analysis.

Another regulation, regulation 1102(d), puts the onus on the park operator to police the installation and use of units within the park to assure compliance with chapter 2 of Division 1, of Title 25. It is not a passive matter. The language effectively

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12 Regulation 1324 provides: "(a) A permit shall be obtained from the enforcement agency each time an MH-unit, is located or installed on any site for the purpose of human habitation or occupancy. Permits are not required to locate recreational vehicles in a park."

13 Regulation 1366 provides: "A 'Mobilehome Installation Acceptance' or 'Certificate of Occupancy' shall not be issued until it is determined that the MH-unit installation complies with the provisions of this chapter. The enforcement agency shall provide copies of the statement of MH-unit installation acceptance or certificate of occupancy for the MH-unit to the installer or other person holding the permit to install and the buyer or registered owner or their representative. The M-H unit installation acceptance shall be provided for MH-units installed pursuant to section 18551(b) or 18613 of the Health and Safety Code. The certificate of occupancy shall be provided for MH-unit installed on foundation systems pursuant to section 18551(a) of the Health and Safety Code."

14 Section 18551, subdivision (a)(1) provides: "Prior to installation of a manufactured home, mobilehome, or commercial modular on a foundation system, the manufactured home, mobilehome, or commercial modular owner or a licensed contractor shall obtain a building permit from the appropriate enforcement agency. To obtain a permit, the owner or contractor shall provide the following: . . . ."

requires park operators to ascertain proper installation: "The operator of a park *shall not permit a unit*, accessory building or structure, building component, or any park utility to be constructed, *installed, used, or maintained* in the park *unless* constructed, *installed, used, and maintained* in accordance with *the requirements of this chapter*." (Italics added.)

The import of regulation 1102, when read in conjunction with regulations 1324 and 1366, and the undisputed facts regarding the appellants' units, is hard to escape. On this record, it appears that the PBPA (or perhaps even its predecessor in interest) allowed units to be both installed and maintained without installation permits.

We thus have a situation analogous to that in *Espinoza, supra,* 169 Cal.App.4th 1393. In *Espinoza*, this court squarely held that a landlord could not collect rent when there had been no certificate of occupancy. "The absence of certificate of occupancy rendered the lease illegal." (*Id*. at p. 1400.)[15]

We see no principled distinction between a mobilehome park's lease of land beneath a unit without an installation acceptance and the rental of an apartment unit without a certificate of occupancy. At least one published opinion, *City of Los Angeles v. Los Olivos Mobile Home Park* (1989) 213 Cal.App.3d 1427, 1435 (*Los Olivos*) has squarely equated the two.[16]

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15 To *Espinoza* we would add the decisions of the Court of Appeal in *Carter v. Cohen* (2010) 188 Cal.App.4th 1038 (*Carter*) and *Gruzen v. Henry* (1978) 84 Cal.App.3d 515 (*Gruzen*). Both *Carter* and *Gruzen* also squarely held that rental agreements for premises that had no certificate of occupancy were unenforceable.

16 The *Los Olivos* case was not specifically mentioned in appellants' opening supplemental briefing, but the argument that units not affixed to a foundation should receive installation acceptances *was* made in that opening supplemental brief, giving the PBPA the chance to respond to it. Regardless of the *Los Olivos* case, though, the statutory and regulatory structure we have examined would compel the same conclusion. As noted, certificates of occupancy are used when mobilehome units are affixed to real property and become real property, while installation acceptances are used when they are not affixed and remain chattel. The take-away is that just as the absence of a certificate of occupancy precluded an action for rent in *Espinoza*, so must the absence of mobilehome installation acceptance preclude an affirmative attempt to collect rent from appellants here.

PBPA's supplemental briefing makes four arguments in favor of keeping the judgment as it is. Three are unavailing. The fourth will require remand for further evidence:

(1) *Because appellants' units are not affixed to permanent foundations there was no need for installation permits.* We cannot agree, because section 18551 contemplates installations without being fixed to permanent foundations and regulation 1366 requires statements of installation acceptances for installations not affixed to permanent foundations. In this regard we also note that section 18008, which defines mobilehomes, uses the phrase "with or without a foundation system," confirming our conclusion that the regulations pertaining to "mobilehomes" include units not on permanent foundations.

(2) *Because appellants stipulated (back in phase 2) that their units were "personal property," no certificates of occupancy were needed.* This argument ignores the equivalence of certificates of occupancy with statements of installation acceptance. As noted, under section 18551 mobilehomes which are *not* permanently affixed remain "chattel," but permits are still required for their installation under regulation 1366.

(3) *Even assuming that statements of installation acceptance were required, appellants have never shown the PBPA did anything to violate regulation 1102; if there are no required statements, that's appellants' fault.* This argument fails because regulation 1102 is plain that park *operators* must assure the proper installation of units in their park. As we said, regulation 1102 requires some affirmative action. The park operator must "not permit" installations without a permit. The operator cannot therefore just assume responsibility rests entirely with the unit owners.

(4) *Appellants' units never qualified as "mobilehomes" under section 18008 requiring installation permits, they really are recreational vehicles, so neither certificates of occupancy or mobilehome installation acceptances were ever required.*

This argument requires remand for an evidentiary hearing. As noted, regulation 1320(d) exempts RV's from the need for installation permits. If appellants' units really are RV's, then PBPA's quest for back rent is perfectly legal, just as any RV park owner's effort to collect space rent would be.

Appellants, in their supplemental briefing, stress the fact that the PBPA's president testified all spaces in the park were occupied by "mobilehomes" and there were no RV's in the park. But we cannot treat this testimony as some sort of judicial admission or substantial evidence that appellants' units were necessarily "mobilehomes." At best it was one person's opinion; at worst a thoughtless figure of speech. Similarly, we do not treat appellants' counsel's own statement in his opening supplemental brief that "The RV area homes are not mobilehomes" (page 11) as a judicial admission. (If we did, we would affirm the judgment right here). In context, counsel's statement appears to have been improvident hyperbole, directed to making the point that appellants' units were "bootleg" units that did not rise to the level of real mobilehomes.

Rather, we hold the issue of whether appellants' units were "mobilehomes" within the meaning of section 18551, and regulations 1102 and 1366 must be returned to the trial court for proper findings of fact. In particular, we note the definition of "mobilehome" from section 18008: "'Mobilehome,' for the purposes of this part, means a structure that was constructed prior to June 15, 1976, is transportable in one or more sections, is eight body feet or more in width, or 40 body feet or more in length, in the traveling mode, *or*, *when erected onsite, is 320 or more square feet*, is built on a permanent chassis and *designed to be used as a single-family dwelling* with or without a foundation system when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein." (Italics added.)

We know that appellants' units pass the "use as single family dwelling" and "with or without a foundation system" clauses of section 18008. But we don't know whether those units exceed 320 square feet. There is no statement to that effect in

appellants' supplemental briefing. Indeed, we are told by appellants' counsel that the bungalow units were "old travel trailer[s]" that were merely attached to bathroom buildings. Such a description ("travel trailer") might plausibly encompass a small structure that does not exceed 320 square feet – certainly we cannot say on this record the appellants' units necessarily exceeded 320 square feet.

The judgment against appellants for unpaid rent must therefore be reversed and the case remanded for an evidentiary hearing, if for no other reason than to examine the factual question of whether each of appellants' units exceed 320 square feet. If the hearing reveals that a given appellants' unit is less than 320 square feet, the judgment is to be reinstated against that appellant.) But there two other reasons for reversing the existing judgment and remanding the case to the trial court:

One, assuming that appellants' units are not RV's (as defined by section 18008), the trial court will need to recalculate how much the *PBPA* owes each appellant for payments on the $200,000 loans they have already made.[17]

Two, we must be fair to PBPA given the belatedness of the certificate of occupancy issue. Because the issue was never properly pleaded by appellants' counsel in the answer to the cross-complaint, PBPA never had the opportunity to assert whatever exceptions to the general rule against the enforcement of illegal contracts might apply.

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[17] However, we must emphasize, this does not include recovery by appellants of any rent payments *already* made. This is where the pleading makes a difference: For all their various theories, plaintiffs never sought *reimbursement* in their 4AC for rent payments already made on the theory of a lack of certificates of occupancy or statements of installation acceptance. It is one thing for a court not to "unwittingly lend its assistance to the consummation or encouragement of what public policy forbids" (*Lewis & Queen, supra*, 48 Cal.2d at p. 148), but it is quite another to allow a party to affirmatively recover on an unpled theory of illegality, particularly one where the transaction was completed long ago. (Cf. *Tri-Q. Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 218-219 [enumerating factors ameliorating rule against enforcement of illegal contracts].) "It is elementary that a party cannot recover on a cause of action not in the complaint." (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 179, italics added.)

(See, e.g., *Medina v. Safe-Guard Products, Internat., Inc.* (2008) 164 Cal.App.4th 105 (*Medina*).)[18]

B. *What's Left*

Turning from an issue that was not fully briefed until we asked for supplemental briefing on appeal, we now take the contentions made in the opening brief.[19]

1. *Judicial misconduct*. Appellants' counsel Patrick J. Evans feels that Judge Moss is biased against him. That bias is, in fact, the major theme of his opening brief. Time and time again, Attorney Evans complains that Judge Moss turned a blind eye to "illegality" and what Evans describes as a "real estate crime scene."

These are unfair allegations, their unfairness underscored by the fact it was Evans' own fault he didn't raise the issue of certificates of occupancy or mobilehome installation acceptances in the answer to the cross-complaint. Indeed, the concept of statements of installation (in lieu of certificates of occupancy) did not appear in the opening brief at all. Statements of installation were not mentioned until *we* asked for supplemental briefing.

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[18] As this court said there: "[t]he courts have recognized that there are circumstances when the innocence of a party to an illegal contract must be taken into account in what is called the "in pari delicto" exception. As *McIntosh v. Mills* (2004) 121 Cal.App.4th 333, 347 recently observed: 'Because of the harsh results that might be visited on innocent parties to a contract when their agreement is voided for illegality, courts have fashioned exceptions [to a rule of invalidity]. . . . [¶] . . . [¶] Perhaps the most common exception to the rule of invalidity . . . is the in pari delicto exception. At its most fundamental level, the exception allows an illegal contract to be enforced "so long as the party seeking its enforcement is less morally blameworthy than the party against whom the contract is being asserted, and there is no overriding public interest to be served by voiding the agreement."'" (*Medina, supra,* 164 Cal.App.4th at p. 110.)

[19] There are nine subheadings in the opening brief under the general heading "PBPA Illegality Itemized." Of these, we have already dealt with two of them, concerning the lack of certificates of occupancy and the corollary argument the spaces on which appellants' mobilehomes rested were non-permitted. Appellants have obtained at least a temporary reversal of the judgment on those two. Additionally, one of the nine subheadings focuses on the violation of TILA, but that is a point the trial court decided in appellants' favor and appellants are not aggrieved by that decision. The PBPA has taken no cross-appeal on the issue.

That leaves two arguments concerning permits under the Subdivided Lands Law, an argument on the original $200,000 assessment, an argument on the pay down of the Thrivent loan, and two arguments about the internal affairs of the PBPA. In addition, given the disproportionate amount of space the opening brief devotes to the issue, we first address its leitmotif that judicial bias somehow rendered the entire judgment a "nullity."

Under such circumstances, Judge Moss can hardly be faulted for not immediately ruling in favor of appellants when the certificate of occupancy (misnamed at that) was brought to his attention. We would remind Attorney Evans of this helpful passage from a practice guide concerning his very theme of "illegality": "Compare – illegality: Public policy against enforcement of illegal contracts is so strong that illegality can be raised even if not pleaded in the answer. Indeed, the court can raise the matter on its own motion, even if neither party raises it. [Citation.] [¶] . . . PRACTICE POINTER: *Even in these cases, it is better practice to plead them as affirmative defenses. Otherwise, a judge might disagree as to whether they are at issue, and you might end up having to fight the issue out on appeal.*" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶¶ 6:442-6:443, p. 6-133, italics added.) That is exactly what happened here.

Apart from the issue of illegality as such, Evans' opening brief asserts the entire judgment is a "nullity" because of Judge Moss' alleged misconduct. However, most of his argument is based not on what happened in this case, but in another, related case, back in December 2015: *Haugen v. PBPA*, Orange County Superior Court Case No. 30–2010–00423544. (Plaintiff Ole Haugen is also one of the appellants in the case now before us.) By way of background, this court denied Haugen's request for a writ of mandate disqualifying Judge Moss at that time. Evans' attempts to disqualify Judge Moss were clearly untimely.

And as far as this case is concerned, we note that not once in the 60 pages of the appellants' opening brief does appellants' counsel ever actually quote anything Judge Moss said or wrote that shows any sort of bias or preconception. Quite the opposite: We've been through this record and can only compliment Judge Moss for extreme judicial restraint. All Judge Moss did – besides hold his temper – was to rule against appellants on a number of occasions. It is well established that adverse rulings –

even many erroneous adverse rulings – are no basis for a claim of judicial bias. (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 795-796.)

But one more point must be made: Attorney Evans has engaged in a pattern of inflammatory accusations against any number of judges who have ruled against him, including not only Judge Moss but the Presiding Justice of this Division. Worse, at oral argument in this court, he practically invited us to hold him in contempt for accusing Judge Moss of fixing the result. (See *In re Koven* (2005) 134 Cal.App.4th 262.)

To repeat: A number of the adverse rulings made by Judge Moss against Attorney Evans' clients were nothing but the natural outcome of the fact Attorney Evans did not raise issues timely or otherwise poorly articulated them.[20] Even the fairest judge sometimes cannot make up for poor pleading or poor research by a litigant's counsel.[21]

We choose not to set contempt proceedings for Attorney Evans for the calumnies he has casually hurled at Judge Moss, nor for those directed at this court.[22] We conclude he craves the attention of such a hearing more than he would suffer from its result. We choose to deny him that attention and write off his intemperance to an excess of zeal on behalf of vulnerable and elderly clients. We now turn to the issues more discreetly raised in the opening brief:

2. *Absence of a securities permit under Business and Professions Code section 11010.8.* This argument fails because no such permit was ever required. A permit is only required if a person "intends to offer subdivided lands within this state for sale or lease[.]" (Bus. & Prof. Code, § 11010, subd. (a).) But the PBPA here never went

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[20] As recounted above, Judge Moss noted that Attorney Evans had failed to explain how Civil Code section 799.1 was violated, and took a "shotgun approach" to allegations of violation of breach of fiduciary duty on the part of the PBPA.

[21] Another example: In the companion *Eicherly* case (*Eicherly v. Palm Beach Park Association,* G052396) involving a challenge to the 2013 ratification election, Evans did not cite to the trial court the key statute on which he builds his case on appeal, former Civil Code section 1303.3.

[22] The general idea being that the Courts of Appeal are engaged in a grand conspiracy to cover up injustice perpetrated by trial judges. Our primary sin, it seems, was to reject Attorney Evans' petition for writ of mandate to remove Judge Moss from the case.

through with any actual subdivision; in fact the members voted against subdividing in 2010. Appellants can hardly be aggrieved by the lack of permits for a subdivision that never happened. (See *In re K.C.* (2011) 52 Cal.4th 231, 236 [appellant must have grievance to have standing to appeal].)

3. *The validity of the original $200,000 assessment in 2007*. This court requested supplemental briefing on the issue of whether the $200,000 assessment might have violated appellants' rights under the MRL, and particularly under Civil Code section 798.31 as it stood in 2007. Our purpose was not, as Attorney Evans wrote in his supplemental brief, to conduct "a lost fishing expedition to try and salve and cure massive fiduciary fraud, illegality, and wrongdoing, enable by demonstrated judicial bias and corruption." Attorney Evans seems to have leaped to the conclusion that we were biased against him. Rather, our purpose was quite the opposite: We asked for that briefing cognizant of the unique vulnerability of mobilehome owners. We were concerned that the $200,000 assessment in 2007 was a raw deal for the poorer residents in the park.

Mobilehomes are, generally speaking, not mobile. Typically, mobilehome owners do not own the land beneath their unit, and the prospect of actually moving their unit must seem as expensive and technically difficult as a moon shot. Thus mobilehome owners face the worst of both worlds of renting and owning. As owners they must make a substantial financial investment in their dwellings, but unlike conventional property owners, they also face rent increases from a third-party landlord. And as renters they are vulnerable to rent increases but cannot easily pull up stakes and move. These facts are well known to the California Legislature. (See generally *Rich v. Schwab* (1998) 63 Cal.App.4th 803, 813-814 (*Schwab*) [citing Stats. 1978, ch. 1031, § 1, p. 3178].)

Accordingly, the Legislature enacted the MRL in 1978 to provide certain protections for mobilehome park unit owners. (See *Schwab, supra*, 63 Cal.App.4th at p. 813; see also § 798.55.) While there is no statewide mobilehome rent control law,

section 798.31 does limit the kinds of monetary costs that can be imposed on mobilehome park tenants. In this case, as a practical matter, all the appellants saw their cost just to stay in their mobilehomes in the wake of the 2007 assessment go up from something like $300 or $400 a month to something like $1,600 a month. At least at first glance, the quadrupling of necessary cost to maintain their residence in the park seemed to us to be incompatible with the protections afforded mobilehome park tenants under Civil Code section 798.31.

However, even though violation of Civil Code section 798 is mentioned in the opening brief (though it only devotes all of five lines to the issue, including a citation to an appellate decision that has been disapproved by the California Supreme Court), in the supplemental briefing Attorney Evans *expressly* abandoned any reliance on the MRL protections, specifically arguing that section 798 et seq. did not apply. Very well. We need only add that the matter has, in any event, become academic since the appellants now face – ironically thanks to the much-vilified *Judge Moss' decision* on the TILA violation – no liability at all for the $200,000 assessment (either in 2007 or in 2013).

4. *Alleged Illegal Pay Down on the Thrivent Loan*. The opening brief says that the PBPA's paydowns on the Thrivent loans were "illegal." If we understand the argument correctly, the theory is that residents who paid off their $200,000 assessments were entitled to have any liens released on their homes. The opening brief fails to explain how appellants – who have all refused to pay the assessments – could possibly have been aggrieved by any pay downs of the Thrivent loan. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) We did not even get five lines on that point, and "Issues not supported by argument or citation to authority are forfeited." (*Needelman v. DeWolf Realty Co., Inc.* (2015) 239 Cal.App.4th 750, 762.)

5. *Lack of annual financial statements and failure to account for allegedly missing reserves*. Since appellants refused to pay the assessments, they lost their memberships in the PBPA. The issue of their derivative claims against the PBPA was

litigated in the *Haugen* decision. It now constitutes a classic case of collateral estoppel. In *Haugen* we held that one of the plaintiffs here, Ole Haugen, could not maintain a derivative action against the PBPA because he was no longer a member of the association. *Haugen* is now final. Appellants here were in unquestionable privity with the appellant in *Haugen*, and also represented by the same counsel. Appellants are thus collaterally estopped to complain of PBPA internal management because, under *Haugen*, they have no standing to do so.

IV. DISPOSITION

The judgment is reversed to the extent it provides that the appellants owe any money to PBPA. The matter is remanded to the trial court to determine whether appellants' various units are "mobilehomes" within the meaning of section 18008, i.e., whether those units exceed 320 square feet. If not, the judgment as to units not exceeding 320 square feet shall be reinstated. If so, the PBPA shall have the opportunity to offer whatever exceptions it might deem appropriate to appellants' theory that collecting rent from them would be illegal as contrary to regulation 1102. Assuming appellants prevail on the illegality issue, the trial court is to calculate how much each appellant paid PBPA by way of payments on the $200,000 loans made by PBPA in violation of TILA, and to enter a new judgment providing for the reimbursement of those monies to each appellant. In all other respects the judgment is affirmed.

Being familiar with this voluminous record and the history of this litigation – which is even more complex than today's decision might make it seem – we think our decision in this appeal is substantively a split one.[23] Each side will thus bear its own costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.

[23] For example, the vast majority of the opening brief is devoted to issues other than the winning *Espinoza* unpaid rent issue.

APPENDIX B

Judgment, by Superior Court Trial Judge R. Moss, 4/14/16 (19 pages)

Cary L. Wood, Esq. SBN 146698
Lewis Brisbois Bisgaard & Smith
633 West Fifth Street, Suite 4000
Los Angeles, California 90071
Telephone: (213) 250-1800
Facsimile: (213) 250-7900
E-mail: cary.wood@lewisbrisbois.com

Attorneys for defendant, Palm Beach Park Association

Allen L. Thomas, Esq. SBN 102924
Allan B. Weiss & Associates
5001 Airport Plaza Drive, Suite 240
Long Beach, California 90815-1280
Telephone: (562) 421-6333
Facsimile: (562) 421-6903
E-mail: allan@weisslawassociates.com

Attorneys for Cross-Complainant, Palm Beach Park Association

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

IN RE PALM BEACH PARK ASSOCIATION CASES This document Relates to: ALL ACTIONS LEAD CASE: CHODOSH VS. PALM BEACH PARK ASSOCIATION, ET AL AND RELATED CROSS-ACTION	**LEAD CASE NO: 30-2010-00423544-CU-BC-CXC** Consolidated with: 30-2010-00423807;30-2010-00425213; 30-2010-00423173;30-2010-00425206; 30-2010-00425291; 30-2010-00425323; 30-2010-00435331; 30-2010-00432261 **[Lead Complaint filed: November 8, 2010]** **[Trial: Completed]** **[Assigned to Judge Robert J. Moss, Dept. C-14]** **[~~PROPOSED~~] JUDGMENT BY COURT**

The case before the court was tried in four phases that the parties have characterized as Phases I, II, III, and IV. Phase I was tried as a bench trial before the Honorable Nancy Wieben Stock (Ret.), Judge then presiding in Department CX-105 of the above entitled court, who subsequently retired. Phases II, III, and IV were tried before the Honorable Robert J. Moss, Judge then presiding in Department CX-102 in the above entitled court, and now presiding in Department C-14.

I. PHASE I

This cause came for a Phase I trial on April 22, 2013, before the Honorable Nancy Wieben Stock, Judge then presiding in Department CX-105 of the above entitled court, who decided three legal issues by stipulation of the parties.

Patrick J. Evans of the Law Office of Patrick J. Evans appeared on behalf of plaintiffs, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly, an individual; Steve Eicherly, an individual; Bonnie P. Harris, an individual; Ole Haugen, an individual; Johan D. Kane, an individual; Rodger Kane, an individual; Chris McLaughlin, an individual; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, U/D/T/ dated June 24, 1994; Todd M. Peterson, an individual; and, Kathleen A. Schowalter, an individual. Patrick J. Evans also appeared on behalf of cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly; Steve Eicherly; Bonnie P. Harris; Ole Haugen; Johan D. Kane; Rodger Kane; Chris McLaughlin; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, and Myrle A. Moore; Todd M. Peterson; and, Kathleen A. Schowalter.

Cary L. Wood and Aaron Kolitz of Lewis Brisbois Bisgaard & Smith LLP appeared on behalf of defendant, Palm Beach Park Association.

Allen L. Thomas of Allan B. Weiss & Associates appeared on behalf of cross-complainant, Palm Beach Park Association, and defendants, Jean Wiley, Armand

Camelot, Don Anderson, Jeanne Stovall, Ron Thornton, Jo Anne C. Strong, Bob Gergen, Jan Huber, Dan Smith, Don Hage, Bill Reynolds, and Don Haskell.

J. John Anderholt of AnderholtWhitaker, LLP appeared on behalf of defendant, Palm Beach Park Association.

Tom Dias of Fidelity National Law Group appeared on behalf of defendant, Thrivent Financial for Lutherans.

After witnesses were sworn and testified and evidence presented in open court, the cause was submitted to the court. Having considered the evidence and arguments presented by the parties, the court issued its oral ruling from the bench finding on the three issues as follows:

1. Palm Beach Park Association is a resident-owned mobilehome park, not a Davis-Stirling common interest development;

2. The Association did not have the authority to impose a $200,000.00 assessment on each member; and,

3. The Association did have the authority to obtain the loan from Thrivent Financial for Lutherans.

Subsequent to the court=s ruling, the Honorable Nancy Wieben Stock retired. Defendant and cross-complainant, Palm Beach Park Association, Inc., requested that the entire cause generally known as In Re Palm Beach Park Association consisting of the fourth amended consolidated complaint and the cross-complaint, including any and all phases and/or bifurcated trials, be heard by the Honorable Robert J. Moss, Judge presiding, pursuant to the decision in *European Beverage, Inc. v. Superior Court (Meara)* (1996) 43 Cal.App.4th 1211.

II. PHASE II

This cause came for a Phase II trial on September 22, 2014, before the Honorable Robert J. Moss, Judge then presiding in Department CX-102 of the above entitled court, who decided six legal issues by stipulation of the parties.

Patrick J. Evans of the Law Office of Patrick J. Evans appeared on behalf of plaintiffs, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly, an individual; Steve Eicherly, an individual; Bonnie P. Harris, an individual; Ole Haugen, an individual; Johan D. Kane, an individual; Rodger Kane, an individual; Chris McLaughlin, an individual, Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, U/D/T/ dated June 24, 1994; Todd M. Peterson, an individual; and, Kathleen A. Schowalter, an individual. Patrick J. Evans also appeared on behalf of cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly; Steve Eicherly; Bonnie P. Harris; Ole Haugen; Johan D. Kane; Rodger Kane; Chris McLaughlin; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, and Myrle A. Moore; Todd M. Peterson; and, Kathleen A. Schowalter.

Cary L. Wood and Domineh Fazel of Lewis Brisbois Bisgaard & Smith LLP appeared on behalf of defendant, Palm Beach Park Association.

Allen L. Thomas of Allan B. Weiss & Associates appeared on behalf of cross-complainant, Palm Beach Park Association.

Tom Dias of Fidelity National Law Group appeared on behalf of defendant, Thrivent Financial for Lutherans.

Prior to presenting evidence, the parties stipulated and agreed in open court that Palm Beach Park Association is a resident-owned mobilehome park, not a Davis-Stirling common interest development and the Association did have the authority to obtain the loan from Thrivent Financial for Lutherans.

After evidence was presented in open court, the cause was submitted to the court. Having considered the evidence and arguments presented by the parties, the court issued its decision by a Minute Order dated October 3, 2014. Based upon the decision by the court as set forth in said Minute Order,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, as follows:

1. Plaintiffs do not now and never have owned any fee interest in the real property which comprises Palm Beach Park. Each plaintiff owned a fractional interest in the corporation, Palm Beach Park Association, Inc. The corporation was and is the sole owner of the real property since December 11, 2007, to the present. Each plaintiff leased space on the real property from the corporation upon which was/is located each plaintiff=s mobilehome;

2. Each plaintiff=s fractional interest in Palm Beach Park Association, Inc. is personal property. While each plaintiff=s lease of space upon which to place their mobilehome may technically be an estate in real property, under California law such interests are governed by the rules applicable to personal property;

3. Plaintiffs lack standing to challenge Palm Beach Park Association=s conveyance of a security interest to Thrivent Financial for Lutherans. Even if they did have standing, the Association had the authority to convey a security interest to the lender;

4. Palm Beach Park Association did convey a security interest in the property to Thrivent Financial for Lutherans; and,

5. Whether the members= leases were subordinate to Thrivent=s interest is not ripe for the court to consider because no default on the Thrivent loan had occurred.

6. Pursuant to stipulation by the parties made in open court, Palm Beach Park Association is a resident-owned mobilehome park, not a Davis-Stirling common interest development and the Association did have the authority to obtain the loan from Thrivent Financial for Lutherans..

III. PHASE III

This cause came for a Phase III trial on April 13, 2015, before the Honorable Robert J. Moss, Judge then presiding in Department CX-102 of the above entitled court, presiding without a jury, a jury having been expressly waived by all parties. The Phase III trial concerned the following causes of action as set forth in plaintiffs= fourth amended

consolidated complaint: first, second, third, eighth, ninth, and eleventh.

Patrick J. Evans of the Law Office of Patrick J. Evans appeared on behalf of plaintiffs, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly, an individual; Steve Eicherly, an individual; Bonnie P. Harris, an individual; Ole Haugen, an individual; Johan D. Kane, an individual; Rodger Kane, an individual; Chris McLaughlin, an individual; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, U/D/T/ dated June 24, 1994; Todd M. Peterson, an individual; and, Kathleen A. Schowalter, an individual. Patrick J. Evans also appeared on behalf of cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly; Steve Eicherly; Bonnie P. Harris; Ole Haugen; Johan D. Kane; Rodger Kane; Chris McLaughlin; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, and Myrle A. Moore; Todd M. Peterson; and, Kathleen A. Schowalter.

Cary L. Wood and Domineh Fazel of Lewis Brisbois Bisgaard & Smith LLP appeared on behalf of defendant, Palm Beach Park Association.

Allen L. Thomas of Allan B. Weiss & Associates appeared on behalf of cross-complainant, Palm Beach Park Association.

After witnesses were sworn and testified and evidence presented in open court, the cause was submitted to the court. Having considered the evidence and arguments presented by the parties, and having issued its Statements of Decision,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, as follows:

1. Judgment for plaintiffs, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly, an individual; Steve Eicherly, an individual; Bonnie P. Harris, an individual; Ole Haugen, an individual; Johan D. Kane, an individual; Rodger Kane, an individual; Chris McLaughlin, an individual; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, U/D/T/

dated June 24, 1994; Todd M. Peterson, an individual; and, Kathleen A. Schowalter, an individual, against defendant, Palm Beach Park Association, a California non-profit mutual benefit corporation, on the eighth cause of action for violation of the federal Truth in Lending Act. The loan made by the Association to each plaintiff is rescinded. Plaintiffs are entitled to restitution for any sums they paid on the loans to the Association, but restitution is deferred for the Phase IV trial to determine, what, if anything, plaintiffs owe on the Association=s cross-complaint.

2. Judgment for defendant, Palm Beach Park Association, a California non-profit mutual benefit corporation against plaintiffs, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly, an individual; Steve Eicherly, an individual; Bonnie P. Harris, an individual; Ole Haugen, an individual; Johan D. Kane, an individual; Rodger Kane, an individual; Chris McLaughlin, an individual; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, U/D/T/ dated June 24, 1994; Todd M. Peterson, an individual; and, Kathleen A. Schowalter, an individual, on the first cause of action for Breach of Contract; second cause of action for Violation of Governing Documents; third cause of action for Violation of Statutes; ninth cause of action for Quiet Title; and, eleventh cause of action for Slander of Title. Defendant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court.

IV. PHASE IV

This cause came for a Phase IV trial on December 7, 8, 9, 14, and 15, 2015, before the Honorable Robert J. Moss, Judge then presiding in Department CX-102 of the above entitled court, presiding without a jury, a jury having been expressly waived by all parties.

Patrick J. Evans of the Law Office of Patrick J. Evans appeared on behalf of plaintiffs, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly, an individual; Steve Eicherly, an

individual; Bonnie P. Harris, an individual; Ole Haugen, an individual; Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, U/D/T/ dated June 24, 1994; Todd M. Peterson, an individual; and, Kathleen A. Schowalter, an individual. Patrick J. Evans also appeared on behalf of cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly; Steve Eicherly; Bonnie P. Harris; Ole Haugen; Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, U/D/T/ dated June 24, 1994, and Myrle A. Moore; Todd M. Peterson; and, Kathleen A. Schowalter.

Cary L. Wood and Domineh Fazel of Lewis Brisbois Bisgaard & Smith LLP appeared on behalf of defendant, Palm Beach Park Association.

Allen L. Thomas of Allan B. Weiss & Associates appeared on behalf of cross-complainant, Palm Beach Park Association.

The Phase IV trial was on plaintiffs= remaining causes of action consisting of negligent misrepresentation (fourth), breach of fiduciary duty (fifth), and wrongful eviction (tenth) and on the causes of action contained in the cross-complaint filed by cross-complainant, Palm Beach Park Association.

Witnesses were sworn and testified and evidence presented in open court. After plaintiffs= rested, the court granted defendant=s motion for judgment as to the wrongful eviction cause of action.

After witnesses were sworn and testified and evidence presented in open court, the cause was submitted to the court. Having considered the evidence and arguments presented by the parties, and having issued its Statements of Decision,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, as follows:

1. Defendant, Palm Beach Park Association, a California non-profit mutual benefit

corporation shall have judgment against plaintiffs, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly, an individual; Steve Eicherly, an individual; Bonnie P. Harris, an individual; Ole Haugen, an individual; Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, U/D/T/ dated June 24, 1994; Todd M. Peterson, an individual; and, Kathleen A. Schowalter, an individual, on the fourth cause of action for negligent misrepresentation and the fifth cause of action for breach of fiduciary duty. Defendant is the prevailing party and shall recover its attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court.

2. Cross-complainant, Palm Beach Park Association, a California non-profit mutual benefit corporation, shall have judgment on their cross-complaint against cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004; Sue Eicherly; Steve Eicherly; Bonnie P. Harris; Ole Haugen; Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased; Myrle A. Moore, in her capacity as trustee of the Moore Family Trust and Myrle A. Moore; Todd M. Peterson; and, Kathleen A. Schowalter in the principal sum and pre-judgment interest on the ascertainable damages for the causes of action consisting of breach of contract, ejectment, money owed, and declaratory relief as follows:

A. Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004

1. Cross-complainant, Palm Beach Park Association, have and recover judgment from cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004, jointly and severally, the principal sum of $107,784.09, minus the offset for the assessment loan payments of $26,612.00, for net damages of $81,172.09; prejudgment interest thereon at the rate of 10

percent per annum from January 1, 2007, to November 30, 2015, in the sum of $8,117.21; and, cross-complainant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court together with interest on such judgment as provided by law.

2. Cross-complainant, Palm Beach Park Association, shall recover possession of real property in Orange County, State of California, commonly known as 406 Ebb Tide, San Clemente, California, (Space Number 44) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672;

3. Any rental agreement entered into by and between cross-complainant, Palm Beach Park Association, and cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004, is cancelled;

4. A Writ of Possession shall be issued to cross-complainant, Palm Beach Park Association, to have and recover possession of real property in Orange County, State of California, commonly known as 406 Ebb Tide, San Clemente, California, (Space Number 44) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672; and,

5. A Writ of Execution shall be issued to the Sheriff of the County of Orange, State of California, directing the Sheriff to remove cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004, and all those claiming by, through, or under him, and to place cross-complainant, Palm Beach Park Association, in possession of the subject property.

Therefore, the total judgment in favor of cross-complainant, Palm Beach Park Association, and against cross-defendants, Floyd M. Chodosh, an individual, and Floyd M. Chodosh, in his capacity as trustee of the Glendia Watson Living Trust 2004, shall be $89,289.30, exclusive of cross-complainant=s attorney=s fees and costs yet to be awarded.

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B. Sue Eicherly, individually and Steve Eicherly, individually

1. Cross-complainant, Palm Beach Park Association, have and recover judgment from cross-defendants, Sue Eicherly and Steve Eicherly, jointly and severally, the principal sum of $155,766.08, minus the offset for the assessment loan payment of $405.00, for net damages of $155,361.08; prejudgment interest thereon at the rate of 10 percent per annum from January 1, 2007, to November 30, 2015 in the sum of $15,536.11; and, cross-complainant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court together with interest on such judgment as provided by law.

2. Cross-complainant, Palm Beach Park Association, shall recover possession of real property in Orange County, State of California, commonly known as 106 Sandy Drive, San Clemente, California, (Space Number 92) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672;

3. Any rental agreement entered into by and between cross-complainant, Palm Beach Park Association, and cross-defendants, Sue Eicherly and Steve Eicherly is cancelled;

4. A Writ of Possession shall be issued to cross-complainant, Palm Beach Park Association, to have and recover possession of real property in Orange County, State of California, commonly known as 106 Sandy Drive, San Clemente, California, (Space Number 92) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672; and,

5. A Writ of Execution shall be issued to the Sheriff of the County of Orange, State of California, directing the Sheriff to remove cross-defendants, Sue Eicherly and Steve Eicherly, and all those claiming by, through, or under them, and to place cross-complainant, Palm Beach Park Association, in possession of the subject property.

Therefore, the total judgment in favor of cross-complainant, Palm Beach Park Association, and against cross-defendants, Sue Eicherly and Steve Eicherly, jointly and

severally shall be $170,897.19, exclusive of cross-complainant=s attorney=s fees and costs yet to be awarded.

C. Bonnie P. Harris, individually

1. Cross-complainant, Palm Beach Park Association, have and recover judgment from cross-defendant, Bonnie P. Harris, the principal sum of $152,433.31, minus the offset for the assessment loan payments of $20,069.51, for net damages of $132,363.80; prejudgment interest thereon at the rate of 10 percent per annum from January 1, 2007, to November 30, 2015, in the sum of $13,236.38; and, cross-complainant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court together with interest on such judgment as provided by law.

2. Cross-complainant, Palm Beach Park Association, shall recover possession of real property in Orange County, State of California, commonly known as 116 Palm Drive, San Clemente, California, (Space Number 110) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672;

3. Any rental agreement entered into by and between cross-complainant, Palm Beach Park Association, and cross-defendant, Bonnie P. Harris is cancelled;

4. A Writ of Possession shall be issued to cross-complainant, Palm Beach Park Association, to have and recover possession of real property in Orange County, State of California, commonly known as 116 Palm Drive, San Clemente, California, (Space Number 110) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672; and,

5. A Writ of Execution shall be issued to the Sheriff of the County of Orange, State of California, directing the Sheriff to remove cross-defendant, Bonnie P. Harris, and all those claiming by, through, or under her, and to place cross-complainant, Palm Beach Park Association, in possession of the subject property.

Therefore, the total judgment in favor of cross-complainant, Palm Beach Park

Association, and against cross-defendant, Bonnie P. Harris, shall be $145,600.18, exclusive of cross-complainant=s attorney=s fees and costs yet to be awarded.

D. Ole Haugen, individually

1. Cross-complainant, Palm Beach Park Association, Inc. have and recover judgment from cross-defendant, Ole Haugen, the principal sum of $142,720.66, minus the offset for the assessment loan payments of $43,589.00, for net damages of $99,131.66; prejudgment interest thereon at the rate of 10 percent per annum from January 1, 2007, to November 30, 2015, in the sum of $9,913.17; and, cross-complainant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court together with interest on such judgment as provided by law.

2. Cross-complainant, Palm Beach Park Association, shall recover possession of real property in Orange County, State of California, commonly known as 104 Palm Drive, San Clemente, California, (Space Number 82) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672;

3. Any rental agreement entered into by and between cross-complainant, Palm Beach Park Association, and cross-defendant, Ole Haugen, is cancelled;

4. A Writ of Possession shall be issued to cross-complainant, Palm Beach Park Association, to have and recover possession of real property in Orange County, State of California, commonly known as 104 Palm Drive, San Clemente, California, (Space Number 82) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672; and,

5. A Writ of Execution shall be issued to the Sheriff of the County of Orange, State of California, directing the Sheriff to remove cross-defendant, Ole Haugen, and all those claiming by, through, or under him, and to place cross-complainant, Palm Beach Park Association, in possession of the subject property.

Therefore, the total judgment in favor of cross-complainant, Palm Beach Park

Association, and against cross-defendant, Ole Haugen, shall be $109,044.83, exclusive of cross-complainant=s attorney=s fees and costs yet to be awarded.

E. Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased

1. Cross-complainant, Palm Beach Park Association, Inc. have and recover judgment from cross-defendant, Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased, jointly and severally, the principal sum of $161,336.85, minus the offset for the assessment loan payments of $29,273.20, for net damages of $132,063.60; prejudgment interest thereon at the rate of 10 percent per annum from January 1, 2007, to November 30, 2015, in the sum of $13,206.37; and, cross-complainant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court together with interest on such judgment as provided by law.

2. Cross-complainant, Palm Beach Park Association, shall recover possession of real property in Orange County, State of California, commonly known as 108 Sandy Drive, San Clemente, California, (Space Number 67) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672;

3. Any rental agreement entered into by and between cross-complainant, Palm Beach Park Association, and cross-defendants, Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased, is cancelled;

4. A Writ of Possession shall be issued to cross-complainant, Palm Beach Park Association, to have and recover possession of real property in Orange County, State of California, commonly known as 108 Sandy Drive, San Clemente, California, (Space Number 67) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672; and,

5. A Writ of Execution shall be issued to the Sheriff of the County of Orange,

State of California, directing the Sheriff to remove cross-defendant, Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased, and all those claiming by, through, or under him, and to place cross-complainant, Palm Beach Park Association, in possession of the subject property.

Therefore, the total judgment in favor of cross-complainant, Palm Beach Park Association, and against cross-defendant, Rodger Kane, Jr., as successor and representative of Johan D. Kane, deceased, and Rodger Kane, deceased, shall be $145,270.02, exclusive of cross-complainant=s attorney=s fees and costs yet to be awarded.

F. Myrle A. Moore, in her capacity as trustee of the Moore Family Trust, and Myrle A. Moore, individually

1. Cross-complainant, Palm Beach Park Association, Inc. have and recover judgment from cross-defendants, Myrle A. Moore, in her capacity as trustee of the Moore Family Trust and Myrle A. Moore, individually, jointly and severally, the principal sum of $157,981.39, minus the offset for the assessment loan payments of $10,644.80, for net damages of $147,336.59; prejudgment interest thereon at the rate of 10 percent per annum from January 1, 2007, to November 30, 2015, in the sum of $14,733.66; and, cross-complainant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court together with interest on such judgment as provided by law.

2. Cross-complainant, Palm Beach Park Association, shall recover possession of real property in Orange County, State of California, commonly known as 105 Sandy Drive, San Clemente, California, (Space Number 88) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672;

3. Any rental agreement entered into by and between cross-complainant, Palm Beach Park Association, and cross-defendants, Myrle A. Moore, in her capacity as trustee of the Moore Family Trust and Myrle A. Moore, individually, is cancelled;

4. A Writ of Possession shall be issued to cross-complainant, Palm Beach Park Association, to have and recover possession of real property in Orange County, State of California, commonly known as 105 Sandy Drive, San Clemente, California, (Space Number 88) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672; and,

5. A Writ of Execution shall be issued to the Sheriff of the County of Orange, State of California, directing the Sheriff to remove cross-defendants, Myrle A. Moore, in her capacity as trustee of the Moore Family Trust and Myrle A. Moore, and all those claiming by, through, or under them, and to place cross-complainant, Palm Beach Park Association, in possession of the subject property.

Therefore, the total judgment in favor of cross-complainant, Palm Beach Park Association, and against cross-defendants, Myrle A. Moore, in her capacity as trustee of the Moore Family Trust and Myrle A. Moore, jointly and severally, shall be $162,070.25, exclusive of cross-complainant=s attorney=s fees and costs yet to be awarded.

G. Todd M. Peterson, individually

1. Cross-complainant, Palm Beach Park Association, have and recover judgment from cross-defendant, Todd M. Peterson, the principal sum of $168,641.97, minus the offset for the assessment loan payments of $9,314.20, for net damages of $159,327.77; prejudgment interest thereon at the rate of 10 percent per annum from January 1, 2007, to the date hereof in the sum of $15,932.78; and, cross-complainant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court together with interest on such judgment as provided by law.

2. Cross-complainant, Palm Beach Park Association, shall recover possession of real property in Orange County, State of California, commonly known as 103 Sandy Drive, San Clemente, California, (Space Number 15) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672;

3. Any rental agreement entered into by and between cross-complainant, Palm Beach Park Association, and cross-defendant, Todd M. Peterson, is cancelled;

4. A Writ of Possession shall be issued to cross-complainant, Palm Beach Park Association, to have and recover possession of real property in Orange County, State of California, commonly known as 103 Sandy Drive, San Clemente, California, (Space Number 15) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672; and,

5. A Writ of Execution shall be issued to the Sheriff of the County of Orange, State of California, directing the Sheriff to remove cross-defendant, Todd M. Peterson, and all those claiming by, through, or under him, and to place cross-complainant, Palm Beach Park Association, in possession of the subject property.

Therefore, the total judgment in favor of cross-complainant, Palm Beach Park Association, and against cross-defendant, Todd M. Peterson,, shall be $175,260.55, exclusive of cross-complainant=s attorney=s fees and costs yet to be awarded.

H. Kathleen A. Schowalter, individually

1. Cross-complainant, Palm Beach Park Association, Inc. have and recover judgment from cross-defendant, Kathleen A. Schowalter, the principal sum of $156,598.12, minus the offset for the assessment loan payments of $14,453, for net damages of $142,145.12; prejudgment interest thereon at the rate of 10 percent per annum from January 1, 2007, to November 30, 2015, in the sum of $14,214.51; and, cross-complainant=s attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court together with interest on such judgment as provided by law.

2. Cross-complainant, Palm Beach Park Association, shall recover possession of real property in Orange County, State of California, commonly known as 126 Palm Drive, San Clemente, California, (Space Number 104) located within the mobilehome park located at

101 Palm Drive, San Clemente, California 92672;

3. Any rental agreement entered into by and between cross-complainant, Palm Beach Park Association, and cross-defendant, Kathleen A. Schowalter, is cancelled;

4. A Writ of Possession shall be issued to cross-complainant, Palm Beach Park Association, to have and recover possession of real property in Orange County, State of California, commonly known as 126 Palm Drive, San Clemente, California, (Space Number 104) located within the mobilehome park located at 101 Palm Drive, San Clemente, California 92672; and,

5. A Writ of Execution shall be issued to the Sheriff of the County of Orange, State of California, directing the Sheriff to remove cross-defendant, Kathleen A. Schowalter, and all those claiming by, through, or under her, and to place cross-complainant, Palm Beach Park Association, in possession of the subject property.

Therefore, the total judgment in favor of cross-complainant, Palm Beach Park Association, and against cross-defendant, Kathleen A. Schowalter, shall be $156,359.63, exclusive of cross-complainant=s attorney=s fees and costs yet to be awarded.

Cross-complainant is the prevailing party and shall recover its attorney=s fees, costs and disbursements subject to a motion for attorney=s fees and a memorandum of costs as may be filed with the court.

DATED: 4/14/16

Robert J. Moss,
Judge of the Superior Court

PROOF OF SERVICE

I hereby certify and declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5001 Airport Plaza Drive, Suite 240, Long Beach, California 90815-1280.

On **March 16, 2016**, I served the foregoing document described as **[PROPOSED] JUDGMENT BY COURT** on interested parties in this action as follows:

Patrick J. Evans, Esq. pevans@pevanslawoffice.com
Law Office of Patrick J. Evans
Attorneys for plaintiffs and cross-defendants,
Floyd Chodosh, etc.

Daniel T. Rudderow dan@rudderowlaw.com
Attorneys for plaintiff and cross-defendant,
Chris McLaughlin

Cary L. Wood, Esq. woodc@lbbslaw.com
Lewis, Brisbois, Bisgaard & Smith, LLP
Attorneys for defendant, Palm Beach Park Association

J. John Anderholt, Esq. john@anderholtwhittaker.com
Anderholt Whittaker, LLP
Attorneys for defendant, Palm Beach Park Association

Tom Dias, Esq. tom.dias@fnf.com
Fidelity National Law Group
Attorneys for defendant, Thrivent Financial for Lutherans

Emory Wishon, Esq. Aew@mmwlawfirm.com
Motschiedler Michaelides & Wishon LLP
Attorneys for defendant, Murphy Bank

BY ELECTRIC MAIL

[X] I caused such document to be served by electronic mail to the addressees as set forth above. The document was served electronically and the transmission was reported complete and without error.

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

Executed on **March 16, 2016,** at Long Beach, California.

/s/
Sivi G. Pederson

APPENDIX C

Order Denying Rehearing on Opinion, 1/8/19 (2 pages)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLOYD M. CHODOSH et al., Plaintiffs and Appellants, v. PALM BEACH PARK ASSOCIATION, Defendant and Respondent.	G053798 (Super. Ct. No. 30-2010-00423544) ORDER DENYING PETITION FOR REHEARING

The petition for rehearing filed on January 2, 2019, is DENIED. For the benefit of the parties and any further review of this case, we make these observations concerning the petition:

(1) This court most assuredly did not agree with attorney Patrick Evans' allegation that Judge Moss "fixed" a related case against appellants. The fact an appellate panel exercises its discretion not to give an attorney the spotlight of a contempt hearing based on a statement the attorney made in open court does not establish the truth of his statement.

(2) *Gruzen v. Henry* (1978) 84 Cal.App.3d 515 explicitly held that a landlord without a certificate of occupancy could still eject a tenant: "We do not imply by this opinion that persons in the situation of these defendants may, without compensation, continue to occupy premises because the landlord has not procured a

certificate of occupancy. . . . Plaintiff is entitled to an order of eviction, but not to an award of rent." (*Id*. at p. 519.)

(3) The petition fails to show that appellants ever tried to amend the answer to their cross-complaint to allege the possibly winning defense of an absence of statements of installation acceptance. The record reference supplied by counsel establishes only that the appellants sought to amend their answer to assert three specific grounds of "illegality" (violation of the subdivision map act, violation of the securities law of 1968, and violation of the residential mortgage lending act) and the absence of statements of acceptance – or even certificates of occupancy – was not among them.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.

APPENDIX D

Appellate Court Denial of Disqualification Motions, 1/8/19 (1 page)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLOYD M. CHODOSH et al., Plaintiffs and Appellants, v. PALM BEACH PARK ASSOCIATION, Defendant and Respondent.	G053798 (Super. Ct. No. 30-2010-00423544) ORDER DENYING MOTION TO FILE OVERSIZE PETITION AND DENYING MOTION TO DISQUALIFY JUSTICES

Appellants' motion to file oversize petition for rehearing is DENIED. Appellants' motion to disqualify justices is DENIED.

BEDSWORTH, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.

APPENDIX E

California Supreme Court Denial of Review (3/13/19) (1 page)

Court of Appeal, Fourth Appellate District, Division Three - No. G053798

S253784

IN THE SUPREME COURT OF CALIFORNIA

En Banc

FLOYD M. CHODOSH et al., Plaintiffs and Appellants,

v.

PALM BEACH PARK ASSOCIATION, Defendant and Respondent.

The request for judicial notice is granted.
The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX F

J. Moss Disqualification and Self-Requalification
In related case *Haugen v. PBPA*, 11/30, 12/22-23/15 (4 pgs.)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 11/30/2015 TIME: 03:03:00 PM DEPT: C01

JUDICIAL OFFICER PRESIDING: Supervising Judge Charles Margines
CLERK: L. Labrador
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT:

CASE NO: **30-2015-00819837-CU-BC-CXC** CASE INIT.DATE: 11/12/2015
CASE TITLE: **Haugen vs. Palm Beach Park Association**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT ID/DOCUMENT ID: 72275651

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

A Peremptory Challenge under C.C.P.§170.6 as to the Honorable Robert J. Moss having been filed on 11/25/15, by Plaintiff, and this matter having been transferred to C1 for reassignment, the Court now rules as follows:

This case is reassigned to the Honorable Gail A. Andler in Department CX101 for all purposes.

Counsel to contact clerk in Department CX101 within 15 days of receipt of this order to reschedule any pending hearings.

The Court determines that for purposes of exercising C.C.P.§170.6 rights, there are two sides to this matter unless the contrary is brought to the attention of the Court, by Ex-Parte motion. Counsel has 15 days from the date of the enclosed certificate of mailing in which to exercise any rights under C.C.P.§170.6.

Court orders Clerk to give notice. Plaintiff to give notice to any parties not listed and to file proof of service with the court within 10 days.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 12/22/2015 TIME: 09:00:00 AM DEPT: CX102

JUDICIAL OFFICER PRESIDING: Under the direction of Honorable Robert J. Moss
CLERK: Betsy Zuanich
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2015-00819837-CU-BC-CXC** CASE INIT.DATE: 11/12/2015
CASE TITLE: **Haugen vs. Palm Beach Park Association**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT ID/DOCUMENT ID: 72288945

EVENT TYPE: Ex Parte

APPEARANCES
Patrick J. Evans, from Law Office of Patrick J. Evans, present for Plaintiff(s).
Cary L. Wood/Domineh Fazel, from Lewis Brisbois Bisgaard & Smith LLP, present for Defendant(s).
Allen L. Thomas present for defendant Palm Beach Park Association
Edward Susolik/Peter S. Bauman, Callahan & Blaine, specially appeared for John Saunders

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Application for Order to Show Cause and Temporary Restraining Order to Enjoin Sale of Palm Beach Mobilehome Park to Saunders Property Co.

Ex Parte Application is continued to 12/28/2015, at 08:30 AM in this department.

Counsel for Palm Beach Park Association will give notice.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 12/22/2015 TIME: 09:29:00 AM DEPT: CX102

JUDICIAL OFFICER PRESIDING: Robert J. Moss
CLERK: Betsy Zuanich
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2015-00819837-CU-BC-CXC** CASE INIT.DATE: 11/12/2015
CASE TITLE: **Haugen vs. Palm Beach Park Association**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT ID/DOCUMENT ID: 72288789

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

Peremptory Challenge pursuant to C.C.P. §170.6 was filed by Plaintiff on 11/25/15, as to the Hon. Robert J. Moss.

Matter was referred to Dept. C1 and case was reassigned to the Hon. Gail A. Andler in Department CX101.

Defendant's Objection to the 170.6 against Judge Moss was filed on 12/01/15.

The Court, having read and considered the objection, now rules as follows:

Defendant's objection is granted.

Peremptory challenge is stricken.

Clerk to give e-Service notice to counsel.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 12/23/2015 TIME: 02:25:00 PM DEPT: CX102

JUDICIAL OFFICER PRESIDING: Under the direction of Honorable Robert J. Moss
CLERK: Betsy Zuanich
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2015-00819837-CU-BC-CXC** CASE INIT.DATE: 11/12/2015
CASE TITLE: **Haugen vs. Palm Beach Park Association**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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EVENT ID/DOCUMENT ID: 72289750

EVENT TYPE: Chambers Work

APPEARANCES

There are no appearances by any party.

Defendant's objection having been granted and peremptory challenge stricken, this case is reassigned to the Honorable Robert J. Moss for all purposes.

Clerk to give notice.

APPENDIX G

J. Moss Memorandum and Declaration to Deny Disqualification Motion, 4/29/16 (9 pgs.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

IN RE:

PALM BEACH PARK ASSOCIATION CASES:

LEAD CASE:

FLOYD M. CHODOSH, ETC., ET AL.

Plaintiffs,

v.

PALM BEACH PARK ASSOCIATION, ET AL.

Defendants.

LEAD CASE NO. 30-2010-00423544

Consolidated With Case Nos.:
30-2010-00423807
30-2010-00425213
30-2010-00425173
30-2010-00425206
30-2010-00432261
30-2010-00425323
30-2010-00425331
30-2010-00425291

ORDER STRIKING STATEMENT OF DISQUALIFICATION AND, IN THE ALTERNATIVE, VERIFIED ANSWER OF JUDGE ROBERT J. MOSS

On April 22, 2016, Patrick J. Evans, counsel for plaintiffs Floyd M. Chodosh et al. filed a Statement of Disqualification asserting the following:

(A) On December 22, 2015, the Court reassumed jurisdiction of a related case, *Haugen v. Palm Beach Park Association* (OCSC Case No. 30-2015-00819837), by sustaining defendant's objection to plaintiff's peremptory challenge;

(B) The Court's rulings and decisions in these proceedings have been based on bias or a person aware of the facts might reasonably entertain a doubt that the Court is biased;

(C) The Court criticized plaintiffs' counsel in tentative rulings and commented on plaintiffs' probability of success and chances of settling.

The Statement of Disqualification is stricken because it is untimely and demonstrates on its face no legal grounds for disqualification. (Code Civ. Proc., § 170.4 subd. (b)[1].)

THE STATEMENT OF DISQUALIFICATION IS UNTIMELY

A party seeking to disqualify a judge must do so "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (§ 170.3, subd. (c)(1).) Failure to comply with this strict promptness requirement constitutes a forfeiture or an implied waiver of the disqualification. (*Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337.) These consolidated cases have been assigned to this Court since January 6, 2014. The final phase of this four-phase trial took place in early December 2015. The Court's tentative ruling issued on February 18, 2016, the Statement of Decision issued on March 30, 2016, and Judgment was entered on April 14, 2016. The Statement of Disqualification was not filed until four months after the Court had reassumed jurisdiction in *Haugen*, and a year after the comments were made in the tentative ruling for Phase II. Because it was not presented at the earliest practicable opportunity, the Statement of Disqualification is ordered stricken as untimely. (§ 170.4 subd (b).)

LEGAL STANDARDS FOR A DISQUALIFICATION CHALLENGE

"The law does not assume prejudice on the part of the trial judge." (*Gimble v. Laramie* (1960) 181 Cal.App.2d 77, 84.) A party seeking to show bias must prove it with

[1] All future statutory references are to the Code of Civil Procedure.

concrete facts and clear averments. (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 220.) A Statement of Disqualification must set forth the facts constituting the grounds for disqualification. (§ 170.3 subd. (c)(1).) Mere conclusions are insufficient. (*In re Morelli* (1970) 11 Cal.App.3d 819, 843.) A Statement of Disqualification "may be stricken from the files by the trial judge involved when all that said papers contain are: conclusions; ...allegations of facts not pertinent or appropriate to the issues to be determined in the hearing; material not legally indicative of bias or prejudice, such as judicial opinions expressed in the discharge of litigation and legal rulings; judicial reactions based on actual observance in participation in legal proceedings; and references to circumstances so inconsequential as to be no indication whatsoever of hostility and nonprobative of any bias or prejudice." (*Id.* at p. 843.) Here, the Statement of Disqualification is based on speculation and judicial opinions and reactions to the proceeding; no disqualifying facts are asserted.

ANY ALLEGED ERROR IN THE *HAUGEN* CASE IS IRRELEVANT

Many of the grounds asserted in the challenge are based on *Haugen v. Palm Beach Park Association*. Through speculation and conjecture, Mr. Evans claims the Court engaged in wrongdoing and improperly reassumed jurisdiction of that case after a peremptory challenge had been filed. Plaintiff dismissed the *Haugen* action on March 9, 2016. No challenge to the Court's determination of the disqualification issue was made until after that case had been dismissed. Section 170.3 subdivision (d) requires a timely writ to be filed to challenge an erroneous ruling on a disqualification challenge and Plaintiff opted not to challenge any of these actions, instead opting to dismiss *Haugen* entirely. Even accepting Plaintiff's argument as accurate and the Court should have been disqualified in *Haugen*, the motion is untimely because the matter was dismissed over six weeks ago.

THE COURT'S RULINGS FORM NO BASIS FOR DISQUALIFICATION

The Statement of Decision asserts that the Court's issued erroneous rulings and decisions and enforced illegal contracts. "A trial court's numerous rulings against a party--even when erroneous--do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) A party's remedy for an erroneous ruling is not a motion to disqualify, but rather review by appeal or writ. (*See Ryan v. Welte* (1948) 87 Cal.App.2d 888, 893.) "Obviously, judges make decisions during the course of a proceeding, and unless the judge in the course of making those decisions demonstrates a loss of the ability to remain fair and impartial, disqualification is not required." (Rothman, California Judicial Conduct Handbook, (2007 3rd ed.) § 7.58 p. 369 [footnote omitted].) Here, nothing demonstrates any loss of the Court's ability to remain fair and impartial. The Court's rulings and decisions in these proceedings form no basis for disqualification.

THE COURT'S COMMENTS ARE NOT DISQUALIFYING

The Statement of Disqualification also asserts the following statements and comments by the Court are disqualifying: In a tentative ruling in May 2015, the Court rebuked plaintiffs' counsel for failing to comply with the Court's admonishment to cite applicable statutes and relevant provisions in exhibits. (Plaintiffs' Exh. 13, p. 585.) In November 2015, the Court responded to counsel's inquiry whether there was a possibility of amending to conform to proof that the transactions were illegal. (*Id.* at Exh. 24, p. 840 "anything is possible. I mean it is possible there is a Santa Clause.") And during a case management conference in 2014, the Court observed the parties' were unlikely to settle because even Justice Trotter had been unable to get the parties to settle. (*Id.* at Exh. S. p. 163.)

Admonishing counsel or expressing frustration with counsel is not disqualifying. (*Roitz v. Caldwell* (1998) 62 Cal.App.4th 716, 723-725.) Expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice. (*Kreling v. Superior Court* (1944) 25 Cal.2d 305, 310-311.) A judge may make statements to explain his or her reasons for ruling against a party. (See *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219.) Except under circumstances not here present, it is not disqualifying for a judge to express a view on a legal or factual issue presented in the proceeding. (§ 170.2 subd. (b).) "The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (Cal. Const., art. VI, § 10.) In addition, the circumstances prompting a challenge for cause must be evaluated in the context of the entire proceeding and not based solely upon isolated conduct or remarks. (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 172.) The Court's comments about plaintiffs' counsel, plaintiffs' possibility of success, and the chances of settlement provide no grounds for disqualification.

A JUDGE HAS A DUTY TO DECIDE CASES WHEN NOT DISQUALIFIED

A judge has both an ethical and statutory duty to decide cases, where, as here, there are no legal grounds for disqualification. (See § 170.) The duty to decide cases if there are no legal grounds is as strong as the duty to recuse if there are grounds. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 100.)

CONCLUSION

Because the Statement of Disqualification is untimely and on its face discloses no legal grounds for disqualification, it is ordered stricken. (§ 170.4 sub. (b).) This determination is not an appealable order and may be reviewed only by a writ of mandate from the Court of

Appeal sought within 10 days of notice to the parties of the decision. (§ 170.3 subd. (d).) In the event that a timely writ is sought and an appellate court determines that an answer should have been timely filed, an alternative answer is filed herewith. (*See PBA, LLC v. KPOD,* LTD (2003) 112 Cal.App.4th 965, 972.)

GOOD CAUSE APPEARING THEREFORE, It is so ordered.

Date: April 29, 2016

Judge Robert J. Moss

VERIFIED ANSWER OF JUDGE ROBERT J. MOSS

I, Robert J. Moss, declare as follows:

1. I am a Judge of the Superior Court of California, County of Orange. If called upon as a witness, I could and would competently testify to the matters stated herein.

2. The judicially noticeable case file reflects that the lead case, *Chodosh vs. Palm Beach Park Association* (OCSC Case No. 30-2010-00423544) was filed on December 13, 2010. In early 2011 it was consolidated with the other Palm Beach Cases including:

a. *Eicherly vs. Palm Beach Park Association* 30-2010-00423807

b. *Harris vs. Palm Beach Park Association* 30-2010-00425213

c. *Schowalter vs. Palm Beach Park Association* 30-2010-00425173

d. *Moore vs. Palm Beach Park Association* 30-2010-00425206

e. *McLaughlin vs. Palm Beach Park Association* 30-2010-00432261

f. *Peterson vs. Palm Beach Park Association* 30-2010-00425323

g. *Kane vs. Palm Beach Park Association* 30-2010-00425331

h. *Haugen vs. Palm Beach Park Association* 30-2010-00425291

3. These consolidated cases were tried in four phases. Phase I was tried as a bench trial before the Honorable Nancy Wieben Stock in 2013. Judge Stock subsequently retired, and these consolidated cases were assigned to me on January 6, 2014. Since then, I have presided over the final three phases. I presided over Phase II commencing on September 22, 2014, and Phase III commencing on April 13, 2015. I presided over a bench trial of Phase IV between December 7, 2015 and December 15, 2015. I took the matter under submission and issued a tentative ruling on February 18, 2016. I issued a written statement of decision on March 30, 2016. Judgment was entered on the consolidated cases

on April 14, 2016.

4. On April 25, 2016, Attorney for Plaintiffs filed a Statement of Disqualification contending that I should be disqualified based on the following allegations:

a. On December 22, 2015, I reassumed jurisdiction of a related case, *Haugen v. Palm Beach Park Association* (OCSC Case No. 30-2015-00819837), by sustaining Defendant's objection to Plaintiff's peremptory challenge;

b. My rulings and decisions in these consolidated proceedings have been based on bias or a person aware of the facts might reasonably entertain a doubt that I am biased;

c. I criticized Plaintiffs' counsel in a tentative ruling, and commented on Plaintiffs' possibility of success on an issue or possibility of settlement.

5. I specifically deny that I am biased or prejudiced for or against any attorney or party in these consolidated proceedings or in *Haugen*. I specifically deny that any of my rulings have been based on bias or prejudice. I am not prejudiced or biased against or in favor of any attorney party in these proceeding actions, nor am I unable to act impartially. I have no personal interest in these proceedings and know of no reason why I cannot be fair and impartial.

6. Plaintiff dismissed the *Haugen* case on March 9, 2016. I specifically deny that I engaged in any *ex parte* contacts in the *Haugen* case. I further deny that I interjected myself into that suit or took any unauthorized action in that proceeding in order to frustrate plaintiffs' success. Rather, I reassumed jurisdiction in *Haugen* after sustaining the defendant's objection to plaintiff's peremptory challenge. The objection established that the peremptory challenge had been untimely asserted. The numbering of the Register of Actions reflects the

correct order in which documents were filed in the *Haugen* case. With respect to the filing times listed in the Register of Actions, I do not believe all of them are accurate. As far as I am aware, no issue concerning my jurisdiction or the propriety of my presiding over the proceedings in *Haugen* was raised until after plaintiff dismissed the case.

7. I specifically deny that I have acted improperly in *Haugen* or in these proceedings. All statements made, all actions taken, and all of my rulings have been based on my understanding of the facts and law, and have been in furtherance of what I believe to be my judicial duties.

8. I do not believe that my recusal would serve the interests of justice.

9. I know of no facts or circumstances which would require my disqualification or recusal in this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 29, 2016, at Santa Ana, California.

Judge Robert J. Moss

APPENDIX H

Denial Writ on J. Moss denial of motion to disqualify him,
by P. J. K. O'Leary, W. Bedsworth 5/26/16 (1 pg.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLOYD M. CHODOSH,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

PALM BEACH PARK ASSOCIATION,

Real Party In Interest.

G053512

(Super. Ct. No. 30-2010-00423544)

O R D E R

THE COURT:*

Petitioner's request for judicial notice is granted. The petition for writ of mandate is DENIED.

O'Leary, P.J.

O'LEARY, P. J.

* Before O'Leary, P. J., Rylaarsdam, J., and Bedsworth, J.

G053512
Chodosh et al. v. The Superior Court of Orange County

Superior Court of Orange County

Patrick J. Evans
Law Office of Patrick J. Evans
16897 Algonquin St Suite F
Huntington Beach, CA 92649

The Superior Court of Orange County
Hon. Robert J. Moss C-14
700 Civic Center Dr. West
Santa Ana, CA 92701

Allen L. Thomas
Thomas Law Firm Incorporated
5001 Airport Plaza Dr., Ste. 240
Long Beach, CA 90815

Cary L. Wood
Lewis Brisbois Bisgaard & Smith
633 W 5th Street Ste 4000
Los Angeles, CA 90071

APPENDIX I

Denial Motion to Disqualify All Div. 3 Justices
by Presiding Justice K. O'Leary 5/3/18 (2 pgs.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLOYD M. CHODOSH et al., Plaintiffs and Appellants, v. PALM BEACH PARK ASSOCIATION, Defendant and Respondent.	G053798 (Super. Ct. No. 30-2010-00423544) O R D E R

On April 18, 2018, appellants and respondent each filed their supplemental letter briefs in response to this court's order of March 19, 2018. Also on April 18, 2018, appellants submitted a second letter, which was received but not filed. Appellants' letter states they object to the Presiding Justice of this court and "every Div. 3 justice" hearing or considering this appeal. Appellants' letter has attached 108 pages of documents described by appellants as a "exhibits for evidence compendium to accompany appellants' [supplemental brief]." On April 26, 2018, respondent submitted a letter stating its objections to appellants' April 18, 2018 letter, which was received but not filed.

The clerk of the court is directed to file forthwith appellants' April 18, 2018 submission and respondent's April 26, 2018 letter in response thereto. Appellants' April 18, 2018 submission is deemed to be a combined motion to augment the record on appeal

(Cal. Rules of Court, rule 8.155) and motion for disqualification of all justices of this court.

Appellants' motion to augment the record on appeal is DENIED.

Appellants' motion for disqualification of all justices of this court is DENIED. Individual justices will determine whether they will recuse themselves. (*Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937-940 [each appellate justice decides for himself or herself whether the facts require recusal].) No appellate justice who has recused himself or herself will be assigned to this matter.

O'Leary, P.J.

O'LEARY, P. J.

APPENDIX J

Denial Motion to Disqualify Div. 3 Justices in related case, *Chodosh v. JAMS*, by Presiding Justice K. O'Leary 8/25/16 (1 pg.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLOYD M. CHODOSH, Individually and as Trustee, etc., et al.,

Plaintiffs and Appellants,

v.

JAMS INC. et al.,

Defendants and Respondents.

G051731 consol. w/ G052301

(Super. Ct. No. 30-2014-00722371)

ORDER

Appellants' request for judicial notice filed on July 8, 2016, respondents' request for judicial notice filed on July 25, 2016, and appellants' supplemental request for judicial notice filed on August 4, 2016, are GRANTED.

Appellants' motion for disqualification of all justices of the Fourth Appellate District from this matter is DENIED. Individual justices will determine whether they will recuse themselves. (*Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937-940 [each appellate justice decides for himself or herself whether the facts require recusal].) No appellate justice who has recused himself or herself will be assigned to this matter.

O'Leary, P.J.

O'LEARY, P. J.

APPENDIX K

California Supreme Court Order Transfer of *Chodosh v. JAMS* 8/25/16 (1 pg.)

Court of Appeal, Fourth Appellate District, Div. Three

IN THE SUPREME COURT OF CALIFORNIA

TRANSFER ORDERS

The following matters, now pending in the Court of Appeal, Fourth Appellate District, are transferred from Division Three to Division One:

G051081 Masters v. Ries

G051216 The People v. Brito et al.

G051649 Frastacky et al. v. Corrente

G051765 Glaser et al. v. City of San Juan Capistrano

G051731 Chodosh et al. v. JAMS, Inc. et al.

G051789 The People v. Rojano-Nieto

G052045 The People v. Mims

G052154 Fox v. Katzman et al.

G051429 The People v. Le

G051588 Wilson v. Nationstar Mortgage, LLC

CANTIL-SAKAUYE

Chief Justice

APPENDIX L

J. Moss Memo and Declaration to Deny Disqualification, 4/29/14 (19 pgs.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CIVIL COMPLEX CENTER

IN RE:

PALM BEACH PARK ASSOCIATION CASES:

This Document Relates to:

ALL ACTIONS

LEAD CASE:

FLOYD M. CHODOSH, an individual, and FLOYD M. CHODOSH, in his capacity as trustee of the GLENDIA WATSON LIVING TRUST 2004,

Plaintiffs,

v.

PALM BEACH PARK ASSOCIATION, a California non-profit mutual benefit corporation, JEAN WILEY, an individual; MURPHY BANK, a corporation, THE GIBBS LAW FIRM, a professional corporation, GERALD GIBBS, an individual; GREGORY BEAM & ASSOCIATES, INC., a professional corporation, GREGORY BEAM, an individual, THRIVENT FINANCIAL FOR LUTHERANS, a Wisconsin corporation, and DOES 1-10,

Defendant.

LEAD CASE NO.

CASE NO. 30-2010-00423544

Consolidated With Case Nos.:
30-2010-00423807
30-2010-00425213
30-2010-00425173
30-2010-00425206
30-2010-00432261
30-2010-00425323
30-2010-00425331
30-2010-00425291

ORDER STRIKING STATEMENTS OF DISQUALIFICATION; DENYING OTHER RELIEF REQUESTED; AND ALTERNATIVE VERIFIED ANSWER OF JUDGE ROBERT J. MOSS

On May 14, 2014, Counsel for Plaintiffs in the Lead Case filed a pleading entitled "PLAINTIFFS FLOYD CHODOSH, ET AL. NOTICE OF MOTION AND MOTION TO DISQUALIFY HON. ROBERT J. MOSS AND DISQUALIFY RULINGS AND ORDERS; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF PATRICK EVANS IN SUPPORT [CODE CIV. PROC. SEC. 170.1(a)(6)(A)(iii)]." The challenge asserts that a person aware of the facts might reasonably entertain a doubt that the assigned judge would be able to be impartial based on the claims that (A) the prior assigned judge, Nancy Wieben Stock, was disqualified because she ordered the parties to mediate their dispute before JAMS while she was in negotiations with JAMS; (B) the mediator had said he would tell Judge Stock that the Plaintiffs refused to settle; (C) the assigned judge "must have" spoken to the previously assigned judge; (D) the Court could at some point become interested in joining JAMS; and (E) the Court issued an adverse ruling against Plaintiffs in one of the lawsuits. Because the pleading is untimely and demonstrates on its face no legal grounds for disqualification, it is ordered stricken pursuant to Code of Civil Procedure section170.4 subdivision (b).

I. Facts Overview

The Lead Case in these Complex Palm Beach Park Association Cases, *Chodosh v. Palm Beach Park Association* (OCSC Case No. 30-2010-00423544) was filed on November 8, 2010. The case was first assigned to Judge Nancy Wieben Stock on March 3, 2011. Judge Stock heard Phase I of the trial and made findings on May 21, 2013. (See Plaintiff's lodged transcript for 5/21/13 hearing.) Following that ruling, the parties agreed to mediate their dispute before Retired Judge John K. Trotter of JAMS. (See Plaintiffs' Request for

Judicial Notice of Complaint in *Chodosh v. Trotter*, OCSC Case No. 30-2014-00722371 ¶¶ 48-53.) Mediation sessions took place on September 26, 2013 and October 11, 2013. (10/16/13 RT 6:6-12.) On October 16, 2013, the parties appeared before Judge Stock for a Trial Setting Conference for Phase II of the trial. At the hearing, Defendants indicated that the case had settled, while Plaintiffs said it had not. (10/16/13 RT 6:13-22; *passim.*) At the hearing, Defense Counsel suggested they could work out the details of the settlement before Judge Trotter. (10/16/13 RT 11:1-7.) Judge Stock asked Plaintiffs' attorney, Patrick J. Evans, whether there was "the possibility of settlement under the auspices of Justice Trotter?" (10/16/13 RT 13:23-25.)

Mr. Evans indicated, "at this point we would be happy to work with Justice Trotter, work with the other side, try to get this case resolved. Obviously, this case just cries out for resolution." (10/16/13 RT 22:3-5.)

Judge Stock suggested that Justice Trotter could help the negotiations and encouraged the parties to exchange ideas for settlement, and to keep the dialog going. (10/16/13 RT 24:16-26; 28:16-18.) She pointed out the parties had two options, either to communicate directly, or through their mediator. (*Id.* at p. 29:11-30:6.) The court ruled that the matters would proceed on a dual track, with both trial preparation and settlement. (10/16/13 minute order.)

The parties subsequently held an additional mediation session before Judge Trotter on November 21, 2013. Plaintiffs claim that at the mediation session in November, Judge Trotter stated that he would personally tell Judge Stock that Plaintiffs refused to settle and that Plaintiffs were the reason why settlement was not reached. (See ¶¶ 4 of the

supplemental declarations of Floyd Chodosh, Bonnie P. Harris, and Chris McLaughlin dated 5/15/14.)

On December 2, 2013, Judge Stock held another Trial Setting Conference. On December 31, 2013, Judge Stock signed an Order setting forth a trial date of April 27, 2014 and related discovery cut-off dates and other rulings that had been made at the Trial Setting Conference. (12/31/14 Order from December 2, 2013 TSC/Status Conf.)

On December 11, 2013, the parties were notified that this action would be reassigned from Judge Stock to this Court effective January 6, 2014. Judge Stock retired shortly thereafter. On February 12, 2014, Counsel for Plaintiffs learned that Judge Stock had joined JAMS. (See ¶ 7 of Supplemental Declaration of Patrick Evans.) Plaintiffs believe that in October 2013, Judge Stock had an arrangement or had been in discussions with JAMS about joining JAMS. (See ¶¶ 8 of the declarations of Floyd Chodosh, Bonnie P. Harris, and Chris McLaughlin filed on 5/14/14 in support of Motion to Disqualify Hon. Robert J. Moss.)

There have been no fewer than 8 hearings in this matter since February 12, 2014, and the Court has issued numerous orders and rulings. On May 5, 2014, this Court granted a motion to dismiss the derivative case, *Haugen v. PBPA*, OCSC Case No. 30-2010-00432259.

Plaintiffs had set an ex parte hearing for May 15, 2014 to shorten time on for the hearings on the statements of disqualification. The assigned judge was away from the courthouse on April 15, 2014 and the parties did not stipulate to a Temporary Judge. The hearings on the ex parte applications, and various other proceedings, were continued to May 30, 2014. Trial is currently set to commence on May 27, 2014.

//

II. Documents Submitted in Connection with the Challenges

On May 14, 2014, Patrick J. Evans, Counsel for the Plaintiffs in the Lead Case filed or lodged numerous documents including, among others, the following:

Documents related to statement of disqualification against this Court

1. PLAINTIFFS FLOYD CHODOSH, ET AL. NOTICE OF MOTION AND MOTION TO DISQUALIFY HON. ROBERT MOSS AND DISQUALIFY RULINGS AND ORDERS; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF PATRICK EVANS IN SUPPORT

2. DECLARATIONS OF FLOYD CHODOSH, BONNIE P. HARRIS AND CHRIS McLAUGHLIN IN SUPPORT OF MOTION TO DISQUALIFY HON. ROBERT J. MOSS AND DISQUALIFY RULINGS AND ORDERS

3. NOTICE OF LODGMENT OF TRANSCRIPT OF COURT'S 10/16/2013 CMC HEARING IN SUPPORT OF PLAINTIFFS' MOTION TO DISQUALIFY HON. ROBERT J. MOSS UNDER CODE CIV. PROC. SEC. 170.1(a)(6)(A)(iii).

4. REPORTER'S TRANSCRIPT FOR THE HEARING THAT TOOK PLACE ON OCTOBER 16, 2013 IN THE PALM BEACH PARK ASSOCIATION CASES. (10/16/13 RT.)

5. PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE OF COMPLAINT FOR THE ACTION *FLOYD CHODOSH, ET AL. V. JOHN K. TROTTER and JAMS, INC.* IN SUPPORT OF MOTIONS TO DISQUALIFY HON. NANCY WIEBEN STOCK AND HON. ROBERT J. MOSS

6. NOTICE OF LODGMENT OF TRANSCRIPT OF COURT'S 5/12/13 ORAL DECISION IN SUPPORT OF PLAINTIFFS' MOTION TO DISQUALIFY HON. ROBERT J. MOSS UNDER CODE CIV. PROC. SEC. 170.1(a)(6)(A)(iii)

7. NOTICE OF ERRATA AND AMENDED NOTICE OF LODGMENT OF TRANSCRIPT OF COURT'S ORAL DECISION FOR THE PHASE I TRIAL ON MAY 21, 2013 IN SUPPORT OF PLAINTIFFS' MOTION TO DISQUALIFY HON. ROBERT J. MOSS UNDER CODE CIV. PROC. SEC. 170.1(a)(6)(A)(iii)

8. NOTICE OF LODGMENT OF TRANSCRIPT OF DEPOSITION OF PALM BEACH PARK BOARD PRESIDENT DIANA MANTELLI IN SUPPORT OF PLAINTIFFS' MOTION TO DISQUALIFY HON. ROBERT J. MOSS PURSUANT TO CODE CIV. PROC. SEC. 170.1(a)(6)(A)(iii)

9. LODGED TRANSCRIPT OF AUDIOTAPED DEPOSITION OF DIANA MANTELLI

10. [PROPOSED] ORDER ON PLAINTIFFS FLOYD CHODOSH, ET AL. MOTION TO DISQUALIFY HON. ROBERT J. MOSS

Documents related to statement of disqualification against Judge Stock

11. PLAINTIFFS FLOYD CHODOSH, ET AL. NOTICE OF MOTION AND MOTION TO DISQUALIFY HON. NANCY WIEBEN STOCK (RET.) AND INVALIDATE AND DECLARE VOID CASE MANAGEMENT ORDER ENTERED DECEMBER 2, 2013 AND LATER ORDERS BASED THEREON; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATIONS OF FLOYD CHODOSH, CHRIS McLAUGHLIN, BONNIE HARRIS AND PATRICK EVANS IN SUPPORT

12. NOTICE OF LODGMENT OF TRANSCRIPT OF COURT'S 10/16/2013 CMC HEARING IN SUPPORT OF PLAINTIFFS' MOTION TO DISQUALIFY HON. NANCY WIEBEN STOCK (RET.) UNDER CODE CIV. PROC. SEC. 170.1(a)(8)(A)(iii) AND SEC. 170.1(a)(6)(A)(iii)

13. APPEAL OF JUDGMENT; NOTICE AND SUGGESTION OF NOT TRIAL COURT JURISDICTION TO PROCEED AND STAY OF ANY PROCEEDINGS

14. [PROPOSED] ORDER ON PLAINTIFFS FLOYD CHODOSH, ET AL. MOTION TO DISQUALIFY HON. NANCY WIEBEN STOCK (Ret.) AND NULLIFY CASE MANAGEMENT ORDER AND RELATED ORDERS

Ex Parte Documents:

15. NOTICE OF PLAINTIFFS' EX PARTE APPLICATION [RULES 3.1300 AND 3.503] AND APPLICATION TO SHORTEN TIME ON PLAINTIFFS' MOTIONS:
    (A) TO DISQUALIFY AND NULLIFY THE CASE MANAGEMENT ORDER OF HON. N. WIEBEN STOCK (RET.)
    (B) TO DISQUALIFY HONORABLE ROBERT J. MOSS
    ([PROPOSED] ORDERS LODGED)
    [MOTIONS FILED SEPARATELY]

16. [PROPOSED] ORDER ON PLAINTIFFS' EX PARTE APPLICATION [RULES 3.1300 AND 3.503] TO SHORTEN TIME ON MOTIONS TO DISQUALIFY:
    (A) HON. N. WIEBEN STOCK (RET.) AND TO NULLIFY CASE MANAGEMENT AND OTHER ORDERS AND
    (B) HON. ROBERT J. MOSS AND TO NULLIFY RULINGS/ORDERS

On May 15, 2014, Moving Plaintiffs filed additional documents:

17. AMENDED NOTICE OF HEARING AND SUPPLEMENTAL DECLARATIONS OF PLAINTIFFS FLOYD CHODOSH, BONNIE P. HARRIS, CHRIS McLAUGHLIN AND

PATRICK EVANS AND THEIR STATEMENTS OF DISQUALIFICATION OBJECTING TO HON. NANCY WIEBEN STOCK (RET.) AND IN SUPPORT OF MOTION TO NULLIFY CASE MANAGEMENT ORDER ENT. 12/31/13

18. AMENDED NOTICE OF HEARING AND SUPPLEMENTAL DECLARATIONS OF PLAINTIFFS FLOYD CHODOSH, BONNIE P. HARRIS, CHRIS McLAUGHLIN AND PATRICK EVANS AND THEIR STATEMENTS OF DISQUALIFICATION OBJECTING TO HON. ROBERT J. MOSS AND IN SUPPORT OF MOTION TO NULLIFY CASE MANAGEMENT RULINGS AND ORDERS

III. The Statement of Disqualification Was Not Served

A statement of disqualification must be "personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers." (Code Civ. Proc., § 170.3 subd. (c)(1).[1]) The statement of disqualification has not been served on either the judge or the clerk while the judge is present in the courthouse.

IV. The Challenge is Untimely

A trial judge against whom a statement of disqualification is filed may order it stricken if it is untimely. (§ 170.4 subd. (b).) A statement of disqualification must be presented "at the earliest practicable time after discovery of the facts constituting the grounds for disqualification." (§ 170.3 subd. (c)(1).) "The matter of disqualification should be raised when the facts constituting the grounds for disqualification are first discovered." (*Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 424.) "It would seem ... intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.'" (*Tri Counties v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337.) In *People v. Panah*, the Supreme Court affirmed an order striking a statement of disqualification on the basis of

1 All future statutory references are to the Code of Civil Procedure unless otherwise indicated.

untimeliness when it was filed approximately seven weeks after the facts to support the argument were known to the challenging party. (*People v. Panah* (2005) 35 Cal.4th 395, 446-447.)

With respect to the present matter, Counsel for Plaintiffs has known for over three months that Judge Stock had taken a position with JAMS. (See ¶ 7 of Supplemental Declaration of Patrick Evans, stating he learned about the new position on or around February 12, 2014.) At the time, Mr. Evans knew that the last hearing had taken place before JAMS in November of 2013. The Court file in this matter reflects that there have been over eight hearings since February 12, 2014 and the trial is set to commence today. Neither statement of disqualification was presented at the earliest practicable time after discovery of the facts constituting the grounds for disqualification, or when the facts constituting the grounds for disqualification were first discovered. Therefore, the statements of disqualification filed against both this Court and Judge Stock are ordered stricken as untimely. (Code Civ. Proc., § 170.4 subd. (b).)

V. The Statement of Disqualification Fails to State Grounds for Disqualification

The Court may strike a statement of disqualification that demonstrates on its face no legal grounds for disqualification. (Code Civ. Proc., § 170.4 subd. (b).) To the extent the challenge is based on conclusory allegations, it fails to establish any facts showing grounds for disqualification exist. Code of Civil Procedure section 170.3 subdivision (c)(1) requires that the disqualification statement set forth "the facts constituting the grounds" for disqualification of the judge. Mere conclusions of the pleader are insufficient. (*In re Morelli* (1970) 11 Cal.App.3d 819, 843.) A party's belief as to a judge's bias and prejudice is

irrelevant in a motion to disqualify, as the test applied is an objective one. (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) A statement of disqualification must be based on clear averments. (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 220.) It cannot be based on information and belief or other inadmissible hearsay. (See, *United Farm Workers, supra,* 170 Cal.App.3d at p. 106, fn. 6.)

Here, the statement of disqualification against the assigned judge is based on mere speculation that (A) the Court spoke to the previously assigned judge; (B) the Court could at some point become interested in joining JAMS, and (C) the mediator said he would tell Judge Stock that the Plaintiffs refused to settle. There are no facts asserted from which a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. (§ 170.1 subd. (a)(6)(A)(iii).) Because the statement of disqualification is based on mere speculation and not facts, it fails to state any grounds for disqualification.

VI. The Court's Ruling on the Derivative Action Is Not Grounds for Disqualification

The court's rulings and findings do not constitute a valid basis for disqualification. "A trial court's numerous rulings against a party--even when erroneous--do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.) A party's remedy for an erroneous ruling is not a motion to disqualify, but rather review by appeal or writ. (*See Ryan v. Welte* (1948) 87 Cal.App.2d 888, 893.) The Court's decisions and rulings are therefore an insufficient basis to support a claim of bias as a matter of law.

VII. A Judge has a Duty to Decide Cases When Not Disqualified

A judge has both an ethical and statutory duty to decide cases, where, as here, there are no legal grounds for disqualification. (*See*, Code Civ. Proc., § 170.) The duty to decide

cases if there are no legal grounds is as strong as the duty to recuse if there are grounds. (*United Farm Workers of America, supra,* 170 Cal.App.3d at p. 100.) Code of Civil Procedure section 170 "serves to remind judges of their duty to hear cases which are controversial and might subject them to public disapproval as well as to protect them from public criticism by a clear statement of the responsibility." (*Id.* at p. 103.)

VIII. The Statement of Disqualification Against Judge Stock Fails to State Grounds

On its face, the verified statement of disqualification asserted against Judge Nancy Wieben Stock discloses no legal grounds for disqualification because there is no hearing or trial set before her. (See § 170.3 subd. (c)(1).) Code of Civil Procedure section 170.3 subdivision (c)(1) permits a party to file "a written verified statement objecting to the *hearing* or *trial* before the judge..." The disqualification statute is premised on hearings or trials being set before the challenged judge. But here, Judge Stock has retired from the bench and there are no hearings or trials set before her. The request to retroactively disqualify Judge Nancy Wieben Stock is improperly before this court. There is no authority to retroactively disqualify a judge who is no longer assigned to the case.

Furthermore, there is no evidence that the Judge Stock directed the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has an arrangement or is discussing or has discussed the employment or service. (§ 170.1 subd. (a)(8)(A)(iii).) Judge Stock did not direct the parties to use JAMS; rather the parties agreed to use JAMS and selected the mediator. (See Plaintiffs' RJN of Complaint ¶¶ 48 to 53 in *Chodosh v. Trotter*, OCSC Case No. 30-2014-00722371; and October 16, 2013 Reporter's Transcript lodged by Plaintiffs.)

Not only did Judge Stock not order the parties to mediation before JAMS, the assertion that Judge Stock had engaged in negotiations for employment by JAMS in October of 2013 is based on mere speculation. Three of the Plaintiffs declare that they *believe* that Judge Stock had an arrangement or had been in discussions with JAMS about joining JAMS in October of 2013. (See ¶¶ 8 of the declarations of Floyd Chodosh, Bonnie P. Harris, and Chris McLaughlin filed in support of Motion to Disqualify Hon. Robert J. Moss.) Without any evidentiary basis, Plaintiffs further claim that the assigned judge must have discussed this matter with Judge Stock. But a statement of disqualification cannot be based on information and belief or other inadmissible hearsay. (See, *United Farm Workers, supra,* 170 Cal.App.3d at p. 106, fn. 6 and *In re Morelli, supra,* 11 Cal.App.3d at p. 843.) Because the statement of disqualification against Judge Stock is based on mere conclusions and not facts, it fails to state any grounds for disqualification. Finally, the statement of disqualification against Judge Stock is untimely for the reasons set forth in Section IV above.

IX. Conclusion

Since the statements of disqualification are untimely, were not served, and on their face disclose no legal grounds for disqualification, they are ordered stricken pursuant to Code of Civil Procedure section 170.4 subdivision (b). This determination is not an appealable order and may be reviewed only by a writ of mandate from the Court of Appeal sought within 10 days of notice to the parties of the decision. (§ 170.3 subd. (d).) In the event that a timely writ is sought and an appellate court determines that an answer should have been timely filed, an alternative answer is filed herewith. (*See PBA, LLC v. KPOD,* LTD (2003) 112 Cal.App.4th 965, 972.)

Plaintiffs' Request for Judicial Notice of Complaint in *Chodosh v. Trotter*, OCSC Case No. 30-2014-00722371 in granted. The *ex parte* applications that address the statements of disqualification which are set for hearing on May 30, 2014 are ordered off calendar.

The request to invalidate and decree void the Case Management Order entered on December 31, 2013 is denied. A statement of disqualification challenging a prior judge is not the proper vehicle to invalidate a Case Management Order.

Date: May 27, 2014

Judge Robert J. Moss

VERIFIED ANSWER OF JUDGE ROBERT J. MOSS

I, Robert J. Moss, declare as follows:

1. I am a Judge of the Superior Court of California, County of Orange, and have been assigned to preside over the instant matter. If called upon as a witness, I could and would competently testify to the matters as stated herein.

2. On May 14, 2014, Counsel for Plaintiff filed a document entitled, "PLAINTIFFS FLOYD CHODOSH, ET AL. NOTICE OF MOTION AND MOTION TO DISQUALIFY HON. ROBERT J. MOSS AND DISQUALIFY RULINGS AND ORDERS; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF PATRICK EVANS IN SUPPORT [CODE CIV. PROC. SEC. 170.1(a)(6)(A)(iii)]," contending that (A) the prior assigned judge, Nancy Wieben Stock, was disqualified because she ordered the parties to mediate their dispute with JAMS while she was in negotiations for employment with JAMS; (B) Judge Trotter, who mediated the dispute before JAMS said he would tell Judge Stock that the Plaintiffs had refused to settle; (C) I must have discussed this case with Judge Stock; (D) I could become interested in joining JAMS; and (E) I issued an adverse ruling against Plaintiffs in one of the lawsuits. Based on these speculative assertions, Plaintiffs assert that a person aware of the facts might reasonably entertain a doubt that I would be able to be impartial.

3. The judicially noticeable case file in this matter reflects that the Lead Case in these Complex Palm Beach Park Association Cases, *Chodosh v. Palm Beach Park Association* (OCSC Case No. 30-2010-00423544) was filed on November 8, 2010. Between March 3, 2011 and January 6, 2014, this case was assigned to Judge Nancy Wieben Stock.

4. This matter has been assigned to me since January 6, 2014. Judge Stock retired shortly thereafter.

5. The trial for these coordinated cases is set to commence today, May 27, 2014. The trial date had been set by an order issued by Judge Stock on December 2, 2013.

6. The record does not reflect that Judge Stock made any orders compelling the parties to mediate their dispute before JAMS or Retired Judge John K. Trotter of JAMS. I am unaware that Judge Stock ordered the parties in this matter to mediate before JAMS. The transcripts submitted by Plaintiffs in support of the statements of disqualification do not establish that Judge Stock made such an order. I am not aware that Judge Trotter had any conversations with Judge Stock concerning the mediation in this case. I have not discussed this case with Judge Stock or Judge Trotter.

7. I do not know when Judge Stock began negotiations to join JAMS. According to the declaration by Plaintiffs' counsel, he received notice that Judge Stock had joined JAMS on February 12, 2014. (See ¶ 7 of Supplemental Declaration of Patrick Evans.) Since February 12, 2014, the court record reflects that there have been no fewer than 8 hearings in this matter. During that time I have made many rulings in this matter. On May 5, 2014, I granted a motion to dismiss the derivative case, *Haugen v. PBPA*, OCSC Case No. 30-2010-00432259.

8. I am not engaged in any negotiations to join JAMS. I have no plans to retire within the next two years.

9. I specifically deny that I am biased or prejudiced for or against any party in this action. I further deny that I am unable to act fairly and impartially in this proceeding. I am not prejudiced or biased against or in favor of either party in this action, nor am I unable to act

impartially in this case. I have no personal interest in these proceedings and know of no reason why I cannot be fair and impartial.

10. I specifically deny that I have acted improperly in this action. All statements made, all actions taken, and all of my rulings in this proceeding have been based on my understanding of the facts and law, and have been in furtherance of what I believe to be my judicial duties. I have considered all relevant evidence and argument before making my rulings.

11. I do not believe that my recusal would serve the interests of justice.

12. I know of no facts or circumstances which would require my disqualification or recusal in this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 27, 2014, at Santa Ana, California.

Judge Robert J. Moss

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

Civil Complex Center
751 W. Santa Ana Blvd
Santa Ana, CA 92701

SHORT TITLE: In Re Palm Beach Park Association Cases (Chodosh)

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **30-2010-00423544-CU-BC-CXC**

I certify that I am not a party to this cause. I certify that a true copy of the Minute Order was mailed following standard court practices in a sealed envelope with postage fully prepaid as indicated below. The mailing and this certification occurred at Santa Ana, California on 05/27/2014

Clerk of the Court, by: _____, Deputy

NEMECEK & COLE
15260 VENTURA BLVD STE 920
SHERMAN OAKS, CA 91403

HOLLINS & LEVY LLP
23801 CALABASAS ROAD # 100
CALABASAS, CA 91302

ALLAN B. WEISS & ASSOCIATES
5001 AIRPORT PLAZA # 240
LONG BEACH, CA 90815

LEWIS BRISBOIS BISGAARD & SMITH LLP
221 N FIGUEROA STREET # 1200
LOS ANGELES, CA 90012

SCHONFELD BERTSCHE PRECIADO & MAHADY LLP
402 W BROADWAY # 1890
SAN DIEGO, CA 92101

EVANS & ASSOCIATES
16897 ALGONQUIN STREET # F
HUNTINGTON BEACH, CA 92649

FIDELITY NATIONAL LAW GROUP
915 WILSHIRE BOULEVARD # 2100
LOS ANGELES, CA 90017

SMITH & HALL, LLP
27345 ORTEGA HIGHWAY # 200
SAN JUAN CAPISTRANO, CA 92675

CLERK'S CERTIFICATE OF SERVICE BY MAIL

Superior Court of California
County of Orange
Civil Complex Center
751 West Santa Ana Blvd.
P.O. Box 22028
Santa Ana, California 92702-2028

CX102

EVANS & ASSOCIATES
16897 ALGONQUIN STREET # F
HUNTINGTON BEACH, CA 92649

1225 (N9/01)

APPENDIX M

Denial Writ on J. Moss denial of disqualification motion,
by Justices W. Rylaarsdam, R. Ikola, D. Thompson 6/26/14 (2 pgs.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

FLOYD M. CHODOSH et al.,

Petitioners,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

PALM BEACH PARK ASSOCIATION,

Real Party in Interest.

G050238

(Super. Ct. No. 30-2010-004235444)

O R D E R

THE COURT:*

Petitioners' motion for leave to file a corrected petition for writ of mandate is GRANTED. The clerk of this court is directed to accept for filing the corrected petition for writ of mandate which has been submitted as an exhibit to the motion.

The petition for writ of mandate is DENIED.

Real party has submitted two preliminary responses in opposition to the petition, one purportedly in its capacity as a defendant and the second in its capacity as a real party in interest. Ordinarily, the clerk of this court would be directed to return the opposition to real party with directions to real party to file a single informal response within a specific

period of time. Such a direction is MOOT in view of the finality of this order denying the writ petition. (Cal. Rules of Court, Rule 8.490(b)(1).)

RYLAARSDAM, J.
RYLAARSDAM, ACTING P. J.

* Before Rylaarsdam, Acting P. J., Ikola, J. and Thompson, J.

RYLAARSDAM, Acting P.J., concurring:

In addition to denying the petition, I would issue an order to show cause why sanctions should not be imposed for the filing of a manifestly frivolous writ. (Cal. Rules of Court, Rule 8.276; see, e.g., *Los Angeles County Dept. of Children etc. Services v. Superior Court* (1995) 37 Cal.App.4th 439, 456-457.) "This court may find a writ petition to be frivolous and order sanctions if we conclude the petition was prosecuted for an improper motive or the petition is indisputably without merit, i.e., any reasonable attorney would agree the petition is completely without merit." (*In re White* (2004) 121 Cal.App.4th 1453, 1479.)

RYLAARSDAM, J.
RYLAARSDAM, ACTING P. J.

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Chodosh et al. v. The Superior Court of Orange County

Superior Court of Orange County

Patrick J. Evans
Law Office of Patrick J. Evana
16897 Algonquin St., Suite F
Huntington Beach, CA 92649

The Superior Court of Orange County
Attn: Hon. Robert Moss
700 Civic Center Dr. West
Santa Ana, CA 92701

Jeffry A. Miller
Lewis Brisbois Bisgaard & Smith LLP
221 N. Figueroa St., Ste. 1200
Los Angeles, CA 90021

Allen L. Thomas
Allen B. Weiss & Associates
5001 Airport Plaza Dr., Ste. 240
Long Beach, CA 90815