

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DANIEL BORGSTROM,

Plaintiff and Respondent,

v.

MARGY WILKINSON et al.,

Defendants and Appellants.

A132296

(Alameda County

Super. Ct. No. RG11555942)

**ORDER MODIFYING OPINION,
AND DENYING PETITION FOR
REHEARING**

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on August 31, 2012, be modified as follows:

1. On page 11, the last sentence at the end of the first full paragraph is deleted and the following sentence is inserted in its place:

“We address each potential defense in turn, bearing in mind that defendant has the burden of proof and must conclusively demonstrate that plaintiff’s claim is precluded by the defense asserted. (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676 (*Peregrine Funding*) “[A]lthough [Code of Civil Procedure] section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense. (Citation.)”].)”

2. On page 11, the last sentence at the end of the second full paragraph is deleted and the following sentence is inserted in its place:

“Thus, defendants have failed to carry their burden of proof on the business judgment rule defense. (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, *supra*, 133 Cal.App.4th at p. 676.)”

3. On page 12, the last sentence at the end of the first full paragraph is deleted and the following sentence is inserted in its place:

“In sum, the record as currently developed does not conclusively establish that plaintiff’s claim is precluded by section 800’s pre-filing requirements as a matter of law. (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, *supra*, 133 Cal.App.4th at p. 676.)”

The Petition for Rehearing filed September 12, 2012 is denied.

DATE:

MCGUINNESS, P.J.*

* Justice Jenkins and Justice Pollak concur.