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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MOHAMMAD CHITSAZZADEH et al.,

Plaintiffs and Appellants,

v.

JOHN S. BIRKE,

Defendant and Respondent.

B250447

(Los Angeles County  
Super. Ct. No. BC417580)

APPEAL from a judgment of the Superior Court of Los Angeles County,

Michael M. Johnson, Judge. Affirmed.

Law Offices of Afzali & Behjatnia and Dominic K. Afzali for Plaintiffs and  
Appellants.

Law Office of Michael R. Sohigian and Michael R. Sohigian for Defendant and  
Respondent.

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Mohammad Chitsazzadeh and Mansoureh Shajari (M. Shajari) appeal a summary judgment in favor of John S. Birke in a malicious prosecution action. Birke was counsel for Abolfazl A. Shajari (A. Shajari) and Brake Land, Inc. (Brake Land), who were plaintiffs in a prior action against Chitsazzadeh and M. Shajari. The trial court in the prior action granted summary judgment in favor of the defendants.

The trial court in the present action determined that Birke satisfied his initial burden as the party moving for summary judgment by presenting evidence that there was probable cause to prosecute the prior action and that he acted without malice. The court determined that Chitsazzadeh and M. Shajari failed to create a triable issue of material fact as to that showing, and therefore granted summary judgment in favor of Birke. On appeal, Chitsazzadeh and M. Shajari challenge those determinations. They also contend the court failed to provide an adequate specification of reasons for granting summary judgment and erred by overruling their evidentiary objections.

We conclude that Birke satisfied his initial burden as the party moving for summary judgment by presenting his own declaration that he acted without malice, and Chitsazzadeh and M. Shajari failed to create a triable issue of material fact as to that element. We also conclude that Chitsazzadeh and M. Shajari have shown no prejudicial error in the specification or reasons or the overruling of their evidentiary objections. We therefore affirm the judgment.

## ***FACTUAL AND PROCEDURAL BACKGROUND***

### *1. Prior Action*

A. Shajari and Brake Land filed a complaint in March 2007 against Chitsazzadeh and M. Shajari (Super. Ct. L.A.County, No. LC077471). A. Sharjari and Brake Land alleged that they were business partners with Chitsazzadeh and M. Shajari prior to the incorporation of Brake Land and that the parties agreed in writing to dissolve the partnership. They alleged that under the terms of the written dissolution agreement dated November 16, 2004, the Tarzana branch of the parties' brake business and Brake Land, the corporation, would become the exclusive property of A. Shajari as of January 1, 2005, and the Woodland Hills branch would become the exclusive property of M. Shajari as of the same date. They also alleged that the parties agreed that M. Shajari could continue to use the name "Brake Land Company" at the Woodland Hills location.

A. Shajari and Brake Land also alleged that "Chitsazzadeh himself was to have no involvement with Brake Land." They claimed, however, that Chitsazzadeh continued to run the Woodland Hills branch without their permission and continued to use the Brake Land name, logos, and brand. They also alleged that, "[a]s a material part of the bargained for consideration between the parties, Chitsazzadeh agreed to transfer to [A.] Shajari real property. However, Chitsazzadeh did not own or control the real property, and Chitsazzadeh failed to provide the bargained for consideration, which was a material part of the contract."

A. Shajari and Brake Land alleged counts for (1) breach of the dissolution agreement; (2) unfair competition; (3) interference with prospective economic advantage; and (4) trademark infringement. The dissolution agreement written in Farsi was attached to the complaint together with an English translation.

Kramer & Kaslow and Philip A. Kramer were counsel of record for plaintiffs A. Shajari and Brake Land upon the filing of the complaint. Birke later worked on the case as an attorney with the Kramer & Kaslow firm.

Chitsazzadeh and M. Shajari moved for summary judgment against the complaint. The trial court granted the motion and entered judgment for Chitsazzadeh and M. Shajari in July 2008.

## 2. *Present Action*

Chitsazzadeh and M. Shajari filed a complaint for malicious prosecution against A. Shajari, Brake Land, Kramer & Kaslow, Kramer, and Birke in the present action in July 2009. Chitsazzadeh and M. Shajari allege that the defendants in this action had no honest belief in the claims alleged in the complaint in the prior action and acted maliciously. They allege that the defendants knew Brake Land was a suspended corporation and was incapable of suing, but brought the action in the name of Brake Land anyway. They also allege that the dissolution agreement did not provide for any transfer of real property by Chitsazzadeh, and that the other claims alleged in the prior complaint also lacked probable cause.

Kramer & Kaslow, Kramer, and Birke filed a special motion to strike the complaint. The trial court struck the special motion to strike as untimely, effectively

denying the motion. The court also awarded Chitsazzadeh and M. Shajari attorney fees as a monetary sanction. On appeal, we held that the court properly denied the motion as untimely, but erred by awarding attorney fees. (*Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 680.)

Birke filed a summary judgment motion in March 2013. He argued that he was a contract attorney working for Kramer & Kaslow at the time of the prior action and that he neither initiated the prior action nor had the authority to decide whether to maintain the prior action. He also argued that Chitsazzadeh and M. Shajari could not prove that he had no probable cause to prosecute the prior action and claimed that he acted without malice.

Birke filed his own declaration stating that he worked for Kramer & Kaslow as a contract attorney paid on an hourly basis and that he was not associated with the firm when the prior action was filed. He declared that he played no role in deciding whether to initiate or maintain the prior action, but believed that the complaint had legal merit, based upon his 18 years of experience as a civil litigator. He also declared that he “had no ill will, malice, or vengeful motive in performing work on the [prior action].”

Chitsazzadeh and M. Shajari opposed the summary judgment motion, arguing that Birke failed to satisfy his initial burden as the party moving for summary judgment because he failed to present evidence showing the existence of probable cause or the absence of malice. They also argued that there was no probable cause to continue to prosecute the complaint in the prior action, and that Birke acted with malice. They filed a declaration of counsel attaching the dissolution agreement, a reporter’s transcript of

the hearing on the summary judgment motion in the prior action, the complaint in the prior action, the judgment in the prior action, and a discovery motion in the prior action and argued that those materials showed a lack of probable cause. They presented no other evidence in opposition to the summary judgment motion. They also filed evidentiary objections to every paragraph of the Birke declaration.

The trial court provided a tentative ruling before the hearing on the summary judgment motion. The court tentatively denied the motion, stating that Birke had failed to present any evidence of probable cause or that he acted without malice. The court also tentatively stated that plaintiffs had presented evidence creating triable issues of material fact as to the existence of probable cause, and that the lack of probable cause would support an inference of malice. After hearing oral argument, however, the court filed a minute order dated May 30, 2013, granting the motion.

The order granting summary judgment stated that the trial court sustained the plaintiffs' objection to one paragraph in the Birke declaration and overruled the other objections.<sup>1</sup> The court found that Birke had satisfied his initial burden as the party moving for summary judgment by presenting evidence negating the elements of probable cause and malice. It stated that Chitsazzadeh and M. Shajari had presented no admissible evidence creating a triable issue of material fact. The court noted that the plaintiffs had submitted no witness declarations, and stated that the documents

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<sup>1</sup> The court sustained plaintiffs' objection to paragraph 11 of the Birke declaration. That paragraph dealt with discussions he had with plaintiffs regarding resolution of the pending case and included no contentions or material facts relating to the summary judgment motion.

presented were unauthenticated and that there was no request for judicial notice. It concluded that it could not accept the truth of the matters asserted in the reporter's transcript. The court granted summary judgment.<sup>2</sup>

The trial court entered a judgment in favor of Birke on June 20, 2013. Chitsazzadeh and M. Shajari timely appealed the judgment.<sup>3</sup>

### ***CONTENTIONS***

Chitsazzadeh and M. Shajari contend (1) Birke failed to negate any element of their malicious prosecution cause of action; (2) the trial court erroneously refused to consider their evidence presented in opposition to the summary judgment motion; (3) the court failed to provide an adequate specification of reasons for granting summary judgment; and (4) the court erred by overruling their evidentiary objections.

### ***DISCUSSION***

#### *1. Standard of Review*

A court may grant a summary judgment only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id.*, subd. (p)(2).) The defendant can satisfy his

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<sup>2</sup> At the same time, the court denied a separate summary judgment motion filed by A. Shajari.

<sup>3</sup> The trial court later granted a nonsuit at trial in favor of A. Shajari and Kramer and entered a judgment in January 2014, awarding Chitsazzadeh and M. Shajari no relief against those defendants.

burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential element. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 (*Miller*)).) If the defendant meets his burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller, supra*, 36 Cal.4th at p. 460.) We must affirm a summary judgment if it is correct on any of the grounds asserted in the trial court, regardless of the trial court's stated reasons. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.) Even if the grounds entitling the moving party to a summary judgment were not asserted in the trial court, we must affirm if the parties have had an adequate opportunity to address those grounds on appeal. (*Ibid.*; see Gov. Code, § 68081; Code Civ. Proc., § 437c, subd. (m)(2).)

## 2. *Law of Malicious Prosecution*

The elements of a cause of action for malicious prosecution are (1) a favorable termination on the merits of a prior action; (2) the defendant initiated or continued to prosecute the action without probable cause; and (3) the defendant acted with malice in initiating or continuing to prosecute the action. (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 (*Zamos*); *Contemporary Services*

*Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1056.)<sup>4</sup> The plaintiff need not prove that the defendant asserted all of the grounds for liability in the underlying case without probable cause and with malice, but need only prove that the defendant asserted any one of the grounds for liability without probable cause and with malice. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 671.)

In analyzing the instant case, we keep in mind that a malicious prosecution claim is a “ ‘disfavored action.’ ” (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1539 (*Jay*)). This is because of “ ‘ “the principles that favor open access to the courts for the redress of grievances.” ’ [Citation.]” (*Daniels, supra*, 182 Cal.App.4th at p. 216.) “[T]he elements of the [malicious prosecution] tort have historically been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim.” (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 872 (*Sheldon Appel*)).

“Probable cause” in the context of malicious prosecution means an objectively reasonable belief that the action is legally tenable based on the facts known to the malicious prosecution defendant at the time. (*Soukup v. Law Offices of Herbert Hafif*

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<sup>4</sup> *Zamos, supra*, 32 Cal.4th at page 970, held that “an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause.” The rule that an attorney may be held liable for continuing to prosecute an action after discovering that it lacks probable cause compels the conclusion that the defendant’s malice in continuing to prosecute an action in those circumstances would satisfy the element of malice. (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226 (*Daniels*); *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1408 & fn. 12 (*Sycamore*)).

(2006) 39 Cal.4th 260, 292; *Sheldon Appel, supra*, 47 Cal.3d at p. 878.) A person has no probable cause to initiate or continue to prosecute an action if the person relies on facts that he or she has no reasonable cause to believe to be true, or seeks recovery on a legal theory that is untenable under the facts known to him or her. (*Soukup, supra*, at p. 292.) There is no probable cause to initiate or continue to prosecute an action if, and only if, no reasonable attorney would believe that the action has any merit and any reasonable attorney would agree that the action is totally and completely without merit. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743, fn. 13 (*Jarrow*); *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 817 (*Wilson*)).

The existence of probable cause to initiate or continue to prosecute an action in light of the facts known to the malicious prosecution defendant at the time is a legal question for the court to decide. (*Wilson, supra*, 28 Cal.4th at p. 817; *Sheldon Appel, supra*, 47 Cal.3d at p. 875.) A controversy as to what facts were known to the malicious prosecution defendant at the time the action was initiated or prosecuted presents a question of fact for the trier of fact. (*Sheldon Appel, supra*, at p. 881.) If there is no dispute as to what facts were known or if the factual dispute is not material to the probable cause determination, probable cause is a pure question of law. (*Ibid.*) There is a low threshold for finding probable cause in order to protect a litigant's right to assert arguable legal claims, even if the claims are extremely unlikely to succeed. (*Jarrow, supra*, 31 Cal.4th at pp. 742-743; *Wilson, supra*, at p. 817.)

Malice concerns a person's subjective intent in initiating or continuing to prosecute an action, and is a question of fact for the trier of fact. (*Sheldon Appel, supra*,

47 Cal.3d at p. 874.) A person initiates or continues to prosecute a prior action with malice only if he or she acts primarily for an improper purpose; that is, a purpose other than to secure a proper adjudication on the merits. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 383; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494 (*Downey Venture*); see Rest.2d Torts, § 676.) Such situations may include (1) when the person does not believe that the claim is meritorious; (2) when the person prosecutes the action because of hostility or ill will, to harass the defendant; (3) when the person prosecutes the action for the purpose of depriving another person of the beneficial use of his or her property; (4) when the person prosecutes the action for the purpose of forcing a settlement unrelated to the merits of the action; and (5) when a person prosecutes a cross-complaint for the purpose of delaying adjudication of the complaint. (*Albertson, supra*, 46 Cal.2d at p. 383, citing Rest., Torts, § 676, com. b; *Sycamore, supra*, 157 Cal.App.4th at p. 1407; see Rest.2d Torts, § 676, com. c., pp. 462-463.)

Malice turns on the subjective intent of the malicious prosecution defendant and therefore cannot be inferred based solely on the determination that the action objectively lacked probable cause. (*Jarrow, supra*, 31 Cal.4th at p. 743; *Downey Venture, supra*, 66 Cal.App.4th at p. 498.) Lack of probable cause is a factor in determining the presence of malice, but is insufficient alone to establish malice. (*Jay, supra*, 218 Cal.App.4th at p. 1543.) “ ‘Merely because the prior action lacked legal tenability, as measured objectively . . . *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor’s subjective malicious state of mind.’ [Citation.]” (*Jarrow, supra*, at p. 743, citing *Downey*

*Venture, supra*, at p. 498.) Rather, a malicious prosecution plaintiff must present some other evidence of the defendant's subjective intent to misuse the judicial system for an improper purpose, such as evidence that the defendant subjectively believed that a cause of action was meritless. (*Jay, supra*, at p. 1543; *Downey Venture, supra*, at p. 498.)

3. *The Trial Court Properly Granted Summary Judgment*

a. *Birke Failed to Shift the Burden on the Element of Lack of Probable Cause*

As noted above, probable cause is an objective inquiry based on the facts known to the malicious prosecution defendant at the time. A defendant's subjective belief that the action had merit is irrelevant to the probable cause inquiry. (*Sheldon Appel, supra*, 47 Cal.3d at p. 881; *Downey Venture, supra*, 66 Cal.App.4th at p. 496.) Here, Birke had no probable cause to continue to prosecute the prior action only if no reasonable attorney would have believed that the action had any merit and any reasonable attorney would have concluded that the action was totally and completely without merit. (*Jarrow, supra*, 31 Cal.4th at p. 743, fn. 13; *Wilson, supra*, 28 Cal.4th at p. 817.)

A malicious prosecution defendant can negate the element of probable cause by presenting evidence of the facts known to the defendant at the time the prior action was initiated or prosecuted and showing that, in light of those facts, the claims alleged in the prior action were factually and legally tenable. This requires a discussion of the facts known to the defendant and why those facts arguably supported the claims asserted. (*Sycamore, supra*, 157 Cal.App.4th at p. 1402.)

In determining if probable cause had been present, the trial court must consider “both the factual circumstances established by the evidence and the legal theory upon which relief is sought.” (*Jay, supra*, 218 Cal.App.4th at p. 1540.) A litigant will lack probable cause for his action if he relies upon facts that he has no reasonable cause to believe to be true. (*Ibid.*)

In Birke’s papers supporting his motion for summary judgment, he did not discuss the factual and legal bases for the claims alleged in the prior action, and he did not explain why those claims were factually and legally tenable. Instead, he simply declared that he believed that “the conduct alleged by the Firm’s clients was actionable under California law.” He did not say what conduct he was referring to, or what facts, if any, supported those allegations. Nor did he say whether he believed them to be true. Thus, his declaration provided insufficient information from which the trial court could determine whether there was probable cause to proceed with the prior action. We conclude that Birke failed to satisfy his initial burden as the party moving for summary judgment to show that Chitsazzadeh and M. Shajari could not establish a lack of probable cause.

b. *Birke Shifted the Burden to Plaintiffs on the Element of Malice*

Malice concerns the malicious prosecution defendant’s subjective intent in initiating or continuing to prosecute an action. (*Sheldon Appel, supra*, 47 Cal.3d at p. 874.) Birke’s declaration that he “had no ill will, malice, or vengeful motive in performing work on the [prior action]” was direct evidence of his subjective intent. Case law establishes that such statements, despite their self-serving nature, can satisfy

a defendant's initial burden as the party moving for summary judgment if malice is an element of the plaintiff's cause of action.<sup>5</sup> (*Golden West Baseball Co. v. Talley* (1991) 232 Cal.App.3d 1294, 1305-1306 [declaration established lack of malice for purposes of an immunity defense under Gov. Code, § 822.2], disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526-527; *Tresemmer v. Barke* (1978) 86 Cal.App.3d 656, 668 [declaration established lack of malice so as to negate liability for punitive damages].) Birke's declaration of no malice satisfied his initial burden to negate that element and shift the burden to plaintiffs.

c. *Chitsazzadeh and M. Shajari Failed to Create a Triable Issue as to Malice*

Chitsazzadeh and M. Shajari argued in opposition to the summary judgment motion that there was no probable cause to prosecute the prior action. The evidence presented in support of their opposition—the dissolution agreement, a reporter's transcript of the hearing on the summary judgment motion in the prior action, the complaint in the prior action, the judgment in the prior action, and a discovery motion in the prior action—all purportedly showed the lack of probable cause. But appellants cite nothing in their materials showing that Birke held the subjective belief that the complaint had no merit, or that he was motivated by hostility or ill will. Nor do they

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<sup>5</sup> A court has the discretion to deny summary judgment if the only proof of a material fact offered in support of the motion is a declaration as to the declarant's state of mind. (Code Civ. Proc., § 437c, subd. (e).) But a court also has the discretion to grant summary judgment based on such a declaration if the evidence is uncontroverted. (*Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 417; *Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 636.)

present any evidence that Birke otherwise prosecuted the action for an improper purpose (e.g., in order to deprive them of the beneficial use of their property, to force a settlement unrelated to the merits of the action, or to delay adjudication of the lawsuit). Instead, they allege that the lack of probable cause, by itself, indicates that the prosecution of the claim was malicious.

As noted above, while the lack of probable cause can be a factor in considering whether malice was present (*Jay, supra*, 218 Cal.App.4th at p. 1543; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 675), one cannot infer the presence of malice from the lack probable cause alone. (*Jarrow, supra*, 31 Cal.4th at p. 743; *Jay, supra*, at p. 1543; *Downey Venture, supra*, 66 Cal.App.4th at p. 498.) There must also be evidence of ill-will or an improper purpose. (*Paulus, supra*, at p. 675.)

Even if one were to conclude that plaintiffs' evidence revealed a lack of probable cause, they have not presented, or attempted to present, evidence of malice in addition to that. Therefore, they have not created a triable issue of fact on that element. The trial court properly granted summary judgment based on Birke's uncontroverted declaration on the issue of malice.<sup>6</sup>

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<sup>6</sup> In light of our conclusion that the evidence presented by Chitsazzadeh and M. Shajari, if considered in its entirety, failed to controvert Birke's declaration regarding malice, plaintiffs' contention that the trial court erroneously refused to consider their evidence is moot.

4. *Plaintiffs Have Shown No Prejudicial Error in the Specification of Reasons*

A trial court granting a summary judgment motion must specify the reasons for granting the motion and the evidence showing that no triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (g).) The failure to comply with these requirements, however, is not reversible error if de novo review by the Court of Appeal establishes the validity of the judgment. (*Soto v. State of California* (1997) 56 Cal.App.4th 196, 199.)

Our de novo review establishes the validity of the judgment based on Birke's uncontroverted evidence that he acted without malice, as stated above. We therefore need not further address the contention that the specification of reasons was inadequate. In any event, the trial court in its written order adequately specified its reasons for granting the motion, and adequately specified the evidence submitted in support of and in opposition to the motion on which the court based its conclusion that there was no triable issue of material fact.<sup>7</sup>

5. *Plaintiffs Have Shown No Error in the Overruling of Their Evidentiary Objections*

Plaintiffs contend the trial court erred by overruling their evidentiary objections to the Birke declaration. But they fail to discuss their objections and explain their claim

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<sup>7</sup> Chitsazzadeh and M. Shajari argue that the specification of reasons was inadequate in part because the trial court failed to explain why it had changed its mind after issuing a tentative ruling. The court was required to provide a specification of reasons pursuant to Code of Civil Procedure section 437c, subdivision (g), but had no separate obligation to explain why its final order differed from its tentative ruling.

of error. We therefore conclude that they have forfeited their claim of error and have shown no error. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.)

***DISPOSITION***

The judgment is affirmed. Birke is entitled to recover his costs on appeal.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

KUSSMAN, J.\*

WE CONCUR:

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KITCHING, Acting P. J.

ALDRICH, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.