No. S165861

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

SUNSET SKY RANCH PILOTS ASSOCIATION, et al.
Petitioners/Plaintiffs and Appellants

v.

THE COUNTY OF SACRAMENTO, et al.
Defendants and Respondents

JOHN TAYLOR and TAYLOR & WILEY, et al.
Real Party in Interest and Respondents

After a Decision by the Court of Appeal
Third Appellate District (No. C055224)

Sacramento Superior Court (No. 06CS00265)
Hon. Jack V. Sapunor, Presiding

REPLY BRIEF ON THE MERITS

TAYLOR & WILEY

John M. Taylor, SBN 98810
Kate Leary Wheatley, SBN 222786
Matthew S. Keasling, SBN 239507
2870 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833
Telephone: (916) 929-5545
Facsimile: (916) 929-0283

Attorneys for Respondents/Real Parties in Interest
JOHN TAYLOR, TAYLOR & WILEY

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Attorneys for Respondents/Real Parties in Interest
JOHN TAYLOR, TAYLOR & WILEY

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INTRODUCTION

Appellants Sunset Skyranch Pilots' Association (Appellants) claim that the County of Sacramento (County) was required to prepare an initial study under CEQA before denying Appellants' application for renewal of an expired conditional use permit (CUP) for the Sunset Skyranch Airport (Airport). In their Answer Brief on the Merits, Appellants argue that the denial of a CUP renewal application for an existing airport will "upset the status quo" because the cessation of airport operations will result in changes to the physical environment, and thus the denial decision must undergo environmental analysis. (AB at 13, 15.)[1] Appellants' argument misses the mark but their confusion is somewhat understandable given the distinct factual and legal setting of this case. Had this case simply involved the denial of an initial request for a CUP, as opposed to the denial of a request to renew an expired CUP, it is doubtful that this matter would be before this Court. This is because the CUP renewal situation involves a unique "wrinkle" not otherwise present: namely, the agency is deciding whether or not to allow an activity which has already been physically occurring to continue. The contention advanced in this brief is that the mere fact that physical activity has already been occurring is irrelevant in determining whether there is a "project," as defined by CEQA, in the CUP renewal context. The dispositive threshold inquiry is not simply, as Appellants suggest, whether the public agency's decision may result in changes to the physical environment (or physical status quo) but rather whether the agency's decision alters the "legal status quo," meaning the applicant's legal right to use its property in a given fashion as reflected in a CUP.

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[1] Citations in this brief are abbreviated as follows: administrative record - "AR [volume]:[page]"; trial court's file (record on appeal) - "TCF [volume]:[page(s)]"; opening brief on the merits – "OB"; answer brief on the merits – "AB"; slip opinion – "Slip Op."

Where, as here, an agency decision does not change the legal rights of an applicant by issuing a CUP renewal, but, instead denies that renewal and thereby retains the existing legal status quo, CEQA analysis is not required: a reality that is borne out by the policy behind CEQA and the definition of a "project" under the Act.

ARGUMENT

I. The Only Action Taken By The Board Of Supervisors Was To Deny Renewal Of An Already Expired CUP.

Much, if not virtually all, of this case seems to revolve around what the Sacramento County Board of Supervisors (Board) actually did when it denied the requested CUP renewal. The Appellants vigorously argue that the action taken was an affirmative action to close the Airport since, as the Third District Court of Appeal (Court of Appeal) noted, the eventual byproduct of nonrenewal would be enforcement of the zoning code, i.e., the shutting down of the Airport. (Slip Op. at 45.) In one of its headers, the Appellants accordingly boldly proclaim that, "The Decision to Close the Airport Was the "Project" Under CEQA." (AB at 11.) Obviously the matter is presented as if it is beyond question that the actual decision was for the closure of the Airport, even though that was not the case. In a similar vein, the Appellants, at the conclusion of one section of their Answer Brief, announce that "Closure of the Airport was a project proposed by, and approved by the County without study of the likely environmental consequences of that action." (*Id.* at 15-16) The reality, however, is that the Board never even "proposed" closure of the Airport nor "approved" closure. (OB at 4-5.) One will search the record of the proceedings before the Board in vain to find any evidence whatsoever in support of either of these assertions.

What then did the Board actually do? It simply denied a request to renew an already expired CUP to operate a private airport. (*Id.*)[2] To review briefly: although the Airport has apparently, in one form or another, been operating since 1934, it was determined in 1999 that it was operating illegally since it did not have a CUP. (TCF I:59, 69-70.) This proposition incidentally was the byproduct of extensive litigation, wherein the Court of Appeal ultimately concluded that the Airport did not have a vested right to operate and that a CUP was required. (*Id.*) In any event, the Airport owner at that time sought, and successfully obtained, a CUP from the County of Sacramento (County). (AR 1:007.) That permit, however, contained a five-year termination provision, with the result being that it was only valid for a period of five years. (*Id.*) Realizing that their permit was about to expire, Appellants filed an application on September 22, 2004 requesting renewal so that they could operate legally following the expiration of the 1999 CUP. (AR 1:008.) They were though unsuccessful in that effort, with the Board ultimately determining, by a vote of four to one, to deny the renewal request. (AR 8:971-972.) Critical to the Board's decision making process was that much residential development had occurred since 1999 around the Airport and that the Elk Grove Unified School District was having a difficult time locating an elementary school to service that development due to the presence of the Airport. (AR 1:008.) Put simply, the Board determined, as a basic proposition of land use policy, that the Airport was no longer an appropriate use and accordingly elected to deny the application for a CUP renewal.

As these background facts clearly indicate, the Board was concerned solely with whether to renew an expired CUP, nothing more and nothing less. That is what the application request before the Board entailed and it was that matter alone that their motion to deny addressed. (*City of Ukiah v. County of Mendocino* (1987)

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[2] See OB at 4-5 for excerpts from the administrative record of proceedings demonstrating that the sole issue before the Board was whether to renew the Airport's expired CUP.

196 Cal.App.3d 47, 53 (noting that, in determining whether a "project" exists for CEQA purposes, public agency should only look at matters "subject to approval" (*i.e.*, matters under review by the agency)).) Although it may be legally useful for the Appellants to recast that decision, they cannot, based upon the actual record, legitimately do so. It is that record that must be controlling and not how the Appellants seek to augment it with matters which were not before the Board at the time it rendered its decision.

II. The Legal Status Quo At The Time The Board Of Supervisors Acted Did Not Allow For Operation Of An Airport.

In their brief, Appellants extensively discuss the notion of the status quo, assuming that the legal status quo includes the operating Airport. (AB at 15-17.) That assumption, however, is erroneous. As of October 12, 2004 the CUP granted in 1999 had expired, rendering the Airport an illegal use. (AR 1:143.) That is to say, after October 12, 2004, the Airport no longer legally existed even though physical operations continued. (See Zoning Code of Sac. County, Title II, Chapter 1, § 201-02 (hereinafter "Zoning Code"), noting that airports are allowed in an AG-80 zone only with a CUP.)[3] Put bluntly, the Airport was no longer supposed to be operating and that legal fact constituted the legal status quo, not what physically might be occurring.

III. Consideration Of The Proposed CUP Renewal Was De Novo.

The natural consequence of the legal status quo was that the Appellants were required to obtain a new CUP to legally operate the Airport. (*Id.*) That is why they requested a renewal of the CUP, a fact which reflects that they understood the legal status quo. It is also why the Board, in considering the renewal request, was

[3] This portion of the Zoning Code is attached as Exhibit A to Real Parties' Opening Brief.

doing so de novo in the sense that it was completely free to either renew or deny renewal of the expired CUP. (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 197 ("[A] conditional use permit ... is, by definition, discretionary.") In other words, it did not in any way have to consider the previously issued permit in rendering its decision for the simple reason that the earlier permit had expired and, hence, no longer legally existed.[4] In reality then, the Board was considering the CUP renewal application as if the 1999 CUP had never existed, that is to say, as if it were considering the matter for the first time. Furthermore, the byproduct of deciding to deny the requested CUP renewal would be simply to retain the legal status quo: namely, a condition wherein no airport was allowed.

IV. The Denial Decision Involved In This Case Resulted In Retention Of The Legal Status Quo And Hence Environmental Analysis Would Have Served No Useful Purpose.

Nothing changed as a result of the Board's decision to deny the requested renewal of the expired CUP. The Airport was operating illegally before that decision was rendered and it was operating illegally after it was rendered. (Zoning Code, Title II, Chapter 1, § 201-02.) From the standpoint of altering the legal status quo, the Board's denial decision was a non-event, which generated no environmental impacts whatsoever. In reality, all the Board actually did was maintain what was already occurring by choosing not to alter the then existing illegal status of the Airport. Under such circumstances, environmental impact analysis would have served no useful purpose since it would have consisted of noting that nothing from an environmental standpoint could possibly occur since the legal status quo was being maintained. Put directly, the Board hardly needed to

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[4] See *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1530 ("*Goat Hill Tavern*"), noting the general rule that "...when a conditional use permit 'expires,' the property owner must renew the conditional use permit."

be informed that nothing would occur as a result of their decision to deny renewal of the already expired CUP. Such a ridiculous gesture would bear no relationship to the legitimate and important information provision function behind CEQA, but would rather simply be an exercise in silliness.

V. Denial Of A CUP Request Will Always Result In Retention Of The Legal Status Quo And Hence Not Warrant Environmental Analysis As Mandated By CEQA.

More generically, no denial of a CUP renewal request can ever result in environmental impacts warranting analysis. This is because any CUP renewal request will, by definition, involve a situation in which the legal status quo, from which CEQA analysis must begin, is no permit. Put slightly differently, no applicant will ever seek a CUP renewal unless the previous permit has or is about to expire by its own terms. (See, e.g., *Goat Hill Tavern, supra,* 6 Cal.App.4th at 1530.) The starting point for analysis is accordingly no permit for the simple reason that any previously issued CUP will no longer exist at the time renewal becomes necessary. A denial decision will accordingly always result in retention of the already existing situation, that is, no authorized CUP.

A potential confusing "wrinkle" to this overall situation arises, however, because, in the CUP renewal context, something will almost always already be physically occurring. In other words, the activity which the project applicant is seeking authorization to continue will usually already be taking place, otherwise there would be nothing for which to seek renewal. This factor should not, however, be used to confuse the conclusion that a denial decision of a CUP renewal request does not change the existing legal status quo. Critical in this regard is that any physical activity that is occurring is not, after expiration of the existing CUP, that which is legally authorized. The dispositive factor then is that which is legally authorized, not that which is occurring pursuant to a CUP which is expired or about to expire. Once this important distinction is realized, it should

be apparent that ongoing physical activity from a CUP for which a renewal is sought is irrelevant to the legal status quo following the actual termination of that permit. Furthermore, it is that legal status quo, and not ongoing physical activity which is or is about to become illegal, which should establish the benchmark to be employed in assessing whether the agency's action is of the type subject to CEQA.

VI. The Definition Of Project Contained In CEQA And The CEQA Guidelines Reflects The Notion That, Where The Legal Status Quo Is Not Changed, CEQA Analysis Is Not Required.

The threshold for the invocation of the environmental information generation requirements of CEQA is formed in the definition of "project" as contained in the Act. (Cal. Code Regs., tit. 14, § 15060, subds. (b) and (c) ("CEQA Guidelines").) That definition, in fact, provides essentially that when impacts will occur as a result of agency action, environmental analysis is required and further that, where nothing is occurring, the provisions of the Act are not invoked. (Pub. Resources Code, § 21065.) As such, it is reflective of the overall purpose of the Act: namely, to assure that decision makers are informed as to the environmental consequences which will stem from their decision to allow a project to proceed. (*Id.*, § 21002.1; see generally, Grant McConnell, Private Power and American Democracy (1966).) It is correspondingly reflective of the notion that, where there will be no such impacts because nothing is occurring, analysis is not required since there will be nothing about which decision makers need to be informed.

A simple review of the Act's definition of project confirms that the underlying purpose of CEQA is embodied in that definitional provision. That provision provides as follows:

> "Project" means an activity which may cause direct physical change in the environment, or a reasonably foreseeable indirect change in the environment, and which is any of the following:

(a) An activity directly undertaken by any public agency.

(b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agency.

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. (Pub. Resources Code, § 21065.)

Initially, it should be noted that this definition of "project" revolves around the concept of "activity" which causes "change" in the environment. In other words, it includes only agency-authorized activities which will actually "change" something about the environment. Activities which do not alter the environment and thereby bring about environmental "change" are not within the definition and are thus not within the purview of CEQA. More directly: the Act pertains only to those agency activities involving "change" to the environment because it is only in such circumstances that decision makers will be benefited by the provision of environmental analysis. (*Id.*) As such, it reflects the overall purpose of the Act to assure that decision makers have information about the environmental consequences of contemplated actions, which it is quite different than providing information where nothing adverse can occur because the legal status quo will remain unchanged. (*Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 254-256.)

VII. The Denial Of The CUP Renewal Involved In This Case Did Not Change The Legal Status Quo And Was Not A Project As Defined By CEQA.

What about the legal status quo changed when the CUP renewal involved in this case was denied by the Board? The answer is absolutely nothing. Before the

CUP renewal was denied the Airport was operating illegally; after the CUP was denied the Airport was operating illegally. (Zoning Code, Title II, Chapter § 1 201-02.) The denial decision accordingly represented a decision not to alter the legal status quo. The byproduct was that the decision to deny the CUP renewal resulted in no environmental impacts, or anything else for that matter, since the decision clearly and unequivocally resulted in retention of the already existing situation. Nothing can ever result in anything other than nothing. That being the case, there was no need for environmental analysis to be generated for the decision makers and the failure to do so was not inconsistent with the environmental information generation purpose underlying CEQA. Nor actually would it even have been possible to generate such nonexistent information.

Beyond these observations, the "project" definition employed in CEQA clearly did not and does not include the denial decision rendered by the Board. (*Main San Gabriel Basin Watermaster v. State Water Resources Control Bd.* (1993) 12 Cal.App.4th 1371, 1379-1380 ("*Main San Gabriel*").) That decision was, once again, to "change" nothing whatsoever, but rather to retain the legal status quo. (AR 1:004; see also AR 8:867.)[5] Such a circumstance does not invoke the definition of "project" contained in the Act which is premised upon the notion that something will change as a result of the decision rendered. (Pub. Resources Code,

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[5] The following excerpt from the record of proceedings makes clear that the Board understood that their denial decision would not change the legal status quo:

> SUPERVISOR DICKINSON: Isn't the status quo that the airport shouldn't be operating today?
> MR. WINBERRY: No.
> SUPERVISOR DICKINSON: The use permit ran out after five years. If you wanted to make this argument...it should have been made in 1999 that there should have been an environmental document to consider what the impacts would be when the use permit expired.

(AR 8:867-868.)

§ 21065.) In this case, however, nothing was going to change since the legal status quo was to remain the same. The result was, quite simply, that an illegally operating airport remained an illegally operating airport. Put otherwise, what the Airport was not allowed to do it continued to not be allowed to do. And, not without significance, the County remained free to ministerially shut down the Airport through a zoning code enforcement action just as it had been before the denial decision since the prior CUP had expired. (Zoning Code, Title I, Chapter 15, § 115-08.) Nothing at all had changed.

VIII. Zoning Code Enforcement, CLUP Overlay Removal And General Plan Adjustment Were Not Part Of The Decision Rendered By The Board But Rather Were The Administrative Consequences Of The Expiration Of The 1999 CUP.

To be more specific, following the decision not to renew the expired CUP, the County remained positioned, as it had been since the expiration of the 1999 CUP on October 12, 2004, to commence zoning code enforcement and shut down the Airport. (*Id.*) It also remained positioned, again, as it had been since October 12, 2004, to request that the Airport Land Use Commission (ALUC) remove the Comprehensive Land Use Plan (CLUP) overlay designations surrounding the Airport and to amend its own General Plan to reflect that the Airport no longer existed. (AR 2:171-175.) These future actions, however, were not part of the decision to deny renewal of the expired CUP as the Appellants argue and as the Court of Appeal, at least with respect to closure as a result of zoning code enforcement, concluded. (AB at 12-13, 16; Slip Op. at 45.) They are instead the administrative consequences of the expiration of the 1999 CUP which rendered the Airport an illegal use. The denial decision simply reflected a decision by the Board not to alter that situation, thereby retaining the status quo.

To elaborate: zoning code enforcement is available anytime that there is a zoning code violation, as there was in this case after October 12, 2004. (Zoning

Code, Title I, Chapter 15, § 115-08.) It simply involves the enforcement of the law, as would be the case with any normal criminal proceeding or other legal infraction. In this case, the legal infraction arose as a result of the expiration of the 1999 CUP and it is that expiration which will give rise to any enforcement action which may proceed. (*Id.*) Stated otherwise, any enforcement action will be the administrative consequence of the expiration of the 1999 CUP and follows naturally therefrom and not from the decision to deny the renewal application. Similarly, the CLUP lines became an inaccurate land use depiction following the expiration of the 1999 CUP as did the General Plan references stemming from the existence of the Airport. Those lines and references, which are intended to reflect the presence of airports on land use planning documents, follow the existence or non-existence of an airport. (AR 2:171-175.) They are not, in other words, intended themselves to reflect a decision to allow an airport to exist, but rather to assure appropriate and compatible land use planning so long as one does exist. (See *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 384, noting that a CLUP is incorporated into local land use plans to insure compatibility with active aircraft operations.) In any event, those lines and references became obsolete on October 12, 2004 and any actions in the future to amend the CLUP and General Plan to reflect that fact will stem from that expiration, not the denial of the renewal request. (AR 1:143-147.) That is to say, they too are the administrative consequences of the expiration of the 1999 CUP.

IX. The Court Of Appeal Inappropriately Employed The "Whole Of The Action" Doctrine In Concluding That The Action Before The Board Consisted Of A Project To Close The Airport.

The critical error made by the Court of Appeal involved its conclusion that eventual possible closure of the Airport, which actually would be only the administrative consequence of the decision to deny the renewal request, was part of the "whole of the action" and was thus subject to CEQA analysis. (Slip Op. at

45.) In that regard it should be noted that, in determining whether an activity constitutes a "project" for CEQA purposes, the "whole of the action" concept defines the scope of the activity to be analyzed. As one court recently noted: "Before the question whether an activity is a project can be addressed, the question concerning which acts to include and exclude from the scope of the activity must be answered. Which acts, that is, constitute the 'whole of an action' for purposes of determining the scope of a potential project?" (*Tuolumne Co. Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1223.) This inquiry is a question of law. (*Id.* at 1224.)

CEQA's mandate that the "whole of the action" be considered when determining the scope of a project cannot though be considered in the abstract. As Real Parties indicated in their Opening Brief, the "whole of an action" concept only comes into play when a "project" is "approved" or proposed to be carried out by a public agency. (OB at 17.)[6] However, in this case, there was no project ever approved since the denial of a CUP does not constitute a project because it does not result in any alteration of the legal status quo. Nor is there anything in the record which even remotely suggests that closure was an independent project which was under consideration. Clearly, any references made at the Board's hearing regarding future zoning enforcement were simply statements as to what might eventually administratively occur and made use of the notion of "winding up" airport activities. (See generally AR 8:156-165.) Most importantly, no vote was ever taken to either close the Airport or to commence zoning enforcement. (*Id.*) As such, the Court of Appeals' conclusion that those matters were part of the project before the Board – indeed apparently were themselves the project – clearly

[6] To be specific: CEQA applies to "discretionary projects proposed to be carried out or *approved* by public agencies." (Pub. Resources Code, § 21080, subd. (a), emphasis added.) "The term 'project' refers to the activity that is being *approved* ... by governmental agencies." (CEQA Guidelines, § 15378, subd. (c), emphasis added.)

involved a completely unwarranted and unprecedented extension of the "whole of the action" doctrine which should be rejected.

X. A Statutory Exemption May Not Be Overcome.

The Appellants seek to argue that, even if project denials are statutorily exempt, that exemption is overcome because the alleged project will alter the physical status quo. (AB at 16-17.) The Appellant is, however, wrong on a variety of fronts, one of which involves the fact that statutory exemptions, unlike categorical exemptions, cannot be refuted by a showing of potentially significant impacts. (Pub. Resources Code, § 21084, subd. (a); CEQA Guidelines, § 15300.2, subd. (c); see also *Western Mun. Water Dist. of Riverside County v. Super.Ct. of San Bernardino County* (1986) 187 Cal. App. 3d 1104, 1113.) The law on this matter is well settled and has even been clearly addressed by this Court. (*Napa Valley Wine Train, Inc. v. Pub. Util. Com.* (1990) 50 Cal 3d 370, 381-382; see also *Main San Gabriel, supra,* 12 Cal.App.4th at 1380-1384.)

CONCLUSION

For the foregoing reasons, this Court should determine (1) that no project was involved in this case and (2) that, even if there was a project, it was statutorily exempt.

December 22, 2008

TAYLOR & WILEY

By: _____ for
John M. Taylor
Attorney for Respondents and
Real Parties in Interest

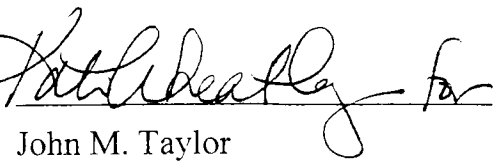
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of this brief contains 4,186 words, as counted by the Microsoft Word 2003 word-processing program used to generate this brief.

December 22, 2008

TAYLOR & WILEY

By: 

John M. Taylor

Attorney for Respondents and
Real Parties in Interest

PROOF OF SERVICE

Sunset Sky Ranch Pilots Assn., et al. v. County of Sacramento, et al.
Supreme Court Case No. S165861
(Court of Appeal Case No. C055224;
Sacramento County Superior Court Case No. 06CS00265)

I, Kate Ogata, declare:

I am now and at all times mentioned herein have been over the age of eighteen years, employed in Sacramento County, California, and not a party to the within action or cause; that my business address is 2870 Gateway Oaks Drive, Suite 200, Sacramento, California 95833. I am readily familiar with the County's business practice for collection and processing of correspondence for mailing with the United States Postal service.

On December 22, 2008, I served a copy of the attached:

Reply Brief on the Merits

X___ by placing said copies in an envelope addressed to the parties and/or their attorneys named below, which envelopes were then sealed, with postage fully prepaid thereon, and placed for collection and mailing at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service at Sacramento, California, on the above-referenced date in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 22, 2008, at Sacramento, California.

Kate Ogata

Sunset Sky Ranch Pilots Assn., et al. v. County of Sacramento, et al.
Supreme Court Case No. S165861

Court of Appeal Case No. C055224
(Sacramento County Superior Court Case No. 06CS00265)

PROOF OF SERVICE LIST

Lanny T. Winberry LAW OFFICE OF LANNY T. WINBERRY 8001 Folsom Blvd., Suite 100 Sacramento, CA 95826 Telephone: (916) 386-4423 Facsimile: (916) 386-8952	Attorney for Appellants
Krista C. Whitman OFFICE OF THE COUNTY COUNSEL 700 H Street, Suite 2650 Sacramento, CA 95814 Telephone: (916) 874-5100	Attorney for Respondents
Court of Appeal, State of California (1 copy) Third Appellate District 900 N Street, Suite 400 Sacramento, CA 95814	(Hand delivered)
Hon. Jack V. Sapunor (1 copy) Sacramento Superior Court, Dept. 20 720 Ninth Street Sacramento, CA 95814	