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Partners LP, John Vidovich, Michael Vidovich
and Kathryn Tomaino

CONFORMED COPY
ORIGINAL FILED ON

SEP 21 2016

JEFFREY E. LEWIS, CLERK OF COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS
IC DEPUTY

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF KINGS

13 GROW LAND AND WATER LLC, a
California limited liability company (f/k/a
14 LIBERTY LAND AND WATER COMPANY
LLC); and KINGS COUNTY VENTURES,
15 LLC, a California limited liability company,
16 Plaintiff,
17 v.
18 McCARTHY FAMILY FARMS, INC., et al.,
19 Defendant.

Case No. 09 C 0378

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO RELEASE THE
BOND, OR IN THE ALTERNATIVE, TO
REDUCE THE BOND AND REQUEST
FOR SANCTIONS**

Date: September 28, 2016
Time: 8:15 a.m.
Dept.: 5

The Hon. Donna Tarter

20 AND RELATED CROSS-ACTION.

21 TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD HEREIN:
22 NOTICE IS HEREBY GIVEN that on September 28, 2016, at 8:15 a.m., or as soon thereafter
23 as the matter may be heard, in Department 5 of the Kings County Superior Court, located at 1640
24 Kings County Drive, Hanford, California 93230, Defendants SANDRIDGE PARTNERS GP,
25 SANDRIDGE PARTNERS LP, JOHN VIDOVICH, MICHAEL VIDOVICH, and KATHRYN
26 TOMAINO (collectively the "Defendants") will and hereby do move this Court for an order granting
27 this Motion to Release the Bond, or in the Alternative, Reduce the Bond. The bond should be released
28

1 or reduced as the judgment it was put in place to protect has been reversed by the Court of Appeal. In
2 the alternative, the bond should be significantly reduced as the bond is excessive, and requiring the
3 bond to remain in place would constitute a manifest injustice, and cause significant harm to
4 Defendants.

5 PLEASE TAKE FURTHER NOTICE that at the above date and time, Defendants will also
6 move this Court to award sanctions pursuant to Code of Civil Procedure section 128.5 against
7 Plaintiffs GROW LAND AND WATER LLC (f/k/a LIBERTY LAND AND WATER COMPANY
8 LLC) and KINGS COUNTY VENTURES, LLC, ("Plaintiffs") for their bad-faith refusal to stipulate
9 to the release of the bond, despite the judgment having been reversed.

10 This Motion is based on this Notice of Motion and Motion, the supporting Memorandum of
11 Points and Authorities, the declaration of Scott M. Reddie, the declaration of John Vidovich, all
12 records and papers on file with the Court herein, any reply filed by Defendants, and upon such
13 evidence and other matters as may be presented to the Court at the time of the hearing on the Motion.

14
15 Dated: September 19, 2016

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

16
17
18 By: 

Marshall C. Whitney
Laura A. Wolfe
Scott M. Reddie

Attorneys for Sandridge Partners GP, Sandridge
Partners LP, John Vidovich, Michael Vidovich and
Kathryn Tomaino

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

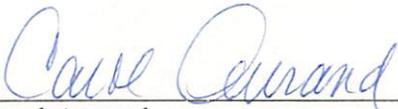
On September 21, 2016, I served true copies of the following document(s) described as **DEFENDANTS' NOTICE OF MOTION AND MOTION TO RELEASE THE BOND, OR IN THE ALTERNATIVE, REDUCE THE BOND AND REQUEST FOR SANCTIONS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 21, 2016, at Fresno, California.



Carol Aurand

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SERVICE LIST
Grow Land v. McCarthy Family Farms
Kings County Superior Court Case No. 9C0378

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REDUCE THE BOND AND REQUEST
FOR SANCTIONS**

Date: September 28, 2016
Time: 8:15 a.m.
Dept.: 5

The Hon. Donna Tarter

21 AND RELATED CROSS-ACTION.

22 Defendants Sandridge Partners GP, Sandridge Partners LP, John Vidovich, Michael Vidovich,
23 and Kathryn Tomaino (collectively "Defendants") hereby submit this Memorandum of Points and
24 Authorities in Support of their Motion to Release the Bond posted on appeal and Request for
25 Sanctions.

26 **I.**
27 **INTRODUCTION**

28 After an extensive trial ending with a judgment against Defendants in the amount of \$76.4

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RELEASE THE BOND,
OR IN THE ALTERNATIVE, REDUCE THE BOND AND REQUEST FOR SANCTIONS**

1 million, Defendants filed an appeal at the Fifth District Court of Appeal. In an effort to avoid having
2 to post a massive and expensive bond to stay enforcement of the \$76.4 million judgment pending
3 appeal, Defendants offered to pay Plaintiffs \$3.8 million, without any right of reimbursement or
4 recoupment, in exchange for a stipulated stay of enforcement of the judgment pending appeal, along
5 with a promise to promptly pay any award that survived the appeal. Plaintiffs rejected the offer out of
6 hand, forcing Defendants to obtain a costly undertaking in the principal amount of \$118 million,
7 which was obtained by taking out loans with unattractive terms and tying up critical assets that affect
8 operations for Defendants.

9 Defendants were successful on their appeal: “The compensatory and punitive damages awards
10 are reversed and the matter remanded for further proceedings consistent with this opinion.” The only
11 damage amount that survived the appeal is the option payments Plaintiffs made totaling \$354,000, a
12 far cry from the judgment amount of \$76.4 million. And, that amount is less than the \$1.1 million
13 offset that Defendants are entitled to as a result of the Michael Nordstrom settlement. The bulk of the
14 damage award—consisting of the fair market value damages of at least \$66 million—cannot be
15 retried. The retrial on remand is limited to the damage components other than the fair market value
16 damages.

17 The Court of Appeal Opinion and Disposition—which is the judgment of the Court of
18 Appeal—became “final” on August 31, 2016. As a result, there is no longer an effective judgment,
19 much less a judgment that can be “enforced.” The fact that the parties have filed Petitions for Review
20 with the California Supreme Court does not in any way change the fact that the Opinion and
21 Disposition are now final and that there is no longer any enforceable judgment. The fact that a
22 remittitur has not yet issued is also of no consequence to the finality of the Court of Appeal Opinion
23 and Disposition because the remittitur simply “notifies” the trial court about the finality of the Opinion
24 and Disposition and reverts jurisdiction in the trial court. It has nothing to do with the finality of the
25 Court of Appeal Opinion. If, e.g., there were no bond in place right now, it would be of no
26 consequence to Defendants because there is no longer a judgment that can be enforced. As a result of
27 the finality of the Court of Appeal Opinion and Disposition, the \$118 million bond no longer serves
28 the purpose for which the bond was given and is not necessary to stay execution of any judgment.

1 Thus, it should be immediately released in accordance with Code of Civil Procedure section 995.430,
2 subdivision (b).

3 Every *day* that the bond remains in effect, it is costing Defendants approximately \$10,504 in
4 fees and interest. That amounts to approximately \$3.83 million per year. That is just the actual out of
5 pocket costs, and does not include any lost opportunity costs or the financial impact the bond is having
6 on business operations. As a result, on a number of occasions since the Opinion was issued on August
7 1, 2016, Defendants have requested Plaintiffs to stipulate to a release of the bond. Although the bond
8 clearly no longer serves the purpose for which it was obtained and the Court of Appeal Opinion and
9 Disposition are now final, Plaintiffs continue to refuse to stipulate to a release of the \$118 million
10 bond, which has forced Defendants to file this Motion and incur even more unnecessary expenses.
11 Plaintiffs' refusal to stipulate to a release of a bond which no longer serves any purpose can only be
12 seen as punitive in nature. Therefore, as part of this Motion, Defendants are also seeking from
13 Plaintiffs the interest and expense costs totaling \$10,504 per day that have continued to accrue on a
14 daily basis since the Court of Appeal Opinion became final on August 31, 2016.

15 **II.**
16 **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

17 After a lengthy trial, judgment was awarded in favor of Plaintiffs in the amount of \$76.4
18 million, consisting of \$73.4 million in compensatory damages, and \$3 million in punitive damages.
19 (Declaration of Scott M. Reddie ["SMR Dec."] ¶ 3.) On July 11, 2014, Defendants filed their Notice
20 of Appeal. (SMR Dec. ¶ 3.)

21 Because Defendants believed they had a strong case on appeal and believed the massive
22 judgment would be reversed, it was important to Defendants to obtain an undertaking/bond so that
23 judgment enforcement would be stayed pending the appeal. Sandridge was charged with obtaining a
24 bond to stay judgment enforcement. Because Sandridge is a small family owned real estate
25 partnership, many of its assets are not liquid and it is heavily dependent on lender financing to conduct
26 ongoing business. (Declaration of John T. Vidovich ["Vidovich Dec."] ¶ 5.) Accordingly, having to
27 provide collateral and incur other costs to secure the minimum \$118 million undertaking on appeal
28 was excessively costly. (Vidovich Dec. ¶ 5.)

1 On the other hand, given Sandridge’s assets, it could credibly assure Plaintiffs that it would
2 pay any final judgment in this matter. Moreover, Plaintiffs had obtained at least \$66.4 million in
3 FMV damages based on a claim that had a high likelihood of reversal—and now has been reversed.
4 For these reasons, it made sense not to incur the considerable cost to bond damages that were unlikely
5 to survive appeal and that Sandridge would pay in any event if they somehow survived appellate
6 review.

7 To attempt to avoid the substantial—but unnecessary—burden of an appeal bond, Sandridge
8 made plaintiffs an eminently reasonable proposal after judgment was entered: it offered to pay
9 Plaintiffs \$3.8 million, without any right of reimbursement or recoupment—the full amount of the
10 attorney’s fees plaintiffs then were seeking—in exchange for a stipulated stay of enforcement of the
11 judgment pending appeal, until 30 days after issuance of the remittitur, along with a promise to
12 promptly pay any award that survived the appeal. (SMR Dec. ¶ 5.) The stipulated stay would have
13 obviated the need for Sandridge and the other Defendants to post an undertaking on appeal and tie up
14 critical and significant assets. (Vidovich Dec. ¶¶ 5-6; SMR Dec. ¶ 5.) After Defendants made that
15 proposal, Plaintiffs rejected it. (SMR Dec. ¶ 6.) To be sure that the substantial costs of an appeal
16 bond were not incurred unnecessarily, Defendants reiterated their proposal, this time noting that those
17 costs would be potentially recoverable in the event of a reversal on appeal. (SMR Dec. ¶ 6.) Plaintiffs
18 not only again rejected the proposal, they mocked Defendants for inquiring again whether these
19 substantial costs could be avoided: “Maybe Plaintiffs’ prior response to Mr. Vidovich’s “offer” was
20 ambiguous. It was “NO” then and the response to the recent written repetition with the addition of a
21 pointless threat remains “NO.” If Mr. Vidovich does not understand “NO” please advise how I may
22 be more specific.” (SMR Dec. ¶ 6.)

23 Due to Plaintiffs’ rejection of the offer, Sandridge was required to obtain an undertaking to
24 stay enforcement of the judgment pending appeal. Obtaining that undertaking under a tight deadline
25 was itself an expensive process, which involved taking loans with unattractive terms and conditions
26 that severely affect Sandridge’s operations. (Vidovich Dec. ¶ 6.) And although Sandridge obtained
27 the \$118 million bond, doing so tied up needed assets, making it virtually impossible for Sandridge to
28 reconfigure its water supplies to attain sustainability while going through the normal borrowing on its

1 crop lines. (Vidovich Dec. ¶ 6.) The undertaking was posted on July 21, 2014, in the amount of \$118
2 million. (Vidovich Dec. ¶ 6.) The bond was issued by co-sureties U.S. Specialty Insurance Company
3 and Munich Reinsurance America, Inc. (Vidovich Dec. ¶ 6.)

4 During the appellate briefing, Plaintiffs requested a number of extensions of time, which
5 Defendants did not initially oppose even though interest was accruing on the judgment at the rate of
6 approximately \$655,109.76 per month and interest and expenses related to the bond were also
7 continuing to accrue. (SMR Dec. ¶ 8.) However, when Plaintiffs sought an additional 30-day
8 extension of time (after already having received 92 days of extensions), Defendants made a perfectly
9 reasonable request. Defendants would agree not to oppose that application on condition that Plaintiffs
10 waive the accrual of post-judgment interest during the extended 30-day period (\$655,109.76) so
11 Defendants would not be forced to bear the financial cost of accommodating Plaintiffs. Plaintiffs
12 refused. (SMR Dec. ¶ 8.) The Court of Appeal therefore denied the application unless the parties
13 filed a stipulation, which, because of Plaintiffs' refusal, never occurred. (SMR Dec. ¶ 9.)

14 Following all briefing on appeal, calendar priority was granted by the Fifth District, and oral
15 argument was held on July 7, 2016. (SMR Dec. ¶ 10.) The Fifth District issued its Opinion and
16 Disposition on August 1, 2016. (SMR Dec. ¶ 10.) The Opinion reversed the compensatory and
17 punitive damages awards, and remanded the matter for further proceedings consistent with the
18 Opinion. (SMR Dec. ¶ 10.)

19 Two days after the Court of Appeal filed its Opinion setting aside the damages awards and
20 substantially limiting Plaintiffs' potential recovery on remand, Defendants wrote Plaintiffs, asking
21 them to stipulate to cancellation of the appeal bond so Defendants could avoid incurring further
22 unnecessary costs. (SMR Dec. ¶ 11.) A few days later, Plaintiffs rejected this reasonable attempt to
23 avoid further appeal costs as well. (SMR Dec. ¶ 11.)

24 The Court of Appeal Opinion and Disposition became "final" on August 31, 2016. Although
25 all parties have filed Petitions for Review with the California Supreme Court, those Petitions do not
26 impact the finality of the Court of Appeal Disposition or the fact that there is currently no judgment
27 that can be enforced notwithstanding the bond.

28 Shortly after the Disposition became final, and in light of the fact that there was no longer any

1 judgment that could be enforced, Defendants once again requested that Plaintiffs stipulate to an
2 immediate release of the bond. (SMR Dec. ¶ 12.) Defendants pointed out that the bond was no longer
3 serving the purpose for which it was procured and that it was serving no purpose other than causing
4 unnecessary damage and hardship to Defendants. (SMR Dec. ¶ 12.) Defendants also stated that if
5 Plaintiffs continued to refuse to stipulate to a release of the bond, that they were reserving their rights
6 to seek any appropriate damages that accrue as a result of the bond remaining in place. (SMR Dec. ¶
7 12.) Once again Plaintiffs refused, necessitating the need for this Motion. (SMR Dec. ¶ 12.)

8 The \$118 million bond is secured by a number of letters of credit, all of which require payment
9 of quarterly fees. The last quarterly fee payment was \$485,319, which equates to \$5,372 per day. The
10 bond itself has an annual premium of \$442,500, which amounts to a daily cost of \$1,212. And, two of
11 the letters of credit are secured by loans. The last monthly interest payment on those loans was
12 \$117,620, which amounts to \$3,920 per day. By being forced to keep the bond in place, Defendants
13 are incurring out of pocket costs in the form of fees and interest totaling approximately \$10,504 *per*
14 *day*. (Vidovich Dec. ¶ 7.)

15 **III.**
16 **LAW AND ARGUMENT**

17 **A. The Bond Should Be Immediately Released As The Purpose For Which The Bond Was**
18 **Procured Has Been Served.**

19 Pursuant to Code of Civil Procedure section 995.430, a bond “remains in force and effect until
20 the earliest of the following events: ... (b) The purpose for which the bond was given is satisfied or
21 the purpose is abandoned without any liability having been incurred.” (Code Civ. Proc., §
22 995.430(b).) An original bond or undertaking may be withdrawn from the files and delivered to the
23 party by whom it was filed on order of the court if all the interested parties so stipulate, or upon a
24 showing that the purpose for which the bond or undertaking was filed has been abandoned without
25 any liability having been incurred. (Cal. Rule Court 3.1130, subdivision (c).) In this case, Defendants
26 posted a bond pursuant to Code of Civil Procedure section 917.1 in order to stay enforcement of the
27 trial court’s judgment while the appeal was pending. The Court of Appeal Opinion and Disposition is
28 now final and, thus, there is no longer a judgment in place in favor of Plaintiffs, much less a judgment
that can be enforced. (Cal. Rule Ct., Rule 8.264(b)(1) [“Except as otherwise provided in this rule, a

1 Court of Appeal decision in a civil appeal ... is final in that court 30 days after filing.”].) Thus, the
2 bond no longer serves any purpose, as Plaintiffs are not entitled to enforce a judgment that no longer
3 exists. A simple way to look at the situation is that if there were currently no bond in place, Plaintiffs
4 would not be permitted to enforce their \$76.4 million judgment. So, the bond is not serving the
5 purpose for which it was procured, to stay enforcement of the \$76.4 million judgment.

6 Plaintiffs have contended that the judgment is not final given the pending Petitions to the
7 California Supreme Court, that there “will be no finality with respect to enforceability of the judgment
8 until the remittitur issues” and that the “judgment remains in effect.” (SMR Dec. ¶ 12.) However,
9 these positions lack support and do not make sense. The judgment does not remain in effect and it
10 cannot be enforced. In its Disposition, the Court of Appeal unequivocally reversed “[t]he
11 compensatory and punitive damages awards” and “remanded [the matter] for further proceedings
12 consistent with [its] opinion.” This disposition “constitutes the rendition of the judgment of appeal,
13 and is the part of the opinion where [the Court of Appeal], in popular parlance, deliver[s] the goods.”
14 (*Ducoing Management Inc. v. Superior Court of Orange County* (2015) 234 Cal.App.4th 306, 312,
15 review denied (Apr. 15, 2015).) In other words, the disposition is the actual judgment by the Court of
16 Appeal. (*Ibid.*) And, the Court of Appeal’s Disposition is now “final.”

17 The remittitur also has no impact on the finality of the Court of Appeal Opinion or the lack of
18 enforceability of the now reversed judgment. Issuance of a remittitur simply “notifies” the trial court
19 that the appellate court judgment is final and reverts jurisdiction in the trial court. (*Snukal v.*
20 *Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 774; *Bryan v. Bank of America* (2001) 86 Cal.App.4th
21 185, 190.) “A remittitur is not the reviewing court’s ‘judgment.’ The judgment is rendered in
22 conjunction with the reviewing court’s written opinion and becomes ‘final’ as to that court upon
23 expiration of a specified period of time [citation.] The ‘remittitur’ notifies the trial court of the
24 appellate judgment and its finality.” (Weil & Brown, Cal. Prac. Guide: Civ. App. & Writs (The Rutter
25 Group) ¶ 14:3, citing *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 10.) Thus, whether or
26 not the remittitur has issued directing the trial court to act in compliance with the Court of Appeal’s
27 disposition is of no consequence to whether or not the Court of Appeal’s Disposition is “final.”
28 Because the Disposition is final, there is no longer a judgment that can be enforced. Without an

1 enforceable judgment, there is no purpose for a bond, particularly a bond in the amount of \$118
2 million.

3 **B. The Bond Should Be Released Because It Is Excessive.**

4 Further support to release the bond at issue here can be found in Code of Civil Procedure
5 section 996.030, which provides that the court “may determine that the amount of the bond is
6 excessive and order the amount reduced to an amount that in the discretion of the court ... appears
7 proper under the circumstances.” (Code. Civ. Proc. § 996.030(a).) There can be no circumstances
8 more compelling which require, at the least, a significant reduction in a bond than in this case. As
9 shown above, Plaintiffs no longer have a judgment, and are no longer entitled to any right of
10 enforcement. Based on the Court of Appeal’s Opinion, the only amount of damages certain after
11 remand is the \$354,000 in option payments that were made. But, Defendants are entitled to an offset
12 of \$1.1 million for the Michael Nordstrom settlement. So, no net damages in favor of Plaintiffs are
13 certain. Certainly, under the circumstances, a \$118 million bond is excessive.

14 The purpose of posting an undertaking like the one here is “to protect the judgment won in the
15 trial court from becoming uncollectible while the judgment is subjected to appellate review.” (*Grant*
16 *v. Superior Court* (1990) 225 Cal.App.3d 929, 934.) The bond ensures that a “successful litigant will
17 have an assured source of funds to meet the amount of the money judgment, costs and postjudgment
18 interest after postponing enjoyment of a trial court victory.” (*Ibid.*) Here, Plaintiffs no longer need
19 such a protection, as they no longer have a judgment against Defendants. As such, requiring a \$118
20 million bond to remain in place serves no function other than causing unnecessary damage and
21 hardship to Defendants. Should the Court determine that *some* level of protection is still afforded to
22 Plaintiffs, the Court should order a reduction of the bond in an amount appropriate to match that level
23 of protection – in this case, at most, \$354,000.

24 **C. Sanctions Should Be Awarded Against Plaintiffs For Their Bad-Faith Refusal to**
25 **Stipulate To The Release Of The Bond.**

26 Defendants request that this Court issue sanctions against Plaintiffs under Code of Civil
27 Procedure section 128.5 in an amount equal to the daily accrual of out of pocket fees and interest
28 payments on the bond since the Court of Appeal Opinion became final on August 31, 2016. At that

1 time, the Court of Appeal could no longer modify its Opinion and the \$76.4 million judgment was
2 gone and no longer enforceable. Defendants should also be entitled to the costs they incurred in
3 preparing and filing this Motion, since the costs were easily avoidable and the result of bad faith and
4 punitive conduct by Plaintiffs. Since reversal of the judgment and because there is no longer an
5 enforceable judgment in place, Defendants have made several requests of Plaintiffs to stipulate to
6 allow the release of the bond. Plaintiffs have repeatedly refused to stipulate, even after the Court of
7 Appeal Opinion became final on August 31, 2016. As a result of Plaintiffs' refusal, significant fees
8 and interest continue to accrue on a bond which is no longer needed.

9 Every day Plaintiffs refuse to stipulate to a release of the bond, Defendants are being damaged
10 and a substantial injustice is occurring. The \$118 million bond is secured by a number of letters of
11 credit, all of which require payment of quarterly fees. The last quarterly fee payment was \$485,319,
12 which equates to \$5,372 per day. The bond itself has an annual premium of \$442,500, which amounts
13 to a daily cost of \$1,212. And, two of the letters of credit are secured by loans. The last monthly
14 interest payment on those loans was \$117,620, which amounts to \$3,920 per day. By being forced to
15 keep the bond in place, Defendants are incurring out of pocket costs in the form of fees and interest
16 totaling approximately \$10,504 *per day*. Because of the punitive nature of Plaintiffs' refusal to
17 stipulate to a release of the bond and forcing Defendants to file this Motion, Plaintiffs should be
18 sanctioned in the amount of \$10,504 per day since the Court of Appeal Opinion became final.

19 Despite providing Plaintiffs with the logic and the law supporting a request for a stipulated
20 release of the bond, Plaintiffs have outright refused, on several occasions, to agree to such a
21 stipulation. Such a refusal is nothing less than abuse by Plaintiffs, and constitutes bad-faith. Indeed, it
22 is clear that Plaintiffs are simply attempting to "punish" Defendants in any manner possible – whether
23 supported by the law or not. Such actions constitute "bad-faith tactics" which are sanctionable under
24 Code of Civil Procedure section 128.5. The "imposition of sanctions, monetary or otherwise, is within
25 the discretion of the trial court." (*In re Woodham* (2001) 95 Cal.App.4th 438, 443.) Actions that
26 waste precious judicial resources and cause needless expense to the taxpayers as well as the opposing
27 party deserve substantial sanctions whether against the attorney or the party under Code of Civil
28 Procedure section 128.5. (*In re Marriage of Quinlan* (1989) 209 Cal.App.3d 1417, 1422.) Whether

1 sanctions are warranted depends on an evaluation of all the circumstances surrounding the questioned
2 action. (*Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 893 citing *Weisman v. Bower*
3 (1987) 193 Cal.App.3d 1231, 1236.) Section 128.5 permits the award of attorney fees, not simply as
4 appropriate compensation to the prevailing party, but as a means of controlling burdensome and
5 unnecessary legal tactics. (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 994–
6 995.)

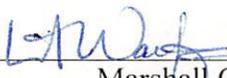
7 In this case, it is clear that Plaintiffs have no legitimate reason for failing to stipulate to the
8 release of the bond, and requiring Defendants to go through the expensive process of filing the instant
9 motion, thereby wasting the Court’s resources, is the exact type of bad-faith tactics courts are
10 authorized to sanction. The bond no longer serves the purpose for which it was procured. Plaintiffs’
11 refusal to stipulate to its release is costing Defendants \$10,504 per day and has also forced Defendants
12 to incur the expense of filing this Motion. Accordingly, this Court should exercise its discretionary
13 power and award sanctions against Plaintiffs in the amount of \$10,504 per day, from August 31, 2016
14 until the Court rules on this matter, plus the expenses incurred related to this Motion in the amount of
15 \$11,675.00. (SMR Dec. ¶¶13-15; Vidovich Dec. ¶¶ 7.)

16 **IV.**
17 **CONCLUSION**

18 For the foregoing reasons, Defendants respectfully request that the Court grant the instant
19 Motion, order the immediate release of the bond posted by Defendants, and award sanctions in the
20 amount of \$10,504 per day from August 31, 2016 until the Court orders the bond released, plus
21 sanctions in the form of attorneys’ fees in the amount of \$11,675.00.

22 Dated: September 19, 2016

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

23
24
25 By: 
26 Marshall C. Whitney
27 Laura A. Wolfe
28 Scott M. Reddie
Attorneys for Sandridge Partners GP, Sandridge
Partners LP, John Vidovich, Michael Vidovich and
Kathryn Tomaino

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On September 21, 2016, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO RELEASE THE BOND, OR IN THE ALTERNATIVE, REDUCE THE BOND AND REQUEST FOR SANCTIONS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 21, 2016, at Fresno, California.



Carol Aurand

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SERVICE LIST
Grow Land v. McCarthy Family Farms
Kings County Superior Court Case No. 9C0378

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Cynthia E. Tobisman, Esq.
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Email: dmaio@reedsmith.com
Attorneys for Defendant and Cross-Complainant McCarthy
Family Farms, Inc.

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3 Laura A. Wolfe, #266751
laura.wolfe@mccormickbarstow.com
4 Scott M. Reddie, #173756
scott.reddie@mccormickbarstow.com
5 7647 North Fresno Street
Fresno, California 93720
6 Telephone: (559) 433-1300
Facsimile: (559) 433-2300
7

8 Attorneys for Sandridge Partners GP, Sandridge
Partners LP, John Vidovich, Michael Vidovich
and Kathryn Tomaino
9

CONFORMED COPY
ORIGINAL FILED ON

SEP 21 2016

JEFFREY E. LEWIS, CLERK OF COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS
JEL DEPUTY

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF KINGS
12

13 GROW LAND AND WATER LLC, a
14 California limited liability company (f/k/a
LIBERTY LAND AND WATER COMPANY
15 LLC); and KINGS COUNTY VENTURES,
16 LLC, a California limited liability company,

17 Plaintiff,

18 v.

19 McCARTHY FAMILY FARMS, INC., et al.,

20 Defendant.
21

Case No. 09 C 0378

**DECLARATION OF SCOTT M. REDDIE
IN SUPPORT OF DEFENDANTS'
MOTION TO RELEASE THE BOND, OR
IN THE ALTERNATIVE, REDUCE THE
BOND AND REQUEST FOR SANCTIONS**

Date: September 28, 2016

Time: 8:15 a.m.

Dept.: 5

The Hon. Donna Tarter

22 AND RELATED CROSS-ACTION.

23 I, Scott M. Reddie, declare as follows:

24 1. I am attorney licensed to practice law before all Courts of the State of California. I am
25 a partner with the law office of McCormick, Barstow, Sheppard, Wayte & Carruth LLP, attorneys of
26 record for Defendants Sandridge Partners, GP, Sandridge Partners, LP, John Vidovich, Michael
27 Vidovich and Kathryn Tomaino.

28 2. I submit this declaration in support of Defendants' Motion to Release the Bond, or in
the Alternative, Reduce the Bond. If called as a witness, I could testify to the below facts from my

**DECLARATION OF SCOTT M. REDDIE IN SUPPORT OF DEFENDANTS' MOTION TO RELEASE THE
BOND, OR IN THE ALTERNATIVE, REDUCE THE BOND AND REQUEST FOR SANCTIONS**

1 own personal knowledge, except where stated upon information and belief, in which case I am
2 informed and believe those facts to be true.

3 3. After a lengthy trial, judgment was awarded in favor of Plaintiffs in the amount of
4 \$76.4 million, consisting of \$73.4 million in compensatory damages, and \$3 million in punitive
5 damages. On July 11, 2014, Defendants filed a Notice of Appeal. I was one of the attorneys
6 responsible for handling the appeal, and handled a large portion of the drafting of the appellate briefs.

7 4. Because Defendants believed they had a strong case on appeal and believed the
8 judgment would be reversed, it was important to Defendants to obtain an undertaking/bond so that
9 judgment enforcement would be stayed pending the appeal. Sandridge was charged with obtaining a
10 bond to stay judgment enforcement. On the other hand, given Sandridge's assets, it could credibly
11 assure Plaintiffs that it would pay any final judgment in this matter. Moreover, Plaintiffs had obtained
12 at least \$66.4 million in FMV damages based on a claim that, in my opinion, had a high likelihood of
13 reversal—and now has been reversed. For these reasons, it made sense not to incur the considerable
14 cost to bond damages that were unlikely to survive appeal and that Sandridge would pay in any event
15 if they somehow survived appellate review.

16 5. To attempt to avoid the substantial burden of an appeal bond, Sandridge made
17 Plaintiffs an eminently reasonable proposal after judgment was entered: it offered to pay Plaintiffs
18 \$3.8 million, without any right of reimbursement or recoupment—the full amount of the attorney's
19 fees plaintiffs then were seeking—in exchange for a stipulated stay of enforcement of the judgment
20 pending appeal, until 30 days after issuance of the remittitur, along with a promise to promptly pay
21 any award that survived the appeal. The stipulated stay would have obviated the need for Sandridge
22 and the other Defendants to post an undertaking on appeal.

23 6. After Defendants made that proposal, Plaintiffs rejected it. To be sure that the
24 substantial costs of an appeal bond were not incurred unnecessarily, Defendants reiterated their
25 proposal, this time noting that those costs would be potentially recoverable in the event of a reversal
26 on appeal. Plaintiffs not only again rejected the proposal, they mocked Defendants for inquiring
27 again whether these substantial costs could be avoided: "Maybe Plaintiffs' prior response to Mr.
28 Vidovich's "offer" was ambiguous. It was "NO" then and the response to the recent written repetition

1 with the addition of a pointless threat remains “NO.” If Mr. Vidovich does not understand “NO”
2 please advise how I may be more specific.” Attached hereto as Exhibit “A” is a true and correct copy
3 of the July 2, 2014 correspondence to Plaintiffs’ counsel regarding the stay. Attached hereto as
4 Exhibit “B” is a true and correct copy of the July 7, 2014 letter from Plaintiffs’ counsel rejecting the
5 offer.

6 7. Due to Plaintiffs’ rejection of the offer, Sandridge was required to obtain an
7 undertaking to stay enforcement of the judgment pending appeal.

8 8. During the appellate briefing, Plaintiffs requested a number of extensions of time,
9 which Defendants did not initially oppose even though interest was accruing on the judgment at the
10 rate of approximately \$655,109.76 per month and interest and expenses related to the bond were also
11 continuing to accrue. However, when Plaintiffs sought an additional 30-day extension of time (after
12 already having received 92 days of extensions), Defendants made a perfectly reasonable request:
13 Defendants would agree not to oppose that application on condition that Plaintiffs waive the accrual of
14 post-judgment interest during the extended 30-day period (\$655,109.76) so Defendants would not be
15 forced to bear the financial cost of accommodating Plaintiffs. Plaintiffs refused. Attached hereto as
16 Exhibit “C” are true and correct copies of the correspondence with Plaintiffs regarding this request.

17 9. The Court of Appeal ultimately denied the application unless the parties filed a
18 stipulation, which, because of Plaintiffs’ refusal, never occurred.

19 10. Following all briefing on appeal, calendar priority was granted by the Fifth District at
20 the request of Defendants, and oral argument was held on July 7, 2016. The Fifth District issued its
21 Opinion and Disposition on August 1, 2016. The Opinion reversed the compensatory and punitive
22 damages awards, and remanded the matter for further proceedings consistent with the Opinion.
23 Attached hereto as Exhibit “D” is a true and correct copy of the Opinion.

24 11. Two days after the Court of Appeal filed its Opinion setting aside the damages awards
25 and substantially limiting Plaintiffs’ potential recovery on remand, Defendants wrote Plaintiffs, asking
26 them to stipulate to cancellation of the appeal bond so Defendants could avoid incurring further
27 unnecessary costs. Attached hereto as Exhibit “E” is a true and correct copy of Defendants’ August 3,
28 2016 request. A few days later, Plaintiffs rejected this reasonable attempt to avoid further appeal costs

1 as well. Attached hereto as Exhibit "F" is a true and correct copy of Plaintiffs' August 9, 2016
2 rejection.

3 12. The Court of Appeal Opinion and Disposition became "final" on August 31, 2016.
4 Shortly after the Court of Appeal Disposition became final, and in light of the fact that there was no
5 longer any judgment that could be enforced, Defendants once again requested that Plaintiffs stipulate
6 to an immediate release of the bond. Defendants pointed out that the bond was no longer serving the
7 purpose for which it was procured and that it was serving no purpose other than causing unnecessary
8 damage and hardship to Defendants. Defendants also stated that if Plaintiffs continued to refuse to
9 stipulate to a release of the bond, that they were reserving their rights to seek any appropriate damages
10 that accrue as a result of the bond remaining in place. Once again, Plaintiffs refused, necessitating the
11 need for this Motion. Attached hereto as Exhibit "G" is a true and correct copy of the correspondence
12 between Defendants and Plaintiffs regarding this renewed request.

13 13. Given that Plaintiffs refused to allow for a release of the bond, and the massive amount
14 of interest accruing on a daily basis for the \$118 million undertaking, Defendants had no choice but to
15 file the instant Motion, which necessarily meant that Defendants had to incur significant costs in doing
16 so. To date, Defendants have incurred attorney's fees and costs in the sum of \$11,675.00, consisting
17 of the following:

18 a. Attorney Laura A. Wolfe: 14.5 hours in researching and drafting the instant
19 motion, at a rate of \$250/hour (\$3,625.00).

20 b. Attorney Scott M. Reddie: 7 hours researching, reviewing and revising the
21 instant Motion at a rate of \$400/hour (\$2,800.00).

22 14. The estimated cost to review any opposition, draft a reply brief and attend oral
23 argument consists of the following:

24 a. Attorney Laura A. Wolfe: 5 hours in reviewing the opposition and drafting the
25 reply, at a rate of \$250/hour \$1,250.00).

26 b. Attorney Scott M. Reddie: 10 hours reviewing the opposition, drafting the reply
27 and attending oral argument at a rate of \$400/hour (\$4,000.00).

28 15. I have practiced law in the State of California for 22 years and am familiar with the

1 hourly rates charged by attorneys of equal experience and competence in the County of Fresno. The
2 fee of \$400 an hour is reasonable for an attorney of my experience and qualifications (including
3 certification as an appellate law specialist) and is reasonable based upon the complexity of the matter
4 herein. \$250 an hour is likewise a reasonable rate for a partner of the same experience and knowledge
5 as Laura A. Wolfe, and is reasonable based upon the complexity of the issues herein.

6 I declare under penalty of perjury that the foregoing is true and correct. This declaration was
7 signed on this 19 day of September, 2016 in Fresno, California.

8 
9
10 _____
11 Scott M. Reddie

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GROW LAND AND WATER, et al. v. MCCARTHY FAMILY FARMS, INC., et. al.

Case No. 09 C 0378

Exhibits to Declaration of Scott M. Reddie In Support of Defendants' :Motion to Release the Bond, or in the Alternative, Reduce the Bond and Request for Sanctions:

DESCRIPTION	LOCATION	PAGE NO.
July 2, 2014 E-Mail Letter from Marshall C. Whitney to C. Russell Georgeson and Phillip A. Baker	Exhibit A to Scott Reddie Declaration	7
July 7, 2014 Letter from C. Russell Georgeson to Marshall C. Whitney	Exhibit B to Scott Reddie Declaration	10
June 17, 2015 Gary J. Wax email to Scott Reddie, Paul Fogel	Exhibit C to Scott Reddie Declaration	12
August 1, 2016 Opinion from Court of Appeal, Fifth Appellate District	Exhibit D to Scott Reddie Declaration	18
August 3, 2016 Letter from Paul D. Fogel to Robin Meadow	Exhibit E to Scott Reddie Declaration	49
August 9, 2016 Letter from Robin Meadow to Paul D. Fogel	Exhibit F to Scott Reddie Declaration	52
September 13, 2016 Email between and Robin Meadow	Exhibit G to Scott Reddie Declaration	54

EXHIBIT "A"



**M c C O R M I C K
B A R S T O W L L P**
ATTORNEYS AT LAW

Marshall C. Whitney
(Admitted in California)
marshall.whitney@mccormickbarstow.com

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Fax (720) 282-8127

LAS VEGAS, NV OFFICE
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Las Vegas, Nevada 89113
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Fax (702) 949-1101

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Fax (209) 524-1188

SEATTLE, WA OFFICE
800 5th Avenue, Suite 4100
Seattle, Washington 98104
Telephone (206) 576-3700
Fax (206) 576-3720

July 2, 2014

VIA EMAIL

C. Russell Georgeson
Georgeson, Belardinelli and Noyes
7060 N. Fresno Street, Suite 250
Fresno, CA 93720

Phillip A. Baker
Baker, Keener & Nahra LLP
633 West 5th Street, Suite 5400
Los Angeles, CA 90071-2005

Re: Grow Land & Water v. McCarthy, et al.

Dear Messrs. Georgeson and Baker:

Before the appellate process gets underway, we wanted to confirm our exchanges with you around the time of the court's ruling on the post-trial motions and your acceptance of the punitive damages remittitur concerning a stay of enforcement of the judgment pending appeal.

As you may recall, McCarthy, Sandridge, and the individual defendants offered to make a nonrefundable payment of the full amount of attorney's fees that your clients are seeking (approximately \$3.8 million) in exchange for a stipulated stay of enforcement of the judgment, which stay would commence upon expiration of the trial court's stay, and remain in effect until 30 days after the remittitur issues. The stay would obviate the need for our clients to obtain a bond to stay enforcement of the judgment pending appeal. If the judgment were affirmed (or alternatively, if any part of the judgment resulted in monetary liability by our clients to your clients), the amount of the fees and costs paid by our clients would be deducted from the amount due your clients, and our clients would make payment of the balance, with any postjudgment interest due, within 30 days of the remittitur's issuance. Although we did not get this far in our discussions, we were open to discussing collateral that you would require be posted or put in place as a condition of the stipulated stay.

I am confirming that your clients rejected this proposal and are not amenable to a stipulated stay of execution in any form that would not require our clients to post an appeal bond. What this means, of course, is that our clients will be forced to incur the fees and costs of obtaining security to avoid enforcement of the judgment pending appeal.

As you know, however, should our clients prevail or partially prevail on appeal such that they are awarded costs, the costs of procuring security to put a stay in place is a recoverable cost. This includes not only the cost of procuring an appeal bond, but any fees and expenses incurred to borrow funds to provide security for an appeal bond or to obtain a letter of credit as collateral for the bond (see Cal. Rules Ct., rule



McCORMICK
BARSTOW LLP
ATTORNEYS AT LAW

C. Russell Georgeson
Phillip A. Baker
July 2, 2014
Page 2

8.278(d)(1)(F) (superseding prior contrary ruling in *Rossa v. D.L. Falk Const., Inc.* (2012) 53 Cal.4th 387, 397-399, 135 CR3d 329, 337-338) and any fees and net interest expenses incurred to borrow funds to make a deposit in lieu of bond (see Cal. Rules Ct., rule 8.278(d)(1)(G)).

If our understanding is in any way erroneous and your clients are interested in entering into a stipulation that would obviate the need for our clients to post an appeal bond, please let me know immediately.

Thank you.

Very truly yours,

Marshall C. Whitney
McCormick Barstow LLP

MCW:kbw

90264-00000 2993302.1

EXHIBIT “B”

GEORGESON BELARDINELLI AND NOYES

ATTORNEYS AT LAW
7060 NORTH FRESNO STREET, SUITE 250
FRESNO, CALIFORNIA 93720

TELEPHONE
(559) 447-8800

TELECOPIER
(559) 447-0747

July 7, 2014

VIA E-MAIL AND U.S. MAIL

Marshall C. Whitney
McCormick Barstow
7647 N Fresno St
Fresno, California 93720

RE: *Grow Land and Water, LLC, et al. v. McCarthy Family Farms, Inc., et al.*
Your July 2, 2014 Letter

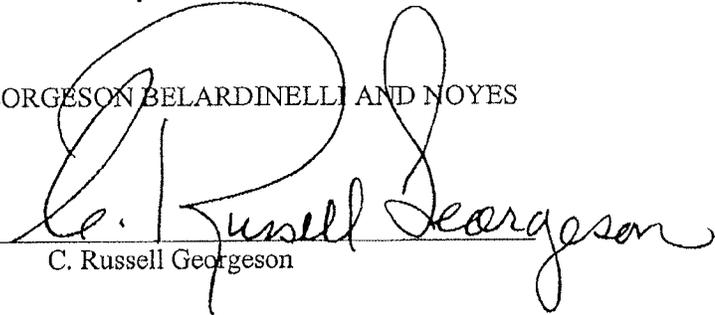
Dear Mr. Whitney:

Maybe Plaintiffs' prior response to Mr. Vidovich's "offer" was ambiguous. It was "NO" then and the response to the recent written repetition with the addition of a pointless threat remains "NO." If Mr. Vidovich does not understand "NO" please advise how I may be more specific.

If Mr. Vidovich is sincere, he should deliver an "offer" that is meaningful given the Defendants' **Judgment Debtors** position. Until then, Plaintiffs will stay the course. I remain,

GEORGESON BELARDINELLI AND NOYES

By


C. Russell Georgeson

CRG/kf

CC: Clients – via e-mail only
Phil Baker – via e-mail only
Bob Joyce – via e-mail only
Jim Lee – via e-mail only

EXHIBIT “C”

Laura Wolfe

From: Gary J. Wax <gwax@gmsr.com>
Sent: Wednesday, June 17, 2015 9:59 AM
To: Scott M. Reddie; 'Fogel, Paul D.'
Cc: Cardozo, Raymond; Marshall Whitney; Laura Wolfe; Todd Baxter; Sutherland, Brian A.; Robin Meadow; Cindy Tobisman
Subject: RE: McCarthy Family Farms

Paul and Scott,

I've spoken to my clients and they do not agree to forego any post-judgment interest. As per your requests (1) we plan to file the application tomorrow, (2) we will attach the e-mail chain to the application and note your intent to oppose, and (3) we will serve the application to you electronically via email.

Regards,

Gary Wax
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90036
310-859-7811
gwax@gmsr.com

From: Scott M. Reddie [mailto:Scott.Reddie@mccormickbarstow.com]
Sent: Monday, June 15, 2015 2:03 PM
To: 'Fogel, Paul D.'; Gary J. Wax
Cc: Cardozo, Raymond; Marshall Whitney; Laura Wolfe; Todd Baxter; Sutherland, Brian A.
Subject: RE: McCarthy Family Farms

Hi Gary:

On behalf of our clients, we join in the below-e-mail sent to you by Paul Fogel.

Scott M. Reddie*
McCormick, Barstow
7647 North Fresno Street
Fresno, CA 93720

*Certified Appellate Law Specialist
certified by the Board of Legal Specialization of the California State Bar.

Office # (559) 433-1300
Direct # (559) 433-2156
Main Office Fax # (559) 433-2300
Email: scott.reddie@mccormickbarstow.com
Assistant: Mary Reimer, Ext. # 3115
Web Site: www.mccormickbarstow.com

=====

CONFIDENTIALITY NOTICE: E-mail may contain confidential information that is legally privileged. Do not read this e-mail if you are not the intended recipient. This e-mail transmission, and any documents, files or previous e-mail messages attached to it may contain confidential and proprietary information that is legally privileged. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is STRICTLY PROHIBITED. If you have received this transmission in error, please immediately notify us by forwarding this to scott.reddie@mccormickbarstow.com or by telephone at (559)433-1300, and destroy the original transmission and its attachments without reading or saving in any manner. Thank you =====

From: Fogel, Paul D. [<mailto:PFogel@ReedSmith.com>]
Sent: Monday, June 15, 2015 1:14 PM
To: 'Gary J. Wax'
Cc: Cardozo, Raymond; Scott M. Reddie; Marshall Whitney; Laura Wolfe; Todd Baxter; Sutherland, Brian A.
Subject: RE: McCarthy Family Farms

Dear Gary,

Thank you for your email.

Our clients oppose the additional-30 day extension unless your clients agree to forego postjudgment interest (approximately \$660,000) for the period of the extension. I note that our clients are incurring more than that with each 30-day delay in the briefing and resolution of the appeal. The bond premium is approximately \$39,000 a month—that is a cost that our clients were forced to incur as a result of your clients insisting on our clients posting an appeal bond (the amount of which was approximately \$119 million). In addition, because our clients were required to put up property and cash as collateral for the bond, the interest cost and bank fees to secure the bond amount to approximately \$400,000 monthly. As you can see, a 30-day extension costs our clients a significant amount of money each month.

As explained in my previous email (which appears below), the extension essentially will essentially cost our clients these amounts in the event the judgment at the current amount is affirmed. Thus, if your clients do not agree to forego the \$660,000 in postjudgment interest for the period of the extension, please note that our clients oppose the application.

In the event your clients reject our condition, I ask that you please do the following: (1) let all the individuals on this email know as soon as possible when you plan on filing your application; (2) attach this email to your application; and (3) be mindful of the parties' agreement to serve each other electronically with all documents filed in this appeal – your last extension application was served only by U.S. Mail, and did not reach us until several days after you filed it in the Court of Appeal.

Thank you for your expected cooperation.

Paul

From: Gary J. Wax [<mailto:gwax@gmsr.com>]
Sent: Monday, June 15, 2015 12:36 PM
To: Fogel, Paul D.; Scott.Reddie@mccormickbarstow.com
Cc: Cardozo, Raymond
Subject: RE: McCarthy Family Farms

Dear Paul and Scott,

KCV/GROW will be applying for another 30-day extension on their combined brief, which is currently due on June 22. I understand that your previous position was that you would oppose a second extension request. I am writing to confirm whether that is still your position so that I can include it in the application.

Thank you again for your previous accommodation.

Regards.

Gary Wax

From: Fogel, Paul D. [<mailto:PFogel@ReedSmith.com>]
Sent: Friday, May 15, 2015 3:09 PM
To: Gary J. Wax
Cc: Cardozo, Raymond
Subject: RE: McCarthy Family Farms

Thanks Gary

From: Gary J. Wax [<mailto:gwax@gmsr.com>]
Sent: Friday, May 15, 2015 3:00 PM
To: Fogel, Paul D.
Cc: Cardozo, Raymond
Subject: RE: McCarthy Family Farms

Thank you, Paul.
And I understand.

Have a nice weekend.

Regards,

Gary Wax

From: Fogel, Paul D. [<mailto:PFogel@ReedSmith.com>]
Sent: Friday, May 15, 2015 12:42 PM
To: Gary J. Wax
Cc: Cardozo, Raymond
Subject: RE: McCarthy Family Farms

Dear Gary,

Our clients will not oppose your application for a 30-day extension on the respondents/cross-appellants' opening brief. Thank you for offering a similar accommodation for our next brief if it should turn out that we need it.

That said, please note that our clients will oppose any further application you might choose to file for this brief. As you know, the interest on the judgment is running at \$660,000 a month, so every month that the briefing schedule, and presumably the decision, slips, and assuming an affirmance, represents an additional \$660,000 in interest. While that may not be of any concern to your client in this case, I'm sure you can understand why it is of great concern to ours (and I'm betting that you or your colleagues have or have had clients in other cases who are facing or have faced large interest amounts running on judgments that you are challenging). We will not inform the Court of our concern this time around, but wish to notify you in advance that we will oppose an additional application or applications for the current brief.

Thanks for your expected understanding. Please let me know if you have any questions.

Paul

Paul D. Fogel
pfogel@reedsmith.com
415 659 5929 (direct)
510 593 8402 (cell)

Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Reception: 415 543 8700
Facsimile: 415 391 8269
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From: Gary J. Wax [<mailto:gwax@gmsr.com>]
Sent: Thursday, May 14, 2015 4:53 PM
To: Fogel, Paul D.
Cc: Cardozo, Raymond
Subject: RE: McCarthy Family Farms

Paul,

Thanks for getting back to me. Tomorrow is fine. And yes, we will reciprocate if you need a similar accommodation.

Many thanks.

Regards,

Gary Wax

Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90036
(310) 859-7811
gwax@gmsr.com

From: Fogel, Paul D. [<mailto:PFogel@ReedSmith.com>]
Sent: Thursday, May 14, 2015 3:57 PM
To: Gary J. Wax
Cc: Cardozo, Raymond
Subject: McCarthy Family Farms

Dear Gary,

Ray forwarded your voicemail to me since he is traveling. I need a day to run your request for non-opposition to the 30 day extension by our clients, so please give me until tomorrow. Because they will ask, however, may I tell them that you would reciprocate if we find ourselves in need of a similar accommodation for the appellants' reply/cross-respondents' brief?

Many thanks.

Paul

* * *

This E-mail, along with any attachments, is considered confidential and may well be legally privileged. If you have received it in error, you are on notice of its status. Please notify us immediately by reply e-mail and then delete this message from your system. Please do not copy it or use it for any purposes, or disclose its contents to any other person. Thank you for your cooperation.

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EXHIBIT “D”

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

AUG 01 2016

By _____ Deputy

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

GROW LAND AND WATER, LLC et al.,

Plaintiffs and Appellants,

v.

MCCARTHY FAMILY FARMS, INC. et al.,

Defendants and Appellants.

F069959

(Super. Ct. No. 09C0378)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Reed Smith, Raymond A. Cardozo, Paul D. Fogel, Brian A. Sutherland; McCormick, Barstow, Sheppard, Wayte & Carruth, Marshall C. Whitney, Todd W. Baxter, Laura A. Wolfe, Scott M. Reddie; Griswold, LaSalle, Cobb, Dowd & Gin and Jim D. Lee for Defendants and Appellants.

Baker, Keener & Nahra, Phillip Alden Baker; Georgeson and Belardinelli, C. Russell Georgeson, Richard A. Belardinelli; Greines, Martin, Stein & Richland, Robin Meadow, Cynthia E. Tobisman and Gary J. Wax for Plaintiffs and Appellants.

-ooOoo-

Defendants and appellants, McCarthy Family Farms, Inc. (McCarthy), Sandridge Partners (Sandridge), and John Vidovich, challenge the judgment entered after a jury found them liable for breach of, and intentional interference with, two option contracts. The jury awarded plaintiffs and appellants, Kings County Ventures, LLC (KCV) and Grow Land and Water, LLC (Grow), \$73.4 million in compensatory damages plus punitive damages. McCarthy, Sandridge and Vidovich contend that neither the liability findings nor the damages awarded are supported by substantial evidence. KCV and Grow challenge the trial court's order reducing the punitive damages award.

Contrary to appellants' position, the liability findings are supported by the record. However, the damages are not.

At issue are option contracts for the sale of real property. One element of the damages for breach of and interference with these contracts is the difference between the option price and the fair market value of the property at the time of the breach. Proof of the value of real property may only be shown through the opinions of a qualified expert or the owner of the property in question. KCV and Grow did not present competent opinion testimony and therefore did not meet their burden of proof. Accordingly, while the liability findings will be affirmed, the compensatory and punitive damages awards will be reversed and the matter remanded for further proceedings.

BACKGROUND

In 2006, William Quay Hays started planning a new community to be built along Interstate 5 in Kings County near the Kern County line. His goal was to create a technologically-advanced, sustainable, and environmentally-responsible city of 150,000 residents named Quay Valley. To succeed, Hays needed land with a reliable water source and access to Interstate 5.

Hays learned that a developer, Jerry Lowrie, held an option to purchase 1,400 acres along Interstate 5 on which Lowrie planned to build a NASCAR speedway. McCarthy had an option to purchase this property, which was part of a 5,100-acre parcel

known as Morris Ranch. The agreement between McCarthy and Lowrie gave Lowrie an option to purchase the property after McCarthy acquired the property pursuant to its own option.

Since Hays needed land near Interstate 5 and Lowrie needed money to make his next option payment, they struck a deal to integrate the NASCAR track project into Quay Valley. Hays took over Lowrie's company and changed its name to KCV.

In 2006, KCV and McCarthy entered into an option agreement for the entire 5,100 acres of Morris Ranch. When McCarthy bought the Morris Ranch directly from its owner at the option price of \$1,200 per acre, KCV agreed to buy it from McCarthy for \$8,500 per acre.

McCarthy also owned property adjacent to Morris Ranch known as Liberty Ranch. Two parcels comprised Liberty Ranch, 4,447 acres referred to as Liberty 1 Ranch, and 17,807 acres referred to as Liberty 2 Ranch.

In June 2007, KCV acquired an option to purchase Liberty 1 Ranch from McCarthy for approximately \$24 million. The purchase was to include 4,447 acres of land and the right to 5,280 acre-feet of water from the Angiola Water District. The agreement valued the land at \$1,100 per acre and the water at \$4,285 per acre-foot.

Liberty 2 Ranch had significant surface and ground water rights from the Angiola Water District with an annual supply of approximately 19,945 acre-feet of water. Water attorney Michael Nordstrom, hired by KCV at McCarthy's suggestion, recommended that Hays purchase Liberty 2 Ranch to satisfy Quay Valley's water needs.

Thereafter, Hays acquired an option to purchase Liberty 2 Ranch from McCarthy for approximately \$27 million. The price was calculated at \$1,500 per acre for 17,866 acres and included an Angiola Water District allocation equal to 1.3 acre-feet of water per acre of land. The agreement stated that the sale could not close until KCV closed on the Liberty 1 Ranch sale. Hays conveyed the Liberty 2 Ranch option to his solely owned

company, Liberty Land and Water Company, LLC (Liberty Land and Water), which was later renamed Grow.

KCV spent approximately \$7.8 million on planning for Quay Valley. These expenses included multiple studies, the preparation of a specific development plan and an environmental impact report, and negotiations with home developers and with Kings County. By March 2009, KCV had completed a significant portion of the planning requirements. However, due to the economic downturn, KCV suspended the planning process.

In mid-2008, KCV's financial condition was "very difficult." Accordingly, KCV wanted to postpone its purchase of Morris Ranch. To enable KCV to negotiate directly with the Morris Ranch owner, McCarthy assigned its Morris Ranch option to KCV. In exchange, KCV agreed to make payments to McCarthy totaling \$30 million upon the happening of certain events pertaining to Quay Valley and KCV's purchase of Morris Ranch. This "performance agreement" also eliminated the need for KCV to purchase Morris Ranch before exercising the Liberty 1 Ranch option.

The Liberty 2 Ranch option expired in February 2008. McCarthy offered Hays a revised option to purchase Liberty 2 Ranch. On March 2, 2009, Hays, on behalf of Liberty Land and Water, executed both the revised option and an assignment of that option to KCV. KCV then made the option payment. The revised option agreement also provided that, upon close of escrow, the parties would execute a three-year lease that would give McCarthy the right to farm Liberty 2 Ranch and use its water.

Sandridge, a family farming operation, is run by Vidovich. There are three additional Sandridge partners who are not actively involved in the business, Kathryn Tomaino, Michael Vidovich and Larry Ritchie. Sandridge's property is adjacent to Liberty Ranch.

Vidovich was interested in Liberty Ranch and had tried to buy it multiple times. However, the parties could not agree on a price.

In November 2008, Vidovich agreed to buy a minimum of 8,000 acre-feet and up to 12,000 acre-feet of Liberty Ranch's water for the 2009 growing season at \$255 per acre-foot. McCarthy and Vidovich decided to keep the terms of this transaction quiet. Accordingly, KCV and Hays were unaware of this water sale. To move the water to his property, Vidovich built a four-mile long pipeline at a cost of over \$3 million.

Shortly after KCV made the option payment on Liberty Ranch in early March 2009, Nordstrom sent an email to Hays warning him that a number of issues had arisen with respect to the Liberty Ranch water that were "not good." Nordstrom explained that dairies and crop shifts had caused a significant overdraft in the area and there was both a regulatory and climatic drought. Nordstrom advised Hays that, given the current state of water and the politics of urban versus agriculture water use, Hays really needed to look for another source of water. Hays questioned Nordstrom's position noting that it was contrary to the historical reliability of Angiola Water and the water assessments that had recently been completed.

On March 21, 2009, Sandridge agreed to buy Liberty Ranch from McCarthy for \$41 million subject to the options held by KCV and Grow. Sandridge agreed to pay \$36 million in cash, with a \$5 million carryback.

At about this time, the KCV board of directors was losing confidence in Hays as KCV's manager. Part of this loss in confidence was caused by Nordstrom notifying KCV chairman Vincent Barabba and director Kathleen Kramer that the Liberty Ranch water was not secure. However, other factors related to Hays's interactions with the board also played a part. In late March 2009, KCV's members voted to replace Hays as KCV's manager and appointed Kramer to take Hays's place.

As KCV's manager, Kramer sought to change KCV's strategy and scale back its business plan. KCV held a board meeting in April 2009 to discuss such modifications. Nordstrom attended this meeting to advise KCV. At that time, Nordstrom informed KCV that he was also doing work for Sandridge and McCarthy and that Sandridge and

McCarthy had entered into a purchase agreement for Liberty Ranch. However, Nordstrom did not disclose to KCV that he would receive a large commission if McCarthy sold Liberty Ranch to Sandridge.

KCV also started discussing a potential land and water deal with Sandridge as recommended and negotiated by Nordstrom. On July 12, 2009, KCV and Sandridge signed a letter agreement. KCV agreed to not exercise its Liberty Ranch options in exchange for options on up to 3,800 acres of other property owned by Sandridge and the right to purchase up to 10,000 acre-feet of State Water Project water. The agreement stated that final option contracts were to be prepared by KCV's attorneys and that "[p]rior to KCV terminating its agreement with McCarthy, Sandridge shall provide KCV a [preliminary title report]." However, the final option contracts were never prepared and Sandridge did not provide KCV with a preliminary title report.

In August 2009, Grow offered to buy KCV's assets for \$10 million. Effective August 31, Kramer stepped down as KCV's manager. Thereafter, Art Torres became KCV's manager and KCV accepted Grow's offer.

On September 1, 2009, KCV exercised its option to purchase Liberty 1 Ranch. The closing date was set for November 30 and KCV was required to deposit the purchase money into escrow by November 27. However, this date could be pushed to December 30 under the option contract.

In September 2009, Michael Bedner, the co-founder, CEO and chairman of Hirsch-Bedner, joined Hays's team and invested \$350,000 in Grow. Hirsch-Bedner is the leading hospitality design firm in the world and handles high-end hotel projects globally.

In November 2009, Sandridge and McCarthy amended their March 21, 2009 purchase agreement for Liberty Ranch. As amended, the agreement provided that Sandridge would pay McCarthy \$26.5 million of the \$41 million purchase price immediately and pay the remainder when McCarthy provided suitable insurable title.

Sandridge also represented that it had an agreement from KCV terminating KCV's option rights and agreed to indemnify McCarthy against legal action by Hays or his affiliates.

Sandridge wired the money to McCarthy and McCarthy conveyed Liberty Ranch to Sandridge, outside of escrow and without title insurance, by deed dated November 20, 2009. This deed was recorded on November 23.

When KCV learned of the sale to Sandridge, it sent a letter to McCarthy giving notice of the breach of the option agreements. KCV demanded that McCarthy "arrange for reconveyance of the property back to you and reconfirm your willingness and ability to close." Thereafter, KCV stopped seeking financing for Liberty 1 Ranch.

On December 11, 2009, KCV and Grow filed a complaint against McCarthy, Sandridge, Vidovich, Nordstrom, and the three other individual Sandridge partners. KCV alleged that McCarthy breached the Liberty 1 Ranch option contract and that Sandridge, Vidovich and Nordstrom intentionally interfered with that contract. Grow alleged that McCarthy breached the Liberty 2 Ranch option contract and that Sandridge, Vidovich and Nordstrom intentionally interfered with that contract. KCV and Grow demanded specific performance of the Liberty option contracts or, alternatively, damages. KCV and Grow also sought punitive damages on their tort claims.

McCarthy and Sandridge cross-complained against KCV and Grow seeking declaratory relief and damages related to the alleged breach of the July 12, 2009 agreement between KCV and Sandridge.

Nordstrom settled and was dismissed.

On its own motion, the trial court requested briefing from the parties regarding the order in which the equitable and legal issues should be tried. The court then ruled that the specific performance claims would be tried first through a court trial. In response, KCV and Grow voluntarily dismissed their specific performance causes of action.

The bifurcated case proceeded to a jury trial. The jury found in favor of KCV and Grow on all liability issues. The jury concluded that McCarthy breached both the

Liberty 1 Ranch option contract with KCV and the Liberty 2 Ranch option contract with Grow. The jury found Vidovich and Sandridge liable for intentional interference with the option contracts and that their conduct was oppressive, fraudulent or malicious.

The jury then awarded KCV and Grow \$73.4 million in compensatory damages and \$55 million in punitive damages against the Sandridge defendants. Following posttrial motions, the trial court conditionally remitted the punitive damages to \$2 million against Sandridge and \$1 million against Vidovich. The court granted a judgment notwithstanding the verdict in favor of Kathryn Tomaino, Michael Vidovich and Larry Ritchie on the award of punitive damages against them.

DISCUSSION

1. *KCV was not bound by the July 12, 2009 letter agreement.*

As noted above, KCV and Sandridge executed a letter agreement on July 12, 2009. KCV agreed it would not exercise its option to acquire the Liberty Ranch in exchange for options to purchase up to 3,800 acres of replacement land and up to 10,000 acre-feet of water owned by Sandridge. However, the particular parcels of land to be optioned and the option prices were not specified. Land was to be purchased in approximately 640-acre sections, unless otherwise agreed to by Sandridge, and prices were listed based on what crops were growing. For example, bare land was to be priced at \$1,500 per acre, land with almonds was to be priced at \$16,000 per acre, land with table grapes was to be priced at \$24,000 per acre, and so on. Vidovich did not know “exactly what the 3800 [acres] encompassed.”

The July 12, 2009 letter agreement further provided that KCV’s promise to not exercise the Liberty Ranch option was contingent on Sandridge executing the final option agreements that were to be prepared by KCV’s attorney. Additionally, the letter agreement states: “Prior to KCV terminating its agreement with McCarthy, Sandridge shall provide KCV a [preliminary title report], showing all matters of record and all items which would be shown as exceptions on a policy of title insurance Subject to review

of the title reports, KCV shall take the land 'AS IS.' ” However, the final option contracts were never drafted and Sandridge did not provide KCV with a preliminary title report.

The jury found that KCV did not give up its rights under the Liberty 1 Ranch option agreement by signing the July 12, 2009 letter agreement. In ruling on Sandridge's posttrial motions, the trial court found that sufficient evidence was introduced to support the jury's finding. The court concluded the letter agreement contemplated further agreement and contracts. The court further found that the sale details were incomplete and that Sandridge never established it had clear title to the property, a condition precedent to KCV's release of the Liberty Ranch options.

Sandridge contends the trial court erred as a matter of law in ruling posttrial that “KCV did not give up its right to purchase Liberty 1 due to the July 12, 2009, Sandridge/KCV agreement.” Sandridge argues the parties objectively manifested their mutual consent to be bound by the agreement; the agreement was not merely an agreement to agree; the contract terms were sufficiently certain; and Sandridge's failure to provide a preliminary title report was excused by KCV's repudiation of the agreement.

Contrary to Sandridge's position, the trial court correctly concluded that a preliminary title report and proof of Sandridge's clear title was a condition precedent to KCV's performance and therefore the letter agreement was unenforceable. Further, KCV's exercise of the Liberty Ranch option did not excuse Sandridge's failure to provide the preliminary title report.

Parties to a contract may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313.) The existence of such a condition precedent generally depends upon the intent of the parties as determined from the words they have used in the contract. (*Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 199.)

While provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring that construction (*Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53), such language is present here. The letter agreement unambiguously states that KCV would not terminate its option agreement with McCarthy before it received a preliminary title report from Sandridge “showing all matters of record and all items which would be shown as exceptions on a policy of title insurance.” Thus, KCV’s duty to terminate its agreement with McCarthy did not arise because it did not receive a preliminary title report on the 3,800 acres of proposed replacement land.

Further, the record demonstrates that KCV considered the preliminary title report to be a critical element of the deal. Before KCV could commit to giving up Liberty Ranch, it needed to know what it was getting as substitute land. Kramer testified that receiving a copy of the preliminary title report was important because KCV needed to understand what it was actually agreeing to purchase. According to Kramer, due diligence required that she “see what other exceptions, easements, mineral rights” and “other things were associated with the land,” as well as whether the land fell within the Williamson Act. Moreover, after signing the letter agreement, Kramer reminded Vidovich that a preliminary title report “‘was a condition’ ” to KCV’s giving up its option agreement with McCarthy.

Sandridge additionally asserts that when KCV exercised the Liberty Ranch option on September 1, 2009, it repudiated the letter agreement and thereby excused Sandridge from providing the preliminary title report.

A contract repudiation may be either express or implied. (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.) “An express repudiation is a clear, positive, unequivocal refusal to perform [citations]; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible [citations].” (*Ibid.*)

Here, KCV did not expressly repudiate the letter agreement. Thus, any repudiation would need to be implied from KCV's conduct. However, exercising the option did not cause KCV to be unable to perform. KCV still had the power to step aside and let Sandridge close on Liberty 1 Ranch. Moreover, Sandridge was in default because it failed to provide a preliminary title report.

In light of this conclusion, the trial court properly dismissed Sandridge's cross-complaint against KCV and Grow for breach of, and interference with, the July 12, 2009 letter agreement.

2. *Whether Grow assigned the Liberty 2 Ranch option to KCV is irrelevant.*

At trial, Sandridge and Vidovich (collectively Sandridge) argued that if Grow effectively assigned the Liberty 2 Ranch option to KCV, it lacked standing to assert claims relating to that option. Grow and KCV took the position that the assignment question was irrelevant because it was an issue between Grow and KCV and their interests were aligned.

Over Grow and KCV's objection, the special verdict asked the jury whether Grow had assigned the Liberty 2 Ranch option to KCV. The jury answered "No."

Sandridge asserts the evidence establishes as a matter of law that KCV accepted the assignment from Grow and therefore Grow did not have standing to prosecute the Liberty 2 Ranch claims. In other words, the Liberty 2 Ranch claims were not pursued by the real party in interest. Accordingly, Sandridge argues, it is entitled to judgment on those claims.

The purpose of requiring a cause of action to be prosecuted by the real party in interest is to protect the defendant " 'against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand.' " (*Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, 351-352.) However, when a judgment for or against the nominal plaintiff would protect the defendant from any action upon the same demand by another, and when as against the nominal plaintiff, the

defendant may assert all defenses and counterclaims that would be available were the claim prosecuted by the real owner, such concern is not present. (*Philbrook v. Superior Court* (1896) 111 Cal. 31, 34-35.)

Here, Grow and KCV were coplaintiffs. Thus, both Grow and KCV would be collaterally estopped from bringing a future action on the Liberty 2 Ranch option against Sandridge. Accordingly, even if KCV is the real party in interest, its status is not a ground for reversal. Sandridge “is fully protected from future action, and the purpose of any objection to the suit upon that ground has been served.” (*Greco v. Oregon Mut. Fire Ins. Co.* (1961) 191 Cal.App.2d 674, 687.)

3. *The jury’s finding that KCV and Grow had the ability to fund the purchase of Liberty Ranch is supported by substantial evidence.*

To recover damages for breach of their option contracts, KCV and Grow were required to prove that they would have had the ability to perform under the contracts if McCarthy had not breached. (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625-626.) Whether a buyer is ready, willing and able to perform is a question of fact. (*Henry v. Sharma* (1984) 154 Cal.App.3d 665, 672 (*Henry*).) Accordingly, the first two questions on the special verdict form asked: “Did KCV[/Grow] have the ability to fund, or access to the funds, for the purchase of Liberty Ranch I[/II] on time if McCarthy had given KCV[/Grow] the opportunity to do so, rather than selling Liberty Ranch I[/II] to Sandridge?” To both questions, the jury answered “Yes.”

Sandridge argues the jury’s findings are not supported by substantial evidence. Hence, we review the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the jury’s decision. We must accept any reasonable interpretation of the evidence that supports the jury’s decision. Nevertheless, we may not defer to that decision entirely. Substantial evidence is not synonymous with *any* evidence. To be considered “substantial,” the

evidence must be reasonable in nature, credible, and of solid value. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389.)

The proof required to show a buyer is ready, willing and able to perform depends on all of the surrounding circumstances. (*Henry, supra*, 154 Cal.App.3d 665, 672.) For example, “financial ability may be proved by showing the purchaser had liquid assets, property which could be sold and the proceeds used as collateral for a loan, or an actual loan commitment, providing such resources are sufficient to close the deal.” (*Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 546.)

In the loan context, the buyer need only command resources upon which it could obtain the requisite credit. (*Henry, supra*, 154 Cal.App.3d at p. 672.) The buyer is not required to have a legally enforceable loan contract. (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1716.)

As noted above, the closing date for Liberty 1 Ranch was set for November 30, 2009, and the purchase money had to be deposited into escrow by November 27. The amount needed to close on Liberty 1 Ranch was approximately \$23.6 million, the approximately \$23.9 million purchase price minus approximately \$300,000 in option payments received by McCarthy. However, this closing date could be pushed to December 30 in the event of a default.

Sandridge asserts that Grow would have had to deposit \$28.4 million in escrow to close Liberty 1 Ranch because Grow was obligated to pay KCV \$5 million under its agreement to purchase KCV’s assets. However, KCV and Grow’s only contractual obligation to McCarthy was to purchase Liberty 1 Ranch for \$23.6 million. Thus, only \$23.6 million was required in escrow to close on Liberty 1 Ranch.

In the months leading up to November 2009, KCV and Grow had been exploring various options for obtaining long-term financing for both Liberty 1 Ranch and Liberty 2 Ranch. KCV and Grow had been in discussions with nearby farmers, Paramount Farms and Woolf Farms, who had expressed interest in leasing Liberty Ranch’s water.

Financier, Byron Georgiou, was also interested in the project. Georgiou said he was “serious in terms of pursuing the potential of either being an equity member or a lender as related to this transaction” and “was intending to pursue it further.” Additionally, Hays was in discussions with MSD Capital, Michael Dell’s investment entity, to borrow up to \$40 million to finance the Liberty Ranch acquisition. However, as of November 24, 2009, the day KCV and Grow learned of the transfer of Liberty Ranch to Sandridge, KCV and Grow did not have either a signed agreement for the sale or lease of water or a written loan commitment.

Nevertheless, Michael Bedner, a Grow equity partner, testified that he was willing and able to provide the money required to close on the Liberty 1 Ranch as a short-term “bridge loan.” Bedner stated that in 2009 he had a net worth of between \$60 million and \$65 million with at least \$7 million in easily accessible cash.

Bedner is the co-founder, CEO and chairman of Hirsch-Bedner, the world’s largest hotel design company. Bedner has a 39.7 percent voting interest in Hirsch-Bedner and is the majority shareholder. In 2009, Hirsch-Bedner had over \$28 million in cash and cash equivalents and over \$14 million in receivables.

Bedner testified that, to finance the bridge loan, he intended to put in \$5 million of his own money and ask Hirsch-Bedner for between \$20 million and \$22 million. At that time, Bedner controlled the Hirsch-Bedner finances and had influence over the board. Bedner stated unequivocally that he intended to fund the deal if Hays did not line up long-term financing before the closing date and that he was “ready and willing to do that transaction.”

In denying Sandridge’s motion for judgment notwithstanding the verdict on the causation issue, the trial court found “that evidence was presented that Bedner had the ability and the willingness to obtain funds for the purchase of Liberty 1.” The court noted that the purchase of Liberty 2 Ranch was not required to be finalized until March

2011, if the option payments were made, and that the purchase of the Morris Ranch was no longer a condition precedent to the Liberty Ranch purchase.

Sandridge argues Bedner's testimony did not constitute substantial evidence that KCV and Grow would have been able to obtain the necessary funding to close on Liberty 1 Ranch. Sandridge notes that Bedner would have needed director and shareholder approval before Hirsch-Bedner could make such a loan and that, as of November 24, 2009, Bedner had not approached the other directors or shareholders. Thus, Sandridge asserts, Bedner's testimony expresses no more than a belief that he could have secured the third party loan and, under California case authority, such "belief" testimony is not substantial evidence. (*Merzoian v. Kludjian* (1920) 183 Cal. 422, 428 (*Merzoian*); *Mattingly v. Pennie* (1895) 105 Cal. 514, 522 (*Mattingly*)).

In *Mattingly*, the only evidence of the buyer's ability to perform was his own testimony that he expected to obtain the necessary funds from a "syndicate." (*Mattingly, supra*, 105 Cal. at p. 522.) Similarly, in *Merzoian*, the buyer's testimony was uncertain regarding what money he had and, in any event, it was insufficient to make the purchase. The only other evidence of ability to perform was the buyer's testimony that third parties had made unenforceable oral promises to lend the buyer additional money. (*Merzoian, supra*, 183 Cal. at p. 428.) Under these circumstances, the courts in *Mattingly* and *Merzoian* held that the evidence was insufficient to demonstrate the buyer was ready, willing and able to purchase the property. "That testimony amounted to nothing more than a statement of his belief that persons not bound by contract to do so would have advanced the money; and it is clearly not such evidence as ... would justify the jury in finding that he had the ability to pay." (*Mattingly, supra*, 105 Cal. at p. 522.)

Here, however, considering all the surrounding circumstances, there was sufficient evidence to support finding that Bedner was ready, able, and willing to make the bridge loan. In addition to having a net worth of around \$60 million, Bedner was the major shareholder in a company with a substantial net worth including \$28 million in cash and

cash equivalents. Thus, Bedner “commanded resources upon which he could obtain the requisite credit.” (*Merzoian, supra*, 183 Cal. at p. 430.)

Sandridge further points out that Bedner admitted that the major shareholders would have needed to conduct “their own independent due diligence” before making the loan. According to Sandridge, there was no evidence that this due diligence could have been completed before December 30, 2009.

However, when Sandridge purchased the Liberty Ranch before the end of the option period, KCV, Grow, and Bedner ceased their efforts to obtain financing. There was no longer any property to purchase. KCV and Grow lost the opportunity to close when McCarthy breached the option contract by selling the Liberty Ranch to Sandridge. (*Cf. 02 Development, LLC v. 607 South Park, LLC* (2008) 159 Cal.App.4th 609, 613.) Under these circumstances, the jury could reasonably have concluded that Bedner would have arranged the bridge loan by December 30, 2009 if Sandridge’s purchase had not deprived KCV and Grow of the opportunity to close on the Liberty 1 Ranch.

Moreover, the jury could reasonably have found that, with a bridge loan in hand, KCV and Grow would have been able to arrange long-term financing. As noted above, both Byron Georgiou and MSD Capital expressed considerable interest in financing Liberty Ranch. The jury also heard testimony that, at the time of trial, Paramount Farms had been purchasing water from Sandridge for several years. Thus, there was evidence that financing based on Liberty Ranch water sales and water leases was feasible.

Accordingly, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the jury’s decision, substantial evidence supports the jury’s finding that KCV and Grow would have been able to fund the purchase of Liberty Ranch on time if McCarthy had given them the opportunity to do so. Because we are upholding the jury’s finding that McCarthy and Sandridge are liable for breach of the option contracts, KCV and Grow remain the prevailing parties. Therefore, McCarthy and Sandridge’s

appeal of the trial court's order awarding fees to KCV and Grow and denying in part McCarthy and Sandridge's motion to tax costs has no merit.

4. ***The compensatory damages award is not supported by the record.***

The measure of damages for a seller's breach of an agreement to convey real property is the difference between the purchase price and the fair market value of the property on the date of the breach, plus consequential damages. (Civ. Code, § 3306; *Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 206.) Accordingly, the trial court instructed the jury that, to recover damages, KCV and Grow had to prove: (1) The difference between the fair market value of the property on the date of the breach and the contract price; (2) the amount of any payments made toward the purchase; (3) the amount of any reasonable expenses for examining title and preparing documents for the sale; and (4) the amount of any reasonable expenses in preparing to occupy the property. Although proof of the precise amount of damages is not required, some reasonable basis of computation must be used. (*Scheenstra v. California Dairies, Inc.* (2013) 213 Cal.App.4th 370, 402.)

However, special rules of evidence apply in any action in which the market value of real property must be ascertained. (Evid. Code, § 810, subd. (a).) One such rule is that proof of the value of property may only be shown through the opinions of a qualified expert or the owner of the property in question. (Evid. Code, § 813, subd. (a).) These limitations are to prevent evidence, otherwise admissible, from being used to support a verdict outside the range of opinion testimony. (*State of California ex rel. State Public Works Board v. Wherity* (1969) 275 Cal.App.2d 241, 249 (*Wherity*).)

i. No expert witness testimony supports the damages award.

Here, only one expert witness testified as to the November 2009 market value of Liberty Ranch. The expert hired by Sandridge, Michael Ming, an agricultural real estate appraiser, valued the Liberty Ranch at \$36.5 million. Although Ming is not a water expert, he included the water associated with Liberty Ranch in his valuation.

KCV and Grow did not present any expert opinion on Liberty Ranch's value in 2009. They proffered testimony from Eric Robbins, a water consultant, who valued the water and predicted what profits could be earned if the water were sold. Robbins admitted he was not qualified to value the land. Using this method, Robbins valued Liberty 1 Ranch at \$255.7 million and Liberty 2 Ranch at \$203.8 million. However, following a hearing outside the presence of the jury, the trial court excluded his testimony as "too speculative." KCV and Grow did not appeal this ruling.

ii. Owner testimony does not support the damages award.

Sandridge moved for judgment notwithstanding the verdict or, alternatively, a new trial, on the ground that the \$73.4 million damage award was excessive and not supported by substantial evidence. Taking into consideration the approximately \$7 million in option payments and expenses that KCV and Grow are entitled to, the jury necessarily determined that Liberty Ranch's fair market value exceeded the approximately \$50.6 million contract price by approximately \$66.4 million for a total fair market value of around \$117 million.

The trial court, noting that the value of real property may be based on the opinion of the owner, denied the motion finding that the evidence of what Sandridge paid McCarthy for Liberty Ranch reflected the owner's opinion of the value. However, the trial court's calculation included elements that are not supported by the record.

In March 2009, Sandridge agreed to pay \$41 million for Liberty Ranch subject to the KCV and Grow options and lease part of the property back to McCarthy for 50 years for \$1 per year. The lease was for the "shop property," which consisted of shop buildings, an office, truck scales and an abandoned airstrip.

Sandridge and McCarthy amended the agreement in November 2009. Sandridge agreed to pay \$26.5 million immediately and the balance when it obtained insurable title to the property. Sandridge also agreed to indemnify McCarthy against any action brought by KCV and Grow.

However, Sandridge was unable to get a loan to finance the purchase. In response, Sandridge and McCarthy again modified their agreement. Vidovich testified that Sandridge paid \$26 to \$28 million in cash, with McCarthy carrying back \$10 million, and provided opportunities for McCarthy to invest in Sandridge. These investment opportunities consisted of Sandridge (1) agreeing to sell some of its property to McCarthy to facilitate a tax-deferred exchange under 26 U.S.C. section 1031 (section 1031); and (2) giving McCarthy the option to contribute additional property to Sandridge in exchange for an ownership interest.

When McCarthy sold Liberty Ranch to Sandridge in 2009, Sandridge in turn sold some of its property to McCarthy to enable McCarthy to defer the taxes on the gain McCarthy realized on the Liberty Ranch sale under section 1031. Approximately three years later, McCarthy contributed the property it had purchased from Sandridge back to Sandridge in exchange for a nine percent interest in the partnership. In 2012, the equity value of Sandridge was approximately \$316.7 million. Once McCarthy became a partner in Sandridge, it began receiving distributions of \$150,000 per quarter.

In analyzing the evidence relating to the Liberty Ranch sale price as evidence of its value in 2009, the trial court recited that McCarthy received \$41 million in cash plus a nine percent interest in Sandridge. However, McCarthy did not receive the entire \$41 million in cash. More importantly the nine percent interest in Sandridge was not part of the sale proceeds. Rather, Sandridge gave McCarthy an option to buy into Sandridge in the future. Three years later, McCarthy contributed the property it had purchased from Sandridge back to Sandridge in exchange for that interest. But, there is no evidence of the value of McCarthy's trade-in property and thus no evidence of what McCarthy "paid" for its partnership interest. Evidence that shows only one side of the financial picture is insufficient. (*Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152.) For example, it is possible that the value of the trade-in property equaled or exceeded the value of the partnership interest. Accordingly, there is no evidence of the

value of that option. Moreover, since it was the option to buy into Sandridge that was part of the consideration paid for Liberty Ranch, not the value of the partnership interest, the trial court erred in concluding that the estimated value of McCarthy's interest in Sandridge was a component of Liberty Ranch's fair market value in 2009.

The trial court also considered the facilitating of the section 1031 exchange as evidence of Liberty Ranch's 2009 value. However, this was a separate transaction where McCarthy purchased property from Sandridge. There was no evidence as to the value of the section 1031 exchange to McCarthy and thus it is not substantial evidence of the fair market value of Liberty Ranch. (Cf. *Newhart v. Pierce* (1967) 254 Cal.App.2d 783, 790-792.)

Before the sale to Sandridge, McCarthy was leasing approximately 15,000 acres of Liberty Ranch land to Dublin Farms, a company owned by individuals related to McCarthy. Dublin Farms was eligible for, and receiving, Farm Service Agency (FSA) subsidies. As part of the purchase agreement, Sandridge agreed to lease this land to McCarthy and permit McCarthy to sublease the land to Dublin Farms. In 2010 and 2011, McCarthy and Dublin Farms received annual farming subsidies of \$300,000 to \$400,000. The trial court concluded that these subsidies added to the 2009 Liberty Ranch value. However, again, these subsidies represent only one side of the financial picture. There was no evidence of what McCarthy paid Sandridge to lease the 15,000 acres. Accordingly, it is unknown what the net profit, if any, was from the farming subsidies. Thus, the receipt of these subsidies is not substantial evidence of Liberty Ranch's fair market value.

The trial court further found that Sandridge's agreement to indemnify McCarthy from any liability due to the Liberty Ranch sale indicated that Sandridge paid more than the \$41 million purchase price. But, once more, there is no evidence of the value of that indemnity provision at the time of the breach. KCV and Grow were unable to place any value on it.

Contrary to KCV and Grow's position, Sean McCarthy's statement in a November 2009 email expressing concern that KCV and Grow might claim damages that "could include the entire project (what ever that is), and the number could be huge" is not an opinion of Liberty Ranch's value. Rather, it refers to concern about what KCV and Grow might claim.

KCV and Grow also assert that an estate appraisal of Sandridge completed in 2013 that adjusted the fair market value of its properties down by \$105.8 million was based on estimated litigation exposure and therefore is evidence of the 2009 value of Liberty Ranch. Again, this claim is unfounded. The appraiser reduced the appraised value of three different ranches, Kettleman City Ranch, Sandridge Utica Ranch, and White Ranch, noting that there were two pending lawsuits that directly affected the marketability of three individual properties. Thus, this was not a litigation exposure assessment.

Regarding the incomplete evidence of the noncash elements of the Liberty Ranch sale, KCV and Grow argue that, because the values were within Sandridge and McCarthy's ability to produce, the jury could draw adverse inferences from Sandridge and McCarthy's failure to present this evidence. However, the burden was on KCV and Grow to present evidence of the fair market value of Liberty Ranch, not Sandridge and McCarthy.

In sum, the only expert opinion valued Liberty Ranch in 2009 at below the option price. Further, the attempt to extrapolate the owner's opinion of value from the various components of the 2009 transaction between McCarthy and Sandridge relied on misinterpretations of the record and incomplete evidence.

iii. In the absence of expert or owner testimony required by Evidence Code section 813, the jury could not properly value Liberty Ranch based on water.

KCV and Grow note that, in addition to evidence of a property owner's valuation of his own property, other types of evidence are relevant to determining fair market value. For example, the price paid by a recent buyer or a subsequent sale may be

evidence of the property's value on the date of the breach. (*Dennis v. County of Santa Clara* (1989) 215 Cal.App.3d 1019, 1028; *Nielsen v. Farrington* (1990) 223 Cal.App.3d 1582, 1586.) KCV and Grow further point out that courts have held, in eminent domain proceedings, that the existence of valuable mineral deposits is an element that may be considered insofar as it influences the market value of the land. (*Ventura County Flood Control Dist. v. Campbell* (1999) 71 Cal.App.4th 211, 219.) "Although it is generally not proper to reach an award by separately evaluating the land and the deposits, 'it is possible to capitalize potential royalties, by multiplying the reasonably probable royalty rate by the estimated tonnage of mineral in place and reducing the result to present value.'" (*Id.* at pp. 219-220.)

Relying on these authorities, KCV and Grow posit that the jury could, and reasonably did, value Liberty Ranch based on its reliable ground water supply. Noting there was evidence presented on the various prices of water ranging from \$4,285 per acre-foot to \$5,775 per acre-foot, KCV and Grow argue that Liberty Ranch's 25,000 acre-feet per year allocation of ground water was worth between approximately \$107 million and \$144 million. According to KCV and Grow, expert evidence was unnecessary for valuing the property in this manner. Therefore, KCV and Grow contend, this water value was substantial evidence of Liberty Ranch's 2009 value.

In support of this position, KCV and Grow cite *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875 (*Foreman & Clark Corp.*). In that case, the court held that, when valuing property, the trier of fact can reject the testimony of an expert witness and follow other evidence in the case. (*Foreman & Clark Corp., supra*, 3 Cal.3d at p. 890.)

However, when *Foreman & Clark Corp.* was decided, Evidence Code section 813 applied only to eminent domain and condemnation proceedings. The court acknowledged that condemnation proceedings required different rules with regard to expert testimony, citing Evidence Code section 810 et seq. (*Foreman & Clark Corp., supra*, 3 Cal.3d at p. 890.) But, in 1980, the limitation on the application of Evidence

Code section 810 et seq. to eminent domain and condemnation proceedings was removed. (Stats. 1980, ch. 381, § 1, p. 757.)

Therefore, as applicable here, Evidence Code section 813 requires that the value of the property be shown only by the opinions of witnesses qualified to express such opinions or the owner of the property being valued. And, while the existence of natural resources is an element that may be considered in valuing the land, expert testimony is still required. (Cf. *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1289-1291.) Again, KCV and Grow did not present any expert or owner opinion testimony on Liberty Ranch's fair market value in 2009. As recognized by the trial court, the law precludes a jury from making an independent valuation of the property. Accordingly, the evidence of what water was being sold for per acre-foot cannot support the compensatory damage award. To hold otherwise would permit the jury to use evidence to support a verdict outside the range of opinion testimony in violation of Evidence Code section 813. (*Wherity, supra*, 275 Cal.App.2d at p. 249.)

iv. The instructions did not remove the limits on the evidence.

KCV and Grow also assert that the instructions given to the jury on damages permitted the jury to determine the fair market value of Liberty Ranch without any limitations on the types of evidence it could consider. KCV and Grow rely on the general rule that the appellate court reviews the sufficiency of the evidence to support a verdict under the law stated in the instructions given, rather than under some other law on which the jury was not instructed. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 674-675.) KCV and Grow argue that, because the jury did not receive any instructions defining "fair market value" or explaining the expert testimony requirement, the jury was permitted to rely on evidence prohibited by Evidence Code section 813.

However, to qualify as substantial evidence, the evidence must be substantial proof of the essentials that the law requires. (*Barratt American, Inc. v. Transcontinental Ins. Co.* (2002) 102 Cal.App.4th 848, 861.) One essential the law requires is that real

property value be shown by an opinion of either an expert or an owner. (Evid. Code, § 813, subd. (a).)

The instructions specified that KCV and Grow were required to prove the fair market value of Liberty Ranch. Thus, the jury was instructed on the applicable rule of law. The absence of a specific instruction on what evidence the jury could consider did not relieve KCV and Grow of their burden to present legally competent evidence to prove this value, i.e., expert or owner opinion testimony. In fact, the trial court would not permit the jury to make an independent valuation of the property and precluded KCV and Grow from urging the jury to do so. Unlike the situation in *Bullock v. Philip Morris USA, Inc., supra*, Sandridge is not seeking reversal based on a substantive element that did not appear in the instructions. Therefore, KCV and Grow's argument that the jury could consider any evidence to determine fair market value lacks merit.

v. The court erred in admitting evidence of the Mojave water sale.

In 2009, Sandridge sold some of its State Water Project contract rights to the Mojave Water Agency for approximately \$73.5 million. Although the trial court excluded this sales price evidence during the liability phase, it admitted the evidence during the damages phase. However, the trial court later acknowledged, outside the jury's presence, that it erred in allowing that evidence to come in and stated it would not allow that evidence to be argued.

Sandridge argues the Mojave sales price evidence was irrelevant to the fair market value of Liberty Ranch and its admission was prejudicial. According to Sandridge, state project water is entirely different from an allocation from the Angiola Water District and thus the sale of project water has no relevance to the Liberty Ranch value. Sandridge further contends this evidence was prejudicial in that it encouraged the jury to speculate as to damages in violation of Evidence Code section 813.

KCV and Grow respond that the price Sandridge obtained for the Mojave water sale was highly relevant to calculating damages because the jury could extrapolate

Liberty Ranch's water value from the Mojave deal. KCV and Grow contend that, because the Angiola water could be severed from the land and sold on the open market, the price Sandridge received when it sold some of its project water on the open market was probative of what Liberty Ranch's water was worth on the open market. According to KCV and Grow, the jury was permitted to consider all evidence regarding value without restriction.

However, as discussed above, the jury could not properly value Liberty Ranch based on the value of its water. Rather, real property value may only be shown through expert or owner testimony. Under Evidence Code section 813, the jury is restricted on the evidence that can be considered in arriving at fair market value. Thus, the Mojave sales price evidence was irrelevant for determining Liberty Ranch's value.

Moreover, state project water and Angiola water are not comparable. Ernest Conant, general counsel to the Angiola Water District, explained the differences between project water and Angiola rights. Project water rights are transferrable whereas the right to Angiola water is based on property ownership and is shared with other property owners overlying a groundwater basin. Also, the property owners depend in part on "return flow," i.e., irrigation water that gets returned to the groundwater basin, to refresh the shared groundwater supply. Therefore, legally and politically, land owners are not permitted to transfer Angiola water outside the Tulare basin. Thus, the number of potential buyers of groundwater is considerably lower than buyers of project water entitlements. Accordingly, these two types of water rights are not sufficiently alike with respect to character, situation and usability to be considered comparable in terms of value. (Evid. Code, § 816.)

In addition to being irrelevant, the Mojave sales price evidence was prejudicial. In other words, there is a reasonable chance that Sandridge would have achieved a more favorable result in the absence of that irrelevant evidence. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 802; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th

704, 715.) First, the nearly identical numbers, the \$73.5 million Mojave sales price and the \$73.4 million in damages, indicate the jury was highly influenced by the Mojave sale evidence. The properly admitted evidence does not lend itself to a calculation that leads to that number. Further, this evidence encouraged the jury to value Liberty Ranch based on the value of its water alone in violation of Evidence Code section 813. In fact, during closing arguments, KCV and Grow's attorney referred to the Mojave sale in a power point presentation.

In sum, neither expert nor owner opinion testimony supports the compensatory damages award. KCV and Grow had the burden to show that the fair market value of Liberty Ranch at the time of the breach exceeded the option price and failed to present competent evidence to do so. Further, the Mojave sales price evidence was irrelevant and prejudicial. Therefore, the compensatory damages award must be reversed.

vi. KCV and Grow are entitled to a limited new trial on damages.

While KCV and Grow have the right to recover the option payments and their entitlement expenses, the general verdict does not segregate those elements of damages. The amount of the option payments, approximately \$354,000, is undisputed. However, the parties disagree on the amount of the entitlement expenses. Accordingly, KCV and Grow are entitled to a new trial on that element of damages.

Nevertheless, because KCV and Grow did not present sufficient evidence of Liberty Ranch's fair market value, they are not entitled to a new trial on that damage component. " ' When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence...." (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919 (*Kelly*)). In another context, the California Supreme Court explained that "[f]or our justice system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214.)

KCV and Grow had a full and fair opportunity to present their case for damages based on the value of Liberty Ranch versus the option price but failed to do so. Thus, the proper resolution is to not remand for retrial on that issue. (*Kelly, supra*, 145 Cal.App.4th at p. 919; accord, *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 289; *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 833-834.)

Punitive damages must bear a reasonable relation to the actual damages. Thus, the reversal of the compensatory damages requires that the punitive damages be redetermined as well. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 284.) In light of this conclusion, there is no need to consider KCV and Grow's appeal of the trial court's order reducing the punitive damages award.

5. *The record supports the jury's finding of oppression, fraud, or malice.*

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).)

Here, the jury found that both Vidovich and Sandridge acted with malice, oppression or fraud in interfering with the Liberty Ranch option agreements. On review, we determine whether substantial evidence supports this finding. Accordingly, we must consider the evidence in the light most favorable to KCV and Grow, giving them the benefit of every reasonable inference, and resolving conflicts in support of the judgment. Although the jury had to find clear and convincing evidence of oppression, fraud, or malice, the substantial evidence standard on appeal is not altered. (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 602-603.)

Vidovich argues that he cannot be liable for punitive damages because the dispute arose from each side asserting rights under signed writings. In other words, the case

sounded in contract, not tort. Vidovich further asserts that he believed the July 12, 2009 letter agreement with KCV was enforceable and therefore was acting in good faith.

However, the jury was not required to accept Vidovich's claim that he was acting in good faith because he believed the July 12, 2009 letter agreement was binding on KCV. Further, the jury could have concluded that the July 12, 2009 letter agreement was a product of Vidovich's interference, i.e., one of the tools he used to accomplish his goal of interfering with the option contracts.

Moreover, although a party to the July 12, 2009 letter agreement, Vidovich was not a party to the Liberty Ranch option contracts. Thus, the rule that tortious interference liability cannot lie against a party to the disputed contract at issue does not apply. Vidovich was an outsider to the contractual relationship he interfered with. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514.)

Vidovich also contends that the jury's finding of oppression, fraud, or malice is not supported by substantial evidence. He argues that, even if he committed a tort, his conduct was not so egregious that punitive damages are warranted.

“ ‘Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or “malice,” or a fraudulent or evil motive on the part of the defendant, *or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.*’ ” (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894-895.)

Malice requires proof that the defendant engaged in conduct that either was intended to cause injury to the plaintiff or was despicable and carried on with a willful and conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (c)(1).) “Oppression” requires proof of despicable conduct that subjects the plaintiff to cruel and unjust hardship in conscious disregard of the plaintiff's rights. (Civ. Code, § 3294, subd. (c)(2).) To demonstrate “fraud,” the plaintiff must show that the defendant intentionally misrepresented, deceived, or concealed a material fact known to the

defendant with the intent to thereby deprive the plaintiff of property or legal rights or otherwise cause injury. (Civ. Code, § 3294, subd. (c)(3).)

The trial court concluded that the pattern and series of acts undertaken by Vidovich in inducing McCarthy to sell Liberty Ranch to him rather than KCV and Grow supported the jury's finding of oppression, fraud, or malice. These acts include:

(1) Installing a pipeline to move Liberty Ranch water to property owned by Sandridge and leasing Liberty Ranch water subject to confidential terms knowing that the Liberty Ranch options had been signed and option payments had been made; (2) writing a letter dated May 12, 2009, to Pat McCarthy and two attorneys regarding the Liberty Ranch options explaining that he was taking title to Liberty Ranch subject to KCV's options, requesting that McCarthy speak to him before communicating with Hays, and urging McCarthy to write to Hays to question a unilateral date change Hays made in the option contract; (3) undermining potential financing for KCV based on a water swap proposal by incorrectly informing the Dudley Ridge Water District that KCV no longer held an option on Liberty Ranch; (4) incorrectly representing to McCarthy that KCV's options had terminated; and (5) pushing McCarthy to close early, outside of escrow and without title insurance, and by agreeing to indemnify McCarthy, knowing McCarthy would be breaching its option contracts with KCV and Grow.

Considering the evidence in the light most favorable to KCV and Grow and giving them the benefit of every reasonable inference, the record supports the jury's finding. The evidence indicates that Vidovich was determined to acquire Liberty Ranch and was willing to do whatever it took to accomplish his goal. The jury could reasonably find that, through his high pressure tactics, intentional interference, and misrepresentations, Vidovich manipulated the situation to his advantage and that this conscious and deliberate disregard of the interests of KCV and Grow was willful or wanton.

DISPOSITION

The compensatory and punitive damages awards are reversed and the matter remanded for further proceedings consistent with this opinion. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

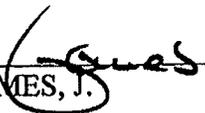


LEVY, J.

WE CONCUR:



HILL, P.J.



GOMES, J.

EXHIBIT “E”

ReedSmith

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August 3, 2016

VIA EMAIL rmeadow@gmsr.com

Robin Meadow, Esq.
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036

Re: *Grow Land and Water LLC et al. v. McCarthy Family Farms, Inc. et al.*
No. F069959

Dear Robin:

Given the nature of the Court of Appeal's remand instructions in Monday's opinion, there is now a very high likelihood that the most your clients can reasonably expect to obtain is a judgment and fee order that is far lower, by tens of millions of dollars, than the judgment and fee order that were entered. Because of that, there is no longer any need to keep in place the \$118 million appeal bond that John Vidovich was required to secure at the demand of your clients, during the summer of 2014.

As you might expect, John already incurred substantial costs—in the millions of dollars—to secure the bond. Unless the parties take steps now to have the bond released, he will be required to continue to incur substantial costs until the remittitur issues, even though there is no reasonable chance that your clients will obtain more than a small fraction of the current judgment and fee order.

By this letter, we are therefore asking if your clients will stipulate to a release of the bond immediately. We believe the Kings County Superior Court has jurisdiction to entertain such a stipulation before the remittitur issues (since issues concerning the bond are indisputably collateral to the appeal), although if you believe otherwise, we invite you to explain why.

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OAKLAND ♦ MUNICH ♦ ABU DHABI ♦ PRINCETON ♦ NORTHERN VIRGINIA ♦ WILMINGTON ♦ SILICON VALLEY ♦ DUBAI ♦ CENTURY CITY ♦ RICHMOND ♦ GREECE

reedsmith.com

-60-

Robin Meadow, Esq.

Re: *Grow Land and Water LLC et al. v.
McCarthy Family Farms, Inc. et al.*

No. F069959

August 3, 2016

Page 2

ReedSmith

We hope that you, your clients, and your co-counsel would stipulate to a release of the bond on principle alone that, given the likely outcome—and the fact that John has sufficient funds to pay what we believe will at most be a substantially reduced judgment and fee award—there is no need for him to suffer further financial injury. But if principle alone is not enough to motivate your side into stipulating, we would like you to know that defendants will be asking the Court of Appeal to modify its opinion to specify that defendants are entitled to costs, on the ground that there is no legitimate argument that each side obtained the same or similar relief on appeal. If defendants succeed in that effort, plaintiffs will be liable for the substantial costs that John incurred to secure the bond. In that event, plaintiffs presumably would be more motivated than ever to stipulate to the release of the bond to ensure that those costs do not continue to mount.

We look forward to a prompt response. Thank you.

Very truly yours,


Paul D. Fogel

cc via email: All remaining counsel of record

EXHIBIT “F”

GMSR

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August 9, 2016

Via Email: PFogel@ReedSmith.com

Paul D. Fogel
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659

Re: *Grow Land and Water LLC v. McCarthy Family Farms, Inc., et al.*
5th Civil No. F069959

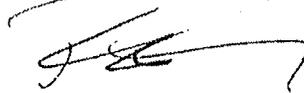
Dear Paul:

In response to your August 3 letter in which you ask our clients to agree to release Mr. Vidovich's appeal bond, we respectfully decline.

The Court of Appeal ruled against your clients on every issue but compensatory damages. It upheld the jury's finding that Mr. Vidovich acted with malice, oppression or fraud in interfering with the Liberty Ranch options. We do not see any realistic chance that you can change those unfavorable results.

All that's left is compensatory damages, and we believe that we will ultimately prevail on that issue because the Court of Appeal's view of the evidence and law is incorrect. It is accordingly premature for our clients to consider releasing the bond.

Very truly yours,



Robin Meadow

RM:lyb

cc: All counsel of record (via email)

EXHIBIT "G"

Laura Wolfe

From: Scott M. Reddie
Sent: Tuesday, September 13, 2016 3:03 PM
To: Laura Wolfe
Subject: FW: Grow Land v. McCarthy et al.

See below.

From: Robin Meadow [mailto:rmeadow@gmsr.com]
Sent: Tuesday, September 13, 2016 3:00 PM
To: Scott M. Reddie
Cc: Gary J. Wax; Cindy Tobisman
Subject: RE: Grow Land v. McCarthy et al.

Scott, thank you for these further thoughts. We have reviewed your comments and the authorities you cite and we respectfully disagree with your conclusions. Accordingly, our clients will not agree to release the bond.

Robin

From: Scott M. Reddie [mailto:Scott.Reddie@mccormickbarstow.com]
Sent: Tuesday, September 13, 2016 7:21 AM
To: Robin Meadow <rmeadow@gmsr.com>; Gary J. Wax <gwax@gmsr.com>
Cc: Gary J. Wax <gwax@gmsr.com>; Cindy Tobisman <ctobisman@gmsr.com>
Subject: RE: Grow Land v. McCarthy et al.

Hi Robin. Thanks for your response. I do not understand your position that there "will be no finality with respect to enforceability of the judgment until the remittitur issues" and that the "judgment remains in effect." If the bond were not in place right now, Grow would still have no right to "enforce" any judgment against defendants. The bond is, thus, serving no purpose other than causing unnecessary damage and hardship to defendants. If there comes a point in time where Grow or KCV have an "enforceable judgment" against defendants then, at that point in time, defendants can chose to post a bond to stay enforcement of any such judgment. However, that is not the case given the Court of Appeal's "judgment" that "[t]he compensatory and punitive damages awards are reversed and the matter remanded for further proceedings consistent with this opinion." (See *Ducoing Management Inc. v. Superior Court* (2015) 234 Cal.App.4th 306, 312-13 ["The disposition constitutes the rendition of the judgment of appeal ...".]) The Court of Appeal's judgment is now final. The fact that it is not "final" in the sense that Supreme Court review is still permissible does not impact the undeniable fact that there is no longer any "enforceable judgment," which is the only reason a bond would be required. Is it your position that, notwithstanding the finality of the Court of Appeal opinion and judgment, that Grow/KCV would be permitted to enforce the now reversed trial court judgment if there was no existing bond?

Furthermore, tying the "finality" of the opinion and enforceability of the prior trial court judgment to the remittitur does not make sense to me. The remittitur has nothing to do with finality or enforceability. Rather, issuance of the remittitur simply "notifies" the trial court that the appellate court judgment is final and reverts jurisdiction in the trial court. (*Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 774; *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 190.) The California Practice Guide on Civil Appeals and Writs notes (at section 14:3): "A remittitur is not the reviewing court's 'judgment.' The *judgment* is rendered in conjunction with the reviewing court's written opinion and becomes 'final' as to that court upon expiration of a specified period of time [citation.] The 'remittitur' notifies the trial court of the appellate judgment and its finality." (Citing *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 10.)

As I mentioned in my prior e-mail, defendants are suffering significant economic harm as a result of an unnecessary bond remaining in place. As a result, if you do not advise me by 5:00 pm today that plaintiffs will stipulate to a release of the bond, then defendants will be immediately moving forward with the filing of a motion in the trial court for an order releasing the bond. Defendants are also reserving any rights they may have to seek any damages as a result of plaintiffs' refusal to stipulate to a release of the bond and insistence that the bond continue to remain in place.

Scott M. Reddie*
McCormick, Barstow
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Fresno, CA 93720

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certified by the Board of Legal Specialization of the California State Bar.

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From: Robin Meadow [<mailto:rmeadow@gmsr.com>]
Sent: Monday, September 12, 2016 5:33 PM
To: Scott M. Reddie; Gary J. Wax
Cc: Gary J. Wax; Cindy Tobisman
Subject: RE: Grow Land v. McCarthy et al.

Scott, while the Court of Appeal opinion is final "in that court" (CRC 82.264(b)(1)), it is certainly not final in any other sense, especially since both sides have filed petitions for review. There will be no finality with respect to the enforceability of the judgment until the remittitur issues, which will not occur until the conclusion of all Supreme Court proceedings.

If you have any contrary authority, I would appreciate seeing it. Otherwise, as far as our clients are concerned the judgment remains in effect, and we must therefore decline your request.

Best,

Robin

From: Scott M. Reddie [<mailto:Scott.Reddie@mccormickbarstow.com>]
Sent: Monday, September 12, 2016 6:27 AM
To: Robin Meadow <rmeadow@gmsr.com>; Gary J. Wax <gwax@gmsr.com>
Subject: Grow Land v. McCarthy et al.

Dear Robin and Gary,

I am writing to you to request that plaintiffs agree to a release of the \$118 million bond that defendants posted in order to stay execution of the judgment while the appeal was pending. The Court of Appeal Opinion is now "final" and there is no longer a "judgment," much less a judgment that can be executed upon. The purpose of the bond was to stay enforcement of the judgment. That purpose no longer exists. As I am sure you can imagine, maintaining a \$118 million bond is incredibly costly, not just in terms of out of pocket costs, but in terms of the ability to conduct business on a daily basis. The annual premium on the bond is hundreds of thousands of dollars, and the bond is costing thousands of dollars per day in interest.

Now that the Court of Appeal Opinion is final, defendants intend to file a motion in the superior court asking, *inter alia*, that the bond be immediately released. However, before incurring the expense of preparing and filing the motion in the superior court, I am requesting that plaintiffs stipulate to an immediate release of the bond. Because time is of the essence and defendants are continuing to incur unnecessary expenses related to the bond, please let me know whether plaintiffs will agree to a release of the bond no later than 5:00 p.m. on Tuesday, September 13th. Thank you.

Scott M. Reddie*
McCormick, Barstow
7647 North Fresno Street
Fresno, CA 93720

*Certified Appellate Law Specialist
certified by the Board of Legal Specialization of the California State Bar.

Office # (559) 433-1300
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=====
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On September 21, 2016, I served true copies of the following document(s) described as **DECLARATION OF SCOTT M. REDDIE IN SUPPORT OF DEFENDANTS' MOTION TO RELEASE THE BOND, OR IN THE ALTERNATIVE, REDUCE THE BOND AND REQUEST FOR SANCTIONS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 21, 2016, at Fresno, California.



Carol Aurand

SERVICE LIST
Grow Land v. McCarthy Family Farms
Kings County Superior Court Case No. 9C0378

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7 Attorneys for Sandridge Partners GP, Sandridge
8 Partners LP, John Vidovich, Michael Vidovich
and Kathryn Tomaino
9

CONFORMED COPY
ORIGINAL FILED ON

SEP 21 2016

JEFFREY E. LEWIS, CLERK OF COURT
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS
DEPUTY

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF KINGS
12

13 GROW LAND AND WATER LLC, a
14 California limited liability company (f/k/a
LIBERTY LAND AND WATER COMPANY
15 LLC); and KINGS COUNTY VENTURES,
16 LLC, a California limited liability company,

17 Plaintiff,

18 v.

19 McCARTHY FAMILY FARMS, INC., et al.,

20 Defendant.

Case No. 09 C 0378

**DECLARATION OF JOHN T. VIDOVICH
IN SUPPORT OF DEFENDANTS'
MOTION TO RELEASE THE BOND, OR
IN THE ALTERNATIVE, REDUCE THE
BOND AND REQUEST FOR SANCTIONS**

Date: September 28, 2016

Time: 8:15 a.m.

Dept.: 5

The Hon. Donna Tarter

21 AND RELATED CROSS-ACTION.
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1 I, John T. Vidovich, declare as follows:

2 1. I submit this declaration in support of Defendants' Motion to Release the Bond, or in
3 the Alternative, Reduce the Bond. If called a witness, I could testify to the below facts from my own
4 personal knowledge, except where stated upon information and belief, in which case I am informed
5 and believe those facts to be true.

6 2. I, through John Vidovich LLC, am the managing partner in Sandridge Partners. I am
7 also, either individually or through John Vidovich LLC (of which I am the managing member) the
8 managing general partner, a limited partner or a managing member of 45 additional entities. Larry
9 Ritchie and my siblings Michael Vidovich and Kathy Tomaino are also limited or General Partners of
10 some of the 45 additional entities.

11 3. In almost all of these 45 additional entities, I share profits with many "outside" partners
12 who are not involved in this action. These partners depend on my ability and authority to act properly
13 and freely as to my duties to manage and take advantage of opportunities that arise on a daily basis.
14 These partners and their business expectations are greatly affected by the outcomes in this case.

15 4. I am intimately familiar with the day to day operations of Sandridge Partners and the
16 other related entities in which I am involved. Currently, Sandridge Partners alone employs over 1000
17 employees from time to time, and these employees all depend upon, me and Sandridge Partners'
18 ability to continue functioning successfully for their jobs.

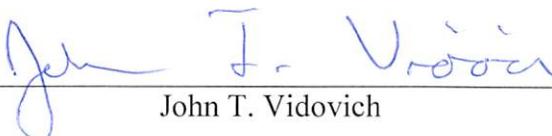
19 5. Due to the extravagant verdict and judgment in this case, and the possibility of Grow
20 seeking to enforce that judgment while Defendants' appealed, I was forced to attempt to get a bond in
21 the amount of \$118 million dollars. Because Sandridge is a small family owned real estate
22 partnership, many of its assets are not liquid and it is heavily dependent on lender financing to conduct
23 ongoing business. Accordingly, having to provide collateral and incur other costs to secure the
24 minimum \$118 million undertaking on appeal was excessively costly.

25 6. Obtaining that undertaking under a tight deadline was itself an expensive process,
26 which involved taking loans with unattractive terms and conditions that severely affect Sandridge's
27 operations. And although Sandridge obtained the \$118 million bond, doing so tied up needed assets,
28 making it virtually impossible for Sandridge to reconfigure its water supplies to attain sustainability

1 while going through the normal borrowing on its crop lines. The undertaking was posted on July 21,
2 2014, in the amount of \$118 million. The bond was issued by co-sureties U.S. Specialty Insurance
3 Company and Munich Reinsurance America, Inc., and accrues at an interest rate of 4.0%.

4 7. In total, as a result of posting the bond, Sandridge has incurred \$7,988,214.22 in fees,
5 and \$3,421,210.91 in interest. At the current rate of interest, the bond costs Sandridge \$10,504.00
6 every day.

7 I declare under penalty of perjury that the foregoing is true and correct. This declaration was
8 signed on this 16 day of September, 2016 in Los Altos, California.

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12 _____
13 John T. Vidovich

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On September 21, 2016, I served true copies of the following document(s) described as **DECLARATION OF JOHN T. VIDOVICH IN SUPPORT OF DEFENDANTS' MOTION TO RELEASE THE BOND, OR IN THE ALTERNATIVE, REDUCE THE BOND AND REQUEST FOR SANCTIONS** on the interested parties in this action as follows:

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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.

Executed on September 21, 2016, at Fresno, California.



Carol Aurand

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SERVICE LIST
Grow Land v. McCarthy Family Farms
Kings County Superior Court Case No. 9C0378

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Case No.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIFTH APPELLATE DISTRICT

SANDRIDGE PARTNERS, GP, et al.
Petitioners, Defendants and Cross-Complainants,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KINGS
Defendants and Cross-Complainants and Appellants.

GROW LAND AND WATER, LLC, et al.
Real Parties in Interest, Plaintiffs and Cross-Defendants

On Petition for Writ Relief From a Ruling by the Kings County
Superior Court on September 28, 2016
Kings County Superior Court, No. 09C 0378
The Honorable Donna Tarter

**PETITION FOR WRIT OF MANDATE AND/OR
APPROPRIATE EXTRAORDINARY RELIEF
(REQUEST FOR IMMEDIATE ACTION AS PETITIONERS
ARE SUFFERING IRREPARABLE INJURY DAILY)**

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Michael Vidovich and Kathryn Tomaino

APPELLATE COURT WRIT PETITION INFORMATION SHEET

PETITIONER: SANDRIDGE PARTNERS, GP, et al.	CASE NUMBER:
RESPONDENT: THE SUPERIOR COURT OF KINGS COUNTY	

INSTRUCTIONS 1. This information sheet must be completed and inserted as page one of the petition for writ.
 2. Exhibits must be tabbed or consecutively paginated with an index.

1. Trial is set for (date):
2. The trial court order asserted to be erroneous was entered as follows:
 - a. Title and location of court (specify): Kings County Superior Court
 - b. Date of each order (specify): September 28, 2016
3. Reason for delay in filing this petition (specify): No delay. The Petition is timely.
4. The record filed or lodged in support of this petition includes a copy of the lower court
 - a. order.
 - b. pleadings.
 - c. motion with supporting and opposition papers.
 - d. reporter s transcripts.
 - e. other (specify):
5. The following record was not filed or lodged in support of this petition:
 - a. Record (specify): Written Order.
 - b. Reason (specify): Has not yet been filed.
 - c. Will be filed or lodged on (date): When received.
6. A petition concerning the subject of this petition was previously filed as follows:
 - a. Title and location of court:
 - b. Case number:
 - c. Disposition:
7. A temporary stay order is requested pending the determination of the petition, and a court reporter s transcript will not be filed or lodged with the court before the stay order is decided,
 - a. Real parties in interest have received have not received actual notice of the request for a stay order,
 - b. A summary of all evidence concerning the matter of this petition and in support of the stay order is set forth (include any testimony adverse to your petition) in attachment 7b. as follows:
8. This petition seeks review of an order denying a motion to
 - a. suppress evidence
 - b. set aside an information

AND

 - c. defendant was arraigned on (date):
 - d. the trial court motion was
 - made within 60 days following the date of the arraignment.
 - not made within 60 days following the date of the arraignment for the reason set forth (specify facts showing why defendant was unaware of any issue or had no opportunity to raise the issue of the motion)
 - in attachment 8d. as follows:
9. This petition seeks review of an order
 - a. granting or denying a motion for change of venue
 - b. denying a motion to quash service of summons
 - c. granting or denying a motion to expunge notice of lis pendens

AND

 - d. written notice of the lower court order was served on (date):
 - e. the lower court extended time to file this petition and a copy of the order is attached.
 - f. other (specify):
10. I understand that the court must be advised of any matters affecting this petition which happen after the filing of this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: October 4, 2016

➤ /s/ Scott M. Reddie

(SIGNATURE OF PETITIONER OR ATTORNEY)

Scott M. Reddie

(THIS FORM IS NOT REQUIRED FOR A PETITION FOR A WRIT OF HABEAS CORPUS)

APPELLATE COURT WRIT PETITION INFORMATION SHEET

[D7262]

American LegalNet, Inc.
www.FormsWorkflow.com

COURT OF APPEAL, FIFTH APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): Scott M. Reddie #173756 McCormick, Barstow, Sheppard, Wayte & Carruth LLP 7647 N. Fresno Street Fresno, CA 93720 TELEPHONE NO.: (559) 433-1300 FAX NO. (<i>Optional</i>): (559) 433-2300 E-MAIL ADDRESS (<i>Optional</i>): scott.reddie@mccormickbarstow.com ATTORNEY FOR (<i>Name</i>): Sandridge Partners GP, et al.	Superior Court Case Number: 09C0378
APPELLANT/PETITIONER: Sandridge Partners GP, et al. RESPONDENT/REAL PARTY IN INTEREST: Superior Court of California, County of Kings / Grow Land and Water, LLC, et al.	<i>FOR COURT USE ONLY</i>
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	
(<i>Check one</i>): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> SUPPLEMENTAL CERTIFICATE	
Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.	

1. This form is being submitted on behalf of the following party (*name*): Sandridge Partners GP, Sandridge Partners LP

2. a. There are no interested entities or persons that must be listed in this certificate under rule 8.208.
 b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (<i>Explain</i>):
--	--

- | | |
|------------------------------|----------------------|
| (1) John T. Vidovich | Partnership interest |
| (2) Kathryn A. Tomaino | Partnership interest |
| (3) Michael Anthony Vidovich | Partnership interest |
| (4) | |
| (5) | |

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 3, 2016

Scott M. Reddie

 (TYPE OR PRINT NAME)

/s/ Scott M. Reddie

 (SIGNATURE OF PARTY OR ATTORNEY)

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I. INTRODUCTION

Despite the fact that this Court's Opinion and Disposition in Case No. F069959 reversing the \$76.4 million judgment against Defendants is final and there is no longer an *enforceable* judgment, Defendants are being held hostage to a \$118 million bond—which has thus far cost them over \$11 million to maintain and is continuing to cost them \$10,504 *per day*—that no longer serves the purpose for which it was given and that they no longer need or want. Maintaining the \$118 million bond is having a devastating impact on Defendants' business operations. Respondent Court denied Defendants' request to release the bond. Defendants therefore seek the assistance of this Court to correct this legal and equitable miscarriage of justice and to prevent needless and daily irreparable harm.

Defendants knew that the prospect of posting a \$118 million bond would be expensive and disruptive to business operations. In an effort to avoid the expense and disruption, Defendants made Plaintiffs an offer shortly after judgment was entered. Defendants offered to pay Plaintiffs \$3.8 million, without any right of reimbursement or recoupment, in exchange for a stipulated stay of enforcement of the judgment pending appeal, along with a promise to promptly pay any judgment that survived the appeal. Plaintiffs rejected the offer

out of hand, forcing Defendants to obtain the costly undertaking, which was obtained by taking out loans with unattractive terms and tying up critical assets that affect operations for Defendants on a daily basis.

Defendants were successful on their appeal: “The compensatory and punitive damages awards are reversed and the matter remanded for further proceedings consistent with this opinion.” The bulk of the damage award—consisting of the fair market value damages of at least \$66 million—cannot be retried. Thus, in the new trial, the damages will be nowhere near the initial judgment amount of \$76.4 million.

This Court’s Opinion and Disposition in Case No. F069959 became “final” on August 31, 2016. As a result, there is no longer an effective or enforceable judgment. The fact that the parties have filed Petitions for Review with the California Supreme Court does not in any way change the fact that the Opinion and Disposition are final and that there is no longer any enforceable judgment. The fact that a remittitur has not yet issued is also of no consequence to the finality of this Court’s Opinion and Disposition because the remittitur simply “notifies” the trial court about the finality of the Opinion and Disposition and reverts jurisdiction in the trial court. It has nothing to do with the finality of this Court’s Opinion. If, e.g., there were no bond in place right now, it would be of no

consequence to Defendants because there is no longer a judgment that can be enforced.

A bond “remains in force and effect until the earliest of the following events: ... (b) The purpose for which the bond was given is satisfied or the purpose is abandoned without any liability having been incurred.” (Code Civ. Proc. § 995.430, subd. (b).) Thus, by statute, a bond only “remains in force and effect” until the “purpose for which the bond was given is satisfied.” Once the purpose for which the bond was given has been satisfied, it is no longer in force and effect and, by order of the court, the bond may be withdrawn from the files and delivered to the party by whom it was filed. (Cal. Rul. Ct. 3.1130, subd. (b).)

On numerous occasions after this Court issued its Opinion, Defendants requested Plaintiffs to stipulate to a release of the bond because the purpose for which the bond was given—to stay enforcement of the judgment—had been satisfied in that there was no longer an enforceable judgment. Plaintiffs refused, forcing Defendants to file a motion with the Respondent Court seeking an order releasing the bond.

On September 28, 2016, following a hearing, the Respondent Court denied the motion and refused to release the bond, concluding that, *as a matter of law*, Code of Civil

Procedure section 917.1, subdivision (b), precluded Respondent Court from releasing the bond until a remittitur was issued in this case. Respondent Court seemingly adopted Plaintiffs' argument that the bond cannot be released until a remittitur issues in the case because a bond "is clearly designed to protect the judgment won in the trial court from becoming uncollectible while the judgment is subjected to appellate review." According to Plaintiffs, the "judgment" is still subject to appellate review because their Petition for Review at the California Supreme Court is still pending.

Plaintiffs, and the Respondent Court, are incorrect. First, section 917.1, subdivision (b), does not apply here and does not, as Respondent Court concluded, preclude a court from releasing a bond as a matter of law prior to issuance of the remittitur. That statute addresses the required amount of a bond and how a plaintiff can collect from a bond. The language expressly states the provision applies in cases where the judgment is "affirmed or the appeal is withdrawn or dismissed" The judgment here was not "affirmed" and the appeal was not "withdrawn or dismissed." The statute does not say anything about what is to take place if a judgment is "reversed" and says nothing about issuance of the remittitur. The statute does not preclude the relief requested by Defendants.

Second, posting the bond was a completely voluntary act by Defendants. There is no requirement that a bond be posted at all—such an undertaking is only required if Defendants want to stay execution of an enforceable money judgment. Thus, Plaintiffs’ citations to cases stating the purpose of the bond is to provide a successful litigant an assured source of funds from which to collect are inapposite. Defendants did not procure the bond to provide Plaintiffs with a source of funds from which to collect. Rather, Defendants procured the bond to *stay enforcement* of the judgment because they believed—and rightly so given this Court’s Opinion—that the judgment would not stand and Defendants did not want to be in a position of trying to recover from Plaintiffs amounts they collected under the now reversed judgment. Defendants have paid in excess of \$11 million in just out of pocket expenses to obtain the benefit of a stay. In exchange for not being able to collect on their enforceable judgment, Plaintiffs received the benefit of an assured source of funds upon which to collect to the extent the judgment was affirmed and Defendants did not otherwise pay the judgment following affirmance.

Defendants, however, no longer need a stay of enforcement as there is no longer an enforceable judgment. Therefore, Plaintiffs are, in turn, no longer entitled to the secondary benefit of a bond providing an assured source of collection. The need for the bond is premised entirely upon the

existence of an enforceable judgment. Without an enforceable judgment, there is no need for a stay, and no need to assure a source of funds from which to collect.

Regardless of any pending Petitions for Review or the lack of the issuance of a remittitur, it is undeniable that there is presently no enforceable judgment. If there were no bond in place right now, Plaintiffs could not enforce any judgment against Defendants. If there ever comes a point in time in the future where Plaintiffs have an enforceable judgment and Defendants want to stay enforcement, Defendants can post another bond. But, right now, the purpose for which the \$118 million bond was given has been satisfied and, thus, it must, as a matter of law, be released.

Every *day* that the bond remains in effect it is costing Defendants approximately \$10,504 in fees and interest. That amounts to approximately \$3.83 million per year. By the time the remittitur issues, it is likely that at least another \$1 million will be paid to maintain the bond. That is just the actual out of pocket costs, and does not include any lost opportunity costs or the financial impact the bond is having on daily business operations. It is an absolute miscarriage of justice to force Defendants to continue to incur the substantial costs of maintaining the \$118 million bond when there is currently no enforceable judgment and no statute or case law

that states the bond must remain in place until a remittitur is issued.

As a result of the finality of this Court's Opinion and Disposition, the \$118 million bond no longer serves the purpose for which the bond was given and is not necessary to stay execution of any judgment. Thus, it should be immediately released in accordance with Code of Civil Procedure section 995.430, subdivision (b).

Writ relief is the only available remedy to correct Respondent Court's erroneous order denying Defendants' motion for an order releasing the bond. Defendants are suffering irreparable harm on a daily basis by being forced to maintain the bond. And, because this Court's Opinion and Disposition states both sides are to bear their own costs, Defendants cannot recover the daily costs they are incurring as a recoverable cost of appeal. Accordingly, Defendants request that this Court issue a peremptory writ of mandate in the first instance directing Respondent Court to vacate its ruling and enter a new order releasing the \$118 million bond. Alternatively, Defendants request that this Court issue an alternative writ directing Respondent Court to vacate its ruling and enter a new order releasing the \$118 million bond, or to show cause why it should not be ordered to do so, and upon return of the alternative writ, issue a peremptory writ

directing the Respondent Court to vacate its order and enter a new order releasing the \$118 million bond.

FINALLY, BECAUSE OUT OF POCKET COSTS ARE ACCRUING AT OVER \$10,000 PER DAY FOR MAINTAINING A BOND THAT NO LONGER SERVES THE PURPOSE FOR WHICH IT WAS GIVEN, DEFENDANTS ARE REQUESTING IMMEDIATE RELIEF.

II. PETITION FOR WRIT OF MANDATE

A. Authenticity of Exhibits

1. All Exhibits accompanying this Petition are true copies of original documents on file with Respondent Court, except Exhibit 7, which is a true and correct copy of the reporter's transcripts of the hearing on September 28, 2016. The Exhibits are incorporated by this reference as though fully set forth in this Petition. The Exhibits are paginated consecutively, and page references in this Petition are to the consecutive pagination.

B. Beneficial interest of Petitioner; capacities of Respondent and Real Party in Interest

2. Petitioners are Sandridge Partners, GP, Sandridge Partners, LP, John Vidovich, Michael Vidovich and Kathryn Tomaino, defendants in an action entitled *Grow Land and*

Water LLC, et al. v. McCarthy Family Farms, Inc., Kings County Superior Court Case No. 09 C 0378. Respondent is the Kings County Superior Court, which issued the ruling denying the motion to release the \$118 million bond. The Real Parties in Interest are Grow Land and Water LLC and Kings County Ventures, LLC, the plaintiffs in this action.

C. Timeliness of Petition

3. At a hearing on September 28, 2016, Respondent Court denied Defendants' motion to release the bond. [Ex. 7, at 123-124] There is no statutory deadline for the filing of a writ challenging Respondent Court's order. Absent a statutory time limit, courts generally expect writ petitions to be filed within 60 days after service of notice of entry of the challenged order. (*Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173; *Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701.) Thus, this Petition is timely.

D. Chronology of pertinent events

4. After a lengthy trial, judgment was awarded in favor of Plaintiffs in the amount of \$76.4 million, consisting of \$73.4 million in compensatory damages, and \$3 million in punitive damages. [Ex. 4, at 30]

5. On July 11, 2014, Defendants filed their Notice of Appeal. [Ex. 4, at 30]

6. Because Defendants believed they had a strong case on appeal and believed the massive judgment would be reversed, it was important to Defendants to obtain an undertaking/bond so that judgment enforcement would be stayed pending the appeal. [Ex. 4, at 30] Sandridge was charged with obtaining a bond to stay judgment enforcement. [Ex. 4, at 30]

7. Because Sandridge is a family owned real estate partnership, many of its assets are not liquid and it is heavily dependent on lender financing to conduct ongoing business. [Ex. 3, at 24] Accordingly, having to provide collateral and incur other costs to secure the \$118 million undertaking on appeal was excessively costly. [Ex. 3, at 24]

8. On the other hand, given Sandridge's assets, it could credibly assure Plaintiffs that it would pay any final judgment in this matter. [Ex. 4, at 30] Moreover, Plaintiffs had obtained at least \$66.4 million in damages based on a claim that had a high likelihood of reversal—and now has been reversed by this Court. [Ex. 4, at 30]

9. For these reasons, it made sense not to incur the considerable cost to bond damages that were unlikely to

survive appeal and that Sandridge would pay in any event if they somehow survived appellate review. [Ex. 4, at 30]

10. To attempt to avoid the substantial—but unnecessary—burden of an appeal bond, Sandridge made plaintiffs an eminently reasonable proposal after judgment was entered: it offered to pay Plaintiffs \$3.8 million, without any right of reimbursement or recoupment—the full amount of the attorney’s fees plaintiffs then were seeking—in exchange for a stipulated stay of enforcement of the judgment pending appeal, until 30 days after issuance of the remittitur, along with a promise to promptly pay any award that survived the appeal. [Ex. 4, at 30]

11. The stipulated stay would have obviated the need for Sandridge and the other Defendants to post an undertaking on appeal and tie up critical and significant assets. [Ex. 3, at 24-25; Ex. 4, at 30]

12. After Defendants made that proposal, Plaintiffs rejected it. [Ex. 4, at 30] To be sure that the substantial costs of an appeal bond were not incurred unnecessarily, Defendants reiterated their proposal, this time noting that those costs would be potentially recoverable in the event of a reversal on appeal. [Ex. 4, at 30]

13. Plaintiffs not only again rejected the proposal, they mocked Defendants for inquiring again whether these substantial costs could be avoided: “Maybe Plaintiffs’ prior response to Mr. Vidovich’s “offer” was ambiguous. It was “**NO**” then and the response to the recent written repetition with the addition of a pointless threat remains “**NO.**” If Mr. Vidovich does not understand “**NO**” please advise how I may be more specific.” [Ex. 4, at 30-31, 39]

14. Due to Plaintiffs’ rejection of the offer, Sandridge was required to obtain an undertaking to stay enforcement of the judgment pending appeal. Obtaining that undertaking under a tight deadline was itself an expensive process, which involved taking out loans with unattractive terms and conditions that severely affect Sandridge’s daily operations. [Ex. 3, at 24-25]

15. Although Sandridge obtained the \$118 million bond, doing so tied up needed assets, making it virtually impossible for Sandridge to reconfigure its water supplies to attain sustainability while going through the normal borrowing on its crop lines. [Ex. 3, at 24-25]

16. The \$118 million bond is secured by loans with unattractive terms that have tied up needed business assets. [Ex. 3, at 24-25]

17. As a result of posting the bond, Defendants have incurred approximately \$8 million in fees and \$3.4 million in interest payments. Currently, by being forced to keep the bond in place, Defendants are incurring out of pocket costs in the form of fees and interest totaling approximately \$10,504 *per day*. [Ex. 3, at 25]

18. The undertaking was posted on July 21, 2014, in the amount of \$118 million. [Ex. 3, at 25] The bond was issued by co-sureties U.S. Specialty Insurance Company and Munich Reinsurance America, Inc. [Ex. 3, at 25]

19. Following all briefing on appeal, calendar priority was granted by this Court, and oral argument was held on July 7, 2016. [Ex. 4, at 31] This Court issued its Opinion and Disposition on August 1, 2016. [Ex. 4, at 31] This Court reversed the compensatory and punitive damages awards, and remanded the matter for further proceedings consistent with the Opinion. [Ex. 4, at 31] However, this Court barred Plaintiffs from seeking the “fair market value” damages at the remanded trial, which consisted of at least \$66 million of the judgment that has now been reversed. [Ex. 4, at 72-73]

20. Two days after this Court filed its Opinion setting aside the damages awards and substantially limiting Plaintiffs’ potential recovery on remand, Defendants wrote Plaintiffs,

asking them to stipulate to release of the appeal bond so Defendants could avoid incurring further unnecessary costs. [Ex. 4, at 31, 78-79] A few days later, Plaintiffs rejected this reasonable attempt to avoid further unnecessary costs. [Ex. 4, at 31-32, 81]

21. This Court's Opinion and Disposition became "final" on August 31, 2016. Although all parties have filed Petitions for Review with the California Supreme Court, those Petitions do not impact the "finality" of this Court's Opinion or Disposition or the fact that there is currently no judgment that can be enforced notwithstanding the bond. [Ex. 4, at 32]

22. Shortly after the Opinion and Disposition became final, and in light of the fact that there was no longer any judgment that could be enforced, Defendants once again requested that Plaintiffs stipulate to an immediate release of the bond. [Ex. 4, at 32, 83-85] Defendants pointed out that the bond was no longer serving the purpose for which it was given and that it was serving no purpose other than causing unnecessary damage and hardship to Defendants. [Ex. 4, at 32, 83-85]

23. Defendants also stated that if Plaintiffs continued to refuse to stipulate to a release of the bond, that they were reserving their rights to seek any appropriate damages that

accrue as a result of the bond remaining in place. [Ex. 4, at 32, 83-85] Once again Plaintiffs refused, necessitating the need for preparing and filing a motion with Respondent Court. [Ex. 4, at 32, 83-85]

24. On September 21, 2016, Defendants filed with Respondent Court their motion to release the bond, or in the alternative, to reduce the bond, and request for sanctions. [Exs. 1-4, at 4-87]

25. On September 26, 2016, Plaintiffs filed an opposition to the motion [Ex. 5, at 88-97], and on September 27, 2016, Defendants filed a reply [Ex. 6, at 98-105].

26. Respondent Court heard the motion on September 28, 2016. [Ex. 7, at 106-125] Respondent Court denied the motion, ruling that the provisions of Code of Civil Procedure section 917.1, subdivision (b), precluded Respondent Court's ability, as a matter of law, from releasing the \$118 million bond until after the remittitur in the case is issued. [Ex. 7, at 123-124] As of the time of the filing of this Petition, the Respondent Court had not yet issued a written order.

E. Basis for relief

27. In its August 1, 2016 Opinion, this Court unequivocally reversed the compensatory and punitive damages awards and remanded the matter for further

proceedings, thereby vacating Plaintiffs’ judgment and rendering the now vacated judgment unenforceable. (See *Ducoing Management Inc. v. Superior Court of Orange County* (2015) 234 Cal.App.4th 306, 312, review denied (Apr. 15, 2015) [the Court’s disposition “constitutes the rendition of the judgment of appeal, and is the part of the opinion where [the Court of Appeal], in popular parlance, deliver[s] the goods.”].)

28. This Court’s Opinion and Disposition became final on August 31, 2016. (Cal. Rule Ct., Rule 8.264(b)(1) [“Except as otherwise provided in this rule, a Court of Appeal decision in a civil appeal ... is final in that court 30 days after filing.”].) After August 31, 2016, this Court no longer had the right to modify its Opinion or Disposition. (*Sparrow’s Real Estate Service, Inc. v. Appellate Dept. of Superior Court of Kern County* (1965) 236 Cal.App.2d 739, 743.) Thus, there is no longer an enforceable judgment.

29. Because there is no longer an enforceable judgment and Plaintiffs refused to stipulate to release the bond, Defendants filed with Respondent Court a motion to release their \$118 million bond—for which they are incurring out of pocket costs in excess of \$10,000 *per day*—in accordance with Code of Civil Procedure section 995.430, subdivision (b), which provides, in relevant part: “[a bond] remains in force and effect until the earliest of the following events: ... (b) The purpose for

which the bond was given is satisfied or the purpose is abandoned without any liability having been incurred.” Defendants argued that, because there was no longer an enforceable judgment, the purpose for which the bond was given—to stay enforcement of the judgment—had been satisfied. Thus, by the express provisions of the statute, the bond was no longer in force and effect.

30. Respondent Court denied the motion, concluding that Code of Civil Procedure section 917.1, subdivision (b), precluded its ability, as a matter of law, from releasing the \$118 million bond until after the remittitur in the case is issued. [Ex. 7, at 123-124] Here, the issuance of the remittitur has been delayed in light of the Petitions for Review with the California Supreme Court that were filed.

31. Respondent Court erred as a matter of law in refusing to grant Defendants’ motion and forthwith release the bond. Section 917.1, by its express terms, addresses the required amount of a bond and how a plaintiff can collect from a bond. The language of the statute expressly states it only applies in cases where the judgment is “affirmed or the appeal is withdrawn or dismissed” The judgment here was not “affirmed” and the appeal was not “withdrawn or dismissed.” The statute does not apply in situations where a judgment has been reversed and says nothing about Supreme Court review

or issuance of the remittitur. The statute does not preclude the relief requested by Defendants and, in fact, does not even apply. It cannot usurp the express provisions of section 995.430, subdivision (b), which state the bond is no longer in force and effect.

32. The posting of the bond was a voluntary act by Defendants to obtain the benefit of a stay of enforcement of the judgment. Defendants do not presently need or require a stay of enforcement and, thus, do not need a bond in place. The purpose for which the bond was given has been satisfied. Thus, under Code of Civil Procedure section 995.430, subdivision (b), the bond no longer “remains in force and effect.” Because the bond, per statute, no longer remains in force and effect, the Respondent Court erred as a matter of law by not ordering that the bond be released.

33. Defendants have thus far paid over \$11 million in out of pocket costs to maintain a bond to stay enforcement of a judgment that has now been reversed. [Ex. 3, at 25] The bulk of the claim cannot be retried. That means, the bulk of the expense of the bond was entirely unnecessary as it was staying enforcement of a judgment that this Court has determined was in error. The bond is continuing to cost Defendants out of pocket costs of approximately \$10,504 *per day*. [Ex. 3, at 25]

Keeping the bond in place is also having a devastating impact on daily business operations.

34. In its Opinion and Disposition, this Court concluded that both sides are to bear their own costs on appeal. [Ex. 4, at 76] Therefore, the costs Defendants continue to incur on a daily basis cannot be recovered as a cost of the appeal. Defendants are being forced to literally throw \$10,504 per day into the trash can without an ability to recover it as a cost of the appeal. Therefore, every day that passes, Defendants are suffering additional irreparable harm.

F. Absence of other remedies

35. Respondent Court's order denying the motion to release the bond is not an appealable order. Furthermore, even if it was, an appeal would not be an adequate remedy in light of the fact that Defendants are being irreparably damaged to the tune of \$10,504 per day plus the continued daily disruption of business operations, and Defendants cannot recover their expenses as a cost of the appeal. Only immediate relief will stop the irreparable harm.

III. PRAYER

Petitioners and Defendants pray that this Court:

1. (a) Issue a peremptory writ of mandate or prohibition in the first instance directing Respondent Court to vacate its ruling denying Defendants' motion to release the bond and enter a new order granting the motion and releasing the bond, or

(b) Issue an alternative writ directing Respondent Court to act as specified in paragraph 1(a) of this prayer, or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ as set forth in paragraph 1(a) of this prayer and for such other extraordinary relief as is warranted.

2. Award Defendants their costs pursuant to Rule 8.493, subdivision (a), of the California Rules of Court; and

3. Grant such other relief as may be just and proper.

Dated: October 4, 2016

McCORMICK BARSTOW LLP

By: /s/ Scott M. Reddie
Scott M. Reddie
Attorneys for Defendants and
Petitioners

VERIFICATION

I, Scott M. Reddie, declare as follows:

I am one of the attorneys for Petitioners, Sandridge Partners GP, Sandridge Partners LP, John Vidovich, Michael Vidovich and Kathryn Tomaino. I have read the foregoing Petition for Writ of Mandate and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceeding, I, rather than Petitioners, verify this Petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on October 4, 2016, at Fresno, California.

/s/ Scott M. Reddie

Scott M. Reddie

**IV.
MEMORANDUM OF POINTS AND AUTHORITIES**

A. Respondent Court had jurisdiction to release the bond

It is the general rule that a perfected appeal divests the trial court of further jurisdiction as to all questions affecting the validity of the judgment or order appealed from, and the trial court during that period has no power to amend or correct the judgment. (*Linstead v. Superior Court* (1936) 17 Cal.App.2d 9, 12.) *However*, the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. Ancillary or collateral matters in connection with the appeal are not affected by the appeal. (*Hennessy v. Superior Court* (1924) 194 Cal. 368, 371; see also *Huskey v. Berini* (1955) 135 Cal.App.2d 613, 617.) Thus, regardless of when or whether a remittitur has been issued, a trial court has full authority to act on collateral matters.

Such collateral matters include issues affecting an undertaking posted on appeal. Thus, , e.g., while an appeal is pending, a trial court retains the power to increase the amount of an undertaking to ensure that it continues to comply with the mandate that the undertaking be in an amount of one and one-half times the judgment. (Code Civ. Proc., § 996.010, subd. (a) [“If a bond is given in an action or proceeding, the court may determine that the bond is or has from any cause become

insufficient because the sureties are insufficient or because the amount of the bond is insufficient.”]; *Grant v. Superior Court* (1990) 225 Cal.App.3d 929, 931–32.)

Likewise, a trial court retains the power to release a bond once it no longer serves its purpose. A bond only remains in force and effect until the purpose for which it was given has been satisfied. (Code Civ. Proc. § 995.430, subd. (b).) Once the purpose for which the bond was given has been satisfied it is no longer in force and effect and, by order of the court, the bond may be withdrawn from the files and delivered to the party by whom it was filed. (Cal. Rul. Ct. 3.1130, subd. (b).)

Thus, there was no jurisdictional bar to the Respondent Court entering an order releasing the bond.

B. The Respondent Court erred by not entering an order releasing the bond

1. The applicable statute mandates that the bond be released

Pursuant to Code of Civil Procedure section 995.430, a bond “remains in force and effect until the earliest of the following events: ... (b) The purpose for which the bond was given is satisfied or the purpose is abandoned without any liability having been incurred.” (Code Civ. Proc., § 995.430, subd. (b).) Thus, pursuant to statute, a bond only “remains in force and effect” until the “purpose for which the bond was

given is satisfied.” Once the purpose for which the bond was given has been satisfied it is no longer in force and effect and, by order of the court, the bond may be withdrawn from the files and delivered to the party by whom it was filed. (Cal. Rul. Ct., Rule 3.1130, subd. (b).)

In this case, Defendants posted a bond in order to stay enforcement of the trial court’s judgment while the appeal was pending. This Court’s Opinion and Disposition reversing the judgment became “final” on August 31, 2016. (Cal. Rule Ct., Rule 8.264, subd. (b)(1) [“Except as otherwise provided in this rule, a Court of Appeal decision in a civil appeal ... is final in that court 30 days after filing.”].) Thus, this Court no longer has jurisdiction to modify the Opinion or Disposition. (See *Sparrow’s Real Estate Service, Inc. v. Appellate Dept. of Superior Court of Kern County* (1965) 236 Cal.App.2d 739, 743.)

As a result of the reversal of the judgment, the proceeding is “left where it stood before the judgment or order was made, and the parties stand in the same position as if no such judgment or order had ever been rendered or made. They have the same rights which they originally had.” (*Sloan v. Court Hotel* (1945) 72 Cal.App.2d 308, 316 [internal citations omitted]. See *Christin v. Superior Court* (1937) 9 Cal.2d 526, 532 [“The effect of the reversal would be to nullify the trial ...

and any judgment or rights obtained as a result thereof, restoring all parties to their positions prior to the rendition of the void judgment.”].) Therefore, Plaintiffs no longer have any judgment against Defendants, much less a judgment that can be enforced.

Without an enforceable judgment, the bond no longer serves the purpose for which it was given, as Plaintiffs are not entitled to enforce a judgment that no longer exists. A simple way to look at the situation is that if there were currently no bond in place, Plaintiffs would not be permitted to enforce their \$76.4 million judgment. So, the bond is not serving the purpose for which it was given, to stay enforcement of the \$76.4 million judgment. The bond, therefore, is no longer in force or effect. Accordingly, the Respondent Court erred as a matter of law by not releasing the bond.

2. The Respondent Court’s reliance on section 917.1 to deny the release of the bond is not supported by the statutory language and was incorrect as a matter of law

In denying Defendants’ motion to release the bond, the Respondent Court concluded: “This Court is of the opinion that it is precluded by statute from reducing or eliminating the appeal bond until the remittitur issues. The authority for that is Code of Civil Procedure 917.1(b).” [Ex. 7, at 123-124] The Respondent Court is incorrect.

Section 917.1, subdivision (b), provides, in relevant part:

The undertaking shall be on condition that if the judgment or order or any part of it is *affirmed* or the appeal is *withdrawn* or *dismissed*, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal. ... The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order. The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court. (Emphasis added.)

By its express terms, section 917.1, subdivision (b), does not apply where the judgment has been “reversed.” The language of the statute expressly states it only applies in cases where the judgment is “affirmed or the appeal is withdrawn or dismissed” The statute also discusses the required amount of the bond and the circumstances under which a party may pursue enforcement against the bond when a judgment has

been affirmed or an appeal withdrawn. The judgment here was not “affirmed” and the appeal was not “withdrawn or dismissed.” The statute does not apply in situations where a judgment has been reversed, and cannot be relied upon to usurp the express provisions of section 995.430, subdivision (b), which state the bond is no longer in force and effect.

The Respondent Court’s conclusion that the bond cannot be released until issuance of the remittitur is based on a misreading of the statute and misunderstanding of the purpose of the remittitur. The remittitur has no impact on the finality of this Court’s Opinion or the lack of enforceability of the now reversed judgment.

Issuance of a remittitur simply “notifies” the trial court that the appellate court judgment is final and reverts jurisdiction in the trial court. (*Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 774; *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 190.) “A remittitur is not the reviewing court’s ‘judgment.’ The judgment is rendered in conjunction with the reviewing court’s written opinion and becomes ‘final’ as to that court upon expiration of a specified period of time [citation.] The ‘remittitur’ notifies the trial court of the appellate judgment and its finality.” (Weil & Brown, Cal. Prac. Guide: Civ. App. & Writs (The Rutter Group) ¶ 14:3, citing *Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 10.)

The effect of the delay between the filing of the Court of Appeal opinion and the issuance of the remittitur is to afford the parties the opportunity to petition for rehearing in the Court of Appeal and to seek review in the Supreme Court, *before appellate jurisdiction is lost.* (*Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330, 335–36, modified (July 19, 1988).) This is because after the remittitur is issued, the jurisdiction of the appellate court ceases, and jurisdiction is revested in the superior court. (*Ibid.* citing *Riley v. Superior Court* (1957) 49 Cal.2d 305, 310.)

Thus, whether or not the remittitur has issued directing the trial court to act in compliance with this Court's Disposition is of no consequence to whether or not this Court's Opinion and Disposition is "final." The distinction between when an opinion becomes final and when the remittitur is issued is a jurisdictional one – it creates a distinction between when the appellate court has jurisdiction and when the trial court does. The issuance of the remittitur has nothing to do with the Opinion becoming final, and is simply a transfer of jurisdiction between the courts. The distinction between when

the opinion is final and when the remittitur is issued *does not* affect whether or not there is a valid judgment in place or not.¹

The reference to “remittitur” in the last sentence of section 917.1, subdivision (b), is discussing the remittitur in the context of when a party can enforce a judgment against the bond following an affirmance or withdraw of the appeal. It has nothing to do with whether a bond can be released because the purpose for which it was given has been satisfied.

Next, in reaching its conclusion, it appears the Respondent Court relied upon an argument made by Plaintiffs that section 917.1, subdivision (b), applies because the purpose of the bonding statute is to make sure *the plaintiff* has an assured source of funds upon which to collect if a judgment is

¹ Plaintiffs cited two cases in their opposition to the motion to release the bond for the purported proposition that this Court’s Opinion is not final until the issuance of the remittitur. [Ex. 5, at 91, citing *Siry Investments, L.P. v. Farkhondehpour* (2015) 238 Cal.App.4th 725, 730; *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330, 335-336] While the *Siry* court stated “an appeal is not final until the court has issued its decision *and* issued the remittitur,” the court cited California Rule of Court 8.264(b)(1) to support its statement, which only states that the Opinion becomes “final in that court 30 days after filing.” The rule does not reference issuance of the remittitur. The *Siry* court’s reference to the remittitur is inconsistent with the express language of the Rule. The *Rare Coins* case does not state that the Opinion is not final until the remittitur issues.

affirmed. Plaintiffs argued that “section 917.1 ‘is clearly designed to protect the judgment won in the trial court from becoming uncollectible *while the judgment is subjected to appellate review*. A successful litigant will have an assured source of funds to meet the amount of the money judgment, costs and post-judgment interest after postponing enjoyment of a trial court victory.” [Ex. 5, at 90-91, citing *Grant v. Superior Court* (1990) 225 Cal.App.3d 929, 934.]

There are a number of problems with Plaintiffs’ argument. First, there is nothing to suggest that *Grant’s* reference to *appellate review* also includes Supreme Court review. The case was only addressing *appellate review* in the context of the appeal pending before the Court. It did not address Supreme Court review, which is a much different type of review.

Black’s Law Dictionary defines “appellate review” as: “Examination of lower court proceeding by an appellate court brought by appeal, bill of exceptions, report or certiorari. Such may also embrace review of administrative board’s decision by an inferior court; e.g. review by federal district court or social security administration decision.” (Black’s Law Dictionary, 6th Ed. (1990).) It is clear this definition does not include Supreme Court review. Also, there is no dispute that the Supreme Court is a court of policy, not a court of error like the Court of

Appeal. The Supreme Court's focus is not on correction of error by the Court of Appeal. (*People v. Davis* (1905) 147 Cal. 346, 348.)

Additionally, the *Grant* Court was addressing a much different issue. In *Grant*, this Court analyzed the extent to which a trial court had the ability to *increase a bond prior to the appellate court issuing an opinion* so as to cover the two-plus years of interest that had accrued since the judgment was issued by the lower court. (*Grant v. Superior Court, supra*, 225 Cal.App.3d at p. 933.) This Court was addressing a situation where there was still in existence an enforceable judgment because the Court had not yet completed its appellate review. Here, this Court's ***appellate review*** is over.

Additionally, Plaintiffs' argument is premised upon their suggestion that the purpose of the bond is to protect them by assuring them a source of funds upon which to collect if the judgment is affirmed. That is not the purpose of the bond.

The posting of the bond by Defendants was a completely voluntary act. There is no requirement that a bond be posted at all—such an undertaking is only required if Defendants want to stay execution of a money judgment. Thus, Plaintiffs' citations to cases stating the purpose of the bond is to provide a successful litigant an assured source of funds from which to

collect are inapposite. Defendants did not procure the bond to provide Plaintiffs with a source of funds from which to collect. Rather, Defendants procured the bond to *stay enforcement* of the judgment because they believed—and rightly so given this Court’s Opinion—that the judgment would not stand and Defendants did not want to be in a position of trying to recover from Plaintiffs amounts they collected under the now reversed judgment.

Defendants have paid in excess of \$11 million in just out of pocket expenses to obtain the benefit of a stay. In exchange for not being able to collect on their enforceable judgment, Plaintiffs received the benefit of an assured source of funds upon which to collect to the extent the judgment was affirmed and Defendants did not otherwise pay the judgment following affirmance. Defendants, however, no longer need a stay of enforcement as there is no longer an enforceable judgment. Therefore, Plaintiffs are, in turn, no longer entitled to the secondary benefit of a bond providing an assured source of collection. The need for the bond is premised entirely upon the existence of an enforceable judgment. Without an enforceable judgment, there is no need for a stay, and no need to assure a source of funds from which to collect.

**V.
CONCLUSION**

As a matter of statutory law, the \$118 million bond is no longer “in force and effect” because “[t]he purpose for which the bond was given is satisfied” The Respondent Court, therefore, abused its discretion in refusing to release the bond. As a result, Defendants are being irreparably damaged to the tune of \$10,504 *per day*—not to mention the devastating impact the bond has on daily business operations—by being forced to keep a bond in place when there is no existing enforceable judgment.

Because of the daily irreparable injury that is being suffered, writ relief is the only relief available to Defendants. This Court should, therefore, issue a peremptory writ of mandate in the first instance directing Respondent Court to vacate its ruling denying Defendants’ motion to release the bond and to forthwith enter a new order granting the motion and releasing the bond. Alternatively, this Court should order such other relief as may be just and proper.

Dated: October 4, 2016

McCORMICK BARSTOW LLP

By: /s/ Scott M. Reddie
 Scott M. Reddie
 Attorneys for Defendants and
 Petitioners

CERTIFICATE OF WORD COUNT
[Cal. Rules of Court, Rule 8.204(c)(1)]

Pursuant to California Rule of Court 8.204(c)(1), I certify that the foregoing petition for Writ of Mandate contains 6,879 words (not including the cover, the Certificate of Interested Entities or Persons, the Table of Contents, the Table of Authorities, the signature block, and this certificate). In preparing this certificate, I relied on the word count of Microsoft Office Word 2010, the computer program used to prepare the Petition.

Dated: October 4, 2016

McCORMICK BARSTOW LLP

By: /s/ Scott M. Reddie
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 Attorneys for Defendants and
 Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On October 4, 2016, I served true copies of the following document(s) described as **PETITION FOR WRIT OF MANDATE AND/OR APPROPRIATE EXTRAORDINARY RELIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY TRUEFILING ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 4, 2016, at Fresno, California.

/s/ Mary M. Reimer

Mary M. Reimer

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