No. _____

IN THE
Supreme Court of the United States

ADAM A. BEREKI,
Petitioner,

v.

KAREN AND GARY HUMPHREYS,
Respondents,

On Petition for a Writ of Certiorari
to the State of California
Fourth District Court of Appeal
Division Three

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are sections §7031(a) and (b), of the California Business and Professions Code unconstitutional in effect or as applied?
2. Is disgorgement under the laws of restitution and unjust enrichment a penal forfeiture? What Constitutional safeguards apply?

PARTIES TO THE PROCEEDING

Adam A. Bereki, Petitioner

Karen and Gary Humphreys, Respondents

28 USC §2403(b) applies. The California Attorney General has been served.

There is no parent or publicly held company involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

Adam A. Bereki petitions for a writ of certiorari to review the judgment of the California Fourth District Court of Appeal, Division 3.

OPINIONS BELOW

The appellate Court's opinion on October 31, 2018 (Pet. App A, pp.1-18) is unpublished but can be found at 2018 Cal. App. Unpub. LEXIS 7469. The denial of the petition for rehearing is unreported.

JURISDICTION

The California Supreme Court's denial of the Petition For Review was entered on January 30, 2019. This Court has jurisdiction pursuant to 28 USC §1257.

STATUTORY PROVISIONS INVOLVED

I. California Business and Professions Code §7031 (a) and (b), hereafter referred to as "§7031" declare:

(a) Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a

contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.

(b) Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.

Refer to (Pet. App. A 26-28) for §7031 in its entirety.

II. Refer to (Pet. App. E 29-32) for §7071.17 in its entirety.

III. Refer to (Pet. App. B 33-35) for Civil Code §3294 in its entirety.

INTRODUCTION

Even though Petitioner was the qualifying individual[1] of his company's contractor's license, he was ordered to forfeit $930,000 as a penalty because the court found the contract to remodel Respondents vacation home was with him personally instead of his licensed company. This amount is 186 times the comparable criminal monetary penalty for the same offense which is a fine of *up to* $5,000 plus restitution of actual damages (if any). This penalty was imposed without any of the safeguards mandated by the United States Constitution including the heightened protections of criminal proceedings.

"If the amount of the forfeiture is grossly disproportional to the gravity of defendant's offense, it is unconstitutional". *United States v. $132,245.00 In U.S. Currency,* 764 F.3d 1055, 1057-58 (9thCir. 2014).

On appeal, Petitioner argued the $930,000 judgement was punitive and that he was punished when the court failed to apply any constitutional protections regarding excessive punitive damages. He argued he was denied fundamental due process including the assistance of counsel, the right to know

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[1] "The qualifying individual is the person who meets the experience and examination requirements for the license and who is responsible for exercising that direct supervision and control of their employer's or principal's construction operations to secure compliance with CSLB's laws, rules, and regulations".http://www.cslb.ca.gov/Resources/FormsAndApplications/ApplicationForOriginalContractorsLicense.pdf

the nature and cause of the accusation, and proof beyond a reasonable doubt. He was even sanctioned by the trial court for challenging jurisdiction. This deprivation of rights effectively denied Petitioner a judicial hearing resulting in all applicable laws being a Bill of Attainder or Bill of Pains and Penalties in violation of Article 1, Section 10. *Cummings v. Missouri*, 71 U.S. 277 (1867).

The appellate Court summarily denied all of his claims finding they were without merit. It held the judgment in this case was "non-punitive" "disgorgement," an "equitable remedy" and "civil consequence."

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Haslip,* infra *p*.47 (1991).

§7031 actions result in a total forfeiture of all payments made by a customer as well as all unpaid balances for a project without any offsets for benefits conferred. This often creates astronomically harsh and irrational penalties capable of financially destroying defendants.

Because these forfeiture cases proceed in a civil setting and the awards are made to a private party, one might suspect the judgments amount to a punitive damage award subject to the 14th Amendment's due process protections. The problem is §7031 actions require no evidence of an actual

injury or damage resulting in no compensatory damages upon which to base a punitive damage award. §7031 is a strict liability statute requiring "full disgorgement" no matter how harsh the penalty. And under §7031, the penalties are virtually limitless.

A claim of fraud, oppression, or malice as required under Civil Code §3294 for a punitive damage award are also not evidenced in §7031 actions. No claim for a punitive damage award is ever made thereby depriving the court of jurisdiction to make such an award. In concert, none of the protections the Court established in *BMW of North America v. Gore,* 517 U.S. 559 (1996), *"Gore",* regarding excessive punitive damage awards are applied or reviewed de novo on appeal. This can and does result in astronomically oppressive judgments that avoid constitutional protections. A defendant's ability to pay is also never considered as required by California law.

Subsequent to trial, an additional penalty is also applied. §7071.17, requires the licensing board to suspend any affiliated license(s) – or deny any attempt at obtaining a license for one seeking rehabilitation – for failure to pay the award or obtain an equivalent payment bond. This suspension or denial occurs without any hearing, much less a judicial hearing.

"One must concede that unlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991), "Haslip".

This caustic statutory scheme thrives on a cascade denial of constitutional protections that can ultimately result in financially destroying a defendant while affirmatively restraining them from earning a living in their profession resulting in a form of constructive custody. (". . . by taking away his opportunity to earn a living, you can drain the blood from his veins without even scratching his skin.") *Flemming v. Nestor,* 363 U.S. 603, 629 (1960) (Justice Black Dissenting).

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This case continues the ongoing string of cases before this Court involving the imposition of punishment that bears no rational relation to the offense resulting in an arbitrary deprivation of property and effective denial of a judicial hearing.

Despite numerous Supreme Court challenges and Legislative petitions, California has been enforcing §7031(a) forfeitures for more than seventy years. This has resulted in unfathomable deprivations of rights to the People of California under color of law. It has further resulted in significant uncertainty and confusion in California's multibillion-dollar construction industry.

The penalty for violating §7031 is entirely based upon a hypothetical legislative presumption made without a judicial hearing that unlicensed contractors are "incompetent and dishonest." This presumption

forms the basis of the irrebuttable 'injury' upon which no evidence is required at "trial" and virtually limitless penalties are imposed under the guise of "non-punitive disgorgement."

"The power to create presumptions is not a means of escape from constitutional restrictions." *Bailey v. Alabama*, 219 U.S. 219, 239 (1911).

In a similar case, the penalty to the unlicensed contractor would have been $22.7 million dollars but for the substantial compliance exception of §7031(e) that was inapplicable to Petitioner in this case. See *Judicial Council of California v. Jacobs Facilities, Inc.,* 239 Cal. App. 4th 882 (2015). This $22.7 million was not "*Jacobs"* profit but the entire amount of the contract for work it performed. The court noted "*Jacobs*" was neither incompetent nor dishonest.

California's public policy declares "no one can take advantage of his own wrong." Civil Code §3517. But in §7031 cases, California is not accounting for any advantage a defendant actually made by gains or profits. Instead, the courts require "full disgorgement" allowing no offset for work the 'contractor' has performed. The homeowner gets to keep the work and receives a full refund resulting in a purely penal forfeiture to the 'contractor' without any evidence the 'contractor' gained or profited anything whatsoever. There is no remedy like this anywhere in the laws of unjust enrichment.

In this case, no evidence was presented that Petitioner gained or profited even one dollar.

This significant violation of Petitioner's constitutional rights cries out for this Court's intervention. California has clearly avoided the ordinary course of judicial process and is in direct conflict with the binding precedent of this court. The issues in this case were part of the federal circuit split evidenced in *Kokesh v SEC,* 581 U.S. ____ (2017), *"Kokesh",* and involve issues of nationwide importance around the rampant abuse of "civil" forfeitures that thwart constitutional protections.

Petitioner has been cruelly and excessively punished while being effectively denied a judicial hearing in every court of California involved in this case. This Court is his last opportunity for a remedy.

This court should grant certiorari.

STATEMENT OF THE CASE

BACKGROUND[2]

In 2007 Petitioner provided the work experience and passed the licensing exam to become a "qualifying individual" for a class B general contractor's license. The Contractor's State License Board determined he met the minimum qualifications and issued license #927244 in the name of his company, The Spartan Associates, Inc. "Spartan".

Spartan was solely owned and operated by Petitioner. It performed remodel construction work for close friends and family members and was never a 'public' company in that sense of the word. Spartan's main client was Respondent's son, with whom, over the course of several years, Petitioner developed a close friendship. It was through this relationship that Petitioner/Spartan was introduced to Respondents to help them with their remodel involved in this case.

Based upon the mutual respect and trust that had developed between Petitioner and Respondent's son, the contractual formalities required by the Business and Professions Code became relaxed. The work requested was performed and the bill paid. It was understood Spartan was the contractor, not Petitioner.

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[2] Some of this background information is not on the record. It is provided here only as context.

THE CASE

On behalf of Spartan, Petitioner met with Respondents at their vacation home, an upstairs bay-facing condominium unit in Newport Beach, to discuss their remodel in April of 2012. Pursuant to the conversation, Petitioner sent them an email detailing the work to be performed and an estimate to complete the work. Spartan was not mentioned in the email.

Shortly after initial demolition work began, Respondents purchased another adjacent condo unit and desired to combine their two units into one.

Petitioner's intent was that Spartan was the contractor. As such, Spartan paid for and obtained the building permits from the City of Newport Beach where it was listed as the contractor. Spartan hired employees and subcontractors and performed the work. It invested more than $840,000 in materials and labor into the remodel and posted its sign on the building to advertise it was performing the work as the contractor.

Over the course of the project Respondents paid $758,000 to Spartan based on invoices Spartan sent them. Petitioner did initially accept checks totaling $90,000 that were made out to him and he did make payments related to the initial project from this account. Accepting payment is not a violation of the licensing laws which also require performance of the work. See California Civil Jury Instructions, CACI §4560 (3).

After a series of ongoing issues, Respondents terminated Spartan (not Petitioner) and hired another contractor. They refused to pay Spartan's final invoice amounting to about $82,000.

Spartan filed an action at law for quantum meruit and open book account. Respondents filed a cross-complaint against Spartan and Adam Bereki. Among the allegations were negligence and intentional and negligent misrepresentation.

Soon thereafter Respondents filed a Motion For Summary Judgment. The Motion stated the "undisputed facts" were that they had contracted with Spartan and Spartan had performed the work but that since Spartan had failed to comply with the contractual requirements of the licensing laws, the agreement was void and they were entitled to summary judgment.

The Court denied summary judgment on the grounds Respondents failed to establish they were entitled to such relief as a matter of law. Even though Spartan may not have complied with the specified requirements, it still had standing to pursue its causes of action and be paid for work it performed.

Subsequent to the closure of discovery, with trial about a month away, Petitioner ran out of money to pay his and Spartan's attorney and began representing himself. At the same time, Respondents filed a Motion to Amend their Cross-Complaint to reflect a new first cause of action for disgorgement pursuant to §7031(b). This was based upon a complete reversal of their earlier representations to

the Court. In their Amended Motion, they claimed they had never contracted with Spartan, but with Petitioner who was unlicensed. Additionally, they filed a Motion For Severance to sever all other remaining causes of action.

Having no training or experience in the practice of law in this respect, Petitioner stood mute, not knowing what to do or how to do it.

By amending their Complaint with opposite factual representations and severing the remaining causes of action, Respondents effectively and essentially bypassed the due process requirements of proving any claim for injury or damage and could receive a windfall of a complete refund on top of retaining all of the remodel work performed. This is precisely one of the ways §7031 is abused and operates to commit outright theft under color of law.

The Court granted Respondent's Motions to Amend and Sever.

TRIAL

A bench trial commenced in March of 2017. Petitioner appeared in Propria Persona. Spartan was represented by its counsel.

Respondents testified they never believed they contracted with Spartan. They presented the initial email between them and Petitioner as the agreement for the project as well as the initial payments made directly to Petitioner, not Spartan.

Spartan testified it believed it was the contractor and presented evidence that it obtained the building permits and performed the work on the project and accepted compensation in the amount of $758,000. It also presented subsequent agreements with Respondents pertaining to the work that actually transpired on the project involving the combination of the two units as reflected by the building permits. This was in rebuttal to the initial email that made no mention of this work.

Petitioner was unaware of Respondents Motion for Summary judgment where they had represented the opposite facts. As a result they were never questioned on these conflicting statements. Spartan's counsel, likely committing malpractice, did not engage in this questioning either, despite having direct knowledge thereof. More importantly, he failed to raise any of the substantive constitutional arguments presented herein. However, like Petitioner and others who have protested these actions, he likely would not have been heard.

The trial Court determined Petitioner acted as an unlicensed contractor and awarded "disgorgement" in the amount of $848,000 to Respondents pursuant to §7031(b) (Pet. App. B, p.21 last paragragh). Spartan's claims, of approximately $82,000 were dismissed for lack of standing because it was determined not to be the contractor pursuant to §7031(a). The total forfeiture to Petitioner was therefore $930,000.

Unlike any other known industry in California, the contractors' licensing laws are based in part upon who has paid the licensing fees as opposed to who is actually 'qualified' to perform the work based on experience in the profession. In other words, even though Petitioner had the work experience and passed the licensing exam, he was unlicensed and presumed 'incompetent and dishonest' to act as a contractor. Yet Spartan on the other hand, a lifeless corporation, was qualified since it had paid the licensing fee and held Petitioner as its qualifying individual.

It remains unknown how Petitioner could be determined competent or incompetent simply because he didn't pay a fee. This is an abuse of a State's police powers. Essentially, his "crime" amounts at most to a clerical error whereby he could have done a better job of ensuring it was clear Spartan was the contractor and not him. As the Responsible Managing Officer for Spartan's license, he was competent to perform all of the tasks Respondents allege he did individually. He was the qualifying individual. Respondents presented no evidence differentiating the work Spartan performed from the work they claimed Petitioner performed as an individual. Additionally, no rebuttal was made as to all of the work Spartan evidenced it performed.

At trial, no evidence was presented of:

1) any profits or gains made by Petitioner to substantiate a cause of action for non-punitive disgorgement (see *Kokesh*, supra; Restatement

(Third) of Restititution and Unjust Enrichment §51, Comment *h*, "Restatement");

2) any actual injury or damage proximately caused by Petitioner's failure to be unlicensed to justify §7031 as remedial or restitutionary;

3) any rational nexus between the forfeiture and the "crime";

4) Petitioner's ability (or inability) to pay the judgment;

5) that Petitioner performed any of the work as required by California Civil Jury Instruction CACI §4560(3);

6) that Petitioner was a "person" to whom the statute applied. See for e.g. *Bass v United States*, 784 Fed. 2d. 1282 (1986) (Court directed verdict as to an essential element of the offense that Bass was an "employee"); *Thompson*, infra p.204 (evidence that doesn't prove all elements of charge violates due process);

7) that Petitioner was "incompetent or dishonest" as presumed by the California legislature, trial, and appellate Courts. See *Hydrotech Systems, Ltd. v. Oasis Waterpark*, 52 Cal. 3d 988, 955 (Supreme Ct. 1991).

Petitioner was never informed of this irrebuttable presumption nor given notice or a judicial hearing prior to its determination. As

> previously stated, he had passed the licensing requirements and was determined to be 'competent' as a "qualifying individual." See *Vlandis v Kline,* 412 U.S. 441, 446-8 (1973) (presumption not true and state had already made determination otherwise. "Statute creating a presumption which operates to deny a fair opportunity to rebut it violates due process…"); *Thompson*, infra p.204 (evidence that doesn't prove all elements of charge violates due process).

It should be noted the trial Court's judgment order reflects only the $848,000 judgement as opposed to the entire $930,000 which was also determined pursuant to §7031(a). The judgment order characterizes the "disgorgement" as "Damages". This characterization follows California Civil Jury Instruction, CACI, §3942 which states "Damages– Payments to Unlicensed Contractors".

Subsequent to trial Petitioner challenged the jurisdiction of the Court four times. Respondents failed to substantiate the jurisdiction of the Court to render judgment which violates the Constitution.

> "[A] plaintiff… must plead the essential jurisdictional facts and must carry throughout the litigation the burden of showing that he is properly in court; if his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof…" *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936), *"Mc Nutt".*

> "A court is a creature of the Constitution and laws under which it exists. To exercise any power not derived from such Constitution and laws would necessarily be a usurpation." *Ex Parte Knowles*, 5 Cal. 300 (Sup. Ct. 1855)
>
> ("[T]wo things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and a [constitutional] act of [Legislature] must have supplied it. Their concurrence is necessary to vest it. . . . It can be brought into activity in no other way. . . .:") *The Mayor v. Cooper*, 73 U.S. 247, 252 (1867), *"The Mayor"*.

Petitioner was ultimately sanctioned for exercising his Right to challenge jurisdiction. He was told his challenge was untimely and further denied due process by the Court's use of state and local rules to deny constitutional protections in violation of Article 6, §2, as the Justices meaningfully stated in *Miranda v. Arizona*, 384 U.S. 436, 491 (1966) ("where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them"). (Jurisdiction can be challenged at any time even on appeal). *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 576 (2004).

APPEAL

On appeal, Petitioner again directly challenged the jurisdiction of the trial Court.

The appellate Court, itself acting without jurisdiction to violate the Constitution, affirmed the trial court's

judgment and summarily dismissed all of Petitioner's claims. See (Pet. App. A p.6 "DISCUSSION") for the list of claims denied by the Court.

Respondents continued to fail to substantiate the trial Court's jurisdiction to render judgment in spite of all of the violations of constitutional law evidenced in Petitioner's brief. It is a further violation of due process to require a defendant to prove lack of jurisdiction. *Mc Nutt, supra*; *Elliot v. Lessee Persol,* 26 U.S. 328, 329, (1828) *"Persol"*; *Thompson v. Louisville,* 362 U.S. 199, 204 (1960), *"Thompson"*; *Cohens v. Virginia*, 19 U.S. 264, 404 (1821); *Windsor v. Mc Veigh*, 93 U.S. 274 (1876), *"Windsor"*.

The appellate Court specifically indicated that the judgment did not qualify under the 8th Amendment's Excessive Fines Clause because it was non-punitive. It therefore refused to recognize the relationship between the nonexistent harm and the penalty; the penalties imposed in similar statutes; Petitioner's (in)ability to pay; or, alternatively, any of the 14th Amendment's due process protections regarding excessive punitive damage awards, thereby committing the same due process violations as the trial Court. (A Court of California does not have jurisdiction to render judgment which violates the California Constitution or the Constitution for the United States".) *County of Ventura v. Tillet*, 133 Cal. App. 3d 105, 110 (1982), *"Tillet"*. The Court then ordered Respondents be awarded costs on appeal.

The Court of Appeal did not address any of the due process violations by the trial Court concerning Petitioner's challenges to jurisdiction. It held that the

sanctions order was separately appealable and Petitioner had not appealed it. (all proceedings founded upon a void judgment are "equally worthless.") *Bennett v. Wilson*, 122 Cal. 509 (Sup. Ct. 1898).

A Petition for Rehearing was filed specifically pointing the Court's attention to *Kokesh,* supra where the laws of unjust enrichment were applied to a disgorgement order to determine it qualified as a penalty under a statute of limitations. The Petition was denied without explanation.

PETITION FOR REVIEW

Petitioner challenged the jurisdiction of the trial and appellate Courts in a Petition For Review to the California Supreme Court. The petition was summarily denied on January 30, 2019 without providing Petitioner a hearing. While California has declared Supreme Court review is not a matter of right, the denial in this instance, when all access to a Constitutional judicial hearing had been denied by lower Courts, was yet another denial of substantive rights. Petitioner has thus been completely denied access to a judicial Constitutional Court in the state in which he is domiciled.

MOTION TO VACATE VOID JUDGMENT

Upon remittitur to the trial court, Respondents filed a Memorandum of Costs on Appeal. Petitioner filed a Motion To Vacate Void Judgment challenging the

jurisdiction of the Court to award costs based on a void judgment.

Respondents opposition offered no authority contrary to the holdings of this Court as presented therein by Petitioner. Instead, Respondents insisted the judgments of the trial and appellate Courts were res judicata. A void judgment in violation of the Constitution cannot possibly be res judicata.

> "[I]f it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers." *Persol*, supra p. 329

The trial Court found in favor of Respondents on the grounds the issue was res judicata. It cited *People v Dutra,* 145 Cal. App 4th 1339 (2006), which again cannot possibly apply if conclusive evidence is presented that there was a violation of substantive rights and if a challenge to jurisdiction can be made at any time.

How can a Court acting administratively or ministerially overrule the United States Supreme Court?

REASONS FOR GRANTING THE WRIT

Petitioner has effectively been denied a judicial hearing and rights secured by the Constitution in every Court of California this case has been presented to. This Court is his last resort. ("A sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal.") *Windsor v Mc Veigh*, 93 U.S. 274 (1876); ("[I]f it act without authority, its judgments and orders are regarded as nullities.) *Persol*, supra.

This case presents an ideal vehicle to further establish uniform procedures governing "disgorgement" and/or penal forfeiture actions in purported "civil" cases. These cases occur nationwide and entail important questions of federal law that have resulted in the federal circuit split in *Kokesh* and others pertaining to whether restitution is punitive.

In the instant case, the holdings of California Courts are in direct opposition to the binding precedent of this Court. Serious foundational constitutional issues have surfaced in these cases involving the imposition of excessive punishment at both State and Federal levels that bears no rational relation to the offense by courts acting without any statutory or Constitutional authority.

"One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is

lawless—a violation of due process" *Bennis v. Michigan*, 516 U.S. 442, 454 (1996).

The questions presented in this case pick up where *Kokesh* left off – with an examination of State and Federal authority to conduct penal forfeitures disguised as non-punitive equitable disgorgement remedies in purported civil cases.

The numerous issues involved and the questions presented in this case recur frequently in countless cases across the nation. Hundreds of billions of dollars in potential liability across multiple industries[3] turn on it and there is significant history involving the repeated abuse of forfeiture proceedings[4]. ("[I]f we look at these forfeitures that are occurring today… many of them are grossly disproportionate to the crimes being charged") Justice Sotomayor, oral argument, *Timbs v. Indiana*, 586 U.S. ____ (2019). See Congressional Research Service, Crime and Forfeiture by Charles Doyle[5].

While the forfeiture cases cited in these articles where abuses occurred are often initiated in the civil context by government, §7031 forfeiture appears to be whole new breed empowering the private party to

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[3] Richard L. Cassin VimpelCom FCPA Disgorgement is third biggest ever, http://www.fcpablog.com/blog/2016/2/23/vimpelcom-fcpa-disgorgement-is-third-biggest-ever.html; See also "Other Authorities" in Petition For Writ of Certiorari and Opening Brief of Petitioner, *Kokesh*, supra.

[4] Statement of Justice Thomas in *Leonard v Texas*, 580 U.S.___ (2017), denial of certiorari.

[5] https://www.hsdl.org/?view&did=762005

maintain the same type of action under government 'authority'.

Only this Court can usher national uniformity, and this case is a perfect vehicle to do so. This Court should grant certiorari.

A. CALIFORNIA COURTS ARE IN DIRECT CONFLICT WITH THIS COURT'S BINDING PRECEDENT

California has not recognized §7031's penal nature for over seventy years, which make its holdings in direct conflict with the binding precedent of this Court and due process. §7031 actions parasitically thrive on a cascade denial of constitutional protections that ultimately result in cruel, unusual, and excessive punishments capable of financially destroying defendants and their ability to earn a living as a contractor. The totality of punishment imposed by this legislative scheme, which can also include license suspension, revocation, or denial, is not considered in these actions, evidencing further abuse of fundamental protections.

The analysis in this section will evidence that California Courts have improperly characterized §7031 actions as "civil" "non-punitive" "disgorgement" "equitable remedies" when they are really criminal penal forfeitures or commercial in rem forfeitures in the Admiralty, a jurisdiction which state Courts are flatly prohibited from exercising.

California authorizes four penalties for engaging in the business of, or acting in the capacity of, a "contractor" without a license – a criminal penalty, a civil penalty, a shield penalty and a sword penalty:

1) The first offense, criminal penalty, an in personam criminal action pursuant to §7028, can be a misdemeanor conviction with a fine *up to* $5,000, plus restitution for actual economic loss (if any). The fine is payable to the government, the economic loss to the customer.

2) The "administrative" penalty, an action pursuant to §7028.17 B&P, is a citation by the Registrar of Contractors for a fine *up to* $15,000. The civil penalty is payable to the government and *in addition to* all other remedies, either civil or criminal.

3) The shield penalty is a "civil" forfeiture action pursuant to §7031(a), which bars the unlicensed contractor from using the Courts to collect money owed for work performed.

4) The sword penalty, a "civil" forfeiture action pursuant to §7031(b), allows the customer to recover "all compensation paid" to the unlicensed contractor.

Neither §7031(a) or (b) use the terms "disgorgement", "forfeiture," "punishment," or "damages," which has undoubtedly led to the confusion over what specific kind of action §7031 is and what constitutional protections apply. California Courts however, use all four of these words to describe §7031 actions in their

opinions or judgment orders, lending even greater confusion:

> "[w]e will refer to the remedies [of 7031(a) and (b)] jointly as **'forfeiture.'"** *Judicial Council*, supra p.895.
>
> "The licensing requirement and the **penalties** for violating that requirement…" *White*, infra. p.517
>
> "The Court finds judgment for… [the] Humphreys for (First Cause of Action For **Disgorgement** of Funds Paid)" (Pet. App. B p.21 last paragraph)
>
> Trial court Judgment Order, "**Damages** $848,000". California Civil Jury Instructions, §4561 **Damages**– All Payments Made to Unlicensed Contractors.

I. §7031 Penalties are Not Disgorgement Under the Laws of Unjust Enrichment

"Disgorgement" is not a statutory term defined in either State or Federal law. Its only known application in law applies to a forfeiture of the ill-gotten gains or profits by a wrongdoer under the laws of Restitution and Unjust Enrichment. See Restatement (Third) of Restitution and Unjust Enrichment §51.

In *Kokesh*, the Court adopted Restatement's definitions of the nature of a cause of action for non-punitive disgorgement:

> "As a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid". Comment *h.*
>
> "Generally, disgorgement is a form of "[r]estitution measured by the defendant's wrongful gain." Comment *a.*

See also Comment *e*: "The profit for which the wrongdoer is liable by the rule of §51(4) is the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong."

See also *United States v. Ursery,* 518 U.S. 267 (1996) ("Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct").

Contrast the foregoing with the appellate Court's opinion in this case, ("[f]ull disgorgement is required; offsets and reductions for labor and materials are not permitted." (Pet. App. A, p.16 first sentence).

It should also be carefully noted that disgorgement requires a "conscious wrongdoer" (see Restatement §51(3) and Comment *e*), which it seems is indistinguishable from a finding of scienter in criminal cases, yet is entirely absent in §7031 actions.

Another layer of confusion involves use of the word "compensation" in §7031(a) and (b). California holds that "all compensation paid to an unlicensed contractor …means …without reductions or offsets for the value of material or services provided." *White v. Cridlebraugh*, 178 Cal. App. 4th 506, 520 (2009), *"White"*.

The *Kokesh* Court also used the word "compensation," but it appears only in the sense that it referred to profits or ill-gotten gains ("'[b]ecause disgorgement orders go beyond **compensation**, are intended to punish…"). (emphasis added).

Comparing these two different definitions of "compensation" reveals an astronomical difference in the amount of the penalty. Consider the following example:

> Suppose an unlicensed contractor receives $500,000 to build a new home. The contractor spends $425,000 in materials, labor, and other costs during construction, leaving the remaining $75,000 in profit or gains.

Here, California's "disgorgement" of "all compensation paid" would result in a $500,000 penalty whereas "compensation" as defined under Restatement *§51* and *Kokesh* would result in a $75,000 penalty. It is important to notice that even applying disgorgement under the laws of unjust enrichment could still potentially result in an excessive fine or punishment, which would require further analysis under the appropriate Constitutional protections. A $75,000 penalty absent

any injury is likely to be grossly disproportionate to the offense.

In its Opinion, (Pet. App. A, p.11) the Fourth District Court of Appeal applied the federal definitions of "disgorgement" and "compensation" in the case of *SEC v. Huffman*, 996 F.2d 800 (5th Cir. 1993), *"Huffman",* to justify that §7031 "disgorgement" was also a "non-punitive equitable remedy". But this is seriously wrong. *Huffman* stated that "disgorgement wrests the ill-gotten gains from the hands of a wrongdoer." *Id.* p.802. In the instant case no gains or profits were evidenced or differentiated from the other material costs of the project. These costs, independent of gains or profit, were benefits conferred to the Humphreys in the form of remodel work. The materials Spartan purchased were installed in their *custom* home and were of no gain or profit to Petitioner whatsoever.

The appellate Court found there was substantial evidence to support the trial Court's findings of "non-punitive disgorgement" when there was no evidence presented of Petitioner's gains or profits to support such a claim. Respondents never even stated a claim for non-punitive disgorgement under Restatement §51.

It is unknown how the appellate Court (and virtually all California Courts) concluded "ill-gotten gains" meant every penny involved in the transaction, as opposed to what Petitioner gained or profited.

The Arizona Supreme Court dealt with very similar issues in *Town of Gilbert Prosecutor's Office v. Downie,* 218 Ariz. 466 (2008). The Court stated:

> "[A] rule of total disgorgement regardless of any benefit conferred on the victim…may lead to absurd or troubling results." *Id.* p.24
>
> "[A] homeowner who received flawless work from an unlicensed contractor would be refunded the full amount paid but would nonetheless also retain the work performed. It is impossible for me to view such a victim as having suffered any loss, economic or otherwise..." Justice Hurwitz, concurring, *Id.* p.30.

The "absurd and troubling" results are precisely what is occurring here – the entire amount paid by the Humphreys is not remotely equivalent to the nonexistent profit or gains of Mr.Bereki.

Forfeitures under §7031 are therefore not non-punitive disgorgement under the laws of unjust enrichment. Nor do they conform in any way to any recognized form of restitution.

IIA. §7031 Actions Are Purely Penal (Criminal) Forfeitures Disguised as "Civil"

"A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Austin v. United States*, 509 U. S. 602, 621 (1993).

Because §7031's penalties are ordered by Courts without evidence of any injury, damage, or nexus to a defendant's (mis)conduct, they do not provide the "victim" equal value for a nonexistent loss and do not make them whole for injuries that they never evidenced. Judgments pursuant to §7031 are therefore neither remedial, compensatory, or restitutionary. They do not restore the status quo and are solely intended to deter and punish. Therefore §7031 actions are purely penal forfeitures.

In ordinary usage, a forfeiture is defined as the loss or giving up of something as a *penalty* for wrongdoing.

Black's Law Dictionary defines "forfeiture" as:

> "Something to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty." (Rev. 4th Ed. 1968)

Under California law, "any provision by which money or property is to be forfeited without regard to the actual damage suffered calls for a penalty…" *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.,* 232 Cal. App. 4th 1332, 1357 (2015)*, "Grand Prospect"*. Both §7031(a) and (b) require forfeiture without regard to any actual damage suffered.

The California Supreme Court has repeatedly affirmed §7031's deterrent nature which is inherently punitive:

> "Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] …" *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, 36 Cal. 4th 412, 423 (Sup. Ct. 2005).

In *Bell v. Wolfish,* 441 U.S. 520, 539 (1979), the Court held:

> "sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because 'deterrence [is] not [a] legitimate non-punitive governmental objectiv[e].'"

In *Huntington v. Attrill,* 146 U. S. 657, 668 (1892):

> "A pecuniary sanction operates as a penalty if it is sought 'for the purpose of punishment, and to deter others from offending in like manner' rather than to compensate victims."

And Boyd v. United States, 116 U.S. 616 (1886):

> "A proceeding to forfeit a person's goods for an offence against the laws, though civil in form, and whether in rem or in personam, is a "criminal case" within the meaning of that part of the Fifth Amendment…"

Petitioner has been unable to locate any cause of action, whether state or federal, evidencing a "civil" in personam forfeiture. See for e.g. U.S. Department of Justice Types of Forfeiture[6]. Federally, an in personam forfeiture is criminal and requires the government to indict the property used or derived from the crime *along with* the defendant. The forfeiture only proceeds after the conviction of the defendant who is afforded the presumption of innocence, assistance of counsel, and other heightened protections in criminal proceedings, all of which were denied here. (Forfeiture was "a part, or at least a consequence, of the judgment of conviction.") *The Palmyra*, 25 U.S. 1, 12 (1827).

This judgment has the potential to force Petitioner into bankruptcy amounting to a forfeiture of all of his real and personal property. Historically, this was known as a forfeiture of estate. ("At common law, anyone convicted and attained for treason or a felony, forfeited all his lands and personal property. Attainder, the judicial declaration of civil death, occurred as a consequence of the pronouncement of final sentence for treason or felony…After the Revolution, the Constitution restricted the use of common law forfeiture in cases of treason, and Congress restricted its use, by statute, in the case of other crimes.") See Footnote 5.

> "There were many ways in which a man might los[e] his freedom, and with his freedom he necessarily lost his citizenship also. Thus he

[6] https://www.justice.gov/afp/types-federal-forfeiture.

> might be sold into slavery as an insolvent debtor, or condemned to the mines for his crimes as *servus poenae" (slave punishment)* [or effectively denied judicial process–ed]. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), *"Kennedy"*, fn. 23.

IIB. Applying the "Kennedy Tests" to Determine a Statute's Civil or Criminal Nature

"Judicial determinations as to the civil or penal nature of a particular provision generally center around the issue of 'whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question.'" [Citations] *Ward v. Coleman*, 598 F.2d 1187 (10th Circuit 1979).

There is nothing about the enactment or enforcement of §7031 actions that appears to indicate a civil, regulatory nature, other than the labels affixed thereto.

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Haslip*, supra p.47.

In *Kennedy*, supra, the Court enumerated a series of tests traditionally applied to determine whether an Act of Congress is penal or regulatory in nature. The

following analysis will apply §7031 to each of the test criteria:

(I) Whether the sanction involves an affirmative disability or restraint:

> The imposition of a monetary penalty of this nature in comparison to the comparable maximum civil and criminal penalties unequivocally imposes a disability or restraint because it has the capability of financially destroying a defendant amounting to a forfeiture of estate. ("The purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not destroy.") *Rufo v. Simpson*, 86 Cal. App. 4th 573, 620 (2001).
>
> Additionally, in connection with §7071.17, any judgment must be reported to the Licensing Board. A bond must be posted in the amount of the judgment or the defendant will not be granted a license for rehabilitation. Any existing licenses in which the defendant is a qualifying individual will be suspended. If the defendant does not have the collateral to obtain the bond they are effectively disabled and/or restrained from earning a living as a contractor.
>
> While not on the record, Petitioner does not have the money or available credit to obtain the bond. The price of the bond quoted was 2% of the amount ($16,960) plus cash or credit in the amount of $848,000 required to fully collateralize the bond.

(II) Whether it has historically been regarded as a punishment:

> While monetary penalties have traditionally been applied to both criminal and civil statutes, in personam forfeitures have always been regarded as criminal. As evidenced, §7031's nature is deterrent which is also inherently punitive. So is the fact that equitable remedies are denied (see p.42) and the fine is neither compensatory, remedial, or restitutionary. Forfeiture of estate was punishment for the commission of treason or a felony.

(III) Whether it comes into play only on a finding of scienter:

> The statute, on its face, does not contain an element of scienter. Yet evidence has been presented that California uses this lack of scienter as part of the disguise of a "civil" proceeding for avoiding criminal due process requirements while dispensing astronomical and debilitating penalties. The lack of scienter in this context does not support the statute being a civil remedy.
>
> Under the laws of unjust enrichment, disgorgement requires a "conscious wrongdoer," which is not evidenced in §7031 actions. Restatement §51(3), Comment *e*.

(IV) Whether its operation will promote the traditional aims of punishment – retribution and deterrence:

> The effect of §7031's operation promotes the traditional aims of punishment, retribution and deterrence, See e.g. *United States v Halper*, 490 U.S. 435, 448 (1989).

(V) Whether the behavior to which it applies is already a crime:

> Section §7028 makes contracting without a license a misdemeanor crime. The penalty for the first offense is a fine *up to* $5,000 plus restitution for damages (if any). While the existence of legislative intent to enact a separate criminal statute may in some cases lend direction as to the nature of other statutes, it does not do so in this instance when the enforcement of the statute by courts has been affirmed by the legislature and falls squarely within the provisions of criminal punishment by more than a century or jurisprudence of the United States Supreme Court.

(VI) Whether an alternative purpose to which it may rationally be connected is assignable for it:

> The licensing laws were enacted to deter unlicensed persons from engaging in contracting business. *MW Erectors*, supra. Absent an actual injury which may lend remedial, compensatory, or restitutionary characteristics, there are no alternative purposes beyond punishment that can be rationally connected to §7031 as it was enacted and has been applied for decades.

> No reasonable rational connection can be made that causing Petitioner to forfeit $930,000 aids in protecting the public, especially when he met the minimum requirements for licensure and was qualified. While the traditional aims of regulation include public safety, no evidence has been presented – or rationally could be – linking Petitioner's specific behavior to harm. Petitioner's "crime" was essentially a clerical error in that he could have made his intent clearer that Spartan was the contracting party. This "error" has no substantial connection to the forfeiture. The money forfeited is not an instrumentality of the crime. See e.g. *United States v. Bajakajian*, 524 U.S. 321 (1998). Nor can a nonexistent "injury" be redressed by the forfeiture. There was also no evidence that any of the alleged "compensation" was in any way intended to be or used to commit any other crimes or offenses.

(VII) Whether it appears excessive in relation to the alternative purpose assigned:

> This factor lends considerable weight to finding §7031 is criminal and not remedial in nature.
>
> The purpose assigned to §7031 and enforced by California Courts is to deter and punish unlicensed contractors for wrongdoing by imposing a monetary penalty in the form of a forfeiture. Under §7031 (a) this results in a forfeiture of all money for services rendered that the unlicensed contractor *has not* been paid for. Under §7031(b), this results in a forfeiture of all

> money the unlicensed contractor *has* been paid for services rendered. They are in effect, opposite sides of the same coin resulting in a total forfeiture as a penalty to the unlicensed contractor.
>
> The legislature has created statutes authorizing a *variable* fine *up to* $5,000 for first offense criminal penalties for contracting without a license. Assuming the maximum award of $5,000 were "reasonable" to the purpose assigned, the judgment in this case is 186 times this amount.
>
> "If the amount of the forfeiture is grossly disproportional to the gravity of defendant's offense, it is unconstitutional". *United States v. $132,245.00 In U.S. Currency*, 764 F.3d 1055, 1057-58 (9thCir. 2014).

Here, "the statutory scheme [is] so punitive either in purpose or effect as to negate [the] intention to establish a civil remedial mechanism.") *United States v. Ursery*, 518 U.S. 267, 278 (1996).

Based upon the foregoing, Petitioner believes he has met the "heavy burden" of providing "the clearest proof … to negate [the legislature's] intention to deem [§7031] civil ….." *Kansas v. Hendricks*, 521 U.S. 346 (1997) citing *United States v. Ward*, 448 U.S. 242, 248 (1980).

III. The Judgment Is Grossly Excessive Under the "Gore Tests" for Excessive Punitive Damages

Momentarily putting all arguments aside that this was a criminal action, the judgment can be examined in light of the three-part test for evaluating the validity of punitive damages in civil cases as established in *Gore,* supra.

Under this test, use of §7031(b) to hypothetically take anything more than nominal damages from Petitioner and give them to Respondents fails every element of the test for the following reasons:

REASONABLENESS

First, the relationship between the "harm" and forfeiture of $930,000 is grossly disproportionate. At trial, Respondents presented no evidence of an injury or damages proximately caused by Petitioner's alleged failure to be licensed.

"Compensatory damages are intended to redress the concrete loss the victim has suffered by reason of the defendant's wrongful conduct. [citations omitted]. By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution" [citations omitted]. *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003)*, "Campbell".*

In the instant case, disgorgement of anything would be an infinite multiple of the nonexistent compensatory damages.

COMPARABLE CASE AWARDS

Second, the difference between the $930,000 forfeiture award and both the criminal and civil penalties authorized in comparable cases is staggering. The maximum criminal penalty is a fine up to $5,000 plus restitution of actual economic loss. The maximum civil penalty is an administrative fine by the Registrar up to $15,000.

Punitive damages in excess of $15,000 therefore do not pass Constitutional muster.

REPREHENSIBLE

Third, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, supra, p. 575.

The conduct here is not reprehensible. There was there no evidence of any damages whatsoever. Had there been, they would have been purely economic. No one was hurt or injured. There was no evidence of fraud, oppression, or malice.

Respondents interacted exclusively with Petitioner, who had the work experience and passed the competency exam to qualify for Spartan's license. He was qualified.

Prior to hiring Petitioner or Spartan, Respondent Gary Humphreys was intimately aware of Petitioner's competency by the previous projects he

had done at Respondent's business and for other family members.

Furthermore, Mr. Humphreys is a nationally recognized expert in project management and a government contractor who teaches project management around the world. He is not a member of the public who needs protection from incompetence and dishonesty from those who provide building and construction services. In fact, he has decades more training and experience in project management than Petitioner, who doesn't even possess a college degree.

* * *

Based on the foregoing, punishment in the amount of $930,000 is grossly excessive.

"One must concede that unlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Haslip,* supra p.18.

Subsequent to the trial court's failure to apply the *Gore* tests, the appellate court failed to comply with the requirements of a de novo review ("exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decision-maker's caprice.") *Campbell,* supra *p.*436 (citations omitted). Both courts also failed to take Petitioner's financial condition into account as required by State law ("evidence of financial condition is critical to whether a punitive damages award serves the purpose of punishment and

deterrence without destroying the defendant financially.") *Adams v Murakami,* 54 Cal. 3d 105, 117-118 (Sup. Ct. 1991)

B. CALIFORNIA HAS DRASTICALLY DEPARTED FROM ORDINARY JUDICIAL PROCESS

California was admitted as a Common Law State. Yet clearly §7031 actions neither proceed at Law nor Equity despite the court's holdings that the judgments thereunder are "equitable remedies."

Since 1957 the California supreme court has held that held an unlicensed contractor cannot resort to equitable remedies such as set off or unjust enrichment in "defiance" of §7031. *Lewis & Queen v. N. M. Ball Sons,* 48 Cal. 2d 141, 152 (1957).

Equitable remedies are meant to preserve due process or the fundamental fairness of a court of Equity. The effect of denying these remedies directly evidences California's intent to enforce the statute in a purely punitive manner.

Equity abhors a forfeiture. §7031 actions cannot possibly be in Equity.

In *Kokesh*, supra, the government relied upon the Federal Court's inherent power to order restitution as its authority to order SEC disgorgement. There is no such inherent power absent statutory authority. See *The Mayor*, supra.

While California Courts proceeding according to the course of the common law do have inherent power to

order restitution, this judgment was not restitution. In fact, California refers to it as "non-restitutionary disgorgement". *Meister v. Mensinger*, 230 Cal. App. 4th 381 (2014). It appears, based on its application, that "non-restitutionary disgorgement" is another name for punishment or a penalty.

Having no apparent basis in Law or Equity and in direct violation of the binding precedent of the Supreme Court of the United States and the Constitution, California's enactment and enforcement of §7031 actions has drastically departed from the ordinary course of judicial process.

C. THIS CASE IS WORTHY OF THIS COURT'S REVIEW

The questions presented in this case and the issues related thereto are important. This court should resolve these issues involving California's failure to heed the binding precedent of this court and the nationwide uncertainty and confusion pertaining to civil forfeiture cases. This case is a perfect vehicle.

D. THE FOURTH DISTRICT COURT OF APPEAL'S OPINION IS WRONG

The Fourth District Court of Appeal's opinion is wrong. The Court acted without jurisdiction to affirm judgment of the trial Court that punished Mr. Bereki by depriving him of the Constitutional protections of excessive punitive damage awards or fines and the heightened protections of criminal proceedings. ("A Court of California does not have jurisdiction to render judgment which violates…the Constitution

for the United States".) *Tillet*, supra. This imposed punishment upon Mr. Bereki while effectively depriving him of a judicial hearing, resulting in a Bill of Attainder or Pains and Penalties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A– OPINION, COURT OF APPEAL

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

GARY HUMPHREYS et al.
Cross-complainants and Respondents.

G055075

v. (Super. Ct. No. 30-2015-00805807)

OPINION

ADAM BEREKI
Cross-defendant and Appellant

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Adam Bereki, in pro. per., for Plaintiff and Appellant. William G. Bissell for Defendants and Respondents.

*****

This case involves the purported general contractor for a condominium remodel project, Adam Bereki, on one side, and the condominium owners, Gary and Karen Humphreys (the Humphreys), on the other. After the Humphreys terminated Bereki's involvement, a now defunct corporation formerly owned by Bereki, Spartan Associates, Inc. (Spartan Associates), sued Humphreys, claiming they still owed approximately $83,000 for work on the project. The Humphreys denied the allegations and cross-complained against Bereki and Spartan Associates. Among the remedies they sought was disgorgement of all payments made for the project, pursuant to Business and Professions Code section 7031, subdivision (b)[7], due to Bereki' s alleged failure to possess a required contractor's license.

Following a bifurcated bench trial on the disgorgement cause of action, the trial court found in favor of the Humphreys and ordered Bereki to repay them all monies received in relation to the remodel work — $848,000. Its ruling and a stipulation by the parties disposed of the remainder of the case and Bereki appealed. He challenges the disgorgement on a variety of constitutional, legal, and factual grounds. We find no merit in his contentions and, therefore affirm the judgment.

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[7] All further statutory references are to the Business and Professions Code unless otherwise indicated.

I. FACTS

The Humphreys own a condominium on Lido Isle in the City of Newport Beach. It was originally two separate units. The couple hired Bereki to do some remodeling which would, among other things, turn the two units into a single unit. After an on-site walkthrough, the Humphreys exchanged e-mails with Bereki to confirm the scope of the project. In one of his e-mails, Bereki stated he and his partner would perform the work for a specified rate.

The Humphreys agreed to the proposed scope and rates, and also inquired whether a written contract was necessary. Bereki responded that it was not; their "'words/commitment [was] enough.'" To start the project, Bereki asked the Humphreys for a $15,000 check deposit payable to him, personally.

Several months into the remodel the Humphreys, at Bereki's request, started making their progress payments to Spartan Associates instead of paying Bereki directly as an individual. Bereki never gave them an explanation for the change or what, if any, involvement Spartan Associates had in the project, but the accountings he sent included the name "Spartan Associates."

After approximately a year and a half, the Humphreys terminated Bereki's involvement and later hired a different general contractor to complete the project.

Believing the Humphreys still owed approximately $82,800 for materials used in the remodel and labor performed, Spartan Associates sued to recover that

amount. The Humphreys generally denied the allegations in the complaint, and filed a cross-complaint against Bereki, Spartan Associates, and a surety company. Among the allegations were causes of action for negligence, intentional misrepresentation, and negligent misrepresentation. The trial court later granted them leave to amend the cross-complaint to include a cause of action for disgorgement of funds paid to an unlicensed contractor, pursuant to section 7031, subdivision (b).

At the Humphreys' request, the trial court bifurcated the disgorgement claim from the remainder of the claims in the cross-complaint, and it held a trial on that issue first. During the course of the two-day bench trial on the disgorgement cause of action, the court heard testimony from the Humphreys and Bereki.

Karen Humphreys testified it was her understanding, based on the initial e-mails exchanged with Bereki, that she and her husband were contracting with Bereki and his partner to do the work. They wanted a licensed contractor to do the work and obtain all the necessary permits, and she "took [Bereki] at his word that he had a license."

She also testified there was no mention of Spartan Associates until months after the project began and insisted they never entered into a contract with Spartan Associates.

Gary Humphreys concurred with his wife's testimony about the remodel details, the series of events that transpired between them and Bereki, and the agreement he believed they entered into with Bereki.

In addition, he confirmed Bereki told him he was a licensed contractor and stated he would not have hired him if he knew it was otherwise.

In contrast, Bereki testified the contract for the couple's remodel project was between the Humphreys and Spartan Associates. He nevertheless acknowledged his initial e-mail communications to the Humphreys made no mention of Spartan Associates, including the one which set forth the proposed scope of work and hourly rates. When asked about contractor's licenses, he admitted he never possessed one as an individual or as a joint venture with his partner. Spartan Associates, however, did have a contractor's license at the time of the project.

As for the work done for the Humphreys, Bereki testified he believed Spartan Associates performed all of it. He testified that the three city permits for the project were all obtained by, and issued to, Spartan Associates. Additionally, he produced contracts with subcontractors who performed aspects of the remodel work. The majority of these contracts were between the given subcontractor and Spartan Associates[8].

The trial court found in favor of the Humphreys on the disgorgement cause of action based on its determination that Bereki, not Spartan Associates, was the contractor who performed all the remodel

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[8] Bereki filed an unopposed motion to augment the record on appeal with certain exhibits admitted in the trial court. We deny the request because the exhibits already are "deemed part of the record" by Court Rule. (Cal. Rules of Court, rule 8.122(a)(3).) We have considered the copies of the exhibits he provided in conjunction with our review of this appeal.

work. As a result, the court also found in favor of the Humphreys on Spartan Associate's complaint. The remainder of the cross- complaint was dismissed without prejudice at the Humphreys' request.

II. DISCUSSION

Bereki challenges the portion of the judgment disgorging all compensation paid to him for his work on the Humphreys' remodel project[9]. Though articulated in various ways, his arguments boil down to the following: (1) disgorgement under section 7031, subdivision (b), is unconstitutional or, alternatively, criminal in nature; (2) the trial court erred in ordering disgorgement because Spartan Associates, not Bereki, performed the work and Spartan Associates held a contractor's license; (3) even assuming Bereki performed the work, the state's contractor licensing requirement does not apply to him as a "natural person"; (4) there was insufficient evidence to support disgorgement, including no evidence of injury due to Bereki's failure to be individually licensed; (5) the court should have offset the disgorgement amount by the value the

[9] Bereki appears to also challenge a postjudgment sanctions order the trial court issued based on Bereki's motion to compel a response to a demand for a bill of particulars filed after entry of judgment. The sanctions order is not encompassed by his earlier appeal from the judgment. And although such a postjudgment order is separately appealable (Code Civ. Proc., § 904.1, subds. (a)(2) & (b)), Bereki did not file another appeal. Accordingly, the issue is not before us. *(Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 693 [court without jurisdiction to review postjudgment order from which no appeal is taken].)

Humphreys received through the remodel work; (6) it was improper to order full disgorgement because certain payments were not made from the Humphreys' personal accounts; and (7) the court Bereki challenges the portion of the judgment disgorging all compensation paid to him for his work on the Humphreys' remodel project. 3 Though articulated in various ways, his arguments boil down to the following: (1) disgorgement under section 7031, subdivision (b), is unconstitutional or, alternatively, criminal in nature; (2) the trial court erred in ordering disgorgement because Spartan Associates, not Bereki, performed the work and Spartan Associates held a contractor's license; (3) even assuming Bereki performed the work, the state's contractor licensing requirement does not apply to him as a "natural person"; (4) there was insufficient evidence to support disgorgement, including no evidence of injury due to Bereki's failure to be individually licensed; (5) the court should have offset the disgorgement amount by the value the Humphreys received through the remodel work; (6) it was improper to order full disgorgement because certain payments were not made from the Humphreys' personal accounts; and (7) the court erroneously failed to provide a written statement of

decision[10]. We find no merit to any of these contentions.

A. Disgorgement Remedy Under Section 7031

Relying heavily on *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 517 *(White),* the decision in *Alatriste v. Cesar 's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656, 664-666 *(Alatriste)* aptly summarizes the nature, purpose and scope of the litigation prohibition and the disgorgement remedy provided in section 7031, subdivisions (a) and (b).

"Section 7031 [, subdivision] (b) is part of the Contractors' State License Law (§ 7000 et seq.), which is a comprehensive legislative scheme governing the construction business in California. [This statutory scheme] provides that contractors

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[10] After briefing was complete, Bereki filed a motion asking that we take judicial notice of a plethora of items, among which are the federal Constitution and other foundational documents for this country, federal and state statutes, and a variety of case law. To begin, "[r]equests for judicial notice should not be used to 'circumvent [ ]' appellate rules and procedures, including the normal briefing process." *(Mangini v. R. J Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064, overruled on another point as stated in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.) Further, " [a] request for judicial notice of published material is unnecessary. Citation to the material is sufficient." *(Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Ca1.4th 26, 45, fn. 9.) We therefore deny Bereki's request as unnecessary to the extent it included such materials. As for the remaining items, we likewise deny the request because we find them not properly the subject of a request for judicial notice and/or irrelevant to resolution of the matters before us. (Evid. Code, §§ 451, 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089, fn. 4 [appellate court will not take judicial notice of irrelevant material].)

performing construction work must be licensed unless exempt. [Citation.] "The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.]" [Citation.] The [laws] are designed to protect the public from incompetent or dishonest providers of building and construction services [Citation.] [Citation.]

"This statutory scheme encourages licensure by subjecting unlicensed contractors to criminal penalties and civil remedies. [Citation.] The civil remedies 'affect the unlicensed contractor's right to receive or retain compensation for unlicensed work.' (Ibid.) The hiring party is entitled to enforce these remedies through a defensive 'shield' or an affirmative 'sword.' [Citation.]

"The shield, contained in section 7031 [subdivision] (a), was enacted more than 70 years ago, and provides that a party has a complete defense to claims for compensation made by a contractor who performed work without a license, unless the contractor meets the requirements of the statutory substantial compliance doctrine. [Citation.] Section 7031 [subdivision] (e), the substantial compliance exception, provides relief only in very narrow specified circumstances, and 'shall not apply ... where the [unlicensed contractor] has never been a duly licensed contractor in this state." [Citation.]

"The California Supreme Court has long given a broad, literal interpretation to section 7031

[,subdivision] (a)'s shield provision. [Citation.] The court has held that [it] applies even when the person for whom the work was performed knew the contractor was unlicensed. [Citation.] . . .. [It] explained that Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] ..."" [Citation.] "'Because of the strength and clarity of this policy [citation]," the bar of section 7031 [, subdivision] (a) applies "[r]egardless of the equities." ' [Citations.]

"In 2001, the Legislature amended section 7031 to add a sword remedy to the hiring party's litigation arsenal. This sword remedy, contained in section 7031 [,subdivision] (b), currently reads: 'Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract." By adding this remedy, the Legislature sought to further section 7031 [,subdivision] (a)'s policy of deterring violations of licensing requirements by 'allow[ing] persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. [Citation.]' [Citation.]" *(Alatriste, supra,* 183 Cal.App.4th at pp. 664-666, fns. omitted.)

Based on the statutory language and legislative history, both *Alatriste* and *White* "concluded that the Legislature intended that courts interpret sections 7031 [, subdivision] (a) and 7031[, subdivision] (b) in a consistent manner, resulting in the same remedy regardless of whether the unlicensed contractor is the plaintiff or the defendant." *(Alatriste, supra,* 183 Cal.App.4th at p. 666, citing *White, supra,* 178 Cal.App.4th at pp. 519-520.) These principles are well-settled under the law.

Bereki contends the disgorgement remedy is penal in nature and, therefore, a contractor defending against such a claim must be afforded all criminal rights and protections. Not so. Disgorgement is a civil consequence- "an equitable remedy"- for performing work without a required contractor's license. *(S.E.* C. *v. Huffman* (5th Cir. 1993) 996 F.2d 800, 802 (S.E.C.); see *Walker v. Appellate Division of Superior Court* (2017) 14 Cal.App.5th 651,657 [§ 7031 contemplates civil proceedings].) The Legislature created a separate criminal penalty. Specifically, section 7028 provides that acting or operating in the capacity of a contractor without a required license is a criminal misdemeanor subject to jail time, or fines, and restitution. (§ 7028, subds. (a)-(c), (h).)

For similar reasons, Bereki' s attempt to characterize disgorgement as an award of unconstitutional punitive damages is unavailing. As an equitable remedy, disgorgement is not punishment and, therefore, it does not implicate the excessive fines clause of the Eighth Amendment to the United States Constitution. (S.E.C. supra, 996 F.2d at p. 802; see

US v Philip Morris *USA* (D.C. 2004) 310 F.Supp.2d 58, 62-63.)

B. Contractor Licensing Requirement

Before turning to application of section 7031, subdivision (b), we address Bereki's claim that he, in his individual capacity, did not need a contractor's license. His argument is twofold, one part legal and the other part factual. We reject both.

As for the legal argument, Bereki asserts that licensing requirements only apply to "fictitious" persons, not "natural" persons such as himself. He cites no authority for his unique interpretation of the relevant statutes. And, the statutes provide otherwise. Contractors who are required to obtain a license include “[a]ny person ... who ... undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct any ... home improvement project, or part thereof." (§ 7026.1, subd. (a)(2).) In turn, '"[p]erson"' is defined to include "an individual[,]" as well as a variety of types of business entities and associations. (§ 7025, subd. (b).) "In ordinary usage[,] the word 'individual' denotes a natural person not a group, association or other artificial entity. (See Webster' s Third New Internat. Diet. (2002 ed.) p. 1152 [giving a primary definition of 'individual' as 'a single human being as contrasted with a social group or institution'].)" *(City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 623, disapproved of on other grounds in *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416.) There is nothing in the statutes that indicates a different, specialized meaning. *(Halbert 's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6

Cal.App.4th 1233, 1238 ["In examining the language, the courts should give to the words of the statute their ordinary, everyday meaning [citations] unless, of course, the statute itself specifically defines those words to give them a special meaning"].)

Bereki's factual attack concerns the trial court's conclusion that he, not Spartan Associates, was the contractor who performed the remodel work for the Humphreys. Though he implores us to engage in de novo review of this issue, it is a factual determination which we review for substantial evidence. *(Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514.) There is ample evidence in the record supporting the court's conclusion.[11]

Both of the Humphreys testified that on the first day they met Bereki for a walkthrough of the site, he informed them that he and his partner would act as the general contractor for the project. Bereki followed

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[11] Bereki filed a motion asking us to consider additional evidence not presented in the trial court, among which are two declarations, an e-mail correspondence and a letter. He believes the documents are relevant to establishing the identity of the contracting parties. We deny the motion as "[i]t has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.'" (In re Zeth S. (2003) 31 Cal.4th 396, 405, italics added.) Circumstances warranting an exception to this rule are very rare and we do not find them extant here, particularly in light of the conflicting evidence weighed by the trial court. (See Diaz v. Professional Community Management, Inc. (2017) 16 Cal.App.5th 1190, 1213 ['" The power to take evidence in the Court of Appeal is never used where there is conflicting evidence in the record and substantial evidence supports the trial court's findings.'"].)

up with a written proposal and estimate, which he sent to the couple from his personal e-mail address. When they inquired whether he had a contractor's license, he assured them he did, and when they asked him to whom they should make out their payment checks, he told them to put them in his name.

At no time during this series of events did Bereki ever mention Spartan Associates. Notably, Bereki did not apply to the State Board of Equalization to register Spartan as an employer until roughly three months after the remodel work began. Then, about four months into the project, he introduced the corporation into the mix by asking the Humphreys, without any explanation, to make future payments to Spartan Associates.

Based on what transpired, the couple believed they contracted with Bereki, in his individual capacity, to complete the remodel work.

While Bereki claims the Humphreys lied when they testified at trial because some of their factual statements purportedly contradicted those they made at the summary judgment stage, our role is not to resolve factual disputes or to judge the credibility of witnesses. *(Leff v. Gunter (1983) 33 Cal.3d 508, 518.)* The trial court bore that responsibility in this case, and our review of the record reveals substantial evidence to support its conclusion that Bereki, not Spartan Associates, was the contractor for the job.

C. Disgorgement Remedy Under Section 7031

Separate from his general attacks on section 7031 , subdivision (b) , Bereki challenges its application

under the specific facts of this case. He first asserts disgorgement is an improper remedy because it gives the Humphreys a double benefit- the remodel improvements and the money they otherwise would have paid for them. In the context of the statute at issue, however, courts have uniformly rejected such an argument and required disgorgement, even though this remedy often produces harsh results. (See, e.g., *Alatriste, supra*, 183 Cal.App.4th at pp. 672-673; *White, supra*, 178 Cal.App.4th at pp. 520-521; see also *Jeff Tracy, Inc. v. City of Pico Rivera* (20 15) 240 Cal.App.4th 510, 521.) Full disgorgement is required; offsets and reductions for labor and materials received are not permitted.

Equally meritless is Bereki ' s contention that there was no justiciable claim under the statute because there was no evidence the Humphreys were injured by his lack of a contractor' s license. Bereki cites no authority for that novel proposition. Injury is not an element of a cause of action under the statute. The disgorgement consequence is not remedial in nature. Similar to the licensing requirement, it is a proactive measure intended to decrease the likelihood of harm due to "incompetent or dishonest providers of building and construction services." *(White, supra,* 178 Cal.App.4th at pp. 517.)

We also are not persuaded by Bereki's objection to the amount the court ordered him to repay to the Humphreys. He highlights evidence showing that some of the payment checks came from Gary Humphreys' corporation, and he argues the Humphreys are not entitled to those amounts given they did not pay them in the first instance. While we

do not necessarily see eye-to-eye with Bereki's legal reasoning, we need not reach the legal aspect of his argument due to the trial court's factual findings.

The trial court, relying on Gary Humphreys' uncontradicted testimony, found that the contested payments ultimately were attributable to Gary Humphrey himself. Substantial evidence supports this conclusion. The Humphreys testified that the business is an S corporation, and at the relevant time Gary Humphreys was the sole shareholder and an employee. Gary Humphreys explained he was traveling often for business during the remodel, including at times when Bereki insisted on needing money "'right away.'" To facilitate the payments, Gary Humphreys had persons in his corporation with signing authority write checks from the corporate account. The amounts paid on the Humphreys behalf were then accounted for through a reduction in the regular income Gary Humphreys received from the corporation. He paid income taxes on those amounts because they were included in the figures listed on his annual W-2 form.

Under these circumstances, we find ample evidence to support the trial court's factual finding that although certain payments to Bereki were made from the Humphreys' business account, they ultimately were accounted for in a way that ensured they were personal payments from the Humphreys, as individuals. Accordingly, the Humphreys were entitled to "all compensation paid." (§ 7031, subd. (b).)

We recognize that the provisions of section 7031, including the disgorgement remedy, are harsh and

may be perceived as unfair. As courts have explained, however, they stem from policy decisions made by the Legislature. *(MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 423; *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995; *Lewis & Queen v. NM Ball Sons* (1957) 48 Cal.2d 141, 151; see *Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896; *Alatriste, supra,* 183 Cal.App.4th at p. 672.) "[T]he choice among competing policy considerations in enacting laws is a legislative function" *(Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1203), and absent a constitutional prohibition, we may not interfere or question the wisdom of the policies embodied in the statute. *(Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 25; *Alatriste, supra,* 183 Cal.App.4th at p. 672.)

D. Statement of Decision

Though he admits he did not timely request a statement of decision, Bereki claims the trial court should have nevertheless provided one after he made an untimely request. To the contrary, "[n]o statement of decision is required if the parties fail to request one." *(Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970; see also Code Civ. Proc., § 632.) The trial court's denial was proper. (See *In re Marriage a/ Steinberg* (1977) 66 Cal.App.3d 815, 822 [upholding court's refusal to make findings of fact and conclusions of law due to party's failure to timely request them].)

III. DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P.J.

GOETHALS, J.

APPENDIX B- TRIAL COURT

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

MINUTE ORDER

CASE NO: 30-2015-00805807-CU-CO-CJC CASE INIT.DATE: 08/21/2015

CASE TITLE: THE SPARTAN ASSOCIATES, INC. vs. HUMPHREYS

CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

APPEARANCES

J. Scott Russo, from Russo & Duckworth LLP, present for Cross- Defendant, Plaintiff(s).

William G. Bissell, from Law Offices of William G. Bissell, present for Defendant, Cross-Complainant(s).

KAREN HUMPHREYS, Defendant is present.

GARY HUMPHREYS, Defendant is present.

Adam Bereki, self represented Cross - Defendant, present.

2nd day of trial

At 9:55a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

At 9:57 a.m. Mr. William G. Bissell presents closing argument on behalf of Cross-Complainants/Defendants, Karen & Gary Humphreys.

At 10:12 a.m. Mr. J. Scott Russo presents closing argument on behalf of Cross-Defendant, The Spartan Associates, Inc ..

Mr. Adam Bereki waived closing argument.

At 10:19 a.m. Court declares a recess.

At 10:52 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

Having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, the Court finds and determines that Mr. Adam Bereki is the contractor and he does not possess contractor's license.

The Court finds judgment for the Cross Complainants, Gary & Karen Humphreys (First Cause of Action, for Disgorgement of Funds Paid) and against cross-defendant, Adam Bereki.

The Court invites counsels to meet and discuss the plan for the remaining cause of actions and the complaint.

At 11:19 a.m. Court declares a recess.

At 11:37 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

Legal discussions held with regards to remaining cross-complaint cause of actions and the complaint as set forth on the record.

Counsels are to resume discussions during lunch hour and report to the Court at 1:45 p.m.

At 11:47 p.m. Court declares a recess.

At 1:48 p.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

Counsels reached an agreement as set forth on the record .

Mr. J . Scott Russo presents an offer of proof on plaintiff's complaint that if called Mr. Adam Bereki would be the witness and the testimony would be that Plaintiff, Spartan Associates had rendered goods and services to the defendants. The fair market value for the services and goods of $82,821.53 to be backed up by invoices and testimony about the reasonable value of those services that would be the first cause of action Quantum Merit. For the 2nd cause of action, go and in hand that it was an open book accounting

was rendered to the defendants that they were given the accountings and the sum was
$82,821.53 that was still due.

Based on Mr. Russo's offer of proof, the Court understand that those claims are based upon the view of plaintiff Spartan Associates, Inc. was the general contractor on the project. The Court finds that Spartan Associates does not have standing as determined earlier today that Mr.Bereki was the purported general contractor on the contract. Spartan Associates, Inc. may have been apparently substituted but it is certainly not with the permission or agreement of the defendants. Based on that, the Court finds judgment for the defendants on the complaint.

The parties have discussed, agreed and stipulates on the record as follows: The entirety of remaining causes of action on the First Amended Cross-Complaint will be dismissed without prejudice. If judgment on the first cause of action becomes final, the dismissal without prejudice will be converted to dismissal with prejudice. Pending judgment on the first cause of action becoming final, the statute of limitations on the re-filing of an action of the dismissed causes of action is waived. If a new action is filed on the dismissed causes of action , discovery deemed completed and will not be re-opened and the newly filed case will be consolidated with the remanded case for trial.

Pursuant to Mr. Bissell's Motion, the Court orders the remaining causes of action, negligence, fraud, alter ego, penalty, attorney's fees and recovery

against the Contractor's license bond be dismissed without prejudice. The judgment on the First Amended Cross Complaint is on the 1st cause of action for discouragement only.

The Court directs Mr. William G. Bissell to prepare the judgment.

At 2:03 p.m. Pursuant to oral stipulation set forth on the record, exhibits are released and returned to the submitting parties/counsels for maintenance, custody and safekeeping pending any post-verdict or appeal proceedings. All identification tags and other identifying markings are to remain in place pending this period.

At 2:05p.m. The Court is adjourned
in this matter.

APPENDIX C- SUPERIOR COURT

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

MINUTE ORDER

TIME: 09:30:00 AM DEPT: C16

JUDICIAL OFFICER PRESIDING: Supervising Judge James J. Di Cesare CLERK: Martha Diaz REPORTER/ERM: Jamie Jennings CSR# 13434 BAILIFF/COURT ATTENDANT: Loretta Schwary

CASE NO: 30-2015-00805807-CU-CO-CJC CASE INIT.DATE: 08/21/2015

CASE TITLE: THE SPARTAN ASSOCIATES, INC. vs. HUMPHREYS

CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

EVENT ID/DOCUMENT ID: 72990898

EVENT TYPE: Motion to Vacate MOVING PARTY: Adam Bereki CAUSAL DOCUMENT/DATE FILED: Motion to Vacate Void Judgment, 02/19/2019

APPEARANCES

Law Offices of William G. Bissell, from Law Offices of William G. Bissell, present for Cross - Complainant, Defendant, Respondent on Appeal(s). Adam Bereki, self represented Defendant, present.

Tentative Ruling posted on the Internet and posted in the public hallway.

The Court having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now makes the tentative ruling final as follows:

MOTION TO VACATE

The Motion "to Vacate Void Judgment" filed by Mr. Adam Bereki is Denied. The arguments presented on this motion were already raised and rejected, and the appellate decision affirming the underlying judgment on the merits is now final. Upon remittitur, the trial court is revested with jurisdiction of the case only to carry out the judgment as ordered by the appellate court. (*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1365-1366.) Arguments on the merits of the underlying judgment cannot be entertained anew here. The Motion is therefore Denied.

Counsel for the Humphreys to give notice.

APPENDIX D- §7031 B&P

BUSINESS AND PROFESSIONS CODE - BPC
DIVISION 3. PROFESSIONS AND VOCATIONS GENERALLY [5000 - 9998.11] *(Heading of Division 3 added by Stats. 1939, Ch. 30.)*

CHAPTER 9. Contractors [7000 - 7191] *(Chapter 9 added by Stats. 1939, Ch. 37.)*

ARTICLE 2. Application of Chapter [7025 - 7034] *(Article 2 added by Stats. 1939, Ch. 37.)*

7031.
(a) Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.
(b) Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.

(c) A security interest taken to secure any payment for the performance of any act or contract for which a license is required by this chapter is unenforceable if the person performing the act or contract was not a duly licensed contractor at all times during the performance of the act or contract.
(d) If licensure or proper licensure is controverted, then proof of licensure pursuant to this section shall be made by production of a verified certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action. Nothing in this subdivision shall require any person or entity controverting licensure or proper licensure to produce a verified certificate. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure shall be on the licensee.
(e) The judicial doctrine of substantial compliance shall not apply under this section where the person who engaged in the business or acted in the capacity of a contractor has never been a duly licensed contractor in this state. However, notwithstanding subdivision (b) of Section 143, the court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to

comply with the licensure requirements upon learning of the failure.

(f) The exceptions to the prohibition against the application of the judicial doctrine of substantial compliance found in subdivision (e) shall apply to all contracts entered into on or after January 1, 1992, and to all actions or arbitrations arising therefrom, except that the amendments to subdivisions (e) and (f) enacted during the 1994 portion of the 1993–94 Regular Session of the Legislature shall not apply to either of the following:

(1) Any legal action or arbitration commenced prior to January 1, 1995, regardless of the date on which the parties entered into the contract.

(2) Any legal action or arbitration commenced on or after January 1, 1995, if the legal action or arbitration was commenced prior to January 1,1995, and was subsequently dismissed.

(Amended by Stats. 2016, Ch. 244, Sec. 1. (AB 1793) Effective January 1, 2017.)

APPENDIX E- §7071.17 B&P

BUSINESS AND PROFESSIONS CODE - BPC
DIVISION 3. PROFESSIONS AND VOCATIONS GENERALLY [5000 - 9998.11] *(Heading of Division 3 added by Stats. 1939, Ch. 30.)*

CHAPTER 9. Contractors [7000 - 7191] *(Chapter 9 added by Stats. 1939, Ch. 37.)*

ARTICLE 5. Licensing [7065 - 7077] *(Article 5 added by Stats. 1939, Ch. 37.)*

7071.17.
(a) Notwithstanding any other provision of law, the board shall require, as a condition precedent to accepting an application for licensure, renewal, reinstatement, or to change officers or other personnel of record, that an applicant, previously found to have failed or refused to pay a contractor, subcontractor, consumer, materials supplier, or employee based on an unsatisfied final judgment, file or have on file with the board a bond sufficient to guarantee payment of an amount equal to the unsatisfied final judgment or judgments. The applicant shall have 90 days from the date of notification by the board to file the bond or the application shall become void and the applicant shall reapply for issuance, reinstatement, or reactivation of a license. The board may not issue, reinstate, or reactivate a license until the bond is filed with the board. The bond required by this section is in addition to the contractor's bond. The bond shall be on file for a minimum of one year, after which the bond may be removed by submitting proof of

satisfaction of all debts. The applicant may provide the board with a notarized copy of any accord, reached with any individual holding an unsatisfied final judgment, to satisfy a debt in lieu of filing the bond. The board shall include on the license application for issuance, reinstatement, or reactivation, a statement, to be made under penalty of perjury, as to whether there are any unsatisfied judgments against the applicant on behalf of contractors, subcontractors, consumers, materials suppliers, or the applicant's employees. Notwithstanding any other provision of law, if it is found that the applicant falsified the statement then the license will be retroactively suspended to the date of issuance and the license will stay suspended until the bond, satisfaction of judgment, or notarized copy of any accord applicable under this section is filed.

(b) (1) Notwithstanding any other provision of law, all licensees shall notify the registrar in writing of any unsatisfied final judgment imposed on the licensee. If the licensee fails to notify the registrar in writing within 90 days, the license shall be automatically suspended on the date that the registrar is informed, or is made aware of the unsatisfied final judgment.

(2) The suspension shall not be removed until proof of satisfaction of the judgment, or in lieu thereof, a notarized copy of an accord is submitted to the registrar.

(3) If the licensee notifies the registrar in writing within 90 days of the imposition of any unsatisfied final judgment, the licensee shall, as a condition to the continual maintenance of the license, file or have on file with the board a bond sufficient to guarantee

payment of an amount equal to all unsatisfied judgments applicable under this section.

(4) The licensee has 90 days from date of notification by the board to file the bond or at the end of the 90 days the license shall be automatically suspended. In lieu of filing the bond required by this section, the licensee may provide the board with a notarized copy of any accord reached with any individual holding an unsatisfied final judgment.

(c) By operation of law, failure to maintain the bond or failure to abide by the accord shall result in the automatic suspension of any license to which this section applies.

(d) A license that is suspended for failure to comply with the provisions of this section can only be reinstated when proof of satisfaction of all debts is made, or when a notarized copy of an accord has been filed as set forth under this section.

(e) This section applies only with respect to an unsatisfied final judgment that is substantially related to the construction activities of a licensee licensed under this chapter, or to the qualifications, functions, or duties of the license.

(f) Except as otherwise provided, this section shall not apply to an applicant or licensee when the financial obligation covered by this section has been discharged in a bankruptcy proceeding.

(g) Except as otherwise provided, the bond shall remain in full force in the amount posted until the entire debt is satisfied. If, at the time of renewal, the licensee submits proof of partial satisfaction of the financial obligations covered by this section, the board may authorize the bond to be reduced to the amount of the unsatisfied portion of the outstanding judgment. When the licensee submits proof of

satisfaction of all debts, the bond requirement may be removed.

(h) The board shall take the actions required by this section upon notification by any party having knowledge of the outstanding judgment upon a showing of proof of the judgment.

(i) For the purposes of this section, the term "judgment" also includes any final arbitration award where the time to file a petition for a trial de novo or a petition to vacate or correct the arbitration award has expired, and no petition is pending.

(j) (1) If a judgment is entered against a licensee, then a qualifying person or personnel of record of the licensee at the time of the activities on which the judgment is based shall be automatically prohibited from serving as a qualifying individual or other personnel of record on another license until the judgment is satisfied.

(2) The prohibition described in paragraph (1) shall cause the license of any other existing renewable licensed entity with any of the same personnel of record as the judgment debtor licensee to be suspended until the license of the judgment debtor is reinstated or until those same personnel of record disassociate themselves from the renewable licensed entity.

(k) For purposes of this section, lawful money or cashier's check deposited pursuant to paragraph (1) of subdivision (a) of Section 995.710 of the Code of Civil Procedure, may be submitted in lieu of the bond.

(l) Notwithstanding subdivision (f), the failure of a licensee to notify the registrar of an unsatisfied final judgment in accordance with this section is cause for disciplinary action. *(Amended by Stats. 2018, Ch. 925, Sec. 3. (AB 3126) Effective January 1, 2019.*

APPENDIX F- §3294 CIVIL CODE

CIVIL CODE - CIV
DIVISION 4. GENERAL PROVISIONS [3274 - 9566] (Heading of Division 4 amended by Stats. 1988, Ch. 160, Sec. 16.)

PART 1. RELIEF [3274 - 3428] (Part 1 enacted 1872.)

TITLE 2. COMPENSATORY RELIEF [3281 - 3360] (Title 2 enacted 1872.)

CHAPTER 1. Damages in General [3281 - 3296] (Chapter 1 enacted 1872.)

ARTICLE 3. Exemplary Damages [3294 - 3296] (Article 3 enacted 1872.)

3294.

(a) 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.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages

are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent

multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

(Amended by Stats. 1992, Ch. 178, Sec. 5. Effective January 1, 1993.)

APPENDIX G– CALIFORNIA SUPREME COURT DENIAL OF PETITION FOR REVIEW

Court of Appeal, Fourth Appellate District, Division Three– No. G055075

S252954

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GARY HUMPHREYS et al., Cross-Complainants and Respondents

v.

ADAM BEREKI, Cross-defendant and Appellant

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice