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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SABRINA GUERRERO,

Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT  
INSURANCE APPEALS BOARD,

Defendant and Respondent,

STERLING BANK AND TRUST,

Real Party in Interest and  
Respondent.

A131952

(San Mateo County  
Super. Ct. No. CIV498016)

Sabrina Guerrero seeks reversal of the San Mateo County Superior Court's upholding of a decision by the California Unemployment Insurance Appeals Board (CUIAB) denying her unemployment benefits, and an order to the trial court that it issue a writ of administrative mandate ordering issuance of these benefits. She argues there is not substantial evidence to support the trial court's ruling that the CUIAB properly determined, pursuant to Unemployment Insurance Code section 1256 (section 1256), that she was not eligible for unemployment benefits because her employment was terminated for misconduct. We find substantial evidence supports the trial court's ruling and affirm the judgment.

**BACKGROUND**

Respondent and real party in interest Sterling Bank and Trust (Sterling) employed Guerrero as a customer service representative for over two and a half years before

terminating her employment in August 2009. Guerrero filed a claim for unemployment insurance benefits with the Employment Development Department (EDD).

### ***The Initial Denial of Guerrero's Claim***

The record contains an EDD "Record of Claims Status Interview Misconduct," which states:

"[The EDD] finds [Guerrero] had willfully breached her duty owed to [Sterling] with actual knowledge. Guerrero was terminated because she cashed a check for a fake customer for \$4000 without checking his ID verification against the customer's file. Guerrero did not follow Sterling's procedures which was to check the customer's ID and pull the signature card prior to cashing a check. Although Guerrero did not receive any prior warning, however Guerrero had received training and had worked for Sterling for 2.5 years. Guerrero should have known Sterling's procedures but disregarded Sterling's procedures, which created a loss of \$4000 to Sterling. Hence, Guerrero's termination was misconduct in connection with work. Therefore, Guerrero is found [misconduct disqualified] under section 1256."

An EDD "Notice of Determination/Ruling" was issued, which stated that Guerrero was "discharged from your last job with Sterling Bank & Trust because you were not performing the duties of your job as required" and, therefore, "did not meet the legal requirements for payment of benefits pursuant to section 1256."

### ***Guerrero's Appeal***

Guerrero appealed this EDD denial, which appeal was considered by an administrative law judge (ALJ) of the San Francisco Office of Appeals of the CUIAB. In a September 24, 2009 letter requesting this appeal, she stated her reasons for disagreeing with the ruling, as follows:

"I was supposed to cash a check for an existing customer. I deposited the check and then I did the withdrawal for the check amount. I requested her drivers license did the withdrawal. Then I asked another employee to count the cash because anything over \$1,000 needs to be double counted. The picture on the drivers license was the same as

the person in front of me. This is how I was trained to do a withdrawal. I do not know any better.

“ . . . I was not given any training on how to tell a fake Drivers License from a real one. When I did the withdrawal I did not see anything fake about the Drivers License in front of me. It looked very real. The picture on the drivers license was the same as the person in front of me. I had no real cause for concern because the customer was not reluctant to show me identification. Had the customer been reluctant to show me identification and I did nothing about the situation then I can accept fault.

“Every branch has inconsistencies in their employee training. . . . [¶] The way I was taught to cash checks was that to ask for identification before giving cash.

“I did not know that I was supposed to check the signature card before cashing the check because I was never told to do it that way until the day that they called me into the office and I was terminated. Therefore there would be no way for me to have known that the ID was a fake ID.

“I want to say that I performed my duties as required. Therefore, I should not be found at fault for my termination and I should be entitled to receive unemployment benefits.”

Guerrero subsequently requested a continuance of the appeal hearing because, she stated, she had a conflicting job interview. Her request was denied on December 7, 2009, but she was allowed to appear in writing. She wrote by fax to the court that she could not attend the hearing date because of a group job interview, attached a statement which read, “A single incident of ordinary negligence or a good faith error in judgment is normally not misconduct,” and stated that she hoped her fax “will suffice my appearance in court.”

Guerrero’s appeal hearing proceeded as scheduled on December 10, 2009, before an ALJ. The ALJ entered a number of exhibits into the record, including Guerrero’s September 24, 2009 letter and December 7, 2009 fax. The sole witness at the hearing was Sterling representative Ami Thomas. Sterling also submitted copies of performance reviews of Guerrero, relevant provisions from its “Branch Volume I: Operations for

CSR” (volume), and documents containing the signatures of the real bank customer and the defrauder in the subject incident.

Thomas testified that Guerrero’s job as a customer service representative required her to assist customers with various transactions, including the cashing of checks. Guerrero was terminated because she did not follow proper procedures and “cashed and allowed a withdrawal for a customer that was not a customer.” Guerrero, prior to her termination, acknowledged that she did not take the customer’s identification and compare it to the signature card according to Sterling’s procedures before cashing the check and allowing the withdrawal. Guerrero said she did not know that she was supposed to do so. She also “kept focusing on the fact that she couldn’t determine that that ID was a fake ID and that she had not been trained on how to identify real ID’s from fake ID’s.”

Thomas further testified that Guerrero had received training that required her, when faced with a circumstance like the subject incident where the customer had an account at another branch, to compare the customer’s identification with the signature card on file for that customer. Thomas based this on the following knowledge:

“Customer service representatives go through two weeks of teller training prior to being in the branches and interacting with customers and then during the two weeks—after the two weeks they are shadowed by a senior member or branch manager that helps them do the training. [¶] In addition to that, they are given those volumes that you have one page out of that handles all of the procedures within the bank and [Guerrero] reads those volumes. It’s referenced in the merit review that she’s very good at reading the volumes. She just doesn’t implement it. So we know that she has received the training.”

Thomas further testified that she had personal knowledge from daily audits that Guerrero handled other transactions involving customers from other branches presenting such checks, and that such a transaction “happens all the time.” She did not know if Guerrero followed the signature comparing requirement in these other transactions. Thomas also said the reason customer service representatives were required to compare signatures for customers from other branches was “so that there is no fraudulent activity

because they were not familiar with the people,” and indicated that signature cards were scanned into a data system that could be viewed by representatives on their computers. Thomas stated that customer service representatives were also required to compare signatures for unfamiliar customers of the same branch, and that written instruction was provided to them so stating.

Thomas further testified that customer service representatives were to be “very intimately” familiar with the contents of the volumes. They were the “bible so to speak when they’re doing their job. They use that on a daily basis for handling transactions,” were to refer to them if they had any questions, and also had available to them a live person to speak to in the branch operations department.

The administrative record contains provisions from the volume including the following:

“Upon receiving an account transaction for a customer whose account did not originate at the branch presented, verification of identification with an acceptable form . . . is required. It is required to compare the identification with the signature card.

“To view the signature card, the branch representative must utilize the Bank’s imaging system. Signature verification must be made BEFORE any transaction can take place.”

Thomas also testified that Guerrero’s performance review indicated Guerrero often read the volumes in her down time, and that Guerrero had “a good knowledge of the procedures involved in various transactions, but sometimes [had] trouble implementing what she [had] learned in real work situations.” The performance reviews contained in the administrative record contain statements that are consistent with this testimony.

### ***The ALJ’s Decision***

The ALJ issued a written decision denying Guerrero’s administrative appeal. The ALJ found that on August 4, 2009, a customer whose account did not originate at Guerrero’s branch presented a personal check to Guerrero to be cashed. The ALJ further found that Sterling required Guerrero, upon receiving an account transaction for a

customer whose account did not originate at the branch, to verify the signature on a proper form of identification with the bank's signature card, which could be viewed on the computer, before completing the transaction. Guerrero did not compare the identification signature with the signature card, the transaction proved to be fraudulent, and Sterling lost almost \$4,000<sup>1</sup> "pursuant to Guerrero's failure to follow procedure." The ALJ further found that Sterling informed Guerrero of these procedures during her training, the written procedures were provided at the worksite, and Guerrero had ready access to them. Guerrero, who said she was unaware of the signature checking procedure, was not issued any prior written warnings before her termination.

In the reasons for the decision, the ALJ cited section 1256. After citing case law and CUIAB precedent decisions regarding what the employer needed to establish in order to show misconduct, the ALJ concluded that "the weight of the evidence shows that [Guerrero's] failure to follow procedure resulted in a substantial loss to the employer. Guerrero knew or should have known about the procedure to avoid fraudulent transactions. The employer has established that Guerrero's conduct constituted misconduct. Guerrero is therefore disqualified for benefits under code section 1256."

Guerrero appealed<sup>2</sup> the ALJ's decision to the Appeals Board of the CUIAB. A CUIAB panel conducted an independent review of the administrative record and adopted the ALJ's decision by a two-to-one vote. Apart from the ALJ's statement that Guerrero worked one year and seven months at the bank instead of two years and seven months, it found "no material errors in the issue statement or in the findings of fact" and determined that "the reasons for [the ALJ's] decision properly apply the law to the facts." The Board adopted the ALJ's issue statement, the corrected findings of fact, and the reasons for decision as its own.

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<sup>1</sup> The ALJ decision referred to a loss of "\$3,977." but the trial court and the parties agree the actual loss was \$3,997.

<sup>2</sup> Guerrero was informed that, if she did not appear at the hearing, she could request a new hearing. She did not do so.

### *The Petition for Writ of Administrative Mandate*

Guerrero filed a petition for writ of administrative mandate in San Mateo County Court to command the CUIAB to reconsider or set aside the ALJ's decision to deny Guerrero unemployment benefits, and a motion for peremptory writ of mandate or prohibition. Guerrero did not file the administrative record with the court before the scheduled hearing and sought a continuance to do so. The court did not grant a continuance, but at the hearing, it denied the writ without prejudice, stating, "if you [Guerrero] can get your record together, I suppose that you can pursue it again, but under the circumstances, it should not happen this way." Sterling's counsel asked the court to affirm that its order would not change the statute of limitations for re-filing. The court responded, "I am not changing anything else. Denied without prejudice, and the tentative ruling otherwise is adopted in its entirety." The court subsequently issued a written order denying the petition without prejudice.

Guerrero subsequently lodged the administrative record with the court and filed an amended motion for a peremptory writ of mandate or prohibition. Sterling's counsel opposed the amended motion, including on jurisdictional grounds, arguing that Guerrero's first petition was effectively dismissed, thereby divesting the court of jurisdiction to take any further action in the case after the statute of limitations had run. At the subsequent hearing, the court concluded that the case was properly before it, stating, "I denied their relief, I did not dismiss the case."

After a hearing, the trial court denied Guerrero's amended motion for peremptory writ of mandate or prohibition. The trial court concluded that "review of the administrative record shows that the evidence supports the findings of the [ALJ]," and that the ALJ's decision "is supported by the weight of the evidence," and cited to specific evidence in the administrative record. Guerrero then filed a timely notice of appeal.

### **DISCUSSION**

Guerrero argues that the trial court erred in denying her a writ of mandate because the record does not contain substantial evidence that her actions rose to the level of "misconduct" required under section 1256. Sterling argues that substantial evidence

supports the trial court's decision and that, if we conclude it does not, we should rule that the trial court lacked jurisdiction over Guerrero's amended petition after it effectively dismissed her initial petition and the statute of limitations ran.<sup>3</sup>

We conclude substantial evidence supports the trial court's denial and affirm the trial court's ruling. Therefore, we do not address Sterling's "lack of jurisdiction" argument.

Regarding the sufficiency of the evidence to support a CUIAB ruling, "[i]n reviewing a decision of the [CUIAB], the [trial] court exercises its independent judgment on the evidentiary record of the administrative proceedings and inquires whether the findings of the administrative agency are supported by the weight of the evidence."

*(Lozano v. Unemployment Ins. Appeals Bd. (1982) 130 Cal.App.3d 749, 754.)*

"In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." *(Fukuda v. City of Angels (1999) 20 Cal.4th 805, 817.)* "On review of the judgment, the appellate court is confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial, credible and competent evidence." *(Lozano, at p. 754.)*

Guerrero was denied unemployment benefits pursuant to section 1256, which states in relevant part that "[a]n individual is disqualified for unemployment compensation benefits if the director finds that he or she . . . has been discharged for misconduct connected with his or her most recent work." (§ 1256.)

Our Supreme Court has held that the term "misconduct," as used in section 1256, "is limited to 'conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of

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<sup>3</sup> The CUIAB filed a notice of appearance in this appeal, stating Guerrero has not demonstrated error, requesting that the trial court judgment be affirmed, and indicating that it will not participate actively in the briefing or arguing in this appeal.

such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute." ' ' ' (Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal.3d 671, 678 (Amador), quoting Maywood Glass Co. v. Stewart (1959) 170 Cal.App.2d 719, 724.)<sup>4</sup>

Furthermore, "[t]he determination of fault is not concluded by a finding that the discharge was justified. The claimant's conduct must evince culpability or bad faith. 'The conduct may be harmful to the employer's interests and justify the employee's discharge; nevertheless, it evokes the disqualification for unemployment insurance benefits only if it is wilful, wanton or equally culpable.' " (Amador, supra, 35 Cal.3d at p. 678.) The employer "bears the overall burden of proving misconduct." (Id. at p. 681, fn. 7.)

Guerrero makes three arguments why substantial evidence does not support the trial court's denial. They are that there is no evidence of misconduct, no substantial evidence that the loss would have been avoided if Guerrero had adhered to the policy, and that the loss to Sterling was not substantial. None of these are persuasive.

#### **A. Evidence of Misconduct**

Regarding misconduct, as indicated by *Amador*, Sterling met its burden of proof if it showed that Guerrero engaged in conduct evincing wilful or wanton disregard of an employee's interests, including a deliberate violation or disregard of standards of behavior that an employer has the right to expect of an employee, or an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

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<sup>4</sup> Among citations listed in the reason for the decision to deny benefits, the ALJ cited as support a precedent benefit decision that also cited *Maywood*.

The trial court reviewed the ALJ's decision, which stated multiple reasons for denying benefits. The ALJ's stated reasons for the decision included references to legal analyses regarding both an employee's negligent act and deliberate disobedience of a reasonable instruction. The ALJ concluded that "the weight of the evidence shows . . . [t]he claimant *knew or should have known* about the procedure to avoid fraudulent transactions." (Italics added.)

Guerrero's appellate arguments include the suggestion that her conduct was negligent and, therefore, required a showing that it resulted in a substantial loss. However, the trial court's ruling, given the evidence that it cited to in the administrative record, indicates it concluded that Guerrero engaged in deliberate misconduct. Although at the hearing the trial court stated its view on other issues as well, such as that the loss incurred by Sterling was substantial, its subsequent written order denying Guerrero's amended motion did not raise the issue of substantial loss. Instead, the court cited as evidentiary support Guerrero's September 24, 2009 letter, as well as specific testimony by Thomas that Guerrero indicated she did not compare the identification presented to the bank's signature card before cashing the check and allowing the withdrawal, received training to compare the signatures of such documents, had a merit review that indicated that she read the bank's written procedures, and had handled other transactions in which a customer with an account that did not originate at the bank presented a check.

The conclusion we draw from the trial court's evidentiary citations is that it found the weight of the evidence indicated Guerrero knew about, but wilfully disregarded, Sterling's requirement that she compare the signature on the proffered identification to the signature on the bank's signature card in the subject incident, and that this constituted "misconduct" sufficient to deny benefits pursuant to section 1256. We find this is a reasonable conclusion that is supported by substantial evidence, based on the evidence cited by the trial court.

Guerrero does not provide an argument that effectively counters the trial court's analysis. First, Guerrero refers to her statement that she received no relevant training. However, as Sterling points out, "[i]f substantial evidence supports the trial court's

findings of fact, the appellate court may disregard the conflicting evidence, resolve conflicting inferences in favor of the prevailing party, and affirm the judgment.” (*General Motors Corp. v. Cal. Unemployment Ins. Appeals Bd.* (1967) 253 Cal.App.2d 540, 545.) Furthermore, Sterling presented evidence that Guerrero was instructed in multiple ways, including in volumes that she studied and which were considered “bibles” to her work, that she was required to compare signatures for the transaction at-issue, that Guerrero had handled this type of transaction before, and that the transaction happened often at the bank. On the other hand, Guerrero did not claim to have forgotten the requirement, but stated she had never been informed of it at all. The trial court, and the ALJ, could reasonably conclude from this conflicting evidence that Guerrero engaged in deliberate misconduct that she would not acknowledge.

Guerrero next argues that Sterling’s representative, Thomas, presented insufficient evidence of Guerrero’s training, stating “in large part conclusory statements” and that Thomas had “no actual knowledge that in fact Guerrero had received proper training.” We disagree for two reasons. First, as our own research indicates, Thomas’s testimony of customer service representatives’ training was evidence of custom and practice that is admissible to prove Guerrero had been trained to check signatures as required.<sup>5</sup> (See *Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 733 [“evidence of custom and practice in a business is admissible as circumstantial evidence of conduct on a particular occasion”]; Evid. Code, § 1105 [“Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom”].)

Second, as we have already discussed, regardless of whether Guerrero received such initial training, Thomas presented other evidence indicating that Guerrero must have known of the requirement that she compare signatures, and willfully disregarded this

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<sup>5</sup> Guerrero did not challenge, or object to, any of Thomas’s testimony; indeed, she was not physically present at the hearing, having informed the ALJ she had a conflicting job interview, been denied a continuance, and submitted written material explaining her position. Although Guerrero raises her absence in her briefing, she does not rely on it to contend error. Therefore, we do not consider it further.

requirement in intentional and substantial disregard of Sterling’s interests and her duties and obligations to Sterling. Thomas presented a page from a volume stating the requirement, performance review comments indicating that Guerrero reviewed the volumes, and testified from personal knowledge that Guerrero had handled this type of transaction before, which occurred often at the bank.

Third, Guerrero argues that her conduct was not “deliberate,” and points out that the ALJ cited among reasons for the decision that the failure to follow a cash register procedure “is not misconduct unless it is shown that such failure occurred after receipt of a warning from the employer.” This analysis ignores that the trial court’s ruling indicates it found the misconduct was deliberate, which basis for denial was also referred to by the ALJ in the decision, and that substantial evidence supports this conclusion.

Furthermore, the warning requirement referred to by the ALJ is taken from *Hecker v. Market Basket* (1976) Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-293, p. 4 (*Hecker*),<sup>6</sup> which involved materially different circumstances. *Hecker* involved three cash register transactions of \$4.03 or less that were not proven, and evidence indicating that the employee thought he had never violated the required procedure, but in fact had on occasion neglected to follow it. (*Id.* at pp. 5-6.) By contrast, the present case involved a much larger transaction of almost \$4,000, done in violation of a clear requirement that was communicated in multiple ways to Guerrero, which Guerrero admits she did not follow, purportedly for lack of knowledge.

In addition, *Hecker* relied for its warning analysis on *Delgado v. Unemployment Ins. Appeals Bd.* (1974) 41 Cal.App.3d 788. (*Hecker, supra*, Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-293, p. 4.) The circumstances discussed and relied on in

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<sup>6</sup> “The Board’s precedent decisions interpret applicable statutes and regulations, and ‘[t]heir correctness as precedent relates to law and policy, not to adjudicative fact. [Citation.]’ [Citation.] Courts will reject the Board’s statutory construction when it is contrary to legislative intent. [Citation.] Nonetheless, in light of the Board’s expertise, its interpretation of a statute it routinely enforces is entitled to great weight and will be accepted unless its application of legislative intent is clearly unauthorized or erroneous.” (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1027.)

*Delgado* also do not indicate that a warning was required in the present case. In *Delgado*, the employee, a checker, while aware of a written rule prohibiting certain conduct regarding cash register transactions, thought her conduct was proper and acceptable to her supervisors, two of whom knew of the prohibited conduct and sometimes participated in it. (*Id.* at p. 791.) Other checkers engaged in the conduct as well. (*Ibid.*) However, the employee was never warned that the conduct was unacceptable before her termination. (*Ibid.*) In that context, the appellate court affirmed the trial court’s determination that the employee’s conduct was a good faith error in judgment rather than misconduct. (*Id.* at pp. 792-793.) These facts are inapposite to the present case, in which we are confronted with conflicting evidence about whether Guerrero knew about a clear requirement designed to prevent fraud, not whether she exercised a good faith error by neglecting a rule that was not always practiced or enforced. In short, substantial evidence supports the trial court’s ruling.

### **B. Guerrero’s Remaining Arguments**

In light of our conclusion that substantial evidence supports the trial court’s denial based on a finding that Guerrero engaged in wilful disregard of a known requirement, we need not address Guerrero’s arguments that Sterling did not prove Guerrero’s failure to compare signatures actually caused the almost \$4,000 loss, and that the loss was not substantial. Therefore, we do so only briefly.

Guerrero does not establish that actual loss must be established in the face of the sort of misconduct and rulings involved here. *Amador* focuses on the impact on an “employer’s interests,” not actual loss. (*Amador, supra*, 35 Cal.3d at p. 678.) As Sterling points out, this is consistent with the CUIAB’s own view that “[t]he term misconduct does not necessarily imply an evil or corrupt motive or an actual intent to injure or damage an employer’s interests. It is sufficient if the act, or the failure to act, on the part of the employee be committed or omitted under such circumstances as would justify *the reasonable inference that the employee should have known that injury or damage to his employer’s interests was a probable result.*” (*Converse v. Trans-World Airlines, Inc.* (1952) Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-193, p. 5, italics)

added.) It can reasonably be inferred that a customer service representative who cashes an almost \$4,000 check while willfully disregarding requirements set into place to prevent fraud should have known that injury to Sterling's *interests* was a probable result, regardless of whether *actual* monetary loss resulted from the misconduct.

In any event, the administrative record contains sufficient signatures of the actual bank customer and the defrauder involved in the subject incident to reasonably draw the conclusion that, but for Guerrero's failure to compare signatures, the transaction would, or should, not have been completed.

Guerrero also argues the loss to Sterling of almost \$4,000 was not substantial, based on appellate counsel's own review of the size of Sterling's assets and investor equity listed, apparently, on Sterling's website. We disregard this argument because it is not supported by any facts in the record. (See, e.g., Rules of Court, rule 8.883(a)(2)(c); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [Cal. Rules of Court require that the opening brief provide a summary of significant facts limited to matters in the record].) We are also unpersuaded by Guerrero's comparison of the almost \$4,000 loss here to the \$250,000 loss found to be substantial in *Converse v. Trans-World Airlines, Inc.*, *supra*, Cal. Unemp. Ins. App. Bd. Precedent Benefit Dec. No. P-B-193. A loss of thousands of dollars can hardly be said to be insignificant in virtually any circumstance. Under the circumstances of the case, we conclude a \$3,997 loss is substantial.

**DISPOSITION**

The judgment is affirmed. The CUIAB and Sterling are awarded costs of appeal.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.