NINTH CIRCUIT COURT OF APPEALS

Dai v. Barr
Order amending opinion

CALIFORNIA COURTS OF APPEAL

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SUMMARIES

Antitrust

Actions to restrain trade not protected petitioning activity (Richman, Acting P.J.)

Richmond Compassionate Care Collective v. 7 Stars Holistic Foundation, Inc.

C.A. 1st; January 29, 2019; A153305

The First Appellate District affirmed a trial court order denying an anti-SLAPP motion. The court held that defendants, in arguing that plaintiff’s amended complaint was based on protected activity, ignored and mischaracterized the substance of the complaint.

The City of Richmond issued medical marijuana collective permit to four entities: Richmond Compassionate Care Collective (RCCC), Richmond Patients Group (RPG), Holistic Healing Collective, Inc., and 7 Stars Holistic Foundation, Inc. The Richmond marijuana ordinance was later amended to reduce the number of dispensaries permits to three. Each permit was conditioned on the permitted facility opening within six months; if the facility did not open within that time period, the permit would expire and become void. RCCC was unable to open on time and lost its permit. It sued the other three collectives and their principals and agents, alleging they had conspired to prevent RCCC from opening, in violation of the Cartwright Act. The trial court sustained defendants’ anti-SLAPP motion, finding that their opposition to RCCC’s opening of facility constituted “statements or conduct made in connection with…official proceedings” regarding “a public issue.” RCCC twice amended its complaint without success. Its third amendment, however, included the declaration of Lisa Hirschhorn, a named defendant who had now apparently switched sides. Hirschhorn described in detail the actions taken by defendants to dissuade or prevent landlords from leasing to RCCC. These activities ranged from “tying them up with paper,” in the form of bogus leases, letters of intent to lease or purchase, and purchase agreements, to warning them that renting to RCCC would result in federal forfeiture proceedings. The scare tactics were effective—property owners, their managers and real estate agents refused to lease or sell to RCCC. The purpose of defendants’ “war on RCCC,” Hirschhorn declared, was to prevent it from acquiring a business location until enough time passed that its permit would expire, so that defendants would control the lucrative medical marijuana market in Richmond.

7 Stars once again moved to strike the complaint as an anti-SLAPP suit, arguing that it was once again targeting protected petitioning activity. The trial court disagreed and denied the motion. 7 Stars appealed.

The court of appeal affirmed, holding that the trial court properly denied the anti-SLAPP motion. The essence of RCCC’s amended complaint was that defendants took private actions to restrain trade and monopolize the medical marijuana market in Richmond. That was the gravamen of the amended complaint. Any protected activity was at the most incidental. As the trial court itself observed, 7 Stars’ arguments to the contrary were based on nothing more than a blatant mischaracterization of the record.

Criminal Law

No bar to imposition of punishment for both conspiracy to commit human trafficking and two substantive human trafficking offenses (Miller, J.)

People v. Beman

C.A. 1st; February 21, 2019; A153841

The First Appellate District affirmed a judgment of sentence. The court held that because a conspiracy to commit human trafficking had broader objectives and involved more victims than two substantive human trafficking offenses, Penal Code §654 did not bar imposition of punishment for all three crimes.

For more than seven years, Eric Beman and coconspirators used threats, force, and violence in pimping at least three victims. The three victims testified to having been beaten, choked, burned, and raped by Beman and/or his coconspirators when they tried to escape or otherwise disobeyed. Based on these acts, Beman pleaded no contest to one count of conspiracy to commit human trafficking, as well as two counts of human trafficking for his conduct against Victim 1. The trial court sentenced Beman to a 14-year prison term for the conspiracy count and to two consecutive 16-month terms for the two counts of human trafficking of Victim 1.

Beman appealed, arguing that Penal Code §654 precluded the imposition of punishment for the two substantive offenses of human trafficking in addition to the punishment for conspiracy to commit human trafficking.

The court of appeal affirmed, holding that the conduct underlying the conspiracy count and the two substantive counts was not the same.

Beman’s convictions for two counts of human trafficking related solely to Victim 1 and to acts that occurred in 2011. The objectives of the conspiracy, however, went far beyond that specific conduct, spanning at least seven years and involving at least two victims in addition to Victim 1. As a result, §654 did not bar punishment for both the conspiracy count and the two substantive human trafficking counts.
Elder Law

Special relationship between petitioner and alleged abuser not prerequisite for standing to seek restraining order under Elder Abuse Act (Miller, J.)

Darrin v. Miller

C.A. 1st; January 28, 2019; A155089

The First Appellate District reversed a trial court order. The court held that the trial court erred in finding that a special relationship between a petitioner and her alleged abuser was a prerequisite for standing to seek a restraining order under the Elder Abuse and Dependent Adult Civil Protection Act.

Jude Darrin, age 81, petitioned for a restraining order under the Elder Abuse Act, alleging that her next-door neighbor, Sandra Miller, subjected her to ongoing abuse and harassment. Darrin alleged that Miller and Miller’s boyfriend taunted and threatened her in myriad ways: they twice removed a wire boundary fence between the properties; they trespassed onto her property and destroyed a hedge and defaced and damaged a barrier fence; they let their dogs menace her unchecked; and the boyfriend ordered the dogs to “kill” her.

The trial court dismissed the petition, concluding that because the two women were simply neighbors, there was no special relationship between them that would give Darrin standing under the Elder Abuse Act.

The court of appeal reversed, holding that the trial court erred in dismissing Darrin’s petition. The plain language of the Elder Abuse Act authorizes a trial court to issue a restraining order against any individual who has engaged in abusive conduct, as defined by statute, toward a person age 65 or older regardless of the relationship between the alleged abuser and victim. The Elder Abuse Act defines “abuse” broadly, including not only physical abuse, neglect, abandonment, isolation or abduction of a person age 65 or older, but also “other treatment,” if that treatment results in “physical harm or pain or mental suffering” to the elder.

The court held that the Medical Board of California failed to provide evidence sufficient to support its request for an order compelling a physician to produce his patient’s records.

Health Care Law

Evidence insufficient to justify order compelling release of physician’s patient records (Bigelow, P.J.)

Grafilo v. Cohanshohet (Medical Board of California)

C.A. 2nd; January 22, 2019; B285193

The Second Appellate District reversed a trial court order. The court held that the Medical Board of California failed to provide evidence sufficient to support its request for an order compelling a physician to produce his patient’s records.

The board received an anonymous complaint regarding physician Kamyar Cohanshohet, a pain management specialist. The complaint alleged that Dr. Cohanshohet “prescribes huge quantities of narcotics to patients without giving exams, tests, x-rays or even blood work. A loved one went to this doctor and is now in rehab. Not once did this doctor examine him, look at charts. He only went by a complaint of pain and started prescribing narcotics at $400 a visit every two weeks. He is in partnership with a pharmacy in his building.” A medical consultant and investigator for the Department of Consumer Affairs reviewed Dr. Cohanshohet’s prescriptions of controlled substances over a 12-month period. He identified five patients who were prescribed dosages of opioids that were possibly in excess of the recommended amount. These five patients were contacted and asked to sign releases for their medical records. They refused. Dr. Cohanshohet was served with subpoenas duces tecum for the records of those five patients. He refused to comply, asserting his patients’ right to privacy.

The board petitioned the trial court for an order compelling Dr. Cohanshohet’s production of the records. Following an evidentiary hearing, the trial court granted the order.

The court of appeal reversed, holding that the board failed to demonstrate good cause for an order compelling disclosure of the patients’ medical records. Good cause requires something more than the mere fact that a specialist in pain medication prescribed doses slightly greater than the recommended dosage for three patients and, for two others, prescribed drugs that, when used in combination, resulted in increased sedative effects. There were no facts suggesting Dr. Cohanshohet was negligent in treating his patients or that he prescribed controlled substances without meeting the standard of care. Given that his practice includes patients seeking active cancer treatment, palliative care, and end-of-life care, it is reasonable to assume at least some of his patients would require treatment for pain that would exceed the recommended dose. The board made no showing of how often similarly-situated physicians who specialize in pain treatment might write similar prescriptions. The consumer complaint did not provide the additional evidence necessary to constitute good cause. An anonymous complaint that provides scant detail, particularly about when and for whom the prescriptions were written, does not constitute substantial evidence of good cause.
The serious legal consequences of my colleagues’ opinion are that it (1) disregards both the purpose and the substance of the REAL ID Act of 2005 (“Act”), (2) ignores the appropriate standard of review, and (3) perpetuates our idiosyncratic approach to an Immigration Judge’s (“IJ”) determination that the testimony of an asylum seeker lacks sufficient credibility or persuasiveness to prove his case. The majority’s opinion accomplishes these results by contaminating the issue before us with irrelevancies, the most troublesome of which is a meritless irrebuttable presumption of credibility. The sole issue should be whether Dai’s unedited presentation compels the conclusion that he carried his burden of proving he is a refugee and thus eligible for a discretionary grant of asylum. Only if we can conclude that no reasonable factfinder could fail to find his evidence conclusive can we grant his petition.

The IJ’s decision not to make an explicit adverse credibility finding is a red herring that throws our analysis off the scent and preordains a result that is incompatible with the evidentiary record. By omitting from their opinion the IJ’s fact-based explanation of his decision, the majority elides eight material findings of fact the IJ did make, each of which is entitled to substantial deference. The majority’s assertion that “there is no finding to which we can defer” is false. For this reason, I quote in full the IJ’s findings and conclusions about the persuasiveness of Dai’s presentation in Part IV of my dissent. The eight findings are as follows.

First, the IJ specifically found that the information reported by the asylum officer about his conversation with Dai was accurate. The IJ said,

As to the contents of [the asylum officer’s notes], I give the notes full weight, insofar as the respondent has confirmed the contents of the questions and answers given during the course of that interview. Furthermore, I note that in the sections in which the respondent equivocated, stating that he was nervous and not sure that he gave those precise answers, I nevertheless give the Asylum Officer’s notes some substantial weight, in that they are consistent with the respondent’s testimony in court.

Accordingly, the IJ accepted as a fact that Dai admitted that he did not disclose the consequential truth about his wife’s and daughter’s travels because he was nervous about how this would be perceived by the asylum officer in connection with his claim.

Second, the IJ accepted Dai’s admission as a fact that he concealed the truth because he was afraid of giving straight answers regarding his wife’s and daughter’s trip to the United States.

Third, the IJ determined that Dai had deliberately omitted highly relevant information from his Form I-589 application for asylum, information that he also tried to conceal from the asylum officer.

Fourth, the IJ found that Dai’s omission of his information “is consistent with his lack of forthrightness before the asylum officer[r] as to his wife and daughter’s travel with him…”

Fifth, the IJ credited Dai’s admission that when asked by the asylum officer to “tell the real story” about his family’s travels, Dai said he “wanted a good environment for his child, and his wife had a job, but he did not, and that is why he stayed here [after his wife and daughter went back to China].

Sixth, the IJ found that Dai admitted he stayed here after they returned “because he was in a bad mood and he wanted to get a job and ‘a friend of mine is here.’”

Seventh, the IJ said “I do not find that [Dai’s] explanations of [his wife’s] return to China while he remained here are adequate.” (Emphasis added).

Finally, the IJ also credited Dai’s concessions that his wife and daughter returned to China because “his daughter’s education would be cheaper in China,” and that “his wife wanted to go to take care of her father.”

When Dai’s subterfuge got to the BIA, the BIA said in its decision that “the record reflects that [Dai] failed to disclose to both the asylum officer and the IJ” the true facts about his family’s travels. The BIA noted that Dai had conceded he was not forthcoming about this material information because he believed that the truth about their travels “would be perceived as inconsistent with his claims of past and feared persecution.”

The IJ’s specific factual findings in connection with Dai’s failure to satisfy his burden of proof were not the product of inferences drawn from circumstantial evidence. These findings were directly based upon revealing answers Dai admitted he gave to the asylum officer during his interview. These facts are beyond debate, and they undercut Dai’s case.

To quote the BIA, these facts were “detrimental to his claim” and “significant to his burden of proof.” Nevertheless, the majority brushes them aside, claiming that an immaterial presumption of credibility overrides all of them.

In this connection, I note a peculiarity in the majority’s approach to Dai’s case: Nowhere does Dai assert that he is entitled to a conclusive presumption of credibility. His brief does not contain any mention of the presumption argument the majority conjures up on his behalf. The closest Dai comes to invoking the majority’s inapt postulate is with a statement that we “should” treat as credible his testimony regarding persecution in China. He does not take issue with the IJ’s foundational adverse factual findings, choosing instead to argue that they were not sufficient in the light of the record as a whole to support the IJ’s ultimate determination.

For example, Dai acknowledges in his brief that the “IJ’s or BIA’s factual findings are reviewed for substantial evidence” and that the “REAL ID Act’s new standards governing adverse credibility determinations applies to applications for asylum, withholding of removal, and CAT relief made on or after May 11, 2005.” Blue Br. 10 (emphasis added) (quotation marks omitted). Next, he notes that “an IJ cannot selectively examine evidence in determining credibility, but rather must present a reasoned analysis of the evidence as a whole and cite specific instances in the record that form the basis of the adverse credibility finding.” Id. (emphasis added) (quotation marks omitted). Moreover, Dai notes that “[t]o support an adverse credibility determination, inconsistencies must be considered in light of the totality of the circumstances, and all relevant factors” adding that “trivial inconsistencies … should not form the basis of an adverse credibility determination.” Id. at 10–11 (emphasis added) (quotation marks omitted). He contends that he “has provided adequate explanation” for his inconsistencies, i.e., the failure to disclose his family’s travels. Id. at 14. Finally, after attempting to pick apart the IJ’s adverse findings, Dai’s bottom line is that “his wife’s departure from the United States does not adversely affect his credibility at all,” an assertion that ignores his failed coverup of it. See id. at 16.

In summary, the majority blue pencils a material part of the evidentiary record even though Dai implores us to “examine it as a whole,” as he did in his brief to the BIA. Dai accepts that the viability of his entire presentation is on the line, but the majority ignores his concession. In this connection, the Attorney General has responded only to the claims and arguments Dai included in his brief. The Attorney General has not been given an opportunity to respond to the majority’s inventive analysis, nor to the theory concocted by the majority on Dai’s behalf. Both sides will be surprised by my colleagues’ artful opinion—Dai pleasantly, the Attorney General not so much.

I will have more to say in Part V about our Circuit’s treatment of the role, responsibility, and product of an asylum officer.

For these reasons, I respectfully dissent.

I BACKDROP

Over the years, our Circuit has manufactured misguided rules regarding the credibility of political asylum seekers. I begin with this issue because the majority’s mishandling of it infects the remainder of their opinion with error. These result-oriented ad hoc hurdles for the government stem from humanitarian intentions, but our court has pursued these intentions with methods that violate the institutional differences between a reviewing appellate court, on one hand, and a trial court on the other, usurping the role of the Department of Homeland Security (“DHS”) and the BIA in the process. Referring to our approach to witness credibility as an “idiosyncratic analytical framework,” a previous panel of our court described this inappropriate situation as follows:

The Supreme Court has repeatedly instructed us on the proper standard to apply when reviewing an immigration judge’s adverse credibility determination. Time and again, however, we have promulgated rules that tend to obscure that clear standard and to flummox immigration judges, who must contort what should be a simple fac-
tual finding to satisfy our often irreconcilable precedents. The result of this sly insubordination is that a panel that takes Congress at its word and accepts that findings of fact are “conclusive unless any reasonable adjudicator would be compelled to conclude the contrary,” … or follows the Supreme Court’s admonition that “[t]o reverse the BIA finding we must find that the evidence not only supports that conclusion, but compels it,” … runs a serious risk of flouting one of our eclectic, and sometimes contradictory, opinions.

Jibril v. Gonzales, 423 F.3d 1129, 1138 (9th Cir. 2005) (alteration in original) (citations omitted).

Many of our Circuit’s rules on this subject and my colleagues’ decision are irreconcilable with the structural principle set forth in Federal Rule of Civil Procedure 52(a)(6) that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” Accordingly, we are expected to apply a highly deferential standard to a trial court’s determination regarding the credibility of a witness. Anderson v. City of Bessemer City, 470 U.S. 564, 573–76 (1985). In discussing this rule, the Supreme Court said that “[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court’s findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” Id. at 575. The Court added that the applicable “clearly erroneous” standard of review “plainly does not entitle a reviewing court to reverse the finding of a trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.” Id. at 573 (emphasis added).

The Supreme Court sharpened this point about our limited role in Gonzales v. Thomas, 547 U.S. 183 (2006) (per curiam), vacating 409 F.3d 1177 (9th Cir. 2005) (en banc). In summarily vacating our en banc opinion, the Court held that we had exceeded our authority and made a determination that belonged to the BIA. 547 U.S. at 185–86. The Court agreed with the Solicitor General that “a court’s role in an immigration case is typically one of review, not of first view.” Id. at 185 (emphasis added) (quotation marks omitted). To support its conclusion, the Court cited INS v. Orlando Ventura, 537 U.S. 12 (2002): a “judicial judgment cannot be made to do service for an administrative judgment.” 537 U.S. at 186 (quoting Ventura, 537 U.S. at 16). More about Ventura later.

The majority’s opinion’s use of an incongruous irrefutable presumption of credibility to erase the IJ’s findings of fact and the BIA’s decision and thus to make us a court of “first view” is another example of our insubigence. If, as they say, we are bound by precedent to do it their way, then its time to change our precedent.

II

A False Premise

The majority opinion’s assertion that “we must treat [Dai’s] testimony as credible” rests on a fallacious premise. Judge Reinhardt writes, “Properly understood, the rebuttable presumption provision of the REAL ID Act applies only to appeals to the BIA, not to petitions for review in our court.” From this inapt premise, he concludes that we must ignore the IJ’s detailed analysis and findings of fact about Dai’s presentation. When it comes to our task of reviewing the credibility of witnesses in a trial court or whether a witness’ testimony suffices to carry his burden of proof, however, there is no material difference between an appeal and a petition for review, none. Federal Rule of Civil Procedure 52(a) makes no such distinction. As Anderson said, Rule 52(a) applies to a “reviewing court,” which is what we are in this capacity. 470 U.S. at 573–74 (emphasis added); see Thomas, 547 U.S. at 185. Neither the Court nor Rule 52(a) differentiate between appeals and petitions for review. Nor would such a distinction make any sense. As Anderson and Thomas illustrate, the issue is one of function, not of form or labels. The Act’s use of the word “appeal” does not dictate how we must go about our process of review. Using the standards provided by Congress, we are not in a position to weigh a witness’s credibility or persuasiveness.

Federal Rule of Appellate Procedure 20, “Applicability of Rules to the Review or Enforcement of an Agency Order,” illustrates the soundness of treating appeals and petitions for review with a uniform approach. Rule 20 reads, “All provisions of these rules . . . apply to the review or enforcement of an agency order. In these rules, ‘appellant’ includes a petitioner or applicant, and ‘appellee’ includes a respondent.”

Moreover, and directly to the point, the Act itself does not require an IJ to make a specific credibility finding in those precise terms. As the BIA correctly said with respect to the Act, “[c]ontrary to the respondent’s argument on appeal, the Immigration Judge need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim.” See discussion infra Section VI. If the IJ does not make such an explicit finding, all the respondent is entitled to is a “rebuttable presumption of credibility on appeal.” 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added). By attempting to restrict this language to an appeal to the BIA, the majority opinion freed itself to apply derelict Ninth Circuit precedent to Dai’s testimony and automatically to deem it credible.2

My colleagues claim that in the absence of a formal adverse credibility finding, “we are required to treat the petitioner’s testimony as credible.” The practical effect of the majority’s rule is breathtaking: The lack of a formal adverse credibility finding becomes a selective positive credibility

2. The majority cites She v. Holder, 629 F.3d 958, 964 & n.5 (9th Cir. 2010) in support of this ipse dixit claim. However, She’s footnote 5 says that because the “rebuttable presumption” provision does not apply retroactively, it had no applicability in She’s case.
finding and dooms a fact-based determination by an IJ and the BIA that an applicant’s case is not sufficiently persuasive to carry his burden of proof. The majority’s approach violates all the rules that control our review of a witness’s testimony before a factfinder.

A conclusive presumption of credibility has no valid place in our task of reviewing the persuasiveness of a witness’s testimony. Such an artifice eliminates relevant factual evidence from consideration and violates Rule 52(a)(6). The deployment of a conclusive presumption becomes a misguided way not only of putting a heavy thumb on one tray of the traditional scales of justice, but also of removing relevant evidence from the other. This approach allows us to evade our responsibilities to examine and to evaluate the entire record before an IJ, permitting us instead to disregard facts that would otherwise discredit our final determination. The evidentiary record in this case devours any such presumption. Judge Reinhardt’s opinion writes the REAL ID Act and its evidentiary record in this case devours any such presumption.

Although the case focuses on corroboration of an applicant’s testimony, our opinion in Aden v. Holder, 589 F.3d 1040 (9th Cir. 2009) correctly explained the effect of the REAL ID Act on our pre-Act jurisprudence.

We have a line of circuit authority for the proposition that corroboration cannot be required from an applicant who testifies credibly. In Ladha v. INS, [215 F.3d 889, 901(9th Cir. 2000)] we ‘reaffirmed that an alien’s testimony, if unrefuted and credible, direct and specific, is sufficient to establish the facts testified without the need for any corroboration.’ Kataria v. INS [232 F.3d 1107, 1113 (9th Cir. 2000)] relied on Ladha in stating that ‘the BIA may not require independent corroborative evidence from an asylum applicant who testifies credibly in support of his application.’ Kataria stated that ‘we must accept an applicant’s testimony as true in the absence of an explicit adverse credibility finding.’

Congress abrogated these holdings in the REAL ID Act of 2005.

The statute additionally restricts the effect of apparently credible testimony by specifying that the IJ need not accept such testimony as true.

Congress has thus swept away our doctrine that ‘when an alien credibly testifies to certain facts, those facts are deemed true.’

Aden, 589 F.3d at 1044-45. More on the Act in the next section.

III

The REAL ID Act

Congress enacted the REAL ID Act of 2005 because of our Circuit’s outlier precedents on this issue and our refusal to follow the rules. The House Conference Committee Report (“House Report”) explained that “the creation of a uniform standard for credibility is needed to address a conflict … between the Ninth Circuit on one hand and other circuits and the BIA.” H.R. Rep. No. 109-72 at 167. The House Report also said that the Act “resolves conflicts between administrative and judicial tribunals with respect to standards to be followed in assessing asylum claims.” Id. at 162. Nevertheless, my colleagues hold that a key part of the Act does not apply to us, only to the BIA.

As the Act pertains to this case, it established a number of key principles, all of which the majority fails to follow, perpetuating the conflicts Congress attempted to resolve.

First, “[t]he burden of proof is on the applicant to establish that the applicant is a refugee …”

Second, “[t]he testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.

Third,

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

We have attempted in a number of panel opinions after the Act to adjust our approach to applicant credibility and

persuasiveness issues, but as the majority opinion illustrates, “old ways die hard.” Huang v. Holder, 744 F.3d 1149 (9th Cir. 2014) captures where we should be on this issue:

[W]e have concluded that “the REAL ID Act requires a healthy measure of deference to agency credibility determinations.” This deference “makes sense because IJs are in the best position to assess demeanor and other credibility cues that we cannot readily access on review.” “[A]n immigration judge alone is in a position to observe an alien’s tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence.” By virtue of their expertise, IJs are “uniquely qualified to decide whether an alien’s testimony has about it the ring of truth.”

The need for deference is particularly strong in the context of demeanor assessments. Such determinations will often be based on non-verbal cues, and “[f]ew, if any, of these ephemeral indicia of credibility can be conveyed by a paper record of the proceedings and it would be extraordinary for a reviewing court to substitute its second-hand impression of the petitioner’s demeanor, candor, or responsiveness for that of the IJ.” Indeed, even before the enactment of the REAL ID Act, we recognized the need to give “special deference to a credibility determination that is based on demeanor,” because the important elements of a witness’s demeanor that “may convince the observing trial judge that the witness is testifying truthfully or falsely” are “entirely unavailable to a reader of the transcript, such as the Board or the Court of Appeals.” The same principles underlie the deference we accord to the credibility determinations of juries and trial judges.

Id. at 1153–54 (alterations in original) (citations omitted). This “healthy measure of deference” should also apply to the agency’s determination with respect to whether an applicant has satisfied the agency’s “trier of fact”—not us—that his evidence is persuasive, an issue that is in the wheelhouse of a jury or a judge or an IJ hearing a case as a factfinder.

In Kho v. Keisler, 505 F.3d 50 (1st Cir. 2007), the First Circuit understood the Act’s effect on the issue of an applicant’s credibility. Not only did our sister circuit correctly comprehend the Act’s impact, but it considered and rejected our approach to this important subject.

Kho supplements his ‘disfavored group’ approach with an argument that because the IJ did not make an explicit finding concerning Kho’s credibility, his testimony ‘must be accepted as true’ by this court. Kho bases this proposed rule as well on a series of Ninth Circuit cases….

We have already rejected the proposition that aliens are entitled to a presumption of credibility on review in this court if there is no express credibility determination made by an IJ….

The REAL ID Act also provides no support for Kho’s argument….

Kho, 505 F.3d at 56-57.

The court further explained that the Act’s reference to a “rebuttable presumption” applies only to an applicant’s appeal to the BIA, not to “reviewing courts of appeal.” Id. at 56.

Thus, not only does my colleagues’ opinion violate the directions of the Act, but it creates an intercircuit conflict with Kho, and an intra-circuit conflict with Aden.

IV

The IJ’s Decision

The IJ in this case concluded that Ming Dai had not satisfied his statutory burden of establishing that he is a refugee pursuant to § 1158(b)(1)(B)(i). The IJ gave as his “principle area of concern” Dai’s implausible unpersuasive testimony, another way of saying it wasn’t credible. As Dai’s brief correctly demonstrates, there is barely a dime’s worth of substantive difference between “credible” and “persuasive.” Here is how the IJ explained his decision in terms of § 1158(b)(1)(B)(i) and (ii):

I have carefully considered the respondent’s testimony and evidence and for the following reasons, I find that the respondent has failed to meet his burden of proving eligibility for asylum.

The principal area of concern with regard to the respondent’s testimony arose during the course of his cross-examination. On cross-examination, the respondent was asked about various aspects of his interview with an Asylum Officer. The Department of Homeland Security also submitted the notes of that interview as Exhibit 5. The respondent was asked specific questions regarding several aspects of his testimony before the Asylum Officer. In the course of cross-examination, the respondent was asked regarding his questions and answers as to whether his wife and daughter travelled with him to the United States. The respondent’s responses included the question of whether the asylum officer had asked him if his wife and daughter travelled anywhere other than to Taiwan and Hong Kong. The respondent conceded that he was asked this question and that he replied yes, they had travelled to Taiwan and Hong Kong. The respondent conceded that he was asked this question, “but I was nervous.” In this regard, I note that the respondent did not directly answer the
question; instead leapt directly to an explanation for what his answer may have been, namely that he was nervous. The respondent was then asked specifically whether the Asylum Officer asked him if his wife had travelled to Australia in 2007. The respondent confirmed that he had been asked this question, and he confirmed that the answer was in the affirmative. The respondent also confirmed that the Asylum Officer had asked him whether she had travelled anywhere else. He confirmed that he had been so asked. The respondent was then asked whether he answered “no,” that she had not travelled anywhere else. The respondent answered that he believed so, that he had so answered. The respondent was then asked, during the course of cross-examination, why he had not said to the Asylum Officer that yes, she had travelled to the United States. The respondent replied that he had not thought of it. He stated that they did come with him (meaning his wife and daughter) and that he thought the Asylum Officer was asking him if they had travelled anywhere other than the United States. He explained that he did so because he assumed the U.S. Government had the records of their travel to the United States. On further questioning, the respondent eventually hesitated at some length when asked to further explain why he did not disclose spontaneously to the Asylum Officer that his wife and daughter had come with him. The respondent paused at some length and I observed that the respondent appeared nervous and at a loss for words. However, after a fairly lengthy pause, the respondent testified that he is afraid to say that his wife and daughter came here and why they went back. The respondent was asked whether he told the Asylum Officer that he was afraid to answer directly. The respondent initially testified that he forgot and did not remember whether he said that. He again reiterated that he was very nervous. He was then asked the question again as to whether he told the Asylum Officer that he was afraid to answer why his wife and daughter had gone back. He then conceded that maybe, yes, he had answered in that fashion. The respondent was asked whether the Asylum Officer inquired why his wife and daughter went back, and the respondent conceded that he had been so asked, and he further conceded that he replied because school in the United States cost a lot of money (referring to the schooling for his daughter). The respondent was then asked to confirm that the Asylum Officer eventually asked him to tell him the real story as to why his family travelled to the United States and returned to China. The respondent confirmed that he was asked this question and when asked, whether he replied that it was because he wanted a good environment for his child and because his wife had a job and he did not and that is why he stayed here. He confirmed that he did, in fact, say that. The respondent was further asked, during the course of testimony in court, why his wife and daughter returned to China. In this regard, the respondent testified that they came with him, but returned to China several weeks after arrival. He testified that they did so because his father-in-law was elderly and needed attention, and because his daughter needed to graduate school in China.

The respondent further claimed that his wife had, in fact, suffered past persecution in the form of a forced abortion and the respondent confirmed that he feared his wife and daughter would suffer future persecution. In this regard, the respondent qualified his answer by saying that his wife was now on an IUD, apparently thereby suggesting that the risk of persecution is reduced. However, the respondent did concede that the risk of future persecution also pertains to his daughter. Indeed, in this regard, the respondent testified that this is, at least in part, why he applied for asylum.

As to the contents of Exhibit 5, I give the notes full weight, insofar as the respondent has confirmed the contents of the questions and answers given during the course of that interview. Furthermore, I note that in the sections in which the respondent equivocated, stating that he was nervous and not sure that he gave those precise answers, I nevertheless give the Asylum Officer’s notes some substantial weight, in that they are consistent with the respondent’s testimony in court. Specifically, I note that the Asylum Officer’s notes state that the respondent ultimately indicated that he was afraid of giving straight answers regarding his daughter and wife’s trip to the United States and return to China. And while the respondent did not confirm this in court, he did give a similar answer as to why he was testifying in this regard. In other words, the respondent appears to have stated, both before the Asylum Officer and in court that he did not spontaneously disclose the travel of his wife and daughter with him to the United States and their return because he was nervous about how this would be perceived by the Asylum Officer in connection with his claim. I further note that the Asylum Officer’s notes are internally consistent with regard to references to earlier questions, such as whether the respondent had stated that he applied for a visa with anyone else. At page 2 of the notes contained in Exhibit 5, the respondent was asked whether he applied for his visa with anyone else and the notes indicated that he stated that, “no, I applied by myself.” Similarly, I note that the testimony before the Asylum Officer and the Court is consistent with the omission in the respondent’s Form I-589 application for asylum, of an answer to the question of the date of the previous arrival of his wife, if she had previously been in the United States. See Exhibit 2, page 2, part A.II, question 23. When asked about this omission, the respondent expressed surprise, stating that he told the preparer about their trip and indicated that he thought
it had been filled out. Notwithstanding the respondent’s statement in this regard, I do observe that the omission is consistent with his lack of forthrightness before the asylum office as to his wife and daughter’s travel with him to the United States and their subsequent return to China shortly thereafter.

In sum, the respondent’s testimony before the Court and his testimony regarding the Asylum Officer notes, as well as the notes themselves, clearly indicate that the respondent failed to spontaneously disclose that his wife and daughter came with him and then returned to China. His testimony and the notes also consistently demonstrate that the respondent paused at length, both before the Court and before the Asylum Officer, when asked about this topic. His testimony and the Asylum Officer notes are also consistent in indicating that he ultimately testified that he was afraid to say that his wife came here and was afraid of being asked about why she went back. Furthermore, the respondent has conceded that he was asked to “tell the real story” about his family’s travel to the United States by the Asylum Officer, and that he replied that he wanted a good environment for his child and his wife had a job, but he did not, and that is why he stayed here.

In Loho v. Mukasey, 531 F.3d 1016, 1018–19 (9th Cir. 2008), the Ninth Circuit addressed the situation in which an asylum applicant has found safety in the United States and then returns to the country claimed of persecution before eventually finding asylum in the United States. The Ninth Circuit held that the applicant’s voluntary return to the country of claimed persecution may be considered in assessing both credibility and whether the respondent has a well-founded fear of persecution in that country. Here, while the respondent himself has not returned to China, his wife and daughter did. Indeed they did so shortly after arriving in the United States, and the respondent confirmed that they did so because the schooling is cheaper for his daughter in China, as well as because his father-in-law is elderly and needed to be cared for. The respondent also told the Asylum Officer that the “real story” about why [sic] his family returned was that his wife had a job and he did not, and that is why he stayed here. This is consistent with respondent’s testimony before the Court that he did not have a job at the time he came to the United States. Furthermore, I note that the respondent’s claim of persecution is founded on the alleged forced abortion inflicted upon his wife. That is the central element of his claim. The respondent claims that he himself was persecuted through his resistance to that abortion. Nevertheless, the fact remains that the fundamental thrust of the respondent’s claim is that his wife was forced to have an abortion. In this regard, the respondent’s wife therefore clearly has an equal, or stronger, claim to asylum than the respondent himself, assuming the facts which he claims are true. The respondent was asked why his wife did not stay and apply for asylum and he replied that he did not know they could apply for asylum at the time they departed. The respondent was then asked why he stayed here after they returned; he said because he was in a bad mood and he wanted to get a job and a friend of mine is here.

While Loho v. Mukasey applies to the applicant himself returning to China, I find that the reasoning of the Ninth Circuit in that case is fully applicable to the respondent’s situation in that his wife, who is the primary object of the persecution in China, freely chose to return to China. I do not find that the respondent’s explanations for her return to China while he remained here are adequate. The respondent has stated that he was in a bad mood and that he had found a job and had a friend here. The respondent has also indicated that his daughter’s education would be cheaper in China than here, and he has also indicated that his wife wanted to go to take care of her father. I do not find that these reasons are sufficiently substantial so as to outweigh the concerns raised by his wife and daughter’s free choice to return to China after having allegedly fled that country following his wife’s and his own persecution.

In view of the foregoing, I find that the respondent has failed to meet his burden of proving eligibility for asylum under Section 208(a) of the Act.

(Emphasis added).

To erase any doubts about Dai’s problematic testimony, the following is an excerpt from it.

MS. HANNETT TO MR. DAI

Q. And isn’t it also true that the [asylum] officer asked why did they go back and you replied, so that my daughter can go to school and in the U.S., you have to pay a lot of money?

A. Yes, that’s what I said.

Q. Okay. And isn’t it also true that the officer asked you, can you tell me the real story about you and your family’s travel to the U.S., and you replied I wanted a good environment for my child. My wife had a job and I didn’t, and that is why I stayed here. My wife and child go home first.

A. I believe I said that.

* * *
Q. So, once you got to the United States, why didn’t your wife apply for asylum?

A. My wife just returned to China.

Q. Right, and my question is why didn’t she stay here and apply for asylum?

A. At that time, we didn’t know the apply, we didn’t know that we can apply for asylum.

Q. Well, if you didn’t know that you could apply for asylum, why did you stay here after they returned?

A. Because at that time, I was in a bad mood and I couldn’t get a job, so I want to stay here for a bit longer and another friend of mine is also here.

The asylum officer’s interview notes discussed by the IJ (and found to be consistent with Dai’s testimony before the IJ) read as follows:

Earlier you said your wife has only traveled to Australia, Taiwan and HK. You also said that you traveled to the US alone. Government records indicate that your wife traveled with you to the United States. Can you explain?

[long pause] the reason is I’m afraid to say that my wife came here, then why did she go back.

Your wife went back? Yes

When did she go back to China? February

Why did she go back? Because my child go to school

Earlier you said you applied for your visa alone. Our records indicate that your child also obtained a visa to the US with you. Can you explain?

[long pause]

Daughter came with wife and you in January?

Yes

Can you explain? I’m afraid

Please tell me what you are afraid of. That is what your interview today is for. To understand your fears?

I’m afraid you ask why my wife and daughter go back

Why did they go back?

So that my daughter can go to school and in the US you have to pay a lot of money.

Can you tell me the real story about you and your family’s travel to the US?

I wanted a good environment for my child. My wife had a job and I didn’t and that is why I stayed here. My wife and child go home first.

(bracketed notations in original).

V

The Role of an Asylum Officer

The majority’s opinion perpetuates another acute error our Circuit has made in its effort to control the DHS’s administrative process. In footnote 2, the majority say that if Dai concealed relevant information “it was only from the asylum officer.” Only from the asylum officer? So Dai’s admitted concealment under oath of germane information during a critical part of the evaluation process is of no moment?

The majority’s misunderstanding of the role of an asylum officer represents a sub silentio application of another faulty proposition on the books in our circuit: Singh v. Gonzales, 403 F.3d 1081 (9th Cir. 2005).

Certain features of an asylum interview make it a potentially unreliable point of comparison to a petitioner’s testimony for purposes of a credibility determination. Barahona-Gomez v. Reno, 236 F.3d 1115 (9th Cir. 2001), explained the significant procedural distinctions between the initial quasi-prosecutorial “informal conferences conducted by asylum officers” after the filing of an asylum application, and the “quasi-judicial functions” exercised by IJs . . . .

Id. at 1087 (emphasis added).

First of all, we may not have in this case a verbatim transcript of Dai’s testimony, but we have the asylum officer’s notes, which the IJ explicitly found to be accurate. Moreover, when appropriately confronted under oath with the notes, Dai admitted they correctly captured what he said. Under these circumstances, any concern that the asylum interview might be a “potentially unreliable point of comparison” to Dai’s testimony is irrelevant. The record (thanks to Dai himself) eliminates any potential for unreliability.

Second, the pronouncement in Singh v. Gonzales that an asylum officer’s interview in an affirmative asylum case is “quasi-prosecutorial” in nature is flat wrong and reveals our fundamental misunderstanding of the process.7 An asylum

officer in an affirmative asylum case does not “prosecute” anyone during the exercise of his responsibilities, and the process is not “quasi-prosecutorial” in nature. In fact, unlike a prosecutor, an asylum officer has the primary authority and discretion to grant asylum to an applicant should the applicant present a convincing case. The asylum officer’s role is essentially judicial, not prosecutorial. We miss the mark here because we see only those cases where an affirmative asylum applicant did not present a sufficiently credible persuasive case to an asylum officer to prevail, and we mistakenly conclude from that unrepresentative sample that asylum officers tend to decide against such applicants.

The true facts emerge from DHS’s June 20, 2016 report to Congress, Affirmative Asylum Application Statistics and Decisions Annual Report, covering “FY 2015 adjudications of affirmative asylum applications by USCIS [U.S. Citizenship & Immigration Services] asylum officers for the stated period.” By way of background, the Report points out that asylum officers have a central determinative role in the process. Asylum determinations “are made by an asylum officer after an applicant files an affirmative asylum application, is interviewed, and clears required security and background checks.” Id. at 2.

The Report contains statistics about the activity of asylum officers. According to the FY2015 statistics, asylum officers completed 40,062 affirmative asylum cases. They approved 15,999 applications for an approval rate of 47% for interviewed cases. Id. at 3.

USCIS has a Policy Manual. Chapter 1 of Volume 1 establishes its “Guiding Principles.” A “Core Principal” reads as follows:

The performance of agency duties inevitably means that some customers will be disappointed if their cases are denied. Good customer service means that everyone USCIS affects will be treated with dignity and courtesy regardless of the outcome of the decision.

** * **

USCIS will approach each case objectively and adjudicate each case in a thorough and fair manner. USCIS will carefully administer every aspect of its immigration mission so that its customers can hold in high regard the privileges and advantages of U.S. immigration.

Id.

Finally, we look at the training given to asylum officers in connection with their interviews of affirmative asylum applicants. In USCIS’s Adjudicator’s Field Manual, we find in Appendix 15-2, “Non-Adversarial Interview Techniques,” the following guidance. 8

I. OVERVIEW

An immigration officer will conduct an interview for each applicant, petitioner or beneficiary where required by law or regulation, or if it is determined that such interviewed [sic] is appropriate. The interview will be conducted in a non-adversarial manner, separate and apart from the general public. The officer must always keep in mind his or her responsibility to uphold the integrity of the adjudication process. As representatives of the United States Government, officers must conduct the interview in a professional manner.

***

Due to the potential consequences of incorrect determinations, it is incumbent upon officers to conduct organized, focused, and well-planned, non-adversarial interviews . . . .

***

III. NON-ADVERSARIAL NATURE OF THE INTERVIEW

A. Concept of the Non-adversarial Interview

A non-adversarial proceeding is one in which the parties are not in opposition to each other. This is in contrast to adversarial proceedings, such as civil and criminal court proceedings, where two sides oppose each other by advocating their mutually exclusive positions before a neutral arbiter until one side prevails and the other side loses. A removal proceeding before an immigration judge is an example of an adversarial proceeding, where the Service trial attorney is seeking to remove a person from the United States, while the alien is seeking to remain.

The interview is part of a non-adversarial proceeding. The principal intent of the Service is not to oppose the interviewee’s goal of obtaining a benefit, but to determine whether he or she qualifies for such benefit. If the


interviewee qualifies for the benefit, it is in the Service’s interest to accommodate that goal.

* * *

B. Points to Keep in Mind When Conducting a Non-adversarial Interview

The officer’s role in the non-adversarial interview is to ask questions formulated to elicit and clarify the information needed to make a determination on the petitioner or applicant’s request. This questioning must be done in a professional manner that is non-threatening and non-accusatory.

1. The officer must:

   a. Treat the interviewee with respect. Even if someone is not eligible for the benefit sought based on the facts of the claim, the officer must treat him or her with respect. The officer may hear similar claims from many interviewees, but must not show impatience towards any individual. Even the most non-confrontational officer may begin to feel annoyance or frustration if he or she believes that the interviewee is lying; however, it is important that the officer keep these emotions from being expressed during the interview.

   b. Be non-judgmental and non-moralistic. Interviewees may have reacted to situations differently than the officer might have reacted. The interviewee may have left family members behind to fend for themselves, or may be a member of a group or organization for which the officer has little respect. Although officers may feel personally offended by some interviewee’s actions or beliefs, officers must set their personal feelings aside in their work, and avoid passing moral judgments in order to make neutral determinations.

   c. Create an atmosphere in which the interviewee can freely express his or her claim. The officer must make an attempt to put the interviewee at ease at the beginning of the interview and continue to do so throughout the interview. If the interviewee is a survivor of severe trauma (such as a battered spouse), he or she may feel especially threatened during the interview. As it is not always easy to determine who is a survivor, officers should be sensitive to the fact that every interviewee is potentially a survivor of trauma.

Treat the interviewee with respect and being non-judgmental and non-moralistic can help put him or her at ease. There are a number of other ways an officer can help put an interviewee at ease, such as:

   • Greet him or her (and others) pleasantly;
   • Introduce himself or herself by name and explain the officer’s role;
   • Explain the process of the interview to the interviewee so he or she will know what to expect during the interview;
   • Avoid speech that appears to be evaluative or that indicates that the officer thinks he or she knows the answer to the question;
   • Be patient with the interviewee; and
   • Keep language as simple as possible.

   d. Treat each interviewee as an individual. Although many claims may be similar, each claim must be treated on a case-by-case basis and each interviewee must be treated as an individual. Officers must be open to each interviewee as a potential approval.

   e. Set aside personal biases. Everyone has individual preferences, biases, and prejudices formed during life experiences that may cause them to view others either positively or negatively. Officers should be aware of their personal biases and recognize that they can potentially interfere with the interview process. Officers must strive to prevent such biases from interfering with their ability to conduct interviews in a non-adversarial and neutral manner.

   f. Probe into all material elements of the interviewee’s claim. The officer must elicit all relevant and useful information bearing on the applicant or beneficiary’s eligibility. The officer must ask questions to expand upon and clarify the interviewee’s statements and information contained on the form. The response to one question may lead to additional questions about a particular topic or event that is material to the claim.

   g. Provide the interviewee an opportunity to clarify inconsistencies. The officer must provide the interviewee with an opportunity during the interview to explain any discrepancy or inconsistency that is material to the determination of eligibility. He or she may have a legitimate reason for having related testimony that outwardly appears to contain an inconsistency, or there may have been a misunderstanding between the officer and the interviewee. Similarly, there may be a legitimate explanation for a discrepancy or inconsistency between information on the form and the interviewee’s testimony.
On the other hand, the interviewee may be fabricating a claim. If the officer believes that an interviewee is fabricating a claim, he or she must be able to clearly articulate why he or she believes that the interviewee is not credible.

h. Maintain a neutral tone throughout the interview. Interviews can be frustrating at times for the officer. The interviewee may be long-winded, may discuss issues that are not relevant to the claim, may be confused by the questioning, may appear to be or may be fabricating a claim, etc. It is important that the officer maintain a neutral tone even when frustrated.

2. The officer must not:

• Argue in opposition to the applicant or petitioner’s claim (if the officer engages in argument, he or she has lost control of the interview);
• Question the applicant in a hostile or abusive manner;
• Take sides in the applicant or petitioner’s claim;
• Attempt to be overly friendly with the interviewee; or
• Allow personal biases to influence him or her during the interview, either in favor of or against the interviewee.

I hope that by exposing the particulars of the affirmative application process we will correct our understanding of the applicant interview process, and that we will drop our uninformed characterization of it as “quasi-prosecutorial.” While under oath, Dai intentionally concealed material information from the asylum officer during a critical aspect of the process. To diminish the import of this potential crime11 because the government official was “only” an asylum officer is a serious mistake.

VI
The BIA’s Decision

Dai unsuccessfully appealed the IJ’s decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. The BIA’s decision follows.

We review for clear error the findings of fact, including determinations of credibility, made by the Immigration Judge. We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. The respondent filed his application for asylum after May 11, 2005, and thus review is governed by the REAL ID Act of 2005.

We adopt and affirm the Immigration Judge’s decision in this case. The Immigration Judge correctly denied the respondent’s applications for failure to meet his burden of proof. The record reflects that the respondent failed to disclose to both the [DHS] asylum officer and the Immigration Judge that his wife and daughter had traveled with him to the United States and voluntarily returned to China shortly after. The respondent further conceded that he was not forthcoming about this information because he believed that the true reasons for their return—that his wife had a job in China and needed to care for her elderly father, and that their daughter could attend school in China for less money than in the United States—would be perceived as inconsistent with his claims of past and feared future persecution.

The Immigration Judge correctly decided that the voluntary return of the respondent’s wife and daughter to China, after allegedly fleeing following the persecution of the respondent and his wife, prevents the respondent from meeting his burden of proving his asylum claim. Contrary to the respondent’s argument on appeal, the Immigration Judge need not have made an explicit adverse credibility finding to nevertheless determine that the respondent did not meet his burden of proving his asylum claim. The respondent’s family voluntarily returning and his not being truthful about it is detrimental to his claim and is significant to his burden of proof.

(Emphasis added) (footnote and citations omitted).

VII
The IJ Becomes a Potted Plant

My colleagues’ opinion boils down to this faulty proposition: Simply because the IJ did not say “I find Dai not credible” but opted instead to expose the glaring factual deficiencies in Dai’s presentation and to explain in specific detail and at length why Dai had not persuasively carried his burden of proving his case, we must selectively embrace as persuasive Dai’s problematic presentation regarding the core of his claim.12 I invite the reader to review once again the IJ’s decision and to decide on the merits whether Dai’s case is persuasive. It is anything but.

My colleagues expunge from the record the blatant flaws in Dai’s performance including demeanor, candor, and responsiveness, claiming that “taking into account the record as a whole, nothing undermines the persuasiveness of Dai’s credible testimony. . . .” Nothing? They disregard inaccuracies, inconsistencies, and implausibilities in his story, and

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11. 18 U.S.C. § 1001 makes it a crime knowingly and willfully to make a material false statement in any matter within the jurisdiction of the executive branch of Government.

12. And if an IJ does make an adverse credibility finding, we have manufactured a multitude of ways to disregard it.
his barefaced attempt to cover up the truth about his wife’s and daughter’s travels and situation. They even sweep aside Dai’s admission to the asylum officer that the “real story” is that (1) he wanted a good environment for his child, (2) his wife left him behind because she had a job in China and he did not, and (3) he was in a “bad mood,” couldn’t get a job, and wanted to stay here “for a bit longer.” In their opinion, there is not a single word regarding the factors cited by the IJ to explain his observations, findings, and decision, including the fact that Dai’s wife, allegedly the initial subject of persecution in China, made a free choice to return. The effect of the presumption is to wipe the record clean of everything identified by the IJ and the BIA as problematic.

The irony in my colleagues’ analysis is that once they proclaim that Dai’s testimony is credible, they pick and choose only those parts of his favorable testimony that support his case—not the parts that undercut it. If we must accept Dai’s presentation as credible, then why not also his “real story” when confronted with the facts that he came to the United States because he wanted a good environment for his daughter, and that he did not return to China with his wife because she had a job and he did not? What becomes of his attempted cover up of the travels of his wife and daughter?

Furthermore, my colleagues’ treatment of the IJ’s opinion is irreconcilable with the BIA’s wholesale acceptance of it. In words as clear as the English language can be, the BIA said, “We adopt and affirm the Immigration Judge’s decision.” To compound their error, the majority then seizes upon and picks apart the BIA’s summary explanation of why it concluded on de novo review that the IJ’s decision was correct. What the BIA did say was that Dai’s failure to be truthful about his family’s voluntary return to China was “detrimental to his claim” and “significant to his burden of proof.”

VIII
Analysis

And so we come at last to the statutory requirement of persuasiveness, an issue uniquely suited to be determined by the “trier of fact,” as the Act and 8 U.S.C. § 1158(b)(1)(B) (ii) dictate. The majority opinion freights this inquiry with an incomplete record. The opinion sweeps demeanor, candor, and plausibility considerations—as well as the IJ’s extensive findings of fact—off the board. Once again, the opinion ignores Huang, a post-Act case.

The need for deference is particularly strong in the context of demeanor assessments. Such determinations will often be based on non-verbal cues, and “[i]f, as is often the case, [these ephemeral indicia of credibility] can be conveyed by a paper record of the proceedings and the record is extraordinary for a reviewing court to substitute its second-hand impression of the petitioner’s demeanor, candor, or responsiveness for that of the IJ.” 744 F.3d at 1153 (alteration in original) (quoting Jibril, 423 F.3d at 1137).

Here, the IJ determined that Dai’s testimony was not persuasive based on demeanor, non-verbal cues, and other germane material factors that went to the heart of his case. The IJ explained his decision in exquisite detail, and our approach and analysis should be simple. In order to reverse the BIA’s conclusion that Dai did not carry his burden of proof, “we must determine ‘that the evidence not only supports [a contrary] conclusion, but compels it—and also compels the further conclusion’ that the petitioner meets the requisite standard for obtaining relief.” Garcia-Milian v. Holder, 755 F.3d 1026, 1031 (9th Cir. 2014) (alteration in original) (quoting INS v. Elias-Zacarias, 502 U.S. 478, 481 n.1 (1992)). If anything, this record compels the conclusion that the IJ and the BIA were correct, not mistaken. Are my colleagues seriously going to hold that an IJ cannot take universally accepted demeanor, candor, responsiveness, plausibility, and forthrightness factors into consideration in assessing persuasiveness, as the IJ did here? And that this detailed record, which is full of Dai’s admissions of an attempted coverup, compels the conclusion that Dai was so persuasive as to carry his burden? Dai accurately understood the damaging implications of his wife’s return to China. So did the IJ and the BIA. As the BIA stated, the truth is “inconsistent with his claims of past and feared future persecution.”

IX
The More Things Change, The More They Stay The Same

In Elias-Zacarias, 921 F.2d 844 (9th Cir. 1990), rev’d, 502 U.S. 478 (1992), our court substituted the panel’s interpretation of the evidence for the BIA’s. The Supreme Court reversed our decision, calling the first of the panel’s two-part reasoning “untrue,” and the second “irrelevant.” 502 U.S. at 481. The Court warned us that we could not reverse the BIA unless the asylum applicant demonstrates that “the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.” Id. at 483–84 (emphasis added). In our case, we again fail to follow this instruction.

In INS v. Orlando Ventura, 537 U.S. 12, 13 (2002) (per curiam), the Court noted that both sides, petitioner and respondent, had asked us to remand the case to the BIA so that it might determine in the first instance whether changed conditions in Guatemala eliminated any realistic threat of persecution of the petitioner. Our panel did not remand the case, evaluating instead the government’s claim of changed conditions by itself and deciding the issue in favor of the petitioner. Id. at 13–14. The Supreme Court summarily reversed our decision, saying “[T]he Court of Appeals committed clear error here. It seriously disregarded the agency’s legally mandated role.” Id. at 17.

A mere two years after Ventura’s per curiam opinion, we knowingly made the same mistake in Thomas v. Gonzales,
409 F.3d 1177 (9th Cir. 2005) (en banc), vacated, 547 U.S. 183 (2006). We disregarded four dissenters to that flawed opinion, who argued in vain that our court’s decision was irreconcilable with Ventura. In short order, the Supreme Court vacated our en banc opinion, saying that our “error is obvious in light of Ventura, itself a summary reversal” and that the same remedy was once again appropriate. 547 U.S. at 185.

With all respect, the majority opinion follows in our tradition of seizing authority that does not belong to us, disregarding DHS’s statutorily mandated role. Even the REAL ID Act has failed to correct our errors.

Thus, I dissent.
California Courts of Appeal

Cite as 19 C.D.O.S. 1614

JUDE DARRIN, Plaintiff and Appellant,
v.
SANDRA J. MILLER, Defendant and Respondent.

No. A155089
In The Court of Appeal of the State of California
First Appellate District
Division Two
(Lake County Super. Ct. No. CV418475)
Filed January 28, 2019
Modified and Certified for Partial Pub. February 21, 2019

COUNSEL
Schinner & Shain, LLP, Reed E. Harvey, Agustin R. Piña; Anna Gregorian, for Plaintiff and Appellant.
Ewing & Associates, Andre M. Ross, for Defendant and Respondent.

ORDER MODIFYING OPINION AND CERTIFYING OPINION FOR PARTIAL PUBLICATION

BY THE COURT:

It is ordered that the opinion filed herein on January 28, 2019, be modified as follows: On page 6, the text of Footnote 5 is replaced with, “Because we do not address Miller’s new claim, we need not reach Darrin’s reply argument that Code of Civil Procedure section 581c does not authorize the trial court to grant a motion for nonsuit in a hearing on an Elder Abuse Act protective order. Regardless of how Miller styled her motion and the trial court styled its order, we have before us a judgment that dismissed an action as a matter of law for lack of standing, and we review it as such.”

The modification does not change the judgment.

The opinion filed herein on January 28, 2019, was not certified for publication in the Official Reports. For good cause and pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, it now appears that the opinion, as modified, should be published in the Official Reports, with the exception of section A.2 of the “Discussion,” and it is so ordered.

P.J.

OPINION

Jude Darrin, age 81, petitioned for a restraining order under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act, Welf. & Inst. Code, § 15600 et seq.), alleging that her next-door neighbor, Sandra Miller, subjected her to ongoing abuse and harassment. The trial court dismissed the petition, concluding that because the two women were simply neighbors, there was no special relationship between them to give Darrin standing under the Elder Abuse Act. We shall reverse. The plain language of the Elder Abuse Act authorizes a trial court to issue a restraining order against any individual who has engaged in abusive conduct, as defined by statute, toward a person age 65 or older regardless of the relationship between the alleged abuser and victim. (§§ 15610.07, subd. (a)(1); 15657.03.)

FACTUAL AND PROCEDURAL BACKGROUND

Darrin filed a Request for Elder or Dependent Adult Abuse Restraining Orders on Judicial Council form EA-100, alleging that Miller and Miller’s boyfriend harassed and intimidated her by taunting her, threatening her, twice removing a wire boundary fence between the properties, and trespassing onto her property where they destroyed a hedge and damaged a barrier fence. Darrin claimed they made harassing and threatening demands to her, her spouse, and her grandson; they let their dogs menace her unchecked; and the boyfriend ordered the dogs to “kill” her. Because of the ongoing harassment and the partial destruction of the barrier fence that Darrin had erected to protect herself, Darrin suffered from fear and anxiety.

Darrin asked the trial court to impose the standard “Personal Conduct Orders” pre-printed on the Judicial Council form that would, among other things, keep Miller from contacting her, destroying her property, harassing her, or disturbing her peace. She also sought orders requiring Miller to stay at least 5 yards away from her, and prohibiting Miller from further vandalizing or stealing her or her spouse’s property.

The trial court issued a temporary restraining order under the Elder Abuse Act and scheduled a hearing on the petition.

The hearing began with an opening statement, in which Darrin’s counsel outlined her case: Miller engaged in “vicious behavior” toward the 81-year-old Darrin, including calling her names; Miller had her boyfriend destroy Darrin’s property, including a fence that Darrin had erected to protect herself from Miller, the boyfriend, and the goings-on at Miller’s property.

Miller then moved for nonsuit under Code of Civil Procedure section 581c, arguing that Darrin had no standing to seek an order against her under the Elder Abuse Act because Miller had no care or custody arrangement with Darrin, and no control over Darrin’s real or personal property. Darrin responded that the Elder Abuse Act applies even in the absence of any relationship between abuser and victim. The trial court agreed with Miller, granted her motion, vacated the tempo-

1. Statutory references are to the Welfare and Institutions Code unless otherwise stated.
rary restraining order, and dismissed the petition on the merits. Darrin timely appealed.

DISCUSSION

A. Legal Principles

1. Elder Abuse Act Protective Orders

Under the Elder Abuse Act, an “elder” is “any person residing in this state, 65 years of age or older.” (§ 15610.27.) As relevant here, elder abuse includes “[p]hysical abuse, neglect, abandonment, isolation, abduction, or other treatment of an elder with resulting physical harm or pain or mental suffering.” (§ 15610.07, subd. (a)(1).)” Mental suffering” is defined as “fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe depression or serious emotional distress of the elder or dependent adult.” (§ 15610.53.)

An elder who has suffered abuse may petition the superior court for an order “enjoining a party from abusing, intimidating, . . . threatening, . . . harassing, . . . or disturbing the peace of, the petitioner.” (§ 15675.03, subds. (a)(1), (b)(4)(A).) The petitioner has the burden to prove a past act of elder abuse by preponderance of the evidence. (Bookout v. Nielsen (2007) 155 Cal.App.4th 1131, 1139-1140 (Bookout).)

[SECTION A.2, SEE ORDER]

B. Analysis

The Elder Abuse Act defines “abuse” broadly, including not only physical abuse, neglect, abandonment, isolation or abduction of a person age 65 or older, but also “other treatment,” if that treatment results in “physical harm or pain or mental suffering” to the elder. (§ 15610.07, subd. (a)(1).) In her opening statement, Darrin claimed she would prove that Miller directed “vicious behavior” toward her and destroyed her personal property, including a fence that Darrin had built to protect herself. From those statements, we can infer that Darrin may be able to prove that Miller subjected her to “treatment” that caused her to experience the “serious emotional distress that is brought about by . . . intimidating behavior [or] harassment” that constitutes “[m]ental suffering” under section 15610.53. (§ 15610.07, subd. (a)(1).) Accordingly, the question before us is a narrow one of statutory interpretation: Can this “other treatment” constitute abuse under section 15610.07, subdivision (a)(1) in the absence of a special relationship between the abuser and the victim, such as a caretaking or custodial relationship? As she did below, Darrin relies on the plain language of the Elder Abuse Act and on cases interpreting it to argue that the answer is yes. We agree with her.

“In interpreting a statute, we begin with its text, as statutory language typically is the best and most reliable indicator of the Legislature’s intended purpose. [Citations.] We consider the ordinary meaning of the language in question as well as the text of related provisions, terms used in other parts of the statute, and the structure of the statutory scheme.” (Larkin v. Workers’ Comp. Appeals Bd. (2015) 62 Cal.4th 152, 157-158.) Our role “is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” (Code Civ. Proc., § 1858.)

The trial court was clearly incorrect in its interpretation of the Elder Abuse Act. Nothing in the text of section 15610.07, subdivision (a)(1), or elsewhere in the Elder Abuse Act requires a special relationship between abuser and victim where the alleged abuse is “other treatment.” In this respect, “other treatment” is similar to “[p]hysical abuse,” which is defined in section 15610.63 without reference to relationships between the elder and alleged abuser. By contrast, other types of abuse in section 15610.07, subdivision (a)(1), require a relationship. Thus “[a]bandonment” is the “desertion or willful forsaking of an elder . . . by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody” (§ 15610.05, italics added), and “[n]eglect” is “the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.” (§ 15610.57, subd. (a)(1), italics added.) When the Legislature intended special relationships be required for claims of elder abuse, it specified what those relationships were. 3 It did not do that for the provision at issue here.

Darrin cites three cases that are consistent with our understanding of the Elder Abuse Act, though they do not address the precise issue before us. They are: Gordon B. v. Gomez (2018) 22 Cal.App.5th 92, 94-95, where an elder abuse restraining order was issued against a neighbor who allegedly harassed a 75-year-old; Bookout, supra, 155 Cal.App.4th at pages 1134-1137, where an elder abuse restraining order was issued to protect a 78-year-old from a 70-year-old, and where the two had lived together for a few months but had no caretaking relationship; and Gdowski v. Gdowski (2009) 175 Cal.App.4th 128, 131, where an elder abuse restraining order was issued against the 83-year-old petitioner’s daughter and

2. Section 15610.07, subdivision (a), states, “‘Abuse of an elder or a dependent adult’ means any of the following: [¶] (1) Physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering. [¶] (2) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering. [¶] (3) Financial abuse, as defined in Section 15610.30.”

3. And we see this elsewhere in section 15610.07: under subdivision (a)(2), an alternate definition of abuse is “The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.” (Italics added.)
there was no indication that the daughter lived with or had any caretaking responsibility for the father.

In her respondent’s brief, Miller jettisons the argument she made in the trial court. Now she asserts that the trial court correctly dismissed the case because Darrin’s allegations and her counsel’s opening statement were “non-specific.” We give this assertion no credit. First, it appears in the “Conclusion” of her appellate brief, unsupported by argument or legal authority or even any heading summarizing the point, all required by the Rules of Court. (Cal. Rules of Court, rule 8.204(a)(1)(B).) Second, it mischaracterizes the record. (Cal. Rules of Court, rule 8.204(a)(C).) Miller’s argument before the trial court was that Darrin had no standing under the Elder Abuse Act because there was no special relationship between Darrin and Miller, and that was the basis of the court’s ruling. On appeal, Miller cannot raise an argument for nonsuit that she did not raise in the trial court. (Marvin, supra, 224 Cal.App.3d at p. 960.)

We also do not address Miller’s suggestion that this appeal is mooted by a civil harassment action that Darrin subsequently filed against Miller. This assertion, mentioned in a sentence in the “Statement of the Case” in Miller’s brief on appeal, does not rise to the level of appellate argument. (Cal. Rules of Court, rule 8.204(a)(1)(B).)

In sum, we conclude that under section 15610.07, subdivision (a)(1), “treatment” that is neither physical abuse, neglect, abandonment, isolation nor abduction, can constitute elder abuse if the treatment results in “physical harm or pain or mental suffering” even if the alleged abuser has no responsibility to care for the elder and no control of the elder’s property. Accordingly, the trial court erred in dismissing Darrin’s petition on the basis of Miller’s claim that Darrin lacked standing: the court should have given Darrin the opportunity to present her evidence. We express no opinion on the merits of Darrin’s claims.

4. In her argument at the trial court, Miller’s counsel stated that Darrin failed “to identify facts and circumstances sufficient to support the issuance of a request for an elder abuse restraining order.” Context makes clear that counsel’s statement referred solely to Darrin’s failure to identify a special relationship between Darrin and Miller.

5. Because we do not address Miller’s new claim, we need not reach Darrin’s reply argument that that Code of Civil Procedure section 581c does not authorize the trial court to grant a motion for nonsuit in a hearing on an Elder Abuse Act protective order. Darrin concedes that if the Elder Abuse Act required a special relationship between abuser and victim, the trial court could deny a petition immediately upon an admission that no such relationship existed. But she argues that it would have been improper for the court to dismiss the petition for lack of specific evidence before allowing Darrin to actually present her evidence, because she had already provided the trial court “reasonable proof” of past abuse, as reflected by the trial court’s issuance of a temporary restraining order. (§ 15657.03, subds. (c) & (e).) Regardless of how Miller styled her motion and the trial court styled its order, we have before us a judgment that dismissed an action as a matter of law for lack of standing, and we review it as such.

6. Miller requests we take judicial notice of two documents Darrin filed in the trial court in her civil harassment case against Miller, and a reporter’s transcript of an oral ruling in that case. The materials are irrelevant to the matter before us, and therefore we deny the request.

DISPOSITION
The judgment of the trial court is vacated. The matter is remanded to the trial court for further proceedings consistent with this opinion. Appellant shall recover her costs on appeal.

Miller, J.

We concur: Kline, P.J., Stewart, J.
THE PEOPLE, Plaintiff and Respondent, v. ERIC RODNEY BEMAN, Defendant and Appellant.

No. A153841
In The Court of Appeal of the State of California
First Appellate District
Division Two
(Contra Costa County Super. Ct. No. 5-152089-9)
Filed February 21, 2019

COUNSEL
Law Office of Paul F. DeMeester, Paul F. DeMeester, under appointment by the Court of Appeal, for Defendant and Appellant.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Bruce L. Ortega and Rene A. Chacon, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION
Defendant pleaded no contest to one count of conspiracy to commit human trafficking based on allegations that for more than seven years, he and his coconspirators used threats, force, and violence in pimping at least three victims. Defendant also pleaded no contest to two counts of human trafficking for his conduct against one of the victims in 2011. For all three counts, the trial court sentenced defendant to 16 years, eight months in prison.

Defendant’s sole claim on appeal is that the two consecutive terms imposed for the two substantive human trafficking counts must be stayed under Penal Code section 654. We reject the claim because defendant’s conspiracy to commit human trafficking had broader objectives and involved more victims than the two substantive offenses. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts
Defendant Eric Rodney Beman and codefendant Roy Gordon worked together as pimps, and they referred to themselves as “brothers.” Codefendant Derrick Harper was also a pimp and would kidnap women and then draw up “contracts” requiring they act as prostitutes to pay money he claimed they owed him. Defendant, Gordon, and Harper all used violence to keep prostitutes working for them, and they sometimes “sold” or “traded” prostitutes with each other.

The victim referred to in the information as Victim 3 met defendant and Gordon in about 2006 or 2007. When she first met defendant, he forced her to prostitute for him. On one occasion, defendant put her in a closet, then took her out of the closet, wrapped her in a blanket, and beat and choked her until she lost consciousness. Later, Victim 3 began prostituting for Gordon. When she tried to leave him in September 2007, he burned her leg twice with a clothing iron, and she could not walk for a week. On another occasion, Victim 3 tried to get away from Gordon, and he grabbed her by the hair, pulled her out of a car, took her back to a house, locked her in a room, and then burned her with a hair iron.

In 2007, Victim 2 learned Gordon had “purchased” her from another pimp in exchange for methamphetamine. She worked as a prostitute for Gordon and he gave her methamphetamine. In 2009, Victim 2 met Harper and they began dating. Harper punished Victim 2 when she allowed one of his prostitutes to escape by having three men rape her, analy raping her herself, and having her head shaved. Harper then “sold” Victim 2 to defendant.

In 2006, Victim 1, who was already working as a prostitute, chose defendant and Gordon to act as her pimps. In 2010 or 2011, she began prostituting for Harper. Harper regularly beat Victim 1 and threatened to hurt her son. Defendant and Harper had a meeting to determine whose “property” Victim 1 was. Defendant “traded” for Victim 1, giving Harper Victim 2 in exchange.

B. The Prosecution
In a 24-count information, the Contra Costa County District Attorney charged defendant and five others with conspiracy to commit human trafficking (§§ 182, subd. (a)(1), 236.1, subd. (b); count 1). The district attorney alleged in great detail a total of 51 overt acts committed by the various six defendants against Victims 1, 2 and 3, and other women working as prostitutes. Defendant was also charged with two counts of the substantive crime of human trafficking of Victim 1 (§ 236.1, subd. (b); counts 14 and 17).

C. Defendant’s Change of Plea and Admissions
Defendant eventually agreed to plead no contest to the information as charged with a maximum potential sentence of 31 years, four months in prison.

1. Count 1—Conspiracy and Overt Acts
In count 1, defendant pleaded no contest to a conspiracy with the five named codefendants to commit human traffick-
ing lasting from January 2006 to April 2013 and admitted nine of the alleged overt acts were true. As to Victim 3, defendant admitted that, in 2006, he acted as her pimp, beat her multiple times, and on one occasion “forcibly held [her] captive . . . and directed other women . . . to beat her if she attempted to leave.” (Overt Acts 2–4.) He admitted that he and codefendant Gordon worked in concert to control and assault the prostitutes they were pimping and pandering, and that, in September 2007, he told Victim 3 she had to earn $10,000 for Gordon before she would be allowed to leave with defendant. (Overt Acts 5, 12.) As to Victim 2, defendant admitted that, in 2010, he “searched [a] house for (Victim Two) as she hid in the clothes dryer.” (Overt Act 39.) And, as to Victim 1, defendant admitted that, in July 2011, he confronted her about prostituting for codefendant Harper, punched her repeatedly and hit her over the head with a bottle cutting her scalp, and forcibly prevented her from leaving with Harper, telling Victim 1 “that she now belonged to him.” (Overt Acts 41, 43.) He further admitted that, “[o]n or about November through December 2011 [defendant] confronted . . . Harper at gunpoint telling Mr. Harper that (Victim One) was now prostituting for [defendant] while (Victim One) retrieved her belongings from Harper’s residence.” (Overt Act 48.)

2. Counts 14 and 17—Human Trafficking of Victim 1

Defendant also pleaded no contest to count 14, human trafficking of Victim 1 around July 2011, and count 17, human trafficking of Victim 1 “between November 1, 2011 and December 31, 2011.”

D. Sentence

The trial court imposed the middle term of 14 years for count 1 (conspiracy to commit human trafficking) and two consecutive 16-month terms (one-third the middle term of four years) for counts 14 and 17 (human trafficking of Victim 1), for a total sentence of 16 years, eight months in prison.

DISCUSSION

Defendant contends section 654\(^5\) precludes the imposition of punishment for the two substantive offenses of human trafficking in addition to the punishment for conspiracy to commit human trafficking. We disagree.

This court has explained: “Because of the prohibition against multiple punishment in section 654, a defendant may not be sentenced ‘for conspiracy to commit several crimes and for each of those crimes where the conspiracy had no objective apart from those crimes. If, however, a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense.’ [Citations.] Thus, punishment for both conspiracy and the underlying substantive offense has been held impermissible when the conspiracy contemplated only the act performed in the substantive offense [citations] or when the substantive offenses are the means by which the conspiracy is carried out [citation].)” (People v. Ramirez (1987) 189 Cal.App.3d 603, 615, disapproved on another point in People v. Russo (2001) 25 Cal.4th 1124, 1137.) On the other hand, “[p]unishment for both conspiracy and substantive offenses has been upheld when the conspiracy has broader or different objectives from the specific substantive offenses.” (Id. at pp. 615–616.) The court elaborated that punishment for both conspiracy and underlying substantive offenses is permissible when the conspiracy “encompasses a number of acts, only some of which are punished independently as substantive offenses.” (Id. at p. 616.) Section 654 only bars multiple punishment when the “conspiracy has multiple objects and all are punished as substantive offenses, or . . . when the conspiracy has but one object which is punished as a substantive offense.” (Ibid.)

People v. Vargas (2001) 91 Cal.App.4th 506 (Vargas) and People v. Collins (1966) 242 Cal.App.2d 626 illustrate when it is permissible to punish a defendant for conspiracy to commit a criminal offense and for committing that criminal offense in a particular instance. In Vargas, the defendant was convicted of conspiracy to commit murder and the murder of Elias Rosas. (Vargas, at pp. 517–518.) The defendant argued he could not be punished for both conspiracy to commit murder and murder under section 654. But the Court of Appeal rejected the argument on the ground the defendant’s gang “conspired to kill not only Rosas, but other persons as well.” (Id. at p. 571.) Thus, in Vargas, punishment for both conspiracy to commit murder and murder was permissible because the defendant’s conspiracy to commit murder had broader objectives (additional victims) than the substantive offense of the murder of Rosas. Similarly, in Collins, the court held section 654 did not preclude sentencing the defendant for a count of conspiracy to commit theft and for six counts of theft because “the conspiracy which was alleged and proved had objectives going beyond the six thefts for which defendant was convicted.” (Collins, at p. 640, italics added; see also People v. Amadio (1971) 22 Cal.App.3d 7, 9–10, 15 (Amadio) [punishment for both conspiracy to receive stolen property and receiving stolen property was permissible where the conspiracy involved receipt of more property than just the property related to the individual counts; “Appellants were not being punished for a conspiracy which had as its only objective the commission of the other offenses charged.”].)

Here, defendant’s convictions for two counts of human trafficking (counts 14 and 17) relate to Victim 1 and to acts that occurred in 2011. But the objectives of defendant’s conspiracy with his codefendants to commit human trafficking went far beyond the specific conduct for which defendant was convicted in counts 14 and 17. Stated differently, it is not the case that defendant’s conspiracy had as its only objec-
tive the commission of human trafficking of Victim 1 in July, November, and December of 2011. (See Amadio, supra, 22 Cal.App.3d at p. 15.) Instead, the conspiracy involved conduct spanning from 2006 to 2013 and, crucially, involved two victims in addition to Victim 1 (the sole victim in counts 14 and 17). (See Vargas, supra, 91 Cal.App.4th at p. 571.) As a result, section 654 does not bar punishment for both count 1, conspiracy to commit human trafficking, and counts 14 and 17, the substantive offenses of human trafficking in this case.

For his position, defendant relies on People v. Briones (2008) 167 Cal.App.4th 524 (Briones), but the facts of that case are easily distinguished. There, defendant Briones borrowed money from a friend to buy heroin and methamphetamine and then bought the two drugs. Briones was convicted of two counts of possession of drugs for sale (one count for each drug) and two counts of conspiracy to possess drugs for sale (again, one count for each drug). He was sentenced for all four offenses. (Id. at pp. 526–527.) On appeal, Briones argued section 654 barred punishment for both conspiracy to possess drugs and the two substantive drug offenses because the objective of the conspiracy was to commit the two drug offenses. (Id. at p. 528.) The court agreed with Briones and stayed the punishment for the conspiracy count. (Id. at p. 529.)

In Briones, the conspiracy had no objective apart from commission of the two drug offenses (that is, possessing for sale the heroin and methamphetamine purchased with the money borrowed from Briones’s friend). There was, for example, no allegation of a broader conspiracy with the friend to buy different types of drugs or to obtain additional drugs at a later time. In contrast, defendant’s conspiracy to commit human trafficking in this case was much broader than an agreement to commit human trafficking of Victim 1 in 2011, as alleged in substantive counts 14 and 17. As we have seen, the conspiracy here involved the use of force and violence to pimp at least three victims for more than seven years. Defendant’s reliance on Briones is misplaced.

Because defendant’s conspiracy was not limited to committing the two substantive offenses, the trial court did not err in imposing consecutive terms for counts 14 and 17.

DISPOSITION

The judgment is affirmed.

We concur: Richman, Acting P.J., Stewart, J.

COUNSEL

Attorney for Plaintiff and Respondent Richmond Compassionate Care Collective: Foreman & Brasso, Ronald D. Foreman.


ORDER MODIFYING OPINION AND DENYING REHEARING, CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed herein on January 29, 2019, is modified as follows:

On page 3, line two is modified to read

marijuana facility is a public issue.” And, he concluded, the allegations “related to

This modification does not effect a change in the judgment. The petition for rehearing is denied.

The opinion filed herein on January 29, 2019, was not certified for publication. Good cause appearing, the Reporter of Decisions is directed to publish the opinion as modified.

Acting P.J.

Cite as 19 C.D.O.S. 1619

RICHMOND COMPASSIONATE CARE COLLECTIVE, Plaintiff and Respondent, v. 7 STARS HOLISTIC FOUNDATION, INC., et al., Defendants and Appellants; HOLISTIC HEALING COLLECTIVE, INC., et al., Defendants.

No. A153305
In The Court of Appeal of the State of California First Appellate District Division Two
(Contra Costa County Super. Ct. No. MSC1601426)
Filed January 29, 2019
Modified and Certified for Pub. February 21, 2019

ORDER MODIFYING OPINION AND DENYING REHEARING, CERTIFYING OPINION FOR PUBLICATION [NO CHANGE IN JUDGMENT]

THE COURT:

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Acting P.J.

OPINION

In 2014, we began our opinion in Moriarty v. Laramar Management Corp. (2014) 224 Cal.App.4th 125, 128 (Moriarty) with this observation: “Another appeal in an anti-SLAPP
case. Another appeal by a defendant whose anti-SLAPP motion failed below. Another appeal that, assuming it has no merit, will result in an inordinate delay of the plaintiff’s case and cause him to incur more unnecessary attorney fees. (See Grewal v. Jammu (2011) 191 Cal.App.4th 977, 1002–1003.) And no merit it has.” Here is yet another such appeal. And we again affirm.

BACKGROUND

The General Setting

In 2011, pursuant to Richmond Marijuana Ordinance No. 28-10 NS (ordinance), the City of Richmond issued a medical marijuana collective permit to Richmond Compassionate Care Collective (RCCC). It was the first collective to obtain such a permit.

Three other permits were later issued over the ensuing years, to: (1) Richmond Patients Group (RPG), acting through principals William Koziol, Darrin Parle, and Alexis Parle; (2) Holistic Healing Collective, Inc. (Holistic), acting through its principal Rebecca Vasquez; and (3) 7 Stars Holistic Foundation, Inc. (7 Stars), acting through its principal Zead M. Handoush.

The ordinance had been adopted in 2010, and was from time to time amended, including in 2011, 2012, and 2014, when the ordinance was amended to reduce the number of dispensary permits from six to three, and also to provide that if a permitted dispensary did not open within six months after the issuance of a permit, the permit would expire and become void. RCCC ended up losing its permit.

The Proceedings Below

In July 2016 RCCC filed a complaint alleging a single cause of action, violation of the Cartwright Act. The complaint named 11 defendants: RPG, Holistic, 7 Stars, William and Alexis Koziol, Parle, Vasquez, Handoush, Lisa Hirschhorn, Antwon Cloird, and Cesar Zepeda. As indicated, eight of the defendants were the three collectives and three principals. As to the other three, Hirschhorn was alleged to be an agent of the other defendants (except Cloird and Zepeda), and Cloird and Zepeda were alleged to be the agents of the other defendants (except Hirschhorn).

The complaint alleged in essence that defendants, acting in concert, encouraged and paid for community opposition to RCCC’s applications before the Richmond City Council and also purchased a favorably zoned property.

In October 2016, represented by five separate counsel, defendants filed a joint special anti-SLAPP motion to strike pursuant to Code of Civil Procedure section 425.16 (section 425.16). The motion was heard by the Honorable Barry Goode, a most experienced Superior Court judge, and on December 5 he granted the anti-SLAPP motion in an “opinion and order” that among other things held that “supporting and encouraging others to oppose Plaintiff’s application before the City Council” were “statements or conduct made in connection with . . . official proceedings” and “the location of a medical marijuana facility is not a public issue.” And, he concluded, the allegations “related to efforts to mobilize public opposition to Plaintiff’s application and to obtain a decision from the Richmond City Council . . . shall be stricken from the complaint. [But,] the allegations of the complaint related to the purchase of real property . . . shall not.”

RCCC filed a First Amended Complaint and then a second, to both of which demurrers were sustained with leave to amend. Both demurrers were ruled on by Judge Goode.

In August 2017 RCCC filed its Third Amended Complaint (TAC). The complaint itself was 85 paragraphs, and also included 17 exhibits consisting of text images, emojis, and notes of defendant Hirschhorn—a defendant, it developed, who had turned on the other defendants and was now assisting RCCC.

On August 31, 2017 defendants 7 Stars and Handoush (collectively, 7 Stars) filed their own anti-SLAPP motion, along with a demurrer. The anti-SLAPP motion asked the Court to strike the claim for violation of the Cartwright Act, and also identified 28 specific paragraphs that 7 Stars claimed involved protected activity or appeared to incorporate by reference allegations of protected activity. The motion was set for hearing on October 12.

While 7 Stars’ motion was pending, the RPG defendants filed their own anti-SLAPP motion, identifying specific allegations they sought to have stricken.

On September 28 RCCC filed its opposition to the 7 Stars anti-SLAPP motion, included within which was a declaration of Hirschhorn, testifying as to the facts that underlay the TAC. And what a declaration it was: 10 pages that set forth in detail what the defendants did to defendant RCCC, detail that supported Hirschhorn’s testimony of a conspiracy among defendants to harm RCCC—their “war on RCCC.” This is how Hirschhorn described it:

“Our group declared war on RCCC. We conspired to prevent RCCC from getting any property in Richmond. We discussed and presented leases, letters of intent to lease or purchase, and purchase agreements—all of which were bogus. The intent of these phony real estate deals or leases, which were presented to landlords was to ‘tie them up with paper.’ Individuals in our group went door to door to landlords to ensure that they would not lease or rent their property to RCCC. As previously stated in this declaration, our group included Rebecca Vasquez, Zead Handoush, Jawad Dayem aka JJ, Adrian _____, Bill Koziol and Darrin Parle and Cesar Zepeda and Antwon Cloird.

“We had a list of names which we compiled to ensure that any landlord would not lease, nor sell any property to RCCC or anyone associated with RCCC. The list of names included John Valdez, Garib Karapetyan, Greg Serobyan, and attorneys, Brad Hirsch, James Anthony.”

Hirschhorn’s 25-paragraph declaration went on to describe in vivid detail all that “the group” did in furtherance of their conspiracy against RCCC. A few examples should suffice:
“16. Our activities included regularly visiting the City of Richmond website to determine what properties would be located in the appropriate zoning district. With this information, we would visit the property owners or their agents and pretend to be prospective purchasers or tenants. This would convince the property owner or agent to turn over its rent rolls which contained the lease termination date of the tenant leases or engage in phony lease negotiations. We would then contact the tenant whose lease was expiring in an attempt to persuade them to relocate to a premise that would otherwise be suitable for RCCC’s needs. Our ideas included an offer to pay their cost of relocating and/or provide a few months of rent payments.

“17. One tactic our group used to dissuade property owners, property managers, or real estate agents from leasing to RCCC or its affiliates was to inform the owners, managers or agents that their properties were subject to federal forfeiture proceedings. This was a successful ploy as we scared property owners, property managers, and real estate agents from leasing to RCCC.

“18. Another successful ploy used by our group was to inform property owners, their managers or real estate agents that we would threaten to notify their lender that the owner was now leasing to a cannabis business. This threat of notifying their lender would cause them to believe that their loan would be called by the lender. We particularly targeted properties where Wells Fargo was the lender. This scare tactic had its intended effect. Property owners, their managers or real estate agents refused to lease or sell to RCCC.

“19. Additionally, Bill Koziol and Zeaad Handoush formed a number of phony neighborhood coalitions to paper various neighborhoods or property owners with adverse consequences of introducing a cannabis related business into their community. This paper warfare also had its intended effect in keeping property owners, managers or agents from leasing to RCCC or its affiliates.” And lest there be any doubt about all who were responsible, Hirschhorn said this:

“20. “To be clear, Zeaad Handoush, Bill Koziol, Darrin Parle, and Rebecca Vasquez were intimately involved in all matters throughout the time frame that I referenced in this declaration. Zeaad Handoush, Bill Koziol, and Rebecca Vasquez called many or all the shots concerning RCCC or John Valdez.

“21. Zeaad Handoush’s express concern was that if RCCC got open for business it would diminish Zeaad Handoush’s market presence in central and south Richmond. Zeaad Handoush and his cousin J.J. would express their dislike for RCCC and complain that they did not want a fourth dispensary in Richmond. Zeaad Handoush would often talk about maintaining three dispensaries only so that he could protect his market share as he anticipated that recreational cannabis would be available in Richmond.

“22. Bill Koziol and Darrin Parle were equally involved in all of the conduct expressed through this declaration. Indeed, Bill Koziol warned us that we were ‘crossing past a point of no return’ and our activities and/or conduct could be the subject of a lawsuit. Nevertheless, Bill led the charge for many of our activities. Bill made us aware that our activities directed at RCCC would potentially be the subject of a lawsuit and that we could get sued. Bill Koziol routinely said ‘I’d rather pay $500,000 to defend my actions than to lose tens of millions of dollars in lost sales.’

“23. Rebecca Vasquez was also intimately involved as she vocalized often that she did not want RCCC or John Valdez to operate in Richmond. She did not want a fourth dispensary to open. Rebecca would say in various group meetings ‘that she [Rebecca] would rather pay agents to get these deeds done now as opposed to sharing sales with a fourth dispensary. I hate John. Fuck a fourth dispensary.’ ”

7 Stars’ anti-SLAPP motion came on for hearing on October 12 before Judge Goode who had issued a tentative ruling denying the motion. The hearing began with argument by 7 Stars’ attorney Mark Meyer, who had hardly begun when he was interrupted by Judge Goode telling him that his claimed description of RCCC’s complaint was “not a fair telling of the complaint.” This is how it went:

“MR. MEYER: So, 7 Stars and Zeaad Handoush have two motions, and I’ll talk to the motion to strike first.

“JUDGE GOODE: Okay.

“MR. MEYER: So joining a group with the purpose of influencing local ordinances and putting in applications is protected, and that is the claim that the complaint makes against my clients.

“It says that they joined this group—quote unquote—and so the tentative, as I see it, is sort of sidestepping this issue.

“JUDGE GOODE: Can you show me where in the complaint, the latest version of the complaint we have which I’m calling up right now, you think that is alleged in the gravamen of the case.

“MR. MEYER: As what?

“JUDGE GOODE: As the gravamen of the case because I read the paragraphs that you cited, and with very minor exceptions I just didn’t think it was a fair telling of the complaint.

“The [TAC] has a very different thrust than the first one did, so tell me where in the [TAC] you think you find the characterization that you’re putting on it?”

And it was downhill for Meyer from there: on several occasions Judge Goode made similar observations, advising Meyer that his reading of the TAC was wrong and mislead-
ing, especially in light of Hirschhorn’s declaration. The following passages are illustrative:

“JUDGE GOODE: Mr. Meyer, the declaration from Ms. Hirschhorn, which is very much echoed in the [TAC], says, for example, ‘Our purpose was to take as many steps as necessary to prevent RCCC from buying or leasing any property in Richmond. We did not want RCCC to acquire or lease any property in Richmond from which RCCC could operate a Cannibis [sic] business.’

“She goes on to talk about all of the ways they sought to interfere with the efforts of the plaintiff to acquire property.

“All of the business about trying to influence the counsel, all the community meetings that you’re talking about are largely gone from the [TAC].

“The [TAC] focuses on the behavior alleged of your client and others to cooperate to do anything they could to deprive the plaintiff of an opportunity to get a toehold in Richmond by acquiring a suitable piece of property.

“So, had you been here two or three months ago arguing with respect to a prior complaint, I would get it, but I’m reading the [TAC], and I’m reading Ms. Hirschhorn’s declaration, and the gravamen of what I’m reading is very different from what I hear you arguing.”

Meyer briefly responded, referring to “petitioning activities,” to which Judge Goode said, apparently incredulous: “Who are your clients petitioning when they are going to landlords and real estate brokers and agents and saying, ‘You better not lease to RCCC’? Who are they petitioning? Meyer replied, “That’s not in the complaint that my client did that,” to be immediately referred to paragraph 43 of the TAC which, Judge Goode said, refers to “the group, which I believe includes your client, conspired.”

Meyer interrupted, speaking for 11 lines, after which this colloquy ensued:

“JUDGE GOODE: I’m sorry, are you saying that the group of conspirators as alleged has two purposes, one to influence public bodies, and, two, to lean on people to say, ‘Nice property you have here. It would be a shame if something happens to it if RCCC leased it?’ That because they have one protected activity, they can do anything they want that is anticompetitive in addition?

“MR. MEYER: No.

“JUDGE GOODE: I’m reading the complaint to allege the second set of actions.

“MR. MEYER: But what is actually in that complaint, though, the basis for saying that his—my client is liable is the joining of a group, a political group.

“JUDGE GOODE: I understand your argument. I just think we see it very differently. I read the [TAC] several times now to try to understand what the thrust of it is, and I just think you’re mischaracterizing the [TAC].”

At the conclusion of the argument, Judge Goode took 7 Stars’ motion under submission, to be continued to November 16, when RPG’s anti-SLAPP motion was set.

On December 27, Judge Goode filed his order that denied 7 Stars’ anti-SLAPP motion in its entirety. Doing so, Judge Goode noted as follows: “In their moving memorandum, 7 Stars and Handoush failed to provide legal authorities to show that a large number of allegations identified in this motion were protected activity. Some of the allegations identified by these defendants could well be protected activity, but defendants were tasked with presenting facts and law to show how the allegations were protected activity. In the moving papers, defendants did not adequately complete this task. Defendants cite many additional authorities in their reply, however, the Court will not consider legal authorities first cited in the reply that could have been cited in the moving papers. In addition, with few exceptions, the alleged conduct is incidental to RCCC’s Cartwright Act claim and 7 Stars and Handoush have not shown otherwise. Therefore, 7 Stars and Handoush have not shifted the burden and this motion is denied.”

On January 4, 2018, 7 Stars filed a notice of appeal.

DISCUSSION

Anti-SLAPP Law and the Standard of Review

We have many times set forth the operation of the anti-SLAPP law, illustrated by our exposition in Hecimovich v. Encinal School Parent Teacher Organization (2012) 203 Cal. App.4th 450, 463–464:

“Subdivision (b)(1) of section 425.16 provides that ‘[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.’ Subdivision (c) of section 425.16 elaborates the four types of acts within the ambit of a SLAPP, including, as pertinent here, ‘(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.’

1. That same day, Judge Goode issued a comprehensive order addressing RPG’s motion, concluding that it was “granted in part and denied in part,” going on to strike paragraphs 37, 38, 54, 55, 56, 58 and 62 of the Third Amended Complaint.
“A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff’s complaint fit one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim. (Navellier v. Sletten (2002) 29 Cal.4th 82, 88 (Navellier).) [¶] … [¶]

“Finally, and as subdivision (a) of section 425.16 expressly mandates, the section ‘shall be construed broadly.’

“With these principles in mind, we turn to a review of the issues before us, a review that is de novo. (Grewal v. Jammu (2011) 191 Cal.App.4th 977, 988 (Grewal).)"

The Third Amended Complaint Is Not Based on Protected Activity

As we have put it, ‘In order for a complaint to be within the anti-SLAPP statute, the ‘critical consideration is whether the cause of action is based on the defendant’s protected free speech or petitioning activity.’ (Navellier v. Sletten (2002) 29 Cal.4th 82, 89.) To make that determination, we look to the ‘principal thrust or gravamen of the plaintiff’s cause of action.’ (Martinez v. Metabolife International, Inc. (2003) 113 Cal.App.4th 181, 188, italics omitted; see Dyer v. Childress (2007) 147 Cal.App.4th 1273, 1279.)’ (Moriarty, supra, 224 Cal.App.4th at pp. 133–134.)

Our Supreme Court has recently put it this way: “A claim arises from protected activity when that activity underlies or forms the basis for the claim. (City of Cotati v. Cashman (2002) 29 Cal.4th 69, 78; Equilon Enterprises v. Consumer Cause, Inc. [(2002)] 29 Cal.4th 53[, 66]; Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1114.)’ (Park v. Board of Trustees of California State University (2017) 2 Cal.5th 1057, 1063 (Park).)

“Critically, ‘the defendant’s act underlying the plaintiff’s cause of action must itself have been an act in furtherance of the right of petition or free speech.’ [Citation.] … The focus is on determining what ‘the defendant’s activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.’ [Citation.] ‘The only means specified in section 425.16 by which a moving defendant can satisfy the “arising from” requirement is to demonstrate that the defendant’s conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e).’ [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.” (Park, supra, 2 Cal.5th at p. 1063.)


As shown above, on several occasions, in no uncertain terms, Judge Goode accused 7 Stars’ attorney of mischaracterizing the TAC, of not reading it “fair[ly].” Against that background, 7 Stars comes before this court with a 55-page brief, citing 60 cases and 16 statutes, that is frankly nothing but more of the same—making arguments based on a reading of the complaint that was utterly rejected by Judge Goode. Sure it’s de novo review. But right is right. And it’s not right to continue to misrepresent “the gravamen,” the thrust, of RCCC’s cause of action.

RCCC’s respondent’s brief calls 7 Stars on this, in an argument that begins as follows:

“A. Appellants Misrepresent The Facts As Alleged in the [TAC] and The Supporting Hirschhorn Declaration[.] [¶] As in the trial court, as pointed out by Judge Goode, Appellants completely mischaracterize the record, for the most part ignoring the Declaration of Lisa Hirschhorn, whose sworn facts undergird the [TAC]. This Court cannot not accept Appellants’ mischaracterization of the facts alleged in the [TAC] and the supporting evidence. Appellants have an obligation to accurately and fairly present the critical facts but failed to do so. See Marriage of Davenport (2011) 194 Cal.App.4th 1507, 1531.”

7 Stars’ reply brief barely acknowledges this criticism, responding this way:

“Plaintiff asserts Appellants ‘mischaracterize the record.’ … Plaintiff does not identify any mischaracterized or uncited fact.” And, 7 Stars goes on, “The Opening Brief presents the facts in the context of the relevant standard of review, with citations to the record. Review is de novo and a ‘defendant need only make a prima facie showing that plaintiff’s claims arise from defendant’s constitutionally protected free speech or petition rights.’ (Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP (2017) 18 Cal.App.5th 95.) On the first step, it is Defendants’ evidence that must be given consideration.” We could not disagree more.

Beyond that, 7 Stars goes on to at length with its representation—more accurately, misrepresentation—of what the TAC is about, going so far at one point to assert that Hirschhorn’s declaration “includes vague statements that ‘our group’ took some action, but does not directly contradict the specific statements of Mr. Handoush. Plaintiff’s failure to plainly refute Mr. Handoush implies evasion of the issue. (Vogel v. Felice (2005) 127 Cal.App.4th 1006, 1022 and fn. 5.)”

This, of course, is directly contrary to Hirschhorn’s testimony—and directly contrary to appropriate advocacy in an anti-SLAPP setting.
In *Moriarty*, supra, 224 Cal.App.4th 125, we easily rejected an appeal by a losing defendant in an anti-SLAPP case, an opinion that among other things criticized defendant’s counsel for his myopic reading of the complaint, describing such conduct as a “selective reading” of the complaint that was “inappropriate.” (*id.* at p. 135.) Likewise here.

*Moriarty* also cited and distilled several cases where, like here, the complaint included what was protected activity, but which protected activity was “only incidental to the thrust of the complaint.” (*Moriarty*, supra, 224 Cal.App.4th at p. 140.) Indeed—and identical to the situation here—one of those cases involved activity by defendants pertaining to permits. Even so, it was not a SLAPP. We described this way: “Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal.App.4th 790, where a seller of real property brought an action against the buyer, the city, and city officials for breach of contract, fraud, and related causes of action, in which some of the actions complained of related to defendants’ conduct in obtaining and issuing permits. Held: the thrust of the action did not ‘arise’ from these activities. (*id.* at p. 799.)” (*Moriarty*, at p. 140.)

*Moriarty* has been cited and quoted many times since 2014, in both published and unpublished opinions. Our most recent reference to *Moriarty* was this year, in *Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203. This, too, was a case where defendant’s counsel filed an anti-SLAPP motion based on a reading of the complaint that was markedly off base. Another experienced trial judge described defendant’s motion as an “aggressive one,” (*id.* at p. 211) and denied it. Again, we easily affirmed.

2 *Moriarty* and *Central Valley Hospitalists v. Dignity Health* may be said to be on point here. They are at least persuasive. They are ignored by 7 Stars.

The gravamen of RCCC’s Cartwright Act claim is set forth at length, and in detail, in the TAC, a complaint whose factual allegations are based on Hirschhorn’s declaration. We need not repeat all that here, but suffice to repeat her introductory paragraph: that from 2011 through 2015 the group, “declared war on RCCC. We conspired to prevent RCCC from getting any property in Richmond. We discussed and presented leases, letters of intent to lease or purchase, and purchase agreements—all of which were bogus. The intent of these phony real estate deals or leases, which were presented to landlords was to ‘tie them up with paper.’ ” As Hirschhorn went on to describe, in pursuit of that conspiracy “the group” employed various tactics to block RCCC from buying or leasing conforming properties in Richmond, all for the explicit purpose of preventing RCCC from acquiring a business location until enough time passed so that its permit would expire and become void, and the three dispensary defendants would control the lucrative medical marijuana market in Richmond. 3

The essence of RCCC’s TAC was the private actions the group took to restrain trade and monopolize the medical marijuana market in Richmond. That was the gravamen, the thrust, of the cause of action. Whatever the protected activity, it was at the most incidental. (*Martinez v. Metabolife International, Inc.*, supra, 113 Cal.App.4th at pp. 187–188; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672–673.)

**DISPOSITION**

The order is affirmed. RCCC shall recover its costs on appeal.

Richman, Acting P.J.

We concur: Stewart, J., Miller, J.

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2. Not only that, we on our own motion raised the issue of sanctions, on the basis that it appeared the appeal was taken for purposes of delay, ultimately not imposing them because it did not appear that the defendant hospital was the responsible party and plaintiff doctors group did not pursue them.

3. Lucrative indeed. RPG was on track to earn $3.5 to $4 million in sales; 7 Stars on track to earn $2.5 to $2.7 million; and HHC on track to earn $1.5 to $1.7 million.
DEAN GRAFILO, as Director, etc.,
Plaintiff and Respondent,

v.
KAMYAR COHANSHOHET, Defendant
and Appellant;
MEDICAL BOARD OF CALIFORNIA,
Real Party in Interest and Respondent.

No. B285193
In The Court of Appeal of the State of California
Second Appellate District
Division Eight
(Los Angeles County Super. Ct. No. BS169143)
APPEAL from an order of the Superior Court of Los Angeles
County. Michelle Williams Court and Joseph R. Kalin,
Judges. Reversed.
Filed January 22, 2019
Certified for Publication February 21, 2019

COUNSEL
Fenton Law Group, Benjamin J. Fenton, Dennis E. Lee
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No appearance for Plaintiff and Respondent.
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Assistant Attorney General, Judith L. Alvarado and Tan N.
Tran Deputy Attorneys General for Real Party in Interest and Respondent, Medical Board of California.

ORDER CERTIFYING
PUBLICATION
[NO CHANGE IN THE JUDGMENT]
THE COURT:
The opinion in the above entitled matter was filed on
January 22, 2019, was not certified for publication in the Of-
icial Reports. For good cause it now appears that the opinion
should be published in the Official Reports and it is so
ordered.

BIGELOW, P. J., GRIMES, J., STRATTON, J.

OPINION
Dr. Kamyar Cohanshohet appeals from the superior
court’s order to produce the medical records of five of his
patients in connection with an investigation into his prescrip-
tion of controlled substances to these patients. Because the
state has failed to demonstrate good cause to obtain these
records, we reverse the order.

PROCEDURAL BACKGROUND
The Investigation
In 2014, the Medical Board of California (the Board) re-
ceived an anonymous complaint alleging Dr. Cohanshohet
“prescribes huge quantities of narcotics to patients without
giving exams, tests, x-rays or even bloodwork. A loved one
goes to this doctor and is in rehab. Not once did this doctor
examine him, look at charts. He only went by a com-
plaint of pain and started prescribing narcotics at $400 a visit
every two weeks. He is in partnership with a pharmacy in his
building.”

An investigator for the Board obtained a report from the
Controlled Substance Utilization Review and Evaluation
System (CURES), a database maintained by the California
Department of Justice. The CURES report for Dr. Cohan-
shohet shows the Schedule II, III, and IV controlled sub-
stances prescribed by him to patients between July 27, 2014
and July 27, 2015.

Dr. Shoaib Naqvi works as a medical consultant for the
Health Quality Investigation Unit of the Department of
Consumer Affairs. He identified five patients who were pre-
scribed dosages of opioids that were possibly in excess of the
recommended amount. These five patients were notified of
the investigation and asked to sign releases for their medical
records. They refused. As a result, subpoenas duces tecum
were served on June 30, 2016, for the medical records of
patients C.B., L.P., M.D., C.S., and R.V. for the time period
between July 27, 2014 and July 27, 2015. The patients were
informed when the subpoenas were issued and advised of
their right to object. Dr. Cohanshohet refused to comply with
the subpoena, asserting his patients’ right to privacy.

The Petition
The Board subsequently filed a petition in the superior
court for an order compelling the production of the medi-
cal records requested and for Dr. Cohanshohet’s testimony.
In support of its petition to compel compliance of the subpoe-
as, the Board submitted the declarations of its investigator
and Dr. Naqvi. The investigator’s declaration sets forth the
impetus for the Board’s investigation: an anonymous com-
plaint that Dr. Cohanshohet overprescribed opioids to one
patient without conducting an examination or screening of
him or her. The anonymous complaint also alleged Dr. Co-
hanshohet was in partnership with the pharmacy in his build-
ing. The investigator further described the sequence of events
leading to the petition, including obtaining the CURES report
for Dr. Naqvi’s review, attempting to obtain consent from the
patients, and Dr. Cohanshohet’s refusal to comply with the
subpoenas.

Dr. Naqvi documented his role and his conclusions from
reviewing Dr. Cohanshohet’s CURES report. He explained
he is tasked with reviewing questionable medical and surgical
practices of physicians licensed by the Board. Thus, he main-
tains familiarity with the standard of medical practice in the
state of California. Dr. Naqvi then in general terms explained
the different classes of controlled substances, their potential for abuse, side effects, indicated use, and the standard of care for prescribing these substances. He also provided details of 11 specific drugs prescribed by Dr. Cohanshohet, nine of which are used to treat pain. The remaining two are used to treat anxiety, insomnia, or muscle spasms and seizures.

Dr. Naqvi further explained that morphine is used as the basis for a comparison of pain treatments to determine if the patient’s opioid dosage is excessive. He stated that knowing the morphine equivalent dosing (MED) is useful to evaluate different types of opioids and to convert from one opioid to another. Opioid dosing may be considered excessive if the MED level exceeds 100 mg per day. Dr. Naqvi noted an MED of greater than 100 mg per day “puts the patient at added risk for overdose and death.” The standard of care requires that the prescriber inform the patient of potential risks and benefits of the drug. The patient must then provide informed consent, including being notified that death is a potential risk, when opioid dosing exceeds 100 mg MED per day.

Dr. Naqvi opined that good cause existed to believe that a violation of the Medical Practice Act (Bus. & Prof. Code, § 2000, et seq.) may have been committed by Dr. Cohanshohet. Dr. Naqvi identified five patients who were prescribed controlled substances in a manner that appeared to deviate from the standard of care for prescribing these drugs.

Patient C.B. regularly received 90–120 (20mg) oxycodone HCL tablets along with 30 (20 mg) oxymorphone HCL tablets and 30 (10 mg) Valium tablets each month from July 27, 2014 to January 5, 2016. Based on this information, C.B. may have taken three tablets of oxycodone, one tablet of oxymorphone HCL, and one tablet of Valium a day, totaling at least 150 mg MED per day. Dr. Naqvi noted the sedative effects of opioids are further aggravated by the use of Valium, resulting in a combination that has a “very real possibility of sedation to the point of respiratory arrest.” He concluded a review of C.B.’s medical record is necessary to confirm that an appropriate examination was done before prescribing this medication regimen, that regular assessments of the efficacy and effects of the treatment regimen were conducted and documented, and that the appropriate monitoring measures were performed.

Likewise, patient M.D. regularly received 90 (30 mg) oxycodone HCL tablets, 30 (4 mg) hydromorphone HCL tablets, 30 (10 mg) Valium tablets, and 60 (350 mg) carisoprodal tablets (a muscle relaxant) each month from July 27, 2014 to July 27, 2015. According to Dr. Naqvi, this would appear to indicate three tablets of oxycodone, one tablet of hydromorphone HCL, two tablets of carisoprodal, and one tablet of Valium were taken each day, resulting in at least 106 mg MED. This treatment regimen also presented the very real possibility of sedation to the point of respiratory arrest.

Patient L.P. regularly received 20–220 (10 mg) hydrocodone bitartrate-acetaminophen with 30–45 (350 mg) carisoprodal each month during the relevant time period, indicating the patient took five tablets of hydrocodone bitartrate-acetaminophen and one or two tablets of carisoprodal daily. This combination appeared equivalent to a minimum of 75 mg MED.

Patient C.S. received prescriptions for 60–120 (10 mg) OxyContin tablets, 120–240 (325 mg–10 mg) Norco tablets, and 30–90 (10 mg) benzodiazepine or related drug (such as Valium, clonazepam, or temazepam, indicating 105–125 mg MED per day.

Patient V.R. received 120–150 (15 mg–20 mg) oxycodone HCL tablets with 20–60 benzodiazepine or related drugs (Valium (10 mg), Ambien, or Zaleplon). This would indicate four to five tablets of Oxycodone and one tablet of Valium along with a sleeping pill per day, resulting in 60–75 mg MED.

The prescriptions for L.P., C.S., and V.R. carried risks similar to those of patients C.B. and M.D. On this basis, Dr. Naqvi concluded these five patients may have received excessive amounts of opioids as compared to the recommended dosage. Dr. Naqvi explained the records are necessary to determine whether Dr. Cohanshohet performed an examination and screening of those patients, received informed consent, regularly assessed the efficacy and effects of the treatment regimen, and monitored those patients.

The Opposition

Four of the five patients submitted declarations objecting to the petition. Dr. Cohanshohet also opposed the petition, asserting the Board lacked good cause to justify the intrusion into his patients’ privacy. He asserted in a declaration that he completed hundreds of hours of post-graduate training in pain management and palliative care and that some of his patients suffer from pain associated with acute injuries while others seek active cancer treatment, palliative care, or end-of-life care.

In addition, he proffered the declaration of Dr. Jack Berger, a physician certified in anesthesiology and who teaches pain medicine and pain management at USC. Dr. Berger reviewed Dr. Naqvi’s declaration. He agreed that physicians who prescribe controlled substances to treat pain are required to complete a medical history and physical examination, diagnose the problem, inform the patient of any risks, and write a treatment plan which states the objectives, proposed treatments, and justifications for the medications selected. He explained one of the primary functions of a pain management specialist is to monitor and guard against patient misuse and abuse of controlled substances such as opioids.

However, Dr. Berger challenged Dr. Naqvi’s reliance on the CDC prescribing guidelines which were merely recommendations for primary care clinicians who are prescribing opioids for chronic pain outside of active cancer treatment, palliative care, and end-of-life care. These guidelines were not in effect at the time the patients in question were treated. He further contested Dr. Naqvi’s conclusions as to each patient. Dr. Berger argued that a dosage greater than 100 mg MED does not automatically violate the standard of care,
so long as the patient’s informed consent was obtained. He found there was no reason to suspect Dr. Cohanshohet failed to perform a proper examination, obtain informed consent, or review the risks and benefits of higher dosage opioid therapy with the patient. He also opined that nonopioid alternatives would have presented similar risk of serious side effects, like morbidity.

The Order

The Hon. Joseph Kalin presided over the hearing on the Board’s petition. After argument, he stated he would take the matter under submission and issue a ruling in “the next day or two.” The Board served a notice of ruling a few weeks later indicating its petition had been granted, but no order was attached. Dr. Cohanshohet objected to the notice, arguing he received no communication from the trial court about its ruling. A different trial judge, the Hon. Michelle Williams Court, informed the parties at a later status conference that she spoke with Judge Kalin, and he confirmed he granted the petition. Dr. Cohanshohet timely appealed.

Although Dr. Cohanshohet questions whether an order was ever issued, the parties are proceeding on the assumption a ruling was made. Indeed, the record is sufficient to demonstrate the superior court granted the petition and ordered Dr. Cohanshohet to produce the requested records. Therefore, we will treat the appeal as one from an appealable judgment. (Dana Point Safe Harbor Collective v. Superior Court (2010) 51 Cal.4th 1, 11–13 [order compelling compliance with administrative subpoena is appealable final judgment].)

DISCUSSION

Dr. Cohanshohet contends the state’s interest in his patients’ medical records is insufficient to overcome their right to privacy. He argues the Board lacks authority to issue subpoenas for records of noncomplaining patients. In addition, the Board has failed to pursue less intrusive means of investigation. Finally, Dr. Cohanshohet argues the Board has failed to establish good cause for its investigation because the records sought have not been shown to be material or relevant to the investigation.

We are not persuaded the Board has demonstrated good cause to require Dr. Cohanshohet to produce the five patients’ records. Accordingly, we reverse the trial court’s order. In doing so, we need not address Dr. Cohanshohet’s other grounds for reversal.

I. THE MEDICAL BOARD

The Board is a unit of the Department of Consumer Affairs. (Bus. & Prof. Code, § 101, subd. (b).) It is tasked with protecting the public against incompetent, impaired, or negligent physicians. To accomplish this task, the Board is authorized to investigate complaints from the public that a physician may be guilty of unprofessional conduct. (Bus. & Prof. Code, § 2220, subd. (a).) A physician may only prescribe controlled substances when he holds a good faith belief that it is required for a patient’s ailment, and only in a quantity and for a length of time that is reasonably necessary. (Health & Saf. Code, § 11210.) A violation of this provision constitutes unprofessional conduct (Bus. & Prof. Code, § 2238), and subjects the violator to disciplinary action by the Board (Bus. & Prof. Code, § 2234).

The Board’s investigators have the status of peace officers (Bus. & Prof. Code, § 160), and possess a wide range of investigative powers, such as the power to issue subpoenas for the appearance of a witness or for the production of documents (Gov. Code, § 11181, subds. (a) & (e)). The Board is authorized to issue a subpoena in “any inquiry [or] investigation” (Gov. Code, § 11181, subd. (e)), and may do so for purely investigative purposes; it is not necessary that a formal accusation be on file or a formal adjudicative hearing be pending. (Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 8; Brovelli v. Superior Court (1961) 56 Cal.2d 524, 528.)

If a party refuses to comply with the administrative subpoena, the Board may petition the superior court for an order compelling compliance. (Gov. Code, §§ 11186–11187.) “If it appears to the court that the subpoena was regularly issued . . . by the head of the department, the court shall enter an order that the person appear before the officer named in the subpoena at the time and place fixed in the order and testify or produce and permit the inspection and copying of the required papers or other items described in subdivision (e) of Section 11181 as required . . . . Upon failure to obey the order, the person shall be dealt with as for contempt of court.” (Gov. Code, § 11188.)

II. STANDARD OF REVIEW

The question of whether a subpoena meets the constitutional standards for enforcement is a question of law to be reviewed de novo. (Fett v. Medical Bd. of California (2016) 245 Cal.App.4th 211, 216 (Fett); Millan v. Restaurant Enterprises Group, Inc. (1993) 14 Cal.App.4th 477, 485.) The superior court’s factual findings regarding whether the Board established good cause to intrude on the patients’ privacy rights are reviewed under the substantial evidence standard. (Fett, supra, 245 Cal.App.4th at p. 216.)

III. PRIVACY LAW IN CALIFORNIA

The state Constitution expressly grants Californians a right of privacy, which extends to their medical records. (Cal. Const., art. I, § 1.) As one court put it: “The state of a person’s gastro-intestinal tract is as much entitled to privacy from unauthorized public or bureaucratic snooping as is that person’s bank account, the contents of his library or his membership in the NAACP.” (Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal.App.3d 669, 679 (Gherardini)).

1. Although the director of Consumer Affairs is the plaintiff and respondent in this matter, the Board is the real party in interest and we refer to it as the petitioner in this opinion rather than the Department of Consumer Affairs.
In *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35 (*Hill*), the California Supreme Court established a framework for evaluating potential invasions of privacy. The party asserting a privacy right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy in the given circumstances, and a threatened intrusion that is serious. (*Id.* at pp. 35–37.) The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy. A court must then balance these competing considerations. (*Id.* at pp. 37–40.)

Additionally, good cause is required to be shown when the state seeks to invade an individual’s privacy rights through an administrative subpoena seeking his or her medical records. (*Gherardini,* supra, 93 Cal.App.3d at p. 681; *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1141–1143 (*Wood*).)

Good cause ‘‘calls for a factual exposition of a reasonable ground for the sought order.’’ (*Gherardini,* supra, at p. 681 quoting *Waters v. Superior Court* (1962) 58 Cal.2d 885, 893.)

In *Wood*, the Board issued administrative subpoenas for the medical records of 52 patients under the care of two different physicians because it suspected the physicians were over-prescribing certain Schedule II drugs. In support of the subpoenas, the Board submitted declarations from its investigators that stated they had obtained copies of the two doctors’ Schedule II drug prescriptions from various pharmacies. One investigator reported a pharmacist had told her he believed a particular patient was receiving an excessive dose of Demerol. The Board’s medical consultant opined that there existed a ‘‘definite possibility of excessive prescribing of controlled drug substances’’ and that the medical records should be obtained to determine whether appropriate medical conditions existed to warrant the prescriptions. (*Wood, supra,* 166 Cal.App.3d at p. 1142.)

The court concluded the Board’s showing was insufficient to warrant a demand for the complete medical records of the patients, because it included records of medical issues unrelated to the prescription of the controlled substances. (*Wood, supra,* 166 Cal.App.3d at p. 1149.) The court further stated, “Here we have some facts about the prescriptions and the conclusions of board personnel that they are suspicious but no mediating facts revealing why the conclusion is warranted.” The board has made no evidentiary showing of how often physicians similarly-situated to petitioners might prescribe these drugs. Alternatively, the board has made no showing of the likelihood that the prescriptions could have been properly issued, given what is known of the circumstances of issuance. Absent this information the trial court has no means by which to gauge the likelihood that the records sought will reveal physician misconduct. Without this there can be no independent judicial assessment of good cause. The judicial function of assessing cause [citation] cannot be abdicated by deferring to the bare conclusions of board personnel.” (*Id.* at p. 1150, italics omitted.)

In *Bearman v. Superior Court* (2004) 117 Cal.App.4th 463 (*Bearman*), a doctor prescribed marijuana to his patient to treat migraines and attention deficit disorder. The doctor provided the patient with a letter certifying the patient was under his medical care and, having evaluated the medical risks and benefits of cannabis use with the patient, the doctor approved his use of cannabis for the relief of pain and nausea of migraines and decreasing the frequency and intensity. The doctor further stated the approval for medicinal cannabis would not require a repeat visit until November or December 2001, effectively providing an expiration date for the prescription. (*Id.* at p. 467.)

On April 10, 2001, park rangers discovered pipes and marijuana among the patient’s possessions. The patient presented the letter to the rangers. Believing the doctor was possibly violating the law and medical ethics by exceeding his scope of practice, one of the park rangers sent a copy of the letter to the Board and asked for “‘appropriate actions.’” (*Bearman, supra,* at pp. 467–468.) An investigation was initiated and the Board issued an administrative subpoena for the patient’s records after the patient refused to consent to the disclosure. (*Id.* at p. 468.)

The trial court granted the Board’s petition to compel compliance, but on appeal, the court found an absence of good cause for disclosure of the patient’s records. The court concluded the supporting declarations by the Board “are nothing more than speculations, unsupported suspicions, and conclusory statements drawn solely from [the doctor’s] letter to [his patient] and the simple fact he recommended the use of marijuana.” (*Bearman, supra,* at p. 471.) There were no facts suggesting the doctor was negligent in his patient’s treatment, or that he prescribed marijuana for improper reasons. (*Ibid.*)

Similarly, in *Gherardini*, the investigator’s declaration was insufficient because it “set[[] forth no facts, no showing of relevance or materiality of the medical records of these five specified patients to the general charge of gross negligence and/or incompetence of the licensee-doctor.” (*Gherardini,* supra, 93 Cal.App.3d at p. 681.)

By contrast, the court in *Cross v. Superior Court* (2017) 11 Cal.App.5th 305 (*Cross*) found good cause for an order compelling compliance with subpoenas for the medical records of three patients. There, the Board subpoenaed a psychiatrist’s patient records to investigate an allegation that she improperly prescribed controlled substances to three people. (*Id.* at p. 310.) The psychiatrist refused to produce the re-
cords, invoking the psychotherapist-patient privilege and the patients’ right to privacy. (Ibid.)

The Department of Consumer Affairs filed a petition to compel compliance with the subpoenas, which was granted. On appeal, the court concluded the patients had a state constitutional right to privacy that protects information contained in their medical records. (Cross, supra, 11 Cal.App.5th at p. 325.) Nevertheless, it found compelling the state’s interest in investigating whether a doctor prescribed excessive or improper amounts of controlled substances. (Id. at p. 327.) The court found unpersuasive the psychiatrist’s contention that there was no compelling interest in her particular case because the facts and declarations relied upon by the Board did not justify its investigation. (Cross, supra, 11 Cal.App.5th at p. 328.) Specifically, the psychiatrist argued the Board’s expert was not competent to demonstrate it had good cause to investigate her prescribing practices because the expert was an internist rather than a specialist in psychiatry. The court found the trial court did not abuse its discretion to conclude the Board’s expert was qualified to competently render an opinion on the subject. (Id. at p. 327.)

Good cause was shown where the Board’s medical consultant “opined on the nature and properties of the drugs prescribed, their potential complications, and the precautions that should be taken by a physician who prescribes the medications.” (Cross, supra, 11 Cal.App.5th at p. 327.) In particular, the Board’s expert believed the three patients in question, all women who were likely postmenopausal, may be at increased risk for coronary artery disease complications, which could be exacerbated by use of the prescribed stimulants. (Id. at p. 315.) The psychiatrist also prescribed high doses of Adderall, a drug predominately used to treat attention deficit hyperactivity disorder (ADHD) and narcolepsy. The psychiatrist prescribed Adderall to one patient at a dosage level that was three times the maximum recommended dosage for treatment of ADHD and in excess of the recommended dosage for treatment of narcolepsy. (Id. at pp. 312–313.)

Good cause was further shown by the investigator’s declaration that one of the purported patients denied she was ever treated by the psychiatrist. Additionally, the psychiatrist had been disciplined by the Texas Medical Board for improper prescribing recommendations, relied upon by Dr. Naqvi, to do not apply in cases involving “active cancer treatment, palliative care, and end-of-life care.” Dr. Naqvi failed to discuss these circumstances in his declaration.

This is in contrast to the supporting evidence in Cross, which provided much greater detail as to why the drugs prescribed posed a greater risk to the three patients identified as opposed to a patient who was not a postmenopausal woman. In addition, one of the patients in Cross received doses that equaled three times the maximum recommended dose. Another patient denied she had been treated by the psychiatrist and the psychiatrist had been previously disciplined by the Texas Medical Board for improper prescription practices. (Cross, supra, 11 Cal.App.5th at pp. 312–315.) Cross presented a much greater showing of good cause to compel compliance of the subpoenas.

The Attorney General contends the consumer complaint, “which alleged the exact concerns identified in Dr. Naqvi’s declaration,” provides the additional evidence necessary to constitute good cause. We are not persuaded an anonymous complaint which provides scant detail, particularly about who and when the prescriptions were written, constitutes substantial evidence of good cause. Indeed, we are skeptical the complaint bolsters Dr. Naqvi’s suspicions, given that Dr. Naqvi was induced to look through the CURES report for improper prescriptions of opioids because of the complaint. Thus, it may be the case that Dr. Naqvi looked through the CURES report to justify the allegations in the anonymous complaint.

Dr. Cohanshohe challenges the basis for the subpoenas, contending good cause is lacking to order compliance of the subpoenas. We agree the Board has failed to demonstrate good cause.

Applying the guidance provided by Wood, Bearman, and Cross, we conclude Dr. Naqvi’s declaration is insufficient to show good cause to compel compliance of the subpoenas at issue. Good cause requires something more than the mere fact that a specialist in pain medication prescribed doses slightly greater than 100 MED to three patients and two others received prescriptions for drugs which, used in combination, resulted in increased sedative effects.

As in Bearman, there are no facts suggesting Dr. Cohanshohe was negligent in treating his patients or that he prescribed controlled substances without meeting the standard of care. Given that Dr. Cohanshohe is a pain management specialist who sometimes treats patients seeking active cancer treatment, palliative care, and end-of-life care, it is reasonable to assume at least some of his patients would require treatment for pain that would exceed the recommended dose. Indeed, there is no indication how many patients Dr. Cohanshohe treats in total and what percentage the five patients at issue comprise that total.

As in Wood, the Board has made no evidentiary showing of how often similarly-situated physicians who specialize in pain treatment might prescribe these drugs. Neither has the Board made any showing of the likelihood that the prescriptions could have been properly issued, given what is known of Dr. Cohanshohe’s practice. Instead, Dr. Berger identified instances where his prescribing patterns would have been appropriate. Specifically, Dr. Berger indicated that the CDC’s prescribing recommendations, relied upon by Dr. Naqvi, do not apply in cases involving “active cancer treatment, palliative care, and end-of-life care.” Dr. Naqvi failed to discuss these circumstances in his declaration.

IV. THE BOARD HAS FAILED TO DEMONSTRATE GOOD CAUSE

Dr. Cohanshohe challenges the basis for the subpoenas, contending good cause is lacking to order compliance of the subpoenas. We agree the Board has failed to demonstrate good cause.

Applying the guidance provided by Wood, Bearman, and Cross, we conclude Dr. Naqvi’s declaration is insufficient to show good cause to compel compliance of the subpoenas at issue. Good cause requires something more than the mere
DISPOSITION

The order to comply with the challenged subpoenas is reversed and the trial court is directed to issue a new order denying the petition. Dr. Cohanshohet is awarded his costs on appeal.

BIGELOW, P. J.

We concur: GRIMES, J., STRATTON, J.