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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

CHARITO S. NERA et al.,

Plaintiffs and Appellants,

v.

LIQUIDATION PROPERTIES, INC., et  
al.,

Defendants and Respondents.

H036289

(Monterey County  
Super. Ct. No. M106087)

Plaintiffs Charito S. Nera and Crishey Nera appeal from a judgment of dismissal entered after the trial court sustained the demurrer of defendants Citi Property Holdings, Inc. (formerly Liquidation Properties, Inc.)<sup>1</sup> and Mortgage Electronic Registration Systems, Inc. (MERS) to the Neras' amended complaint for wrongful foreclosure and to quiet title. The Neras claim the trial court (1) improperly dismissed their first amended complaint without leave to amend, "because [it] does allege essential facts for its causes of action," and (2) "improperly deprived [them] of their right to seek a timely motion for reconsideration" by entering judgment of dismissal before the 10-day period for filing a motion for reconsideration expired. We affirm.

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<sup>1</sup> Because the name change occurred on March 1, 2010, after the foreclosure sale that is at issue here, we will refer to the entity as Liquidation Properties, Inc.

## I. Background

In 2006, the Neras refinanced the mortgage on their home, giving a promissory note in the principal amount of \$614,880 to lender Sadek, Inc. The note was secured by a deed of trust identifying MERS as the “nominee” of Sadek and its successors and assigns. The deed of trust provided that “[t]he beneficiary of this Security Instrument is MERS (solely as nominee for [Sadek] and [Sadek’s] successors and assigns) and the successors and assigns of MERS.” The deed of trust further provided that although MERS held “only legal title” to the interests granted by the Neras in the deed of trust, “if necessary to comply with law or custom, MERS (as nominee for [Sadek] and [Sadek’s] successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.”

The Neras defaulted on the loan, and in March 2008, they were served with a notice of default and election to sell. In September 2008, MERS, as Sadek’s nominee, executed a substitution of trustee naming the Law Offices of Len Zieve (Zieve) as trustee. A notice of trustee’s sale was recorded in October 2008, and a second one was recorded in January 2009. In October 2009, MERS, “acting solely as a nominee for Sadek, Inc.,” assigned the deed of trust to Liquidation Properties. In January 2010, the Neras’ home was sold in foreclosure to Liquidation Properties.

Seeking to set aside the foreclosure and to recover damages, the Neras sued Sadek, MERS, Zieve, Liquidation Properties, and “Countrywide Bank of America.”<sup>2</sup> Their amended complaint purported to state causes of action for quiet title, wrongful foreclosure, declaratory relief, and injunctive relief. In the “Introduction” to their pleading, the Neras explained their central theory: that MERS’s 2009 assignment of the deed of trust to Liquidation Properties was unlawful because Sadek was a suspended

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<sup>2</sup> Countrywide/Bank of America filed a separate demurrer to the Neras’ amended complaint, which was sustained without leave to amend. The Neras do not challenge that ruling. Zieve is not a party to this appeal.

corporation at the time and thus “legally incapacitated from conducting any valid corporate acts, including transferring an interest in real property under California law.”

On October 8, 2010, the trial court sustained defendants’ demurrer to the Neras’ amended complaint, ruling that their legal theory was “unsupported by applicable authority.” “I’m just not convinced by plaintiff’s theory about a previous assignment of the deed of trust [from] MERS to Liquidation Properties being invalid and that therefore Liquidation Properties has no authority to foreclose,” the court explained. “I understand your basic logic,” the court told the Neras. “And I’m sorry I’m not persuaded, but I am still going with my initial analysis and going to sustain the [demurrer] . . . without leave to amend.”

On October 19, 2010, the Neras learned that the court had entered judgment of dismissal four days earlier, on the same day it entered the order sustaining the demurrer. On October 25, 2010, 10 days after the Neras were served with notice of entry of the order, they filed a motion for reconsideration. They withdrew that motion on November 1, 2011, explaining that “Plaintiffs have decided to file a Notice of Appeal instead.” They filed a timely notice of appeal.

## **II. Discussion**

### **A. Demurrer**

The Neras contend that the trial court “improperly dismissed” their complaint without leave to amend. We disagree.

“In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.]’” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*)). “[F]acts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence.” (*Dodd v. Citizens Bank of Costa*

*Mesa* (1990) 222 Cal.App.3d 1624, 1627.) “‘We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]” (*Blank*, at p. 318.) We “review the complaint de novo to determine . . . whether or not the trial court erroneously sustained the demurrer as a matter of law. [Citation.]” (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879, fn. omitted.) On appeal, “‘the plaintiff bears the burden of demonstrating that the trial court erred.’ [Citation.]” (*Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1020.)

### **1. Sustaining of the Demurrer**

The pivotal allegation in the Neras’ amended complaint is that Sadek was a suspended corporation when MERS assigned the deed of trust to Liquidation Properties. This is a factual allegation that we must accept as true. (*Blank, supra*, 39 Cal.3d at p. 318.) We need not accept as true, however, the contentions and legal conclusions that the Neras claim flow from Sadek’s suspended status—specifically, their contention that the assignment of the deed of trust to Liquidation Properties was void because the suspension rendered Sadek incapable of contracting and/or terminated its agency relationship with MERS. That contention fails because both of its starting premises are wrong as a matter of law.<sup>3</sup>

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<sup>3</sup> We note that defendants’ demurrer identified numerous other problems with the amended complaint. Among other things, it was not verified, as the quiet title statute requires. (Code Civ. Proc., § 761.020.) It did not allege the basis of the Neras’ claim to title (Code Civ. Proc., § 761.020, subd. (b)) but, on the contrary, supported an inference (based on their failure to deny they had defaulted on the loan and their allegation that the property was sold in foreclosure) that they no longer had an interest in the property. An allegation that the Neras tendered payment of the balance due on the loan was also lacking. (See *Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 337 [debtor “must offer to do equity by making a tender or otherwise offering to pay his debt” before asking a court to set aside a foreclosure].)

The suspension of Sadek's corporate status would not have rendered the assignment void. Contracts that a suspended corporation enters into are not void but merely *voidable*, "at the instance of any party to the contract other than the [suspended corporation]." (Rev. & Tax. Code, § 23304.1, subd. (a); *Performance Plastering v. Richmond American Homes of California, Inc.* (2007) 153 Cal.App.4th 659, 668-669 (*Performance Plastering*)). As nonparties to the assignment here, the Neras could not have voided it. (Rev. & Tax. Code, § 23304.1, subd. (a).) Only Liquidation Properties could have done so. The Neras' amended complaint did not allege any effort by Liquidation Properties to void the assignment. Absent any effort to void it, the assignment would have remained valid notwithstanding the suspension of Sadek's corporate status. (*Myrick v. O'Neill* (1939) 33 Cal.App.2d 644, 648 ["[A] voidable contract is one which may be rendered null at the option of one of the parties, *but is not void until so rendered.*"]; *Depner v. Joseph Zukin Blouses* (1936) 13 Cal.App.2d 124, 127-128 ["Inasmuch as the wronged party in the instant case has not by a judicial adjudication or otherwise declared the agreement . . . void, we are of the opinion that the said agreement remains in full legal force and effect."].) The Neras' contention that the suspension of Sadek's corporate status rendered the assignment void fails as a matter of law. (*Performance Plastering*, at p. 668.) This contention cannot support any of the causes of action in the amended complaint.

The Neras' contention that the suspension of Sadek's corporate status terminated Sadek's agency relationship with MERS, thus depriving MERS of authority to execute the assignment as Sadek's nominee, also fails. Civil Code section 2355 provides that an agency is terminated by (a) the expiration of its term, (b) the extinction of its subject, (c) the death of the agent, (d) the agent's renunciation of the agency, or (e) the incapacity of the agent to act as such. (Civ. Code, § 2355, subs. (a)-(e).) None of these events was alleged here, and the Neras did not claim that any could be alleged.

Civil Code section 2356, subdivision (a) provides that unless the power of an agent is coupled with an interest in the subject of the agency (in which case the agency is irrevocable), the agency can be terminated by (a) revocation by the principal, (b) the death of the principal, or (c) the incapacity of the principal to contract. (Civ. Code, § 2356, subs. (a)(1)-(3).) Here, there was no allegation that Sadek ever revoked MERS's agency. (Civ. Code, § 2356, subd. (a).) There were no facts alleged to support the conclusion that Sadek dissolved before the assignment was made (Civ. Code, § 2356, subd. (b)); the complaint instead alleged that the corporation was merely suspended when the deed of trust was assigned. Finally, suspension of Sadek's corporate status did not render it incapable of contracting.<sup>4</sup> (Civ. Code, § 2356, subd. (c).) On the contrary, by providing in Revenue and Taxation Code section 23304.1, subdivision (a) that the contracts of a suspended corporation are not void but voidable, the Legislature implicitly recognized that a suspended corporation may enter into contracts. (Rev. & Tax. Code, § 23304.1, subd. (a); see also Rev. & Tax. Code, § 23303 [providing that "Notwithstanding the provisions of Section 23301 or 23301.5, any corporation that transacts business or receives income within the period of its suspension or forfeiture shall be subject to tax under the provisions of this chapter."].) The Neras' contention that Sadek's suspension terminated its agency relationship with MERS and deprived MERS of authority to execute the assignment cannot support any of the causes of action in the amended complaint either.

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<sup>4</sup> The Neras' reliance on *Channel Lumber Co. v. Porter Simon* (2000) 78 Cal.App.4th 1222, in which the court noted that a principal "may not employ an agent to do that which the principal cannot do personally," is therefore misplaced. (*Id.* at p. 1228.) Their reliance on *Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361 is also misplaced. *Timberline* stands for the settled proposition that a suspended corporation may not prosecute or defend an action in a California court. (*Id.* at pp. 1365-1366 [holding that the court erred in denying the defendant's motion to vacate a renewal of judgment where "the [plaintiff] corporation's action in requesting the court to renew the judgment was an unauthorized act by a suspended corporation."].) *Timberline* says nothing about a suspended corporation's capacity to contract.

In their reply brief, the Neras argue that if MERS lacked authority to execute the assignment, then it also lacked authority to execute the substitution of trustee, and “the appointment of [Zieve] as trustee by MERS [was] void.” “Therefore,” they assert, “the foreclosure commenced, conducted and closed by the substitute trustee, [Zieve], was void.” We disagree. We have already determined that the suspension of Sadek’s corporate status did not terminate its agency relationship with MERS. (*Performance Plastering, supra*, 153 Cal.App.4th at p. 668.) The Neras’ contention that MERS lacked authority to execute the substitution of trustee cannot support any of the causes of action in the amended complaint.

As the Neras acknowledge, “[t]his appeal will win or lose based on the Assignment of the Deed of Trust. This entire case, in fact, will win or lose based on the Assignment of the Deed of Trust. If the Assignment is void, then [defendants] had no right to foreclose on the Neras’ property.” The converse is also true, however. If the assignment was not void, the foundation of the amended complaint was destroyed, and the demurrer was properly sustained.

The amended complaint was entirely founded on the claimed invalidity of the assignment. From that starting point, the Neras reasoned in their first and second causes of action that Liquidation Properties had no authority to foreclose on the property, that the foreclosure sale had to be set aside, and that title had to be quieted in the Neras. They contended in their third cause of action that the “wrongful foreclosure,” in turn, entitled them to a declaration “that none of the defendants, at the time of the recordation of [the notice of default, notice of trustee’s sale, assignment of the deed of trust, and trustee’s deed upon sale] has or had any right or interest in [the note, the deed of trust] or the Subject Real Property which authorized them, in fact or as a matter of law, to record such instruments.” It also entitled them, they concluded in their fourth cause of action, to an injunction “prohibiting [defendants] from any further legal or other activity regarding the Subject Real Property.” Because they were founded on a faulty legal theory, all of these

contentions fail. The trial court properly sustained defendants' demurrer to the Neras' first amended complaint.

## **2. Denial of Leave to Amend**

Claiming that the court abused its discretion by denying leave to amend, the Neras argue that it was "too early in the day" to deprive them of the right to do so. We disagree.

When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Blank, supra*, 39 Cal.3d at p. 318.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid.*) "Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of the pleading." (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636 (*Cooper*)). The showing need not be made in the trial court so long as it is made to the reviewing court. (*Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 731; Code Civ. Proc., § 472c.)

The Neras included a copy of their proposed verified second amended complaint when they filed their motion for reconsideration in the trial court, but they did not include a copy in the record on appeal. We are thus left to discern from their appellate briefs and from the record what that complaint might have alleged. The Neras' arguments in this court and their briefs in support of their motion for reconsideration make it clear that it included the same deficient claims, based on the same erroneous legal theories, that their former complaints asserted. Those claims cannot be cured by amendment because, as we have already determined, they lack foundation in the law.

### a. Fraud

In their motion for reconsideration, the Neras also “attempted to bring to the trial court’s attention new facts on possible fraudulent signatures of ‘robo signers’<sup>5</sup> on the Assignment of Deed of Trust, to bring home the point that a closer scrutiny of that document . . . [was] merited.” That motion was never heard, because the Neras withdrew it. Their counsel had, however, briefly alluded to fraud at the demurrer hearing. After confirming that the court was aware of “recent developments” regarding “messy foreclosure documentation in the 23 states where several big players . . . have suspended foreclosure,” counsel noted that a MERS vice-president signed the assignment of the Neras’ deed of trust on October 19, 2009, “presumably” in Virginia, where MERS is headquartered. But, counsel emphasized, the notarization reflected that the vice-president personally appeared before the notary *in Fulton County, Georgia* on that date and executed the assignment there. That made the assignment “really questionable,” counsel asserted, and “probably fraudulent because of all these things that’s [*sic*] going on.” “[O]n its face, Your Honor,” counsel argued, “this assignment is really sounding like fraud.”

To the extent the Neras argued that they could amend their complaint to plead fraud, the trial court properly rejected the argument. Fraud must be pleaded with “particularity.” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47.) Mere speculation that signatures on the assignment “*may have been forged*,” as the Neras argued in their motion for reconsideration, does not begin to approach this standard. (Italics added.) The rule that on appeal from the sustaining of a demurrer, we assume the truth of facts alleged in the complaint as well as any reasonable inferences that may be drawn therefrom has no application where, as here, the inferences suggested are

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<sup>5</sup> The Neras explained that “robo signers” “are employees who sign foreclosure forms without taking the required legal steps or even reading the paperwork. They simply act like robots. In some cases, documents may have been falsified.”

unreasonable. (*Miklosy v. Regents of the University of California* (2008) 44 Cal.4th 876, 883.) That MERS is headquartered in Virginia does not, without more, support an inference that, as the Neras asserted in their motion for reconsideration, the assignment “was signed at MERS (in Reston, Virginia) [but] notarized in Georgia.” Nor does it support an inference that the MERS vice-president’s signature was forged in Georgia or that the Georgia notary falsely attested under penalty of perjury that the vice-president personally appeared before her and executed the assignment on October 19, 2009. Neither the assignment itself nor anything else in the record states or even suggests that the document was executed in Virginia rather than in Georgia.

Even if we were to assume that the assignment was “robo signed,” the Neras’ attempt to plead fraud would fail. Resulting damage is one of the elements a plaintiff must plead to state a cause of action for fraud. (*Gil v. Bank of America, N.A.* (2006) 138 Cal.App.4th 1371, 1381.) “[T]he pleading must show a cause and effect relationship between the fraud and damages sought; otherwise no cause of action is stated.” (*Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508, 518, 520-521 (*Commonwealth Mortgage*).

The Neras cannot possibly allege resulting damage here. They have never denied that they defaulted on their loan. They do not allege that they cured the default; on the contrary, they conceded in their first amended complaint that they had not tendered the amount due. They have never denied that they received notice of default and notice of the foreclosure sale. On these facts, it cannot be inferred that they would not have lost their home to foreclosure but for the alleged “robo signing.” (*Commonwealth Mortgage, supra*, 211 Cal.App.3d at pp. 520-521; see *Bucy v. Aurora Loan Services* (S.D. Ohio, Mar. 18, 2011, No. 2:10-cv-1050) [2011 WL 1044045 at p. \*6] [“While this Court must draw all inferences in favor of Plaintiff, there is no reasonable inference to be drawn from the facts alleged that the [alleged ‘robo signing’] was the proximate cause of the foreclosure, where Plaintiff does not dispute the accuracy of any of the salient facts, such

as the amount owed or the amount in default.”].) The Neras have not shown that they can cure their deficient complaint to plead fraud. (*Cooper, supra*, 70 Cal.2d at p. 636.)

**b. Business and Professions Code Section 17200**

The Neras’ briefs in support of their motion for reconsideration also made vague mention of a “new cause of action” alleging a violation of Business and Professions Code section 17200 (the UCL), which was apparently based on the same allegations they claimed suggested fraud and additional “facts” derived from media reports about “robo signers” and “the foreclosure mess all over the country.” “The new facts and circumstances pertaining to the flawed foreclosure documents,” the Neras asserted without elaboration, “constitute business acts or practices that are unlawful, fraudulent, unfair, and deceptive.”

The UCL prohibits unfair competition, including “any unlawful, unfair or fraudulent business act or practice . . . .” (Bus. & Prof. Code, § 17200.) “‘Because . . . section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. “‘[A] practice is prohibited as ‘unfair’ or ‘deceptive’ even if not ‘unlawful’ and vice versa.’” [Citations.]” (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

Even if we assume that “robo signing” is an unfair business practice, the Neras’ attempt to plead a UCL cause of action would fail for lack of standing. “To satisfy the narrower standing requirements imposed by Proposition 64, a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice . . . .” (*Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, 993, quoting *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322.) Here, as we have explained (*ante*, at p. 10), the Neras cannot allege that they lost their home to foreclosure *as a result of* any “robo signing.” Thus, they cannot plead

a UCL cause of action, and denying them leave to amend was not an abuse of discretion. (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685 [“[L]eave to amend should *not* be granted where, in all probability, amendment would be futile.”].)

Arguing that the case was “in its birthing stage” and emphasizing the liberal policy of allowing amendment, the Neras claim that denying them leave to amend their *first* amended complaint was an abuse of discretion. We disagree. As the California Supreme Court has explained, “[n]othing in this policy of liberal allowance [of amendments] requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment.” (*HFH, Ltd. v. Superior Court of Los Angeles County* (1975) 15 Cal.3d 508, 513, fn. 3.) Here, the Neras have failed to indicate any way in which they can amend their complaint to properly allege the causes of action they attempted to assert or any others, and we find nothing in the record that suggests how they might do so. It follows that the trial court did not abuse its discretion in sustaining the demurrer without leave to amend. (*Blank, supra*, 39 Cal.3d at p. 318.)

### **B. Motion for Reconsideration**

The Neras claim the trial court “improperly deprived [them] of their right to seek a timely motion for reconsideration” by entering judgment before the 10-day period for filing such a motion expired.

Code of Civil Procedure section 1008 provides in relevant part that “[w]hen an application for an order has been made . . . to a court, and refused in whole or in part, or granted, . . . any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order.” (Code Civ. Proc., § 1008, subd. (a).)

The Neras timely filed their motion for reconsideration on October 25, 2010, ten days after they were served with notice of entry of the order sustaining the demurrer. As they discovered, however, the court had signed *both* the proposed order and the proposed judgment on October 15, 2010. Thus, while entry of the *order* started the clock running on the time to file a motion for reconsideration (Code Civ. Proc., § 1008, subd. (a)), simultaneous entry of the *judgment* divested the court of jurisdiction to rule on any such motion. (*APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181 (*APRI*).

The Neras have not directed our attention to any authority requiring a trial court to delay entering a judgment until the period for filing a motion for reconsideration has run, and we have found none. We acknowledge the court's statement in *APRI* that "[t]he trial court should not have signed the order of dismissal while the motion for reconsideration was pending. Under [Code of Civil Procedure] section 1008, plaintiff had 10 days from service of notice of entry of the order to bring her motion for reconsideration. The court should have considered the merits of the motion for reconsideration, and then, if it was still appropriate, signed the order of dismissal." (*APRI, supra*, 76 Cal.App.4th at p. 182.) But *APRI* is distinguishable. In that case, the motion for reconsideration was filed four days *before* the court signed the proposed order granting *APRI*'s motion to quash and dismissing it from the action. (*Id.* at p. 179.) Here, by contrast, there was no pending motion for reconsideration when the court signed the order of dismissal, and there is no suggestion that the court was aware the Neras were planning to file any such motion. More importantly, although the *APRI* court stated that the trial court "should not have signed the order of dismissal," it did not grant the plaintiff relief but instead issued a writ of mandate directing it to vacate its order granting the motion for reconsideration. (*Id.* at p. 186.)

Even if we assume that the trial court erred by entering judgment before the 10-day period for seeking reconsideration expired, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As we have explained, the demurrer to the first

amended complaint was properly sustained without leave to amend because the legal theories underlying the causes of action it purported to assert were wrong as a matter of law, and the Neras failed to show any way in which they could amend their defective pleading to state a valid cause of action. Thus, it was not reasonably probable that reconsideration, had it been granted, would have produced a more favorable outcome. (*Id.* at p. 836.)

### **III. Disposition**

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Walsh, J.\*

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