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SUMMARY

Admiralty

Injured seaman who established entitlement to maintenance and proved actual expenses should have been awarded maintenance (Nguyen, J.)

Barnes v. Sea Hawaii Rafting, Inc.

9th Cir.; March 28, 2018; 16-15023

The court of appeals reversed in part a judgment and remanded, and granted a petition for writ of mandamus. The court held that the district court erred in denying an award of maintenance to an injured seaman who established entitlement to such an award and proved his actual expenses.

Seaman Chad Barnes was injured while working on the M/V Tehani. Barnes sued the Tehani in rem and vessel owner Sea Hawaii Rafting, LLC (SHR) and others in personam to enforce a seaman’s lien against the vessel for maintenance and cure. The district court found Barnes was entitled to maintenance and cure and had demonstrated his actual maintenance expenses, but nonetheless declined to award Barnes any maintenance until trial. After fifteen months of litigation and shortly before trial, SHR declared bankruptcy. The district court stayed Barnes’ action. The court later dismissed Barnes’ claims against the Tehani, reasoning that even though Barnes had verified his original complaint, his later filing of an unverified amended complaint deprived the court of in rem jurisdiction.

While Barnes’ appeal from those rulings was pending, the bankruptcy court approved the trustee’s sale of the Tehani free and clear of Barnes’ maritime lien. The trustee thereafter moved to dismiss Barnes’ appeal as moot.

The court of appeals denied the trustee’s motion to dismiss and reversed the judgment dismissing Barnes’ claims against the Tehani, holding that the district court obtained jurisdiction over the vessel when Barnes filed his original verified complaint and the defendants appeared generally and litigated without contesting in rem jurisdiction. The district court did not lose in rem jurisdiction while the Tehani remained in its constructive custody. Further, the court’s control over the vessel, once obtained, was exclusive. SHR’s later-filed bankruptcy petition did not divest the district court of in rem jurisdiction. Moreover, the automatic bankruptcy stay did not affect Barnes’ maritime lien against the Tehani. The bankruptcy court thus had no authority to dispose of the lien through the application of bankruptcy law. Treating Barnes’ appeal from the denial of maintenance benefits as a petition for writ of mandamus, the court held that the district court erred by denying Barnes’ requests. Once a seaman establishes his entitlement to maintenance and provides some evidence of his actual living expenses, the burden shifts to the vessel’s owner to produce evidence that the seaman’s actual costs were unreasonable. Whether or not the vessel’s owner provides such evidence, the seaman is entitled to a maintenance award in the amount of his actual costs up to the reasonable rate in his locality. Here, over three years had elapsed since the district court found Barnes was entitled to maintenance and had sufficiently proven his actual costs, and the district court had yet to award him any maintenance. The court issued a writ of mandamus to the district court to award Barnes maintenance for his undisputed actual and reasonable expenses—$34 per day—subject to a potential increase after trial.

Business Torts

Talent agency’s mere noncompliance with Fee-Related Talent Services Law insufficient to establish injury (Baker, J.)

Demeter v. Taxi Computer Services, Inc.

C.A. 2nd; March 27, 2018; B276192

The Second Appellate District affirmed a judgment. The court held that the plaintiff failed to show that he suffered any injury as the result of a talent agency’s alleged noncompliance with California’s Fee-Related Talent Services Law (FTSL).

Taxi Computer Services, Inc. provides a listing service for professionals in the music industry who are looking for composers and songs for their artists. Based on information provided by industry professionals, Taxi creates and posts listings on its website describing the type of music sought and the submission deadline. Taxi’s artist members pay an annual fee for access to Taxi’s listings and other services. Michael Demeter purchased a one-year Taxi membership for $299.95. Taxi’s user agreement provided that members could request a full refund for up to 365 days after purchasing a Taxi membership, if they were dissatisfied with Taxi’s listings, feedback, or customer service.

Some six weeks after purchasing his membership, Demeter filed a putative class action complaint against Taxi and its CEO, Michael Laskow, alleging that Taxi had violated the Unfair Competition Law by failing to procure the $50,000 bond purportedly required under the FTSL. Demeter did not seek a refund. The trial court granted Taxi’s motion for summary judgment.

The court of appeal affirmed, holding that Demeter failed to establish that he suffered a cognizable injury under the FTSL. Because Taxi’s alleged failure to provide Demeter with an FTSL-compliant contract rendered the contract merely voidable, not per se illegal, Demeter’s theory of injury failed as to that asserted violation. Further, because Demeter both admitted he did not know Taxi was required to have a bond before he purchased his membership and failed to provide any evidence he suffered some injury that might have entitled him to collect on such a bond, Demeter failed to demonstrate
the existence of a triable issue of material fact regarding any injury caused by the absence of a bond. Demeter’s FTSL claim thus amounted to no more than an assertion Demeter was injured by Taxi’s noncompliance with the FTSL. Mere noncompliance with the FTSL, however, does not constitute an injury. For similar reasons, Demeter’s evidence also failed to raise a triable issue of material fact as to whether he suffered an economic injury caused by Taxi’s alleged violations of the FTSL, which injured needed to be established in order for him to have standing to sue under the UCL.

Environmental Law

Clean Water Act prohibits indirect discharge of pollutants into Pacific Ocean (D.W. Nelson, J.)

Hawai’i Wildlife Fund v. County of Maui

9th Cir.; February 1, 2018; 15-17447

The court of appeals affirmed a district court judgment. The court held that the Clean Water Act (CWA) prohibits both the direct and the indirect discharge of pollutants into the Pacific Ocean.

The County of Maui operates four wells at the Lahaina Wastewater Reclamation Facility (LWRF). The wells serve as the county’s primary means of effluent disposal into groundwater and the Pacific Ocean. The county injects some 3 to 5 million gallons of treated wastewater per day into the groundwater via its wells, at least some of which reaches the Pacific Ocean. Hawai’i Wildlife Fund and others sued the county for violation of the CWA.

The district court granted summary judgment in favor of plaintiffs, finding it undisputed that the county was discharging effluents into navigable waters in violation of the CWA.

The court of appeals affirmed, holding that the county’s indirect discharge of pollutants into the ocean, by way of groundwater, was just as much a violation of the CWA as would have been the case had the county dumped the pollutants directly into the ocean. The county could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without a National Pollutant Discharge Elimination System permit. It could not avoid CWA liability by doing so indirectly. To hold otherwise would make a mockery of the CWA’s prohibitions. Under the circumstances of this case, the district court properly concluded that the county discharged pollutants from its wells into the Pacific Ocean, in violation of the CWA. The district court also properly found that the county had fair notice of what was prohibited.
Family Law

Parent may be entitled to recover attorney fees and costs incurred in out-of-state proceeding arising from California custody order (Dato, J.)

**N.S. v. D.M.**

C.A. 4th; March 28, 2018; D071305

The Fourth Appellate District reversed a family court order and remanded. The court held that a parent may be entitled to recover attorney fees and costs incurred in an out-of-state proceeding arising from a California custody order.

In 2013, the Santa Clara County Superior Court entered a judgment determining custody and visitation rights as to the two minor children of mother N.S. and father D.M., who were unmarried. Father later relocated to Illinois, where he attempted to register that judgment under the UCCJEA and to modify custody. Mother opposed. The Illinois court ultimately declined to exercise jurisdiction. The case was returned to Santa Clara County and later transferred to San Diego County. Relying on Family Code §§3452(a) and 7605(a), Mother moved in San Diego County for an award of attorney’s fees, travel expenses, and other costs associated with the parties’ litigation in Santa Clara County and Illinois.

The family court denied expenses under both §3452(a) and §7605(a).

The court of appeal reversed and remanded, holding that the family court erred in declining to consider Mother’s request under §7605(a). Section 7605(a) provides for a need-based fee and cost award for fees and costs incurred in maintaining or defending a custody or visitation proceeding to the extent such fees and costs are “reasonably necessary.” That a large portion of the attorney fees at issue here were incurred in Illinois did not, as the family court found, preclude recovery so long as the Illinois action was sufficiently related to the California case to render the Illinois attorney fees “reasonably necessary.” Because the family court did not exercise its discretion to consider Mother’s request under §7605(a), remand was necessary for that court to determine, using appropriate needs-based criteria, whether an award of fees and costs was appropriate. Mother was not, however entitled to expenses under §3452(a) because she was not a prevailing party in a UCCJEA enforcement proceeding within the meaning of that statute. Although Mother ultimately prevailed in having the case transferred back to California, she was not entitled to expenses under §3452(a) because the Illinois proceeding focused on the issue of jurisdiction, and not on enforcement.

Internet Law

Virtual gaming platform properly alleged to constitute illegal gambling (M.D. Smith, J.)

**Kater v. Churchill Downs Incorporated**

9th Cir.; March 28, 2018; 16-35010

The court of appeals reversed a district court judgment. The court held that a virtual gaming platform was properly alleged to constitute illegal gambling within the scope of Washington’s Recovery of Money Lost at Gambling Act (RMLGA).

Churchill Downs Incorporated operates an virtual game platform known as “Big Fish Casino,” where users can play various electronic casino games, such as blackjack, poker, and slots. Users play the games using virtual chips that are provided free of charge to new users. Users can earn chips as a reward for winning games, and can also purchase additional chips. Upon payment of a transaction fee to Churchill Downs, users can also transfer their virtual chips to other users, at a price negotiated between the users. Washington resident Cheryl Kater began playing Big Fish Casino in 2013, eventually buying and losing over $1,000 worth of chips. She filed a putative class action against Churchill Downs, alleging, among other things, violation of the RMLGA, which provides that “persons losing money or anything of value at or on any illegal gambling games shall have a cause of action to recover from the dealer or player winning, or from the proprietor for whose benefit such game was played or dealt, or such money or things of value won, the amount of the money or the value of the thing so lost.”

The district court dismissed this case with prejudice, holding that because the virtual chips are not a “thing of value,” Big Fish Casino is not illegal gambling for purposes of the RMLGA.

The court of appeals reversed, holding that the district court erred in finding the virtual chips were not a “thing of value.” Washington law defines a “thing of value” as including “any form of credit…involving extension of…a privilege of playing at a game or scheme without charge.” The virtual chips, as alleged in the complaint, are a credit that permit the user to play casino games inside the virtual Big Fish Casino. If a user runs out of virtual chips and wants to continue playing, she must buy more chips. Likewise, if a user wins chips, she wins the privilege of playing Big Fish Casino without charge. Because the virtual chips extend the privilege of playing Big Fish Casino, as alleged in the complaint, constitutes an illegal gambling game for purposes of the RMLGA, entitling Kater to recover the value of her lost chips.
Land Use and Planning

Combined city ordinances rendered operation of medical marijuana dispensaries within city limits a nuisance per se (Collins, J.)

**Urgent Care Medical Services v. City of Pasadena**

C.A. 2nd; March 5, 2018; B277827

The Second Appellate District affirmed trial court judgments. The court held that city zoning ordinances, when read together, rendered operation of medical marijuana dispensaries within city limits a nuisance subject to abatement.

The City of Pasadena enacted a zoning ordinance that failed to include medical marijuana dispensaries as a permitted land use within city limits. Another provision of the Pasadena Municipal Code (PMC) states that any violation of the zoning ordinance constitutes a nuisance. The city filed a nuisance abatement action against various businesses and persons found to be operating medical marijuana dispensaries within the city. The dispensaries filed suit against the city, seeking declaratory and injunctive relief.

In each of the two actions, the trial court granted Pasadena’s request for injunctions, prohibiting defendants from operating medical marijuana dispensaries within the city. The dispensaries appealed, arguing, among other things, that the ordinance sections relied on by the city do not render medical marijuana dispensaries a nuisance per se.

The court of appeal affirmed, holding that the dispensaries’ challenge to the adequacy of the city ordinance was unavailing. The dispensaries cited no authority for their contention that a finding of nuisance per se must be based on a single statute as opposed to a statutory scheme. Here, PMC §17.21.030(A) sets forth a list of land uses that are permitted within each of the city’s different zoning districts. The code section further states that any land uses that are not listed “are not allowed.” Medical marijuana dispensaries are not included in the lists of permitted uses. PMC §17.78.060(A)(3) states that “any use...contrary to the provisions of this Zoning Code...is hereby declared to be unlawful and a public nuisance...and shall be...summarily abated by this City.” The PMC thereby states that medical marijuana dispensaries are not permitted, and non-permitted uses are nuisances. Nothing further was required. The dispensaries’ remaining challenges to enforcement were similarly without merit.

Litigation

Remittitur issued in underlying case not “newly discovered evidence” warranting new trial in malicious prosecution action (Chavez, J.)

**Aron v. WIB Holdings**

C.A. 2nd; March 28, 2018; B271271

The Second Appellate District affirmed in part and reversed in part trial court orders. The court held that a remittitur issued in the tenant’s favor in an underlying landlord-tenant action did not constitute “newly discovered evidence” warranting a new trial in the tenant’s malicious prosecution action.

Landlord WIB Holdings filed an unlawful detainer action against tenant Paul Aron. Aron prevailed at trial. WIB appealed. While WIB’s appeal was pending, Aron sued WIB for damages under Santa Monica’s Tenant Harassment Ordinance. WIB filed a special motion to strike the complaint under the anti-SLAPP statute, arguing that it arose out of the unlawful detainer action, which was protected petitioning activity. WIB argued further that Aron could not establish a reasonable probability of prevailing on the merits because WIB’s appeal of the underlying unlawful detainer judgment remained pending. The trial court agreed and granted WIB’s motion to strike. After remittitur issued affirming the judgment in the unlawful detainer case, Aron filed a motion for new trial on his complaint, arguing that the remittitur was newly discovered evidence that he could not reasonably have discovered at the time of the anti-SLAPP hearing.

The trial court granted the new trial motion on that basis. WIB appealed. Aron cross-appealed the prior order granting WIB’s motion to strike.

The court of appeal reversed the trial court order granting Aron a new trial. The appellate division’s remittitur affirming the underlying unlawful detainer judgment was not newly discovered evidence and could not be the basis for a new trial because it did not exist at the time of the anti-SLAPP hearing. In order for evidence alleged to be newly discovered to support a motion for new trial, that evidence must be shown (1) to have been in existence at the time of the trial, and (2) to not have been discoverable at that time using reasonable diligence. Evidence that did not exist at the time of the earlier trial thus does not constitute newly discovered evidence for purposes of a motion for new trial. Because the remittitur in the unlawful detainer action was not “newly discovered evidence,” the trial court abused its discretion by granting Aron’s motion for a new trial on that basis. There was no error, however, in the trial court’s prior ruling granting WIB’s anti-SLAPP motion and dismissing Aron’s complaint.
FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 2941

HAWAI’I WILDLIFE FUND, a Hawaii non-profit corporation; SIERRA CLUB - MAUI GROUP, a non-profit corporation; SURFRIDER FOUNDATION, a non-profit corporation; WEST MAUI PRESERVATION ASSOCIATION, a Hawaii non-profit corporation, Plaintiffs-Appellees,
v.
COUNTY OF MAUI, Defendant-Appellant.

No. 15-17447
United States Court of Appeals for the Ninth Circuit
D.C. No. 1:12-cv-00198-SOM-BMK
Appeal from the United States District Court for the District of Hawaii
Susan O. Mollway, Senior District Judge, Presiding
Argued and Submitted October 12, 2017
University of Hawaii Manoa
Filed February 1, 2018
Amended March 30, 2018
Before: Mary M. Schroeder, Dorothy W. Nelson, and M. Margaret McKeown, Circuit Judges.

ORDER

The Opinion filed on February 1, 2018, is amended as follows:

1. On slip opinion page 12, footnote 2, the following text was added to the end of the footnote: <Hence, it does not affect our analysis that some of our sister circuits have concluded that groundwater is not a navigable water. See Rice v. Harken Expl., 250 F.3d 264, 270 (5th Cir. 2001); Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994). We are not suggesting that the CWA regulates all groundwater. Rather, in fidelity to the statute, we are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater. Our holding is therefore consistent with Rice, where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters, 250 F.3d at 272, and with Dayton Hudson, where the Seventh Circuit only considered allegations of a “potential [rather than an actual] connection between ground waters and surface waters,” 24 F.3d at 965.>

2. On slip opinion page 19, footnote 3, the following text was added to the end of the footnote: <Those principles are especially relevant in the CWA context because the law authorizes citizen suits to enforce its provisions. See § 1365. Our approach is firmly grounded in our case law, which distinguishes between point source and nonpoint source pollution based on whether pollutants can be “traced” or are “traceable” back to a point source. See Alaska, 749 F.2d at 558; Ecological Rights, 713 F.3d at 508; supra, at 12–15.>
3. On slip opinion at page 19, the following text replaces the sentence after the citation to Haw. Wildlife, 24 F. Supp. 3d at 1000: <Here, the Tracer Dye Study and the County’s concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean, with 64 percent of the wells’ pollutants reaching the ocean. The Study also traced a southwesterly path from the wells’ point source discharge to the ocean.> With these amendments, Judge McKeown voted to deny County of Maui’s Petition for Rehearing En Banc. Judge Schroeder and Judge Nelson recommended denial of petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. The petition for rehearing en banc is DENIED. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

D.W. NELSON, Senior Circuit Judge:

The County of Maui ("County") appeals the district court's summary judgment rulings finding the County violated the Clean Water Act ("CWA") when it discharged pollutants from its wells into the Pacific Ocean, and further finding it had fair notice of its violations. Hawai'i Wildlife Fund, Sierra Club - Maui Group, Surfrider Foundation, and West Maui Preservation Association ("Associations") urge us to uphold these rulings. For the reasons set forth below, we affirm the district court.

BACKGROUND

1. The Lahaina Wells and the Effluent Injections

The County owns and operates four wells at the Lahaina Wastewater Reclamation Facility ("LWRF"), the principal municipal wastewater treatment plant for West Maui. Wells 1 and 2 were installed in 1979 as part of the original 1975 plant design, and Wells 3 and 4 were added in 1985 as part of an expansion project. Although constructed initially to serve as a backup disposal method for wastewater reclamation, the wells have since become the County's primary means of effluent disposal into groundwater and the Pacific Ocean.

The LWRF receives approximately 4 million gallons of sewage per day from a collection system serving approximately 40,000 people. That sewage is treated at the Facility and then either sold to customers for irrigation purposes or injected into the wells for disposal. The County disposes of almost all the sewage it receives—it injects approximately 3 to 5 million gallons of treated wastewater per day into the groundwater via its wells.

That some of the treated effluent then reaches the Pacific Ocean is undisputed. The County expressly conceded below and its expert confirmed that wastewater injected into Wells 1 and 2 enters the Pacific Ocean. The Associations submitted various studies and expert declarations establishing a connection between Wells 3 and 4 and the ocean. Although the County quibbles with how much effluent enters the ocean and by what paths the pollutants travel to get there, it concedes that effluent from all four wells reaches the ocean.

The County has known this since the Facility's inception. The record establishes the County considered building an ocean outfall to dispose of effluent directly into the ocean but decided against it because it would be too harmful to the coastal waters. It opted instead for injection wells it knew would affect these waters indirectly. When the Facility underwent environmental review in February 1973, the County's consultant—Dr. Michael Chun—stated effluent that was not used for reclamation purposes would be injected into the wells and that these pollutants would then enter the ocean some distance from the shore. The County further confirmed this in its reassessment of the Facility in 1991.

According to the County's expert, when the wells inject 2.8 million gallons of effluent per day, the flow of effluent into the ocean is about 3,456 gallons per meter of coastline per day—roughly the equivalent of installing a permanently-running garden hose at every meter along the 800 meters of coastline. About one out of every seven gallons of groundwater entering the ocean near the LWRF is comprised of effluent from the wells.

2. The Tracer Dye Study

In June 2013, the U.S. Environmental Protection Agency ("EPA"), the Hawaii Department of Health ("HDOH"), the U.S. Army Engineer Research and Development Center, and researchers at the University of Hawaii conducted a study (the "Tracer Dye Study" or "Study") on Wells 2, 3, and 4 to gather data on, among other things, the hydrological connections between the injected treated wastewater effluent and the coastal waters. The Study involved placing tracer dye into Wells 2, 3, and 4, and monitoring the submarine seeps off Kahekili Beach to see if and when the dye would appear in the ocean.

The Study concluded “a hydrogeologic connection exists between . . . Wells 3 and 4 and the nearby coastal waters of West Maui.” Eighty-four days after injection, tracer dye introduced to Wells 3 and 4 began to emerge “from very nearshore seafloor along North Kaanapali Beach,” near Kahekili Beach Park, about a half-mile southwest of the LWRF. According to the Study, the effluent travels in this southwesterly path “due to geologic controls that include a hydraulic barrier created by valley fills to the northwest.” The Study found “64 percent of the treated wastewater injected into [Wells 3 and 4] currently discharges [into the ocean].” It further concluded “[t]he major discharge areas are confined to two clusters, only several meters wide, with very little discharge [occurring] in between and around them.”

Tracer dye from Well 2 was not detected in the ocean. But this was because Wells 3 and 4—located between Well 2 and the areas in the ocean where the wastewater discharges—inject the majority of effluent,” which likely diverted the
injected wastewater from Well 2 into taking “a different path other than directly towards the submarine springs” where the wastewater from Wells 3 and 4 discharges. If Well 2 were to receive most of the effluent at the Facility, that effluent would also take the southwesterly path taken by the wastewater from Wells 3 and 4. And “[b]ecause Well 1 is located in very close proximity to Well 2, . . . the [T]racer [S]tudies’ predictions for the fate of effluent from Well 2 can be used to predict the fate of effluent from Well 1,” according to the Associations’ expert Dr. Jean Moran.

3. The District Court’s Summary Judgment Rulings

The County appeals three of the district court’s summary judgment rulings. In the first, the district court found the County liable as to Wells 3 and 4 for discharging effluent through groundwater and into the ocean without the National Pollutant Discharge Elimination System (“NPDES”) permit required by the CWA. Haw. Wildlife Fund v. Cty. of Maui, 24 F. Supp. 3d 980, 1005 (D. Haw. 2014). The court based its decision on three independent grounds: (1) the County “indirectly discharge[d] a pollutant into the ocean through a groundwater conduit,” (2) the groundwater is a “point source” under the CWA, and (3) the groundwater is a “navigable water” under the Act. Id. at 993, 999, 1005.

In its second order, the district court held the County liable as to Wells 1 and 2 based largely on the same reasons it found the County liable on Wells 3 and 4. Haw. Wildlife Fund v. Cty. of Maui, Civil No. 12-00198 SOM/BMK, 2015 WL 328227, at *5–6 (D. Haw. Jan. 23, 2015). The court acknowledged that no study confirms the “point of entry into the ocean of flow from [W]ells 1 and 2.” Id. at *2. But it nonetheless held against the County after “repeatedly confirm[ing] at the [summary judgment] hearing . . . that the County was expressly conceding that pollutants introduced by the County into [W]ells 1 and 2 were making their way to the ocean.” Id.

Finally, the district court found the County could not claim a due process violation because it had fair notice under the plain language of the CWA that it could not discharge effluent via groundwater into the ocean.

This appeal followed.

STANDARD OF REVIEW

The Ninth Circuit “review[s] the district court’s grant or denial of motions for summary judgment de novo.” Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987, 988 (9th Cir. 2016) (citation and internal quotation marks omitted). “Thus, on appellate review, [the] [Court] employ[s] the same standard used by the trial court under Federal Rule of Civil Procedure 56(c).” Id. “As required by that standard, [the Court] review[s] the evidence in the light most favorable to the nonmoving party, determine[s] whether there are any genuine issues of material fact, and decide[s] whether the district court correctly applied the relevant substantive law.” Id. at 989 (citation omitted).

DISCUSSION

The Clean Water Act is designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the “discharge of any pollutant by any person,” id. § 1311(a), and defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source,” id. § 1362(12) (internal quotation marks omitted). A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged.” Id. § 1362(14) (internal quotation marks omitted). A party who obtains an NPDES permit is exempt from the general prohibition on point source pollution. Id. §§ 1311(a), 1342(a)(1). Under these provisions, a party violates the CWA when it does not obtain such a permit and “(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source.” Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th Cir. 2001) (citation omitted).

1. Liability under the CWA

The County argues the district court erred in concluding it was liable under the CWA as to all four of its wells. We disagree.

a. Point Source Discharges

Neither side here disputes that each of the four wells constitutes a “point source” under the CWA. Given the wells here are “discernible, confined and discrete conveyance[s] . . . from which pollutants are . . . discharged,” and the plain language of the statute expressly includes a “well” as an example of a “point source,” the County could not plausibly deny the wells are “point source[s]” under the statute. § 1362(14) (internal quotation marks omitted). The record further establishes that from these point sources the County discharges “pollutants” in the form of treated effluent into groundwater, through which the pollutants then enter a “navigable water[,]” the Pacific Ocean. See id. §§ 1362(7)–(8), (12), (14). As the pollutants here enter navigable waters and can be “traced [back] to . . . identifiable point[s] of discharge,” “[the wells] are subject to NPDES regulation, as are all point sources” under the plain language of the CWA. Trs. for Alaska v. E.P.A., 749 F.2d 549, 558 (9th Cir. 1984) (citations omitted).

That the County’s activities constitute “point source” discharges becomes clearer once we consider our jurisprudence on “nonpoint source pollution”: “[S]uch pollution . . . arises from many dispersed activities over large areas,” “is not traceable to any single discrete source,” and due to its “dilute” nature, “is very difficult to regulate through individual permits.” Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 508 (9th Cir. 2013) (citations omitted). The most common example of nonpoint source pollution is the residue left on roadways by automobiles” which rainwater “wash[es] off . . . the streets and . . . carry[es] . . . along by runoff in a polluted soup to creeks, rivers, bays, and the ocean.” Id.
Our cases have consistently held that such runoff constitutes nonpoint source pollution unless it is later collected, channeled, and discharged through a point source. See, e.g., id. (citations omitted); *Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 841 n.8 (9th Cir. 2003) (citation omitted). Applying these principles in *Ecological Rights*, we held that rainwater runoff carrying pollutants from the defendants’ utility poles to navigable waters constituted nonpoint source pollution under the CWA. 713 F.3d at 509 (citations omitted).

Ours is a different case entirely. Unlike the “millions of cars” discussed in *Ecological Rights*, here we have four “discrete” wells that have been identified and can be “regulate[d] through individual permits.” *Id.* at 508 (citations omitted). Furthermore, the automobiles and the utility poles discussed in *Ecological Rights* did nothing themselves to “discretely collect[,] and convey[.]” the pollutants to a navigable water, and hence could not constitute “point source[s]” under § 1362(14). *Id.* at 508–10 (citations omitted). The Lahaina Wells, by contrast, collect and inject pollutants in four discrete wells into groundwater connected to the Pacific Ocean, thereby “discretely collect[ing] and convey[ing]” pollutants to a navigable water. *Id.* at 509 (citations omitted); § 1362(14). The Tracer Dye Study confirms this connection as to Wells 3 and 4, and the County conceded as much as to Wells 1 and 2. Given the County knew of these effects well before the LWRF’s inception, the record further establishes that how pollutants travel from the original point source to navigable waters matters. More specifically, the County contends the point source itself must convey the pollutants *directly* into the navigable water under the CWA. As the wells here discharge into groundwater, and then indirectly into the Pacific Ocean, the County asserts they do not come within the ambit of the statute.2

The County first cites *Alaska*, where we held that point source pollution occurs when “the pollution reaches the water through a confined, discrete conveyance,” regardless of “the kind of pollution” at issue or “the activity causing [it].” *Id.* at 558 (citation omitted). As the effluent here reaches the Pacific Ocean “through” groundwater—a nonpoint source—the County contends it is not liable under the CWA. The County reads *Alaska* out of context. First, we never addressed in *Alaska* whether a polluter may be liable under the CWA for indirect discharges because the issue was not before us. *See id.* Furthermore, when we stated the “pollution [must] reach[] the water through a confined, discrete conveyance,” we were merely stating the pollution must come “from a discernible conveyance” as opposed to some “unidentifiable point of discharge.” *Id.* (emphasis added) (citations omitted). As the “discharge water [there] [was] released from a sluice box, a confined channel within the statutory definition,” the activity came within the ambit of the CWA. *Id.* (emphasis added). This case is no different—the effluent comes “from” the four wells and travels “through” them before entering navigable waters. *Id.* It just also travels through groundwater before entering the Pacific Ocean.

A more recent case *Greater Yellowstone Coalition v. Lewis* supports the Associations’ contention that the CWA governs indirect discharges. We held there that precipitation flowing into pits containing “newly extracted waste rock,” “filter[ed]” hundreds of feet underground, and “eventually entering the surface water” did not constitute point source pollution under the CWA. 628 F.3d 1143, 1147, 1153 (9th Cir. 2010) (citation omitted). The “pits that collect[ed] the waste rock [did] not constitute point sources” because “there [was] no confinement or containment of the [polluted] water” before it entered navigable waters, as prohibited by the statute. *Id.* We also concluded, however, that precipitation flowing into a “stormwater drain system” before “enter[ing]...
the ground and, eventually, surface water” constituted a point source discharge—the “stormwater system [was] exactly the type of collection or channeling contemplated by the CWA.” Id. at 1152.

The wells here are more akin to the stormwater drain system in Greater Yellowstone than they are to the pits that collected the waste rock. Unlike the pits that “[did] not constitute points sources within the meaning of the CWA,” the wells here “confine[] and contain[] . . . the [effluent]” before discharging it “[into] the ground and, eventually, surface water.” Id. at 1152–53. And it was of no import to us in Greater Yellowstone that the pollutants—as here—had to travel through the ground before “eventually, [entering] surface water.” Id. at 1152. The Court was only concerned with whether there was a point source from which the defendant discharged the pollutants. As the stormwater drain system constituted this point source, the Court concluded the defendant was required to “obtain[] the requisite . . . certification for that system.” Id. at 1153. As the County also discharges its pollutants from a point source, it, too, must obtain an NPDES permit under the CWA.

Our sister circuits agree that an indirect discharge from a point source to a navigable water suffices for CWA liability to attach. In Concerned Area Residents for Environment v. Southview Farm, the Second Circuit held “[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges under the case law.” 34 F.3d 114, 119 (2d Cir. 1994). Regardless of whether the field itself was a point source, the court concluded there was a “point source discharge[]” under the CWA because (1) the pollutant itself was released from the tanker, a point source, and (2) there was a “direct[]” connection between the field and the navigable water. See id. Both elements are present here. The wells are point sources under the statute, § 1362(14), and the Tracer Dye Study along with the County’s concessions establish an undeniable connection between the wells and the Pacific Ocean. The study establishes effluent injected into the wells travels a southwesterly path from the Facility, appearing in submarine springs only a half-mile away.

Furthermore, in Sierra Club v. Abston Construction, the Fifth Circuit recognized that the “ultimate question [as to CWA liability] is whether pollutants [are] discharged from ‘discernible, confined, and discrete conveyance(s)’ either by gravitational or nongravitational means.” 620 F.2d 41, 45 (5th Cir. 1980). It went on to hold that “[s]ediment basins dug by the miners and designed to collect sediment are . . . point sources . . . even though the materials [are] carried away from the basins by gravity flow of rainwater.” Id. (emphasis added). “Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials.” Id. (emphasis added). That is what occurred here. The County “initially collected [and] channeled” the pollutants in its wells and injected them into the ground, where they were “carried away from the [wells] by the gravity flow of [groundwater].” Id. And based on the overwhelming evidence in this case establishing a connection between the wells and the Pacific Ocean, it cannot be disputed the wells are “reasonably likely to be the means by which [the] [effluent] [is] ultimately deposited into a navigable body of water.” Id. Indeed, the County has known since the LWRF’s inception that effluent from the wells would eventually reach the ocean some distance from the shore. That the ground-water plays a role in delivering the pollutants from the wells to the navigable water does not preclude liability under the statute. See id.

The Second Circuit further recognized the indirect discharge theory in Peconic Baykeeper, Inc. v. Suffolk County, where it rejected the district court’s conclusion that “because the trucks and helicopters discharged pesticides into the air, any discharge was indirect, and thus not from a point source.” 600 F.3d 180, 188 (2d Cir. 2010). As the pesticides there were “discharged ‘from’ the source, and not from the air,” the court concluded the “spray apparatus . . . attached to [the] trucks and helicopters” constituted a point source under the CWA. Id. at 188–89 (emphasis added). The Ninth Circuit has similarly held discharges through the air can constitute “point source pollution” under the statute. League of Wilderness Def/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1185, 1192–93 (9th Cir. 2002).

But accepting the County’s position—that pollutants must “travel via a ‘confined and discrete conveyance’” to navigable waters for CWA liability to attach—would necessarily preclude liability in cases such as Peconic Baykeeper and League of Wilderness. The pollutants in both cases traveled to navigable waters via the air, and not via the point sources from which they were released. See Peconic Baykeeper, 600 F.3d at 188; League of Wilderness, 309 F.3d at 1185. Taken to its logical conclusion, the County’s theory would only support liability in cases where the point source itself directly feeds into the navigable water—e.g., via a pipe or a ditch. That the circuits have recognized CWA liability where such a direct connection does not exist counsels against accepting the County’s theory.

Indeed, writing for the plurality in Rapanos v. United States, Justice Scalia recognized the CWA does not forbid the “‘addition of any pollutant directly to navigable waters from any point source,’ but rather the ‘addition of any pollutant to navigable waters.’” 547 U.S. 715, 743 (2006) (plurality opinion) (emphasis in original) (quoting §§ 1311(a), 1362(12)(A)). He further recognized that “from the time of the CWA’s enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.” Id. (emphasis in original) (citations omitted). In support of his “‘indirect discharge’ rationale,” Justice Scalia cited Concerned Area Residents, where, as described above,
the Second Circuit held the discharge of manure from point sources onto fields (which were not necessarily point sources themselves) and eventually into navigable waters constituted point source discharges under the CWA. *Id.* at 744.

Although the Court in *Rapanos* splintered on other issues, no Justice disagreed with the plurality opinion that the CWA holds liable those who discharge a pollutant from a defined point source to the ocean. Justice Kennedy’s opinion concurring in the judgment objected only to the plurality opinion’s creation of certain limitations on the Executive Branch’s authority to enforce the CWA’s environmental purpose and statutory mandate. *Id.* at 778. Similarly, the four-Justice dissent cited the CWA’s prohibition of “any addition of any pollutant to navigable waters from any point source” as strong evidence of the law’s wide sweep, and disagreed with the plurality opinion’s creation of two limitations on CWA enforcement. *Id.* at 787, 800–06 (Stevens, J., dissenting).

In past cases, we have recognized Justice Kennedy’s concurrence in *Rapanos*, not Justice Scalia’s plurality opinion, as controlling. But we have only done so in the context of “determin[ing] whether a wetland that is not adjacent to and does not contain a navigable-in-fact water is subject to the CWA.” *United States v. Robertson*, 875 F.3d 1281, 1288–89 (9th Cir. 2017) (citations omitted); see also *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007). As this is not a case about wetlands, and we do not decide whether groundwater is a “navigable water” under the statute, we do not apply Justice Kennedy’s concurrence here, and consider Justice Scalia’s plurality opinion only for its persuasive value, *United States v. Brobst*, 558 F.3d 982, 991 (9th Cir. 2009) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987)) (internal quotation marks omitted). See *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) (“No Justice [in *Rapanos*], even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act.”).

Justice Scalia’s plurality opinion demonstrates the County is reading into the statute at least one critical term that does not appear on its face—that the pollutants must be discharged “directly” to navigable waters from a point source. As “the plain language of a statute should be enforced according to its terms,” we therefore reject the County’s reading of the CWA and affirm the district court’s rulings finding the County liable under the CWA. *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015) (citations omitted).

We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than de minimis.3 The second point in particular is an important one. We therefore disagree with the district court that “liability under the Clean Water Act is triggered when pollutants reach navigable water, regardless of how they get there.” *Haw. Wildlife*, 24 F. Supp. 3d at 1000 (emphasis added). Here, the Tracer Dye Study and the County’s concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean, with 64 percent of the wells’ pollutants reaching the ocean. The Study also traced a southwesterly path from the wells’ point source discharges to the ocean. We leave for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.

**c. Disposals of Pollutants into Wells**

Finally, the County contends its effluent injections are not discharges into navigable waters but “disposal[s] of pollutants into wells,” and that the Act categorically excludes well disposals from the permitting requirements of § 1342. *See, e.g.*, § 1342(b)(1)(D). As the County urges a “construction that the statute on its face does not permit,” we “reject” it here. *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001) (citation and internal quotation marks omitted).

The County first relies on § 1342(b), which permits the EPA to delegate CWA authority to “each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction.” So long as the State “submit[s] to the Administrator a full and complete description of [its] program” and “a statement . . . that the laws of [the] State . . . provide adequate authority to carry out the described program,” the State may “issue [NPDES] permits which[,] [among other things] control the disposal of pollutants into wells.” § 1342(b)(1)(D) (emphasis added). The County contends based on this language the NPDES permitting requirements do not apply at all to well disposals. Not so. The plain language of the statute clearly permits States to issue NPDES permits for well disposals, and such permits are required only for “discharges into navigable waters.” *Id.* § 131242(b); *see also id.* § 1342(a)(1). The provision furthermore makes no judgment about whether a “disposal” always constitutes a “discharge” requiring a NPDES permit. Indeed, only when a “disposal” is also a “discharge” is a permit required. *See Inland Steel Co. v. E.P.A.*, 901 F.2d 1419, 1422 (7th Cir. 1990) (noting § 1342(b)(1)(D) “was not intended to

deferece, it reads two words into the CWA (“direct” and “hydrological”) that are not there. Our rule adopted here, by contrast, better aligns with the statutory text and requires only a “fairly traceable” connection, consistent with Article III standing principles. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Those principles are especially relevant in the CWA context because the law authorizes citizen suits to enforce its provisions. See § 1365. Our approach is firmly grounded in our case law, which distinguishes between point source and nonpoint source pollution based on whether pollutants can be “traced” or are “traceable” back to a point source. *See Alaska*, 749 F.2d at 558; *Ecological Rights*, 713 F.3d at 508; *supra*, at 12–15.

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3. The EPA as *amicus curiae* proposes a liability rule requiring a “direct hydrological connection” between the point source and the navigable water. Regardless of whether that standard is entitled to any
authorize [States to] regulat[e] . . . all wells used to dispose of pollutants, regardless of absence of any effects on navigable waters” (emphasis in original).

The County also argues that under § 1342(b)(1)(D), only the State, not the EPA, has authority to regulate well disposals. This Court, however, has already concluded the Act does not “expressly grant[] to the EPA or [the administering] state agency the exclusive authority to decide whether [there is a CWA violation],” even while recognizing § 1342 “suspend[s] the availability of federal NPDES permits once a state-permitting program has been submitted and approved by the EPA.” Ass’n to Protect Hammersley, Eld., and Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1010–12 (9th Cir. 2002) (citing § 1342(c)(1)). That the administering state agency, HDOH, has “cho[sen] to sit on the sidelines . . . is not a barrier to a citizen’s otherwise proper federal suit to enforce the Clean Water Act” and does not somehow “divest [this Court] of jurisdiction” over this case. Id. at 1012; see also Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 305 F.3d 943, 949–50 (9th Cir. 2002) (“Under the CWAs[,] private citizens may sue any person alleged to be in violation of the conditions of an effluent standard or limitation under the Act or of an order issued with respect to such a standard or limitation by the Administrator of the [EPA] or any state.” (citation omitted)).

The County next relies on § 1314(f)(2)(D), which “directs the [EPA] to give States information on the evaluation and control of [nonpoint source] ‘pollution resulting from . . . [the disposal of pollutants in wells].’” S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 106 (2004) (citing and quoting § 1314(f)(2)(D)). According to the County, § 1314(f)(2)(D) affirmatively establishes disposals into wells constitute nonpoint source pollution and that it need not obtain NPDES permits under the CWA. But the Supreme Court itself acknowledged in South Florida that while § 1314(f)(2) listed a variety of circumstances constituting “nonpoint source[] [pollution]”—including well disposals—the provision “does not explicitly exempt [these] nonpoint pollution sources from the NPDES program if they also fall within the ‘point source’ definition.” Id. (emphasis added). Consistent with our reading of § 1342(b)(1)(D), the implication here is that well disposals do not always constitute nonpoint source pollution. If pollutants from those wells are discharged into a navigable water from a discrete source, that is point source pollution, and the polluter must obtain an NPDES permit if it wants to avoid liability under the CWA. See §§ 1311(a), 1342(a)(1).

The CWA’s definition of “pollutant” also supports this reading. See § 1362(6)(B). Under the Act, “[t]his term [excludes] . . . water derived in association with oil or gas production and disposed of in a well, if [1] the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and [2] such State determines that such injection or disposal will not result in the degradation of ground or surface water resource-

es.” Id. (emphasis added). By contrast, pollutants “disposed of in . . . well[s]” that “alter the water quality” of “surface water[s]” are “subject to NPDES permitting requirements.” N. Plains Res. Council v. Fid. Expl. & Dev. Co., 325 F.3d 1155, 1161–62 (9th Cir. 2003) (citing § 1362(6)(B)). Section 1362(6)(B), therefore, confirms that contrary to the County’s contentions, the CWA does not categorically exempt all well disposals from the NPDES requirements. “Were we to conclude otherwise,” and create out of whole cloth a categorical exemption for well disposals, we would improperly amend the statute and “undermine the integrity of [the CWA’s] prohibitions.” Id. at 1162 (citation and internal quotation marks omitted). We decline to do so here.

2. Fair Notice

“Due process requires that [a statute] provide fair notice of what conduct is prohibited before a sanction can be imposed.” United States v. Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th Cir. 2008) (citation and internal quotation marks omitted). “To provide sufficient notice, a statute . . . must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.” Id. (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)) (internal quotation marks omitted). If the “[p]lain [l]anguage of the [s]tatute” is “sufficiently clear to warn a party about what is expected,” a court may find the party had “fair notice” under the due process clause. Id.; see also Garvey v. Nat’l Transp. Safety Bd., 190 F.3d 571, 584 (D.C. Cir. 1999) (finding the defendant had “fair notice” based on “plain language” of regulation).

In determining whether there has been fair notice, this Court must “first look to the language of the statute itself.” Shark Fins, 520 F.3d at 980 (citation omitted). Here, the Clean Water Act prohibits the “discharge of any pollutant by any person.” § 1311(a). The Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” Id. § 1362(12) (internal quotation marks omitted). A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged.” Id. § 1362(14) (internal quotation marks omitted). Finally, there is an exception to the general prohibition on point source pollution if a party obtains an NPDES permit. Id. §§ 1311(a), 1342(a)(1).

It is undisputed the County “add[s] . . . pollutants”—treated effluent—“to navigable waters”—the Pacific Ocean—from . . . point source[s]”—its four injection wells. See id. §§ 1362(6), (12), (14). As its actions fall squarely within the “[p]lain [l]anguage of the [s]tatute,” we conclude the County had “fair notice” its actions violated the CWA. See Shark Fins, 520 F.3d at 980; Garvey, 190 F.3d at 584; Lee v. Enter. Leasing Co.-West, LLC, 30 F. Supp. 3d 1002, 1012 (D. Nev. 2014) (finding “reasonable reading of the statute . . . afforded [the] [d]efendants fair notice that their conduct was at risk”).
But the County contends it did not have “fair notice” because the statutory text can be fairly read to exclude the wells from the NPDES permit requirements. It argues again that pollution via its wells and the groundwater is nonpoint source pollution not subject to the CWA’s prohibitions. Even so, “due process does not demand unattainable feats of statutory clarity.” Planned Parenthood of Cent. and N. Ariz. v. State of Ariz., 718 F.2d 938, 948 (9th Cir. 1983) (citation and internal quotation marks omitted). That there is a “difference[] of opinion” on “the precise meaning of [the CWA]” is “[n]ot . . . enough to render [it]” violative of the due process clause. Id.

The County further contends it did not have “fair notice” because HDOH—the state agency tasked with administering the NPDES permit program—has maintained an NPDES permit is unnecessary for the wells. The County does not describe HDOH’s position accurately. As late as April 2014, HDOH stated in a letter to the County it was still “in the process of determining if an NPDES permit is applicable” to the wells. That HDOH has not solidified its position on the issue does not affirmatively demonstrate it believes the permits are unnecessary, as the County contends. And the fact that the County “has been unable to receive an interpretation of the [CWA] from . . . [HDOH] officials administering the program” is also “[n]ot . . . enough to render [enforcement of the CWA]” unconstitutional. Id. As a “reasonable person would [have] underst[oo]d the [CWA]” as prohibiting the discharges here, enforcement of the statute does not violate the due process clause. Id. at 948–49; see also Shark Fins, 520 F.3d at 980 (holding liability would attach if “regulation is . . . sufficiently clear to warn a party about what is expected of it” (citation and internal quotation marks omitted)).

CONCLUSION

At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly. The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA’s prohibitions. Under the circumstances of this case, we therefore affirm the district court’s summary judgment rulings finding the County discharged pollutants from its wells into the Pacific Ocean, in violation of the CWA, and further finding the County had fair notice of what was prohibited.

AFFIRMED.
remedy of maintenance and cure, among other relief, Barnes sued the Tehani in rem and SHR and Henry in personam to enforce his seaman’s lien against the vessel. Although admiralty courts normally handle such matters expeditiously, that did not happen here for two reasons.

First, the district court rejected Barnes’s pretrial requests to enforce SHR’s obligation to pay maintenance and cure. The court concluded that Barnes was entitled to maintenance and cure and had demonstrated his actual maintenance expenses. Nonetheless, despite undisputed evidence that Barnes was entitled to at least some of his actual expenses, the district court declined to award Barnes any maintenance until trial.

Second, when SHR declared bankruptcy after fifteen months of litigation and shortly before trial, the district court stayed Barnes’s action. The district court concluded that the Tehani was an asset of the debtor’s estate and that the automatic bankruptcy stay barred proceedings to enforce Barnes’s maritime lien against the vessel. The bankruptcy court partially lifted the district court to allow the district court to evaluate Barnes’s claims against SHR but expressly prohibited the district court from issuing any ruling that would affect the maritime lien’s status.

Ultimately, the district court dismissed Barnes’s claims against the Tehani. The court reasoned that it lacked in rem jurisdiction because, even though Barnes verified his original complaint, he failed to verify the amended complaint. Then, while Barnes’s appeal was pending, the bankruptcy trustee— with the bankruptcy court’s approval—sold the Tehani purportedly free and clear of Barnes’s maritime lien. The trustee subsequently moved to dismiss this appeal as moot.

We conclude that the district court erred by denying Barnes’s maintenance requests in full, staying the action, and dismissing the Tehani. The district court obtained jurisdiction over the vessel Tehani when Barnes filed a verified complaint and the defendants appeared generally and litigated without contesting in rem jurisdiction. The district court did not lose in rem jurisdiction while the Tehani remained in its constructive custody. And the court’s control over the vessel, once obtained, was exclusive. SHR’s later-filed bankruptcy petition did not divest the district court of in rem jurisdiction. Moreover, the automatic bankruptcy stay did not affect Barnes’s maritime lien against the Tehani, and the bankruptcy court had no authority to dispose of the lien through the application of bankruptcy law.

When, as here, a seaman establishes his entitlement to maintenance and provides some evidence of his actual living expenses, the burden shifts to the vessel’s owner to produce evidence that the seaman’s actual costs were unreasonable. Whether or not the vessel’s owner provides such evidence, the seaman is entitled to a maintenance award in the amount of his actual costs up to the reasonable rate in his locality.

Over three years after concluding that Barnes was entitled to maintenance and had sufficiently proven his actual costs, the district court has yet to award him any maintenance.

Accordingly, we deny the trustee’s motion to dismiss, reverse the district court’s dismissal of the Tehani, and issue a writ of mandamus to the district court to award Barnes maintenance for his undisputed actual and reasonable expenses—$34 per day—subject to a potential increase after trial.

I.

A. Factual Background

Barnes worked for SHR for six years as a captain and crew member of the Tehani, a 25-foot rigid hull inflatable boat powered by twin outboard engines. Barnes took passengers from Honokohau Harbor on sightseeing and snorkeling trips along the Kona coast. Henry paid Barnes under the table with personal checks made out to “cash.”

On July 3, 2012, Henry and Barnes were launching the Tehani for a night snorkeling trip. Henry was in his truck, towing the Tehani on an attached trailer, and Barnes was onboard the boat. Henry backed the trailer down the launch ramp until the vessel was in the water. When Barnes started the starboard engine, the Tehani exploded. The hatch struck Barnes on his back and head, propelling him into the ocean.

A Coast Guard investigation found that the explosion was caused by a fuel tank with a missing screw in the fuel tank sender. Fuel leaked into the bilge, where vapors accumulated and ignited when Barnes started the engine. The investigator concluded that the incident might have been avoided if Henry had installed the required flammable vapor detector and mechanical exhaust system. See 46 C.F.R. §§ 182.460, 182.480.

The boat, which was insured, was subsequently repaired and returned to service.

Barnes was less fortunate. SHR lacked insurance to cover his medical expenses for physical, psychological, and neurological treatment. Barnes required approximately 12 staples—$34 per day—to reattach parts of his scalp. Due to his head injuries, he can no longer drive a car or swim. He cannot afford rent and has been living on friends’ couches. He receives approximately $300 per month in disability income from the State of Hawaii.

B. Litigation in the District and Bankruptcy Courts

On January 1, 2013, Barnes filed a verified complaint in admiralty against Henry, SHR, and the Tehani, claiming unseaworthiness, various theories of negligence, and intentional infliction of emotional distress. Barnes sought maintenance and cure, damages, and attorney’s fees. The three defendants answered the complaint. Despite denying Barnes’s allegation that the Tehani was subject to the district court’s in rem

1. “Maintenance” is a seaman’s “right . . . to food and lodging if he falls ill or becomes injured while in the service of the ship.” “Cure” is the right to necessary medical services.” 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 6-28 (5th ed. 2016) (footnote omitted).

2. Barnes also received some assistance from Henry, but the parties dispute the exact amount. Barnes acknowledges that Henry paid him $500 to cover rent. It is unclear whether Henry made this payment in his personal capacity or on SHR’s behalf.
jurisdiction, they did not move to dismiss the Tehani on that basis but instead proceeded to litigate the dispute.

Barnes moved for “summary judgment for payment of maintenance and cure,” requesting that the district court order defendants to pay his “reasonable, actual costs of food and lodging” and medical costs since the date of his injury until he reached “maximum medical cure.” The district court granted Barnes’s motion in part. Noting that defendants did not dispute that Barnes was injured in the service of the Tehani, the district court ruled that Barnes was entitled to maintenance and cure and had not yet reached maximum cure. Applying the standard for determining a maintenance rate from *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582 (5th Cir. 2001), the district court concluded that Barnes had shown his actual food and lodging costs but not the reasonable amount for such costs in Honolulu or his actual medical expenses. The court therefore declined to award either maintenance or cure.

About four months after the district court’s order, Henry volunteered to pay Barnes $962.83 per month towards maintenance but stopped after making two payments. Barnes moved two more times for summary judgment to determine a daily maintenance rate. The district court denied both motions, concluding that there were triable issues of fact regarding reasonable food and lodging costs in Hawaii. The district court also denied Barnes’s separate motion for summary judgment for payment of cure.

Meanwhile, Barnes filed an unverified amended complaint, adding a claim for negligence per se. In answering the amended complaint, defendants again stated a general denial of Barnes’s allegation that the Tehani was subject to the district court’s in rem jurisdiction but did not specifically challenge jurisdiction by filing a motion under Federal Rule of Civil Procedure 12(b) or otherwise bringing the issue to the district court’s attention.

In yet another summary judgment motion, Barnes asked the district court to grant relief on his claims for unseaworthiness, negligence per se, and Jones Act negligence. Two weeks before the hearing on this motion and just over a month before the scheduled trial, SHR and Henry filed for bankruptcy relief—Henry for reorganization under Chapter 13 and SHR for dissolution under Chapter 7. Pursuant to the automatic bankruptcy stay, 11 U.S.C. § 362(a), the district court stayed the proceedings against all three defendants.

The bankruptcy court, recognizing the district court’s “experience and expertise . . . in matters in admiralty,” partially lifted the stay as to Henry and SHR so that the district court could “adjudicate the validity, extent, amount, and date of perfection of any maritime lien claim by . . . Barnes against the [Tehani].” However, the bankruptcy court expressly kept the stay in place “to bar the enforcement of any maritime lien.” The bankruptcy court expressed concern that the “limited assets” of SHR’s estate did not warrant the bankruptcy trustee’s “participation in extended or unlimited litigation in the District Court.”

After the bankruptcy court partially lifted the stay, the district court reopened the case. In a subsequent minute order addressing Barnes’s outstanding summary judgment motions, the district court noted—sua sponte and parenthetically—that “it lack[ed] jurisdiction over the [Tehani], as [the vessel] was never arrested.” Thereafter, Barnes attempted several times to verify the amended complaint—a verified complaint being a precondition of arrest, see Fed. R. Civ. P. Supp. Adm. & Mar. Cl. R. C(2)(a)—though Barnes made no attempt to arrest the Tehani. The trustee in SHR’s bankruptcy case conceded to the district court that defendants’ “pre-petition answer subjected [them] to the [district court’s] jurisdiction.” The trustee acknowledged the district court’s previous statement that it lacked in rem jurisdiction but did not seek dismissal on that ground. Rather, the trustee argued that Barnes had lost any maritime lien he had in the vessel through his failure to verify the amended complaint and invoke the district court’s in rem jurisdiction. Henry also did not seek dismissal for lack of in rem jurisdiction.

The district court nonetheless dismissed the Tehani for lack of in rem jurisdiction and, in the same order, granted Barnes partial summary judgment on his claim for negligence per se. In dismissing the Tehani, the district court reasoned that Barnes’s unverified amended complaint—filed after more than 15 months of litigation—superseded the original verified complaint; Barnes’s attempts to verify the amended complaint while the bankruptcy stay was in effect were invalid; verification of the amended complaint was necessary for his maritime lien against the Tehani to attach; and Barnes’s failure to verify the amended complaint deprived the district court of in rem jurisdiction.

Barnes appeals the district court’s orders dismissing the Tehani and denying his request to set a maintenance amount. While his appeal was pending, the bankruptcy court approved, and SHR’s bankruptcy trustee executed, the sale of Henry’s rather than SHR’s asset in their bankruptcy cases. Under that misapprehension, the bankruptcy court first lifted only the stay in Henry’s bankruptcy, though the order allowed the district court to “value to its conclusion the claim of [Barnes] arising from [the admiralty case],” which necessarily implicated Barnes’s claim against SHR’s property. When the Tehani’s ownership was clarified, the district court refused to proceed further with SHR’s bankruptcy stay still in place. The bankruptcy court then lifted that stay as well.

5. The Tehani and its trailer, appraised to be worth $38,500 and $2,500, respectively, were the estate’s only substantial assets.

6. Less than a week before the hearing on Barnes’s motion for summary judgment on his claims for unseaworthiness, negligence per se, and Jones Act negligence, Henry in a supplemental memorandum requested dismissal of the action for lack of subject matter jurisdiction based on Barnes’s failure to verify the amended complaint. He cited no authority for this proposition, and we know of none.
the Tehani and its trailer to Henry’s new company, Aloha Ocean Excursions, LLC, for $35,000.

II. JURISDICTION

We begin by considering our own jurisdiction as to each issue raised on appeal. See Ashcroft v. Igbal, 556 U.S. 662, 671 (2009) (“Subject-matter jurisdiction . . . should be considered when fairly in doubt.”) (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006))); Gupta v. Thai Airways Int’l, Ltd., 487 F.3d 759, 769–70 (9th Cir. 2007) (“[A]ppellate courts must examine each claim or issue presented separately to determine their jurisdiction on interlocutory appeal . . .”.) (citing Will v. Hallock, 546 U.S. 345, 349 (2006))). The district court, sitting in admiralty, had jurisdiction under 28 U.S.C. § 1333(1). SHR’s bankruptcy trustee asserts that if this appeal is not moot, we have appellate jurisdiction under 28 U.S.C. § 1292(a)(3) to review the dismissal of the Tehani, the issue is close, and the better practice in that situation would be to make an alternative ruling under § 1292(b) to review the dismissal of the Tehani, the issue is close, and the better practice in that situation would be to make an alternative ruling under § 1292(b).

We lack jurisdiction, however, to consider whether the district court should have awarded maintenance. The court’s partial summary judgment that defendants are liable to Barnes for maintenance payments is not at issue. Defendants did not appeal that ruling, and the time to do so on an interlocutory basis expired long before Barnes filed his notice of appeal. See 28 U.S.C. § 2107(a) (providing a 30-day deadline to appeal “any judgment, order or decree”). Rather, Barnes is attempting to appeal the district court’s denial of summary judgment as to a maintenance amount. Except in limited circumstances not applicable here, the denial of summary judgment is not appealable. See, e.g., Thomas v. Dillard, 818 F.3d 864, 874 (9th Cir. 2016) (citing Mueller v. Auker, 576 F.3d 979, 987 (9th Cir. 2009)); see also P.R. Ports Auth. v. Barge Katy-B, 427 F.3d 93, 106–07 (1st Cir. 2005) (holding that § 1292(a)(3) permits interlocutory review of only the portion of an order determining the parties’ rights and liabilities); cf. EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 757 (9th Cir. 1991) (dismissing for lack of jurisdiction challenge to district court’s failure to rule on sanctions request in otherwise appealable order granting preliminary injunction).

When appellate jurisdiction is lacking, “[w]e can . . . treat the notice of appeal as a petition for a writ of mandamus.” Miller v. Gammie, 335 F.3d 889, 895 (9th Cir. 2003) (en banc). For reasons we will explain, we conclude that mandamus relief is warranted in these unique circumstances. First, however, we turn to the district court’s dismissal of the Tehani for lack of in rem jurisdiction, which we review de novo.

7. Barnes moved for leave to file an interlocutory appeal under 28 U.S.C. § 1292(a)(3) or (b). The district court, viewing its approval as unnecessary for an appeal pursuant to § 1292(a)(3), see Seattle First Nat’l Bank v. Bluewater P’ship, 772 F.2d 565, 569 (9th Cir. 1985), denied the motion as moot. Although we ultimately agree with the district court that we have appellate jurisdiction under § 1292(a)(3) to review the dismissal of the Tehani, the issue is close, and the better practice in that situation would be to make an alternative ruling under § 1292(b).
See Ventura Packers, Inc. v. F/V Jeanine Kathleen, 424 F.3d 852, 858 (9th Cir. 2005).

III.

A. The District Court’s In Rem Jurisdiction over the Tahani

To commence an action in rem against a vessel, the plaintiff must file a verified complaint that describes the vessel “with reasonable particularity” and states that the vessel “is within the district” or will be so “while the action is pending.” Fed. R. Civ. P. Supp. Adm. & Mar. Cl. R. C(2); see Madeja v. Olympic Packers, LLC, 310 F.3d 628, 637 (9th Cir. 2002). If the plaintiff meets these conditions, the district court must take the boat into custody—unless the plaintiff requests otherwise—by issuing an arrest warrant to be served by the marshal. See Fed. R. Civ. P. Supp. Adm. & Mar. Cl. R. C(3)(a)–(b), E(3)(b).

“Once the district court issue[s] warrants for the arrest of the . . . vessels pursuant to Rule C, and the warrants [are] successfully served, ‘jurisdiction [i]s complete.’” F/V Jeanine Kathleen, 424 F.3d at 858 (quoting The Rio Grande, 90 U.S. (23 Wall.) 458, 463 (1874)). However, “as with other forms of jurisdiction over the party, see Fed. R. Civ. P. 12(h)(1), a vessel may waive jurisdiction in rem by appearing in the action and failing to raise the defense of lack of jurisdiction over the party in a timely fashion.” United States v. Republic Marine, Inc., 829 F.2d 1399, 1402 (7th Cir. 1987); see Cactus Pipe & Supply Co. v. M/V Montmartre, 756 F.2d 1103, 1107–11 (5th Cir. 1985); see also Hapag-Lloyd A.G. v. U.S. Oil Trading LLC, 814 F.3d 146, 153–54 (2d Cir. 2016) (noting “the many cases in which in rem jurisdiction has been held waived without seizure when the owner appears without contesting jurisdiction” (citing Republic Marine and M/V Montmartre)); Porsche Cars N.A., Inc. v. Porsche.net, 302 F.3d 248, 256 (4th Cir. 2002) (“[I]n admiralty . . . cases, for years courts have held that objections to in rem jurisdiction may be waived.”); Farwest Steel Corp. v. Barge Sea Span 241, 769 F.2d 620, 622 (9th Cir. 1985) (“[I]n admiralty . . . cases, for years courts have held that objections to in rem jurisdiction may be waived.”); Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); The Willamette, 70 F. 874, 877–78 (9th Cir. 1895) (holding that challenge to in rem jurisdiction was waived where the shipowner appeared and answered the complaint).

Barnes’s original complaint was verified and met the other prerequisites to invoke the district court’s in rem jurisdiction. Barnes understood that it was necessary to seek the Tehani’s arrest. He was unwilling to pay the associated costs, which he estimated would be approximately $30,000; there was no risk that the vessel would leave the district; and, Barnes asserts, “allowing Henry to continue to operate his ocean excursion business with the vessel was the only possible way that [Henry] could generate enough money to pay Barnes [m]aintenance.” Barnes’s failure to arrest the Tehani benefitted defendants as well. Had he arrested the Tehani, defendants not only would have had to put up security to obtain the vessel’s release, see Fed. R. Civ. P. Supp. Adm. & Mar. Cl. R. E(5)(a)–(b), but would have endured the inconvenience of being unable to use the vessel until its release was secured. See 4 Erastus Cornelius Benedict et al., Benedict on Admiralty § 2.15(C) (7th ed., rev. 2017).

When Barnes filed his verified complaint, the district court issued summonses for each of the defendants, including the Tehani. Four months after Henry and SHR were served, they and the Tehani answered the complaint without moving to dismiss for lack of in rem jurisdiction. The three defendants then actively participated in the litigation—covering discovery, opposing two summary judgment motions and two motions for reconsideration of orders denying summary judgment, and participating in two settlement conferences—without challenging the court’s in rem jurisdiction. By the time Barnes filed his unverified amended complaint, defendants had clearly waived any objection to in rem jurisdiction by litigating the merits of Barnes’s claims for more than 15 months. See Peterson v. Highland Music, Inc., 140 F.3d 1313, 1318 (9th Cir. 1998) (“Most defenses, including the defense of lack of personal jurisdiction, may be waived as a result of the course of conduct pursued by a party during litigation.”); cf. Cont’l Bank, N.A. v. Meyer, 10 F.3d 1293, 1297 (7th Cir. 1993) (holding that personal jurisdiction defense, even though raised in the answer sufficiently to avoid waiver under Rule 12(h), was waived where “the defendants fully

8. Supplemental Admiralty and Maritime Claims Rule C(3)(a)(i) provides that the district court “must review the complaint and any supporting papers” and, if satisfactory, “the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel.” (Emphasis added.) The District of Hawaii requires admiralty plaintiffs to apply for this review and places the burden on the applicant “to ensure that the application has been reviewed and, upon approval, presented to the clerk for issuance of the appropriate order.” D. Haw. Adm. R. E(5)(e). Barnes does not challenge the local rule as being inconsistent with the federal rule, and it is unnecessary for us to consider any tension between them.

9. A party seeking to arrest a vessel must deposit sufficient funds to cover for at least 10 days the marshal’s expenses, including dockage, keepers, maintenance, and insurance, and pay the marshal’s ongoing expenses in advance until the vessel is released. See 28 U.S.C. § 1921; D. Haw. Adm. R. E.11. There is a split of authority over whether seamen are exempt from prepayment of these fees. See 28 U.S.C. § 1916 (“In all courts of the United States, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefor.”); compare Thielebeule v. M/S Nordsee Pilot, 452 F.2d 1230, 1232 (2d Cir. 1971) (holding seamen are exempt from prepayment), with P.R. Drydock & Marine Terminals, Inc. v. Motor Vessel Luisa Del Caribe, 746 F.2d 93, 94 (1st Cir. 1984) (holding seamen are not exempt), and Araya v. McLelland, 525 F.2d 1194, 1196 (5th Cir. 1976) (same).
participated in litigation of the merits for over two-and-a-half years without actively contesting personal jurisdiction”.

B. Barnes’s Failure to Verify the Amended Complaint Did Not Divest the Court of In Rem Jurisdiction

The district court concluded that it lacked in rem jurisdiction because Barnes failed to verify the amended complaint. It reasoned that an “amended complaint supersedes the original, the latter being treated thereafter as non-existent,” Lacey v. Maricopa County, 693 F.3d 896, 925 (9th Cir. 2012) (en banc) (quoting Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997)), and that Barnes’s “failure to verify [his amended] complaint deprived the district court of in rem jurisdiction.” Madeja, 310 F.3d at 637 (citing United States v. $84,740.00 U.S. Currency, 900 F.2d 1402, 1405 (9th Cir. 1990)). Neither Lacey nor Madeja support the district court’s conclusion.

While an amended complaint supersedes the original, it normally does so only with regard to the pleading’s substance, not its procedural effect. For example, Lacey involved “the [former] law of this circuit that a plaintiff waives all claims alleged in a dismissed complaint which are not realleged in an amended complaint.” 693 F.3d at 925 (quoting Forsyth, 114 F.3d at 1474). Lacey overruled this “formalistic and harsh” rule, which was neither “prudent [n]or sufficiently justified.” Id. at 927. Now, “claims dismissed with prejudice [or] without leave to amend [need not] be repled in a subsequent amended complaint to preserve them for appeal.” Id. at 928. The procedural effect of the original complaint—preserving for appeal certain subsequently dismissed claims—survives its amendment. Relation back is another example. A timely-filed claim is not rendered un timely when included in an amended complaint filed after the statute of limitations has passed. See Fed. R. Civ. P. 15(c).

In rem jurisdiction is no different. It is a “general principle” of admiralty law that in rem “jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised.” Republic Nat’l Bank of Miami v. United States, 506 U.S. 80, 85 (1992) (quoting United States v. The Little Charles, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612) (Marshall, C.J.)); see Edlin v. M/V Truthseeker, 69 F.3d 392, 393 (9th Cir. 1995) (“Although control of the res is required to establish jurisdiction, it is not required to maintain a court’s jurisdiction.”); cf. J. Lauritsen A/S v. Dashwood Shipping, Ltd., 65 F.3d 139, 142 (9th Cir. 1995) (explaining that quasi in rem jurisdiction, “once obtained, will not be defeated by a change in circumstances”). Since Barnes’s original, verified complaint established the court’s in rem jurisdiction, his unverified amended complaint did not take it away.

“Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit.” Fed. R. Civ. P. 11(a) (emphasis added). Here, the relevant rule provides only that “the complaint” must be verified. Id., Supplemental Rule C says nothing about the necessity of verifying amended pleadings. Such a requirement would not serve its purpose, which is to provide procedural protections to the vessel’s owner—whose property is arrested without prior notice or a hearing—in order “to eliminate any doubt as to the rule’s constitutionality.” Id., Supp. Adm. & Mar. Cl. R. C, advisory committee’s note to 1985 amendment; see also Merchs. Nat’l Bank of Mobile v. Dredge Gen. G. L. Gillespie, 663 F.2d 1338, 1349–50 (5th Cir. Unit A Dec. 1981) (“[T]he verified complaint filed by a maritime lienor as well as the prayer for seizure constitute the ‘process’ that brings that entity into court. Together, the verified complaint and the warrant constitute notice,’ and the shipmaster (or person in charge) knows of the arrest and is in a position to notify the owner.”).

After the vessel is arrested, the owner is entitled to “a prompt post-seizure hearing at which he can attack the verified complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings up to that point.” Gen. G. L. Gillespie, 663 F.2d at 1351; see Fed. R. Civ. P. Supp. Adm. & Mar. Cl. R. E(4)(f). Once the owner has appeared, whether due to the vessel’s arrest or because the owner learned of the proceeding through some other means, no further procedural purpose is served by requiring the verification of amended pleadings. To the extent the verification provides evidentiary value, the original complaint “does not lose its character as the equivalent of an affidavit just because a later, amended complaint, is filed.” Beal v. Beller, 847 F.3d 897, 901 (7th Cir. 2017).

Madeja did not involve an amended complaint or a situation in which the defendants had waived objections to in rem jurisdiction. Rather, it involved an original complaint that was inadequately verified and defendants that successfully objected to in rem jurisdiction. See Madeja, 310 F.3d at 637; see also Madeja v. Olympic Packer, LLC, 155 F. Supp. 2d 1183, 1211 (D. Haw. 2001). It is inapplicable here. The district court erred in dismissing the Tehani for lack of in rem jurisdiction.

C. The Bankruptcy Court Lacked Jurisdiction to Dispose of the Maritime Lien

SHR’s bankruptcy trustee argues that even if the district court erred, Barnes’s claims are now moot because the bankruptcy court authorized the Tehani’s sale to be free and clear of any liens. This argument assumes that the bankruptcy court had jurisdiction to dispose of Barnes’s maritime lien. It did not.

I.

The automatic bankruptcy stay applies to “any act to create, perfect, or enforce any lien against property of the estate.” 11 U.S.C. § 362(a)(4). The district court concluded that Barnes’s claims to enforce his maritime lien were subject to the bankruptcy stay. In United States v. ZP Chandon, we reversed a district court’s similar ruling “that the automatic stay
provisions of the Bankruptcy Act apply to [a maritime lien for] seamen’s wages.” 2954 889 F.2d 233, 238 (9th Cir. 1989).

Although Chandon involved a maritime lien for seaman’s wages rather than for maintenance and cure, its reasoning applies equally to both. We “construe[d] Congress’ omission of any reference to maritime law in § 362(a)(4) as evidence of its intention to limit the reach of that statute to land-based transactions where (1) a recording of a lien interest is required and (2) the creditor first in time is entitled to priority.” Id. at 238.

The trustee would distinguish Chandon as involving a post-petition claim in a Chapter 11 reorganization case rather than the pre-petition claim in a Chapter 7 dissolution case at issue here. Those are not material differences. Chandon decided, broadly, “whether the enactment of the Bankruptcy Act and the Congressional grant of jurisdiction to the bankruptcy courts restricts the district court’s jurisdiction in admiralty or maritime cases.” Id. at 236. In answering that question in the negative, we reasoned that the automatic stay provision “does not expressly refer to maritime liens,” which, when owed to seamen as a consequence of their service, “are ‘sacred liens’ entitled to protection ‘as long as a plank of the ship remains.’” Id. at 238 (quoting The John G. Stevens, 170 U.S. 113, 119 (1898)). We concluded that Congress would not have overruled this “sacred” principle of admiralty law in the Bankruptcy Act sub silentio.

Neither the timing of the bankruptcy petition relative to the maritime lien nor the nature of the bankruptcy proceeding—liquidation versus reorganization—factored into our decision. The trustee does not explain why they should. We therefore conclude that, under Chandon, the bankruptcy stay did not apply to Barnes’s efforts to enforce his maritime lien for maintenance and cure.

2. The bankruptcy court lacked jurisdiction to adjudicate Barnes’s maritime lien because the admiralty court had already obtained jurisdiction over the Tehani. “As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute.” Moran v. Sturges, 154 U.S. 256, 283–84 (1894); see also State Engr. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians, 339 F.3d 804, 809 (9th Cir. 2003) (discussing the “ancient and oft-repeated . . . doctrine of prior exclusive jurisdiction—that when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court” (quoting 14 Charles Alan Wright et al., Federal Practice and Procedure § 3631, at 8 (3d ed. 1998))).

Here, the district court took constructive control of the Tehani in order to adjudicate Barnes’s maritime lien at the time Barnes filed his verified complaint. SHR’s bankruptcy petition, filed nearly two years later, could not have vested the bankruptcy court with the same jurisdiction.

3. Even if the bankruptcy court had in rem jurisdiction over the Tehani, it is an open question whether bankruptcy courts have “the effective ability to sell a vessel free and clear of maritime liens.” 3B Benedict et al., supra, § 43 (citing Jonathan M. Landers, The Shipowner Becomes a Bankrupt, 39 U. Chi. L. Rev. 490, 500 (1972)). Nonetheless, two principles are well-established.

First, a maritime lien “accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem.” Vandewater v. Mills, 60 U.S. 82, 89 (1856); see In re World Imports Ltd., 820 F.3d 576, 583 (3d Cir.) (“[A maritime] lien attaches to the maritime property from the moment a debt arises, and adheres, even through changes in the property’s ownership, until extinguished by operation of law.”), cert. denied sub nom. World Imports, Ltd. v. OEC Grp. N.Y., 137 S. Ct. 340 (2016); Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 9-2, at 588 (2d ed. 1975) (“The maritime lien can be ‘executed’ (which is the admiralty terminology for ‘foreclosed’) only by an admiralty court acting in rem.”). The bankruptcy proceeding that purportedly discharged Barnes’s maritime lien was in rem. See Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004).

Second, a maritime lien cannot be extinguished except through the application of admiralty law. See In re Millenium Seacarriers, Inc., 419 F.3d 83, 93 (2d Cir. 2005) (Sotomayor, J.) (“Traditional admiralty principles suggest that only a federal admiralty court acting in rem has the jurisdiction to quiet title to a vessel conclusively by extinguishing its maritime liens.”); Eric D. Grayson, Maritime Arrest and Rule C: A Historical Perspective, 6 Mar. Law. 265, 271 (1981) (“It is

10. A seaman’s right to unearned wages while injured or ill on a voyage is “part of the doctrine of ‘maintenance and cure.’” Day v. Am. Seafoods Co., 557 F.3d 1056, 1058 (9th Cir. 2009) (citing Lipscomb v. Foss Maritime Co., 83 F.3d 1106, 1109 (9th Cir. 1996)).


12. There is an exception to prior exclusive jurisdiction that is inapplicable here: “where the jurisdiction [of the two courts over the res] is not the same or concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the priority of jurisdiction.” Harkin v. Brundage, 276 U.S. 36, 43 (1928).
a basic tenet of American jurisprudence that a maritime lien is enforceable only by in rem process and by a federal court sitting in admiralty.

There are good reasons why a bankruptcy court, if it can release a maritime lien at all, should be required to do so pursuant to admiralty law. “The central bankruptcy scheme of pro rata distribution among creditors deprives secured creditors of immediate enforcement” and “is obviously at odds with the complex maritime system providing for priorities between various creditors and distinguishing between maritime and nonmaritime creditors.” 3B Benedict et al., supra, § 1[a][9]. See generally 2 Benedict et al., supra, § 51 (discussing priority of liens). Maritime creditors have “secret liens,” enforceable “without . . . formal or substantial documentation,” which are “antithetical” to bankruptcy practice. 3B Benedict et al., supra, § 1[a][9]. See generally Gilmore & Black, supra, § 9–1, at 586–89 (discussing differences between land-based liens and maritime liens).

Other “unique aspects” of maritime liens make them ill-suited for resolution under bankruptcy law; for example, “seamen have traditionally been recognized by maritime courts as ‘the wards of admiralty,’ placing them in a preferred position. A seaman, after settling a claim . . . under the general maritime law, even when represented by an attorney, may later contend either that he was under-represented or that his rights were not completely explained to him.” 29 James Wm. Moore et al., Moore’s Federal Practice § 707.01[12] (3d ed. 2017). A seaman without counsel can claim “that he failed to understand what he was doing when he accepted money in exchange for a release.” Id.

In Millenium Seacarriers, the Second Circuit held that a bankruptcy court could extinguish a maritime lien in an admiralty adversary proceeding to which the lienors voluntarily submitted. 419 F.3d at 95–96. Its decision turned on the lienors’ consent to bankruptcy jurisdiction because “admiralty law itself allows individual lien claims to be expunged when lienors have submitted their claims to the equitable jurisdiction of another court.” Id. Here, in contrast, the bankruptcy court applied bankruptcy law rather than admiralty law and Barnes did not submit voluntarily to the court’s jurisdiction. Its attempt to dispose of his maritime lien was ineffectual.

IV.

**BARNES’S ENTITLEMENT TO MAINTENANCE**

Having determined that the dismissal of the Tehani was improper, we need not reach Barnes’s constitutional arguments. As for the merits of the district court’s decision not to award maintenance, we lack appellate jurisdiction to review the orders denying summary judgment on that issue. We therefore consider whether mandamus relief is warranted. See Miller, 335 F.3d at 895 (“We can . . . treat the notice of appeal as a petition for a writ of mandamus . . . ”). “Whether we construe the appeal as a writ of mandamus depends on whether mandamus is itself justified.” Hernandez v. Tanininen, 604 F.3d 1095, 1099 (9th Cir. 2010) (citing Z-Seven Fund, Inc. v. Motorcar Parts & Accessories, 231 F.3d 1215, 1219–20 (9th Cir. 2000)).

We review a party’s entitlement to mandamus relief by weighing five factors:

(1) whether the petitioner has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court’s order is clearly erroneous as a matter of law; (4) whether the district court’s order is an oft-repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court’s order raises new and important problems or issues of first impression.

United States v. U.S. Dist. Court, 694 F.3d 1051, 1057 (9th Cir. 2012) (citing Bauman v. U.S. Dist. Court, 557 F.2d 650, 654–55 (9th Cir. 1977)). “These factors are not exhaustive.” In re Bundy, 840 F.3d 1034, 1041 (9th Cir. 2016) (citing In re Cement Antitrust Litig., 688 F.2d 1297, 1301 (9th Cir. 1982)), and need not all be met in order to grant mandamus relief, In re Benvin, 791 F.3d 1096, 1103 (9th Cir. 2015) (per curiam) (citing Bauman, 557 F.2d at 655). Where a district court has erroneously concluded that triable issues of fact exist, or “has misconceived the burden of proof at trial,” the district court’s denial of summary judgment “implies Bauman factors.” Ho ex rel. Ho v. S.F. Unified Sch. Dist., 147 F.3d 854, 861 (9th Cir. 1998).

A. Other Adequate Means of Relief

Barnes could not have immediately appealed the district court’s pretrial denials of summary judgment, which were not final orders. See Thomas, 818 F.3d at 874. Furthermore, although Barnes did not request certification of an interlocutory appeal under 28 U.S.C. § 1292(b), we seriously doubt that the district court would have granted such a request given the evidentiary nature of its rulings. In the district court’s view, Barnes was not entitled to maintenance due to eviden-

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13. Although Barnes did not indicate in his notice of appeal that he intended to appeal the district court’s failure to set a maintenance rate, he conspicuously raised the issue in his opening brief. Henry, in his answering brief, also addressed the issue. The trustee, although noting the issue, declined to address it, as it was not material to his arguments. We conclude that defendants therefore had notice of the appeal of the maintenance rate issue and are not prejudiced by our consideration of it. See Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 691 (9th Cir. 1993) (concluding that the appellant’s opening brief was “enough to demonstrate that the appellee had notice of the issue and did not suffer prejudice from the appellant’s failure to specify the order in the notice of appeal” (citing Meehan v. County of Los Angeles, 856 F.2d 102, 105–06 (9th Cir. 1988))).

14. Barnes sought permission to file an interlocutory appeal under § 1292(a)(3) from the district court’s first order denying his motion for summary judgment to set a maintenance rate, but the district court denied this request after concluding that its ruling did not “finally determine . . . the parties’ rights and liabilities.”
tary insufficiency rather than a controlling question of law as required by § 1292(b). Nor can Barnes seek review of the district court’s orders denying summary judgment after a trial on the merits and final judgment. See Ortiz v. Jordan, 562 U.S. 180, 183–84 (2011). Thus, the first Bauman factor favors relief.

B. Damage or Prejudice Correctable on Appeal

The second Bauman factor, whether the petitioner will be damaged or prejudiced in a way not correctable on appeal, “is closely related to the first.” In re Henson, 869 F.3d 1052, 1058 (9th Cir. 2017) (citing Douglas v. U.S. Dist. Court, 495 F.3d 1062, 1068 n.3 (9th Cir. 2007) (per curiam)). Without our intervention now, it is unclear whether there ever will be an appeal given Barnes’s extremely limited resources—he is currently homeless. Moreover, even if there is an appeal, relief will come long after Barnes was entitled to maintenance to cover his basic living expenses. Four years have passed since Barnes initiated this litigation, and over three years have passed since the district court concluded that he was entitled to maintenance and had sufficiently demonstrated his actual expenses. Relief in a few more years will not redress his current need for assistance.

Although the timeliness of relief on appeal is an ever-present concern when a case proceeds to trial, this concern is of special import in the context of maintenance and cure. The shipowner’s duty to pay maintenance and cure is virtually automatic, regardless of negligence by the seaman or lack of negligence by the shipowner. Bertram v. Freeport McMoran, Inc., 35 F.3d 1008, 1013 (5th Cir. 1994); accord Sana v. Hawaiian Cruises, Ltd., 181 F.3d 1041, 1044 (9th Cir. 1999). It “extends during the period when [the seaman] is incapacitated to do a seaman’s work and continues until he reaches maximum medical recovery.” Vaughan v. Atkinson, 369 U.S. 527, 531 (1962). There are three main reasons why courts impose this duty: “[t]he protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; and maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service.” Id. (quoting Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938)).

In line with these goals, admiralty procedure is designed to resolve a seaman’s dispute quickly and flexibly. See Cont’l Grain Co. v. The Barge FBL-585, 364 U.S. 19, 25 (1960); Farrell v. United States, 336 U.S. 511, 516 (1949) (“[T]he seaman’s right to maintenance and cure . . . is so inclusive as to be relatively simple, and can be understood and administered without technical considerations.”); Putnam v. Lower, 236 F.2d 561, 568 (9th Cir. 1956) (observing that “admiralty courts are flexible in operation”); cf. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 (2009) (“[R]emedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures.” (quoting Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 18 (1963))).

For example, a complaint in admiralty is required to “state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.” Fed. R. Civ. P. Supp. Adm. & Mar. Cl. R. E(2)(a). In addition, “the special needs of expedition that often arise in admiralty justify . . . the practice” of allowing the plaintiff to serve interrogatories with the complaint and requiring the defendant to answer the interrogatories when answering the complaint. Id. R. C(6), advisory committee’s note to 2000 amendment. These rules favoring expediency supplant inconsistent provisions in the Federal Rules of Civil Procedure. See id. R. A(2).

In light of admiralty’s singular concern for the expeditious resolution of a seaman’s claims for maintenance and cure, and Barnes’s current need for financial assistance to meet his daily living expenses, the second Bauman factor favors mandamus relief.

C. Clear Error

The third Bauman factor is whether the district court clearly erred as a matter of law. “Where a petition for mandamus raises an important issue of first impression, however, a petitioner need show only ‘ordinary (as opposed to clear) error,’” San Jose Mercury News, Inc. v. U.S. Dist. Court, 187 F.3d 1096, 1100 (9th Cir. 1999) (quoting Calderon v. U.S. Dist. Court, 134 F.3d 981, 983 (9th Cir. 1998)). Even if we have never squarely addressed an issue, a district court’s ruling still can be clearly erroneous if contrary to an “unbroken string of authorities” from other jurisdictions. See id. at 1102.

I.

A question that has divided district courts in this circuit is the appropriate legal standard to adopt in a pretrial motion for maintenance and cure. See Best v. Pasha Haw. Transp. Lines, LLC, No. 06-634, 2008 WL 1968334, at *1 (D. Haw. May 6, 2008) (“District Courts in the Ninth Circuit have not been consistent in their treatment of motions for maintenance and cure. Some courts apply the summary judgment standard, even when the seaman is the moving party, while other courts have found that the summary judgment standard is inappropriate in such circumstances because it does not account for the flexible approach courts should take in admiralty law cases and the deference courts should provide to seamen.”). There is inherent tension between the law of admiralty, with its solicitude for seamen, and the Federal Rules of Civil Procedure.15

Under the Federal Rules, a plaintiff seeking summary judgment on a claim “must offer evidence sufficient to support a finding upon every element of his [or her] claim” other

15. The district court here, while commenting on this tension, found it unnecessary to resolve.
than elements admitted by the defendants. *Watts v. United States*, 703 F.2d 346, 347 (9th Cir. 1983) (quoting *United States v. Dibble*, 429 F.2d 598, 601 (9th Cir. 1970)). There cannot be a “dispute as to any material fact.” Fed. R. Civ. P. 56(a). Rule 56 “authorizes summary judgment only where . . . it is quite clear what the truth is.” *Poller v. Columbia Broad. Sys.*, Inc., 368 U.S. 464, 467 (1962) (internal quotation marks omitted) (quoting *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627 (1944)). It is ordinarily a “heavy burden” for the plaintiff. *Ambat v. City & County of San Francisco*, 757 F.3d 1017, 1031 (9th Cir. 2014). “Reasonable doubts as to the existence of material factual issue are resolved against the moving party” and inferences are drawn in the light most favorable to the non-moving party.” *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

Admiralty’s approach, on the other hand, is “to do justice with slight regard to formal matters.” *Cont’l Grain*, 364 U.S. at 25 (quoting *Point Landing, Inc. v. Ala. Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 866 (5th Cir. 1958)). The administration of maintenance should be “easy and ready,” with “few exceptions or conditions to stir contentions, cause delays, and invite litigations.” *Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975) (quoting *Farrell*, 336 U.S. at 516). Given these concerns, courts sometimes decline to resolve a pretrial motion for maintenance and cure under a summary judgment standard. *See, e.g.*, *Connors v. Iqueque U.S.L.L.C.*, No. 05-334, 2005 WL 2206922, at *2 (W.D. Wash. Aug. 25, 2005) (“[T]he Supreme Court’s instructions to construe claims for maintenance and cure liberally in favor of seamen counsel against applying the rigid standards of Rule 56 to a pretrial motion to compel maintenance and cure.”).16

Despite the tension between Rule 56 and admiralty procedure, the two standards are not incompatible. Although it is ordinarily difficult for a plaintiff to prevail on a motion for summary judgment, the seaman seeking maintenance has an easier task as a result of the breadth of the shipowner’s duty. To establish his entitlement to maintenance, the seaman need only prove that he “bec[ame] ill or . . . injured while in the service of the ship.” *Vella*, 421 U.S. at 3. The shipowner’s duty to pay maintenance “arises irrespective of the absence of shipowner negligence and indeed irrespective of whether the illness or injury is suffered in the course of the seaman’s employment.” *Id.* at 4. “[S]o broad is the shipowner’s obligation” that even “negligence or acts short of culpable misconduct on the seaman’s part will not relieve (the shipowner) of the responsibility.” *Id.* (quoting *Aguilar*, 318 U.S. at 730–31).

In sum, the liberal admiralty policies and correspondingly rudimentary elements of a maintenance claim mean that, in practice, a seaman will have little difficulty demonstrating his entitlement to maintenance under a summary judgment standard. Accordingly, “[a] seaman’s initial entitlement to maintenance and cure . . . can properly be resolved on summary judgment.” *Dean*, 300 P.3d at 822, as evidenced by the “numerous federal district courts” to have done so, *id.* at 821 (citing cases); *see also Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1505–06 (9th Cir. 1995) (upholding the denial of summary judgment where there was a factual dispute over whether the “alleged accident aboard the [vessel] even occurred”), *abrogated on other grounds by Atlantic Sounding v. Robb*, 2016 WL 2986233, at *2 (collecting cases and adopting the approach of courts that construe pretrial requests for maintenance and cure under a summary judgment standard).17

The summary judgment standard is also capable of governing disputes over the amount of maintenance. The burden-shifting framework we adopt is a familiar mode of analysis at the summary judgment stage in other contexts, *see, e.g.*, *Hardie v. Nat’l Collegiate Athletic Ass’n*, 876 F.3d 312, 323–24 (9th Cir. 2017) (affirming grant of summary judgment where there was no genuine issue of material fact at each step of the disparate-impact analysis), and has been successfully employed by district courts in this circuit to determine a maintenance amount, *see, e.g.*, *Sabow v. Am. Seafoods Co.*, 188 F. Supp. 3d 1036, 1044–45 (W.D. Wash. 2016).

We recognize that the denial of summary judgment as to a maintenance amount could delay the seaman’s recovery of maintenance that is owed to him and thereby undermine the remedy’s “easy and ready administration.” *Vella*, 421 U.S. at 4. This problem, however, can be mitigated in two ways. First, as we explain, a seaman who demonstrates his entitlement to maintenance and actual expenses need not wait until trial to receive the portion of those expenses to which he is undisputedly entitled. See *Fed. R. Civ. P. 56(g)* (“If the court does not grant all the relief requested by the motion [for summary judgment], it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in

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16. In addition, several courts have deviated from the summary judgment standard where a shipowner unilaterally terminates maintenance payments upon the belief that the seaman has reached maximum cure, leading the seaman to move to reinstate such payments. *See Robb v. Jantran, Inc.*, No. 15-162, 2016 WL 2986233, at *2 (N.D. Miss. May 6, 2016) (collecting cases from the Ninth Circuit); *Dean v. Fishing Co. of Alaska, Inc.*, 300 P.3d 815, 824 (Wash. 2013) (adopting the approach of district courts in the Ninth Circuit). These courts take the approach that absent a trial, the shipowner must reinstate payments “unless the shipowner can provide unequivocal evidence that the seaman has reached maximum cure.” *Dean*, 300 P.3d at 824. As we are not faced with a motion for reinstatement or a dispute over whether Barnes has reached maximum cure, we do not pass on the appropriate-ness of the standard adopted by these courts.

17. The Supreme Court’s statement that “ambiguities or doubts . . . are resolved in favor of the seaman.” *Vaughan*, 369 U.S. at 532, concerned the seaman’s entitlement to maintenance at trial, not at summary judgment. Because the summary judgment standard is compatible with a seaman’s claim for maintenance, we see no reason to modify the summary judgment standard in this way. Any such modification would run contrary to the stated purpose of the 1966 integration of admiralty and civil rules. *See 14A Wright et al., § 3671.4* (“[T]he view of the 1966 integration of admiralty and civil rules, procedure in admiralty . . . should be the same as in cases in law and equity unless a strong policy or statute prevents this uniformity of treatment.” (quoting *United States v. Article Consisting of 216 Cartoned Bottles, More or Less, Sudden Change*, 288 F. Supp. 29, 32 (E.D.N.Y. 1968))).
the case.” (emphasis added)). Second, a district court may on its own or at the seaman’s request sever the issue of maintenance and hold an expedited trial on that claim under Federal Rule of Civil Procedure 42(b). See Tate v. Am. Tugs, Inc., 634 F.2d 869, 871 (5th Cir. Unit A Jan. 1981) (“[The seaman] may . . . ask for severance of the maintenance claim and an expedited trial of it by the court.”) (citing Caulfield v. AC&D Marine, Inc., 633 F.2d 1129, 1133 (5th Cir. Unit A Jan. 1981)).

In light of these safeguards, we conclude that the summary judgment standard properly governs a pretrial request to set a maintenance amount. See 1B Benedict et al., supra, § 51 (“The amount to which an injured or ill seaman is entitled [for maintenance and cure] . . . [may] be determined by the court on a motion for summary judgment where the ‘extraneous materials’ in support of the motion ‘establish with certainty that there is no triable issue of fact.’”). We now turn to the application of that standard.

2. In evaluating the amount of maintenance to award, the district court stated that it was applying the standard articulated by the Fifth Circuit in Hall v. Noble Drilling (U.S.) Inc., 242 F.3d 582 (5th Cir. 2001). Under Hall, a seaman-plaintiff seeking maintenance “is entitled to the reasonable cost of food and lodging, provided he has incurred the expense.” 242 F.3d at 587. The plaintiff’s actual expenses are presumptively reasonable, subject to an adjustment upwards or downwards if the court determines that the actual costs were more or less than an objectively reasonable amount. See id. at 590.

The burden is on the plaintiff to “present evidence to the court that is sufficient to provide an evidentiary basis for the court to estimate his actual costs.” Id. In light of admiralty’s goal of an expedient remedy for the seaman, his evidentiary burden “is ‘feather light,’ and a court may award reasonable expenses, even if the precise amount of actual expenses is not conclusively proved.” Id. at 588 (quoting Yelverton v. Mobile Labs., Inc., 782 F.2d 555, 558 (5th Cir. 1986)). “If the plaintiff presents no evidence of actual expenses,” however, “the plaintiff may not recover maintenance.” Id. at 590. But if the plaintiff does provide evidence of actual expenses, “the court must determine the maintenance award” by “comparing the seaman’s actual expenses to reasonable expenses,” and awarding the lower amount unless “the plaintiff’s actual expenses were inadequate to provide him with reasonable food and lodging.” Id. Thus, a thrifty seaman will normally be entitled to his actual expenses.

Hall explained how the district court should calculate a reasonable maintenance rate:

In determining the reasonable costs of food and lodging, the court may consider evidence in the form of the seaman’s actual costs, evidence of reasonable costs in the locality or region, union contracts stipulating a rate of maintenance or per diem payments for shoreside food or lodging while in the service of a vessel, and maintenance rates awarded in other cases for seamen in the same region.

Id. Importantly, “[a] seaman need not present evidence of the reasonable rate; a court may take judicial notice of the prevailing rate in the district.” Id.

Courts and commentators roundly cite the Fifth Circuit’s approach. E.g., Block Island Fishing, Inc. v. Rogers, 844 F.3d 358, 365 (1st Cir. 2016) (“In this circuit, as in numerous sister circuits, the norm is to award an injured seaman maintenance and cure payments in the amount of his actual living expenses.” (citing inter alia, Hall)); 2 Robert Force & Martin J. Norris, The Law of Seamen § 26:27 (5th ed. 2016) (citing Hall with approval); 1B Benedict et al., supra, § 51 (setting forth Hall standard). Some describe it as a burden-shifting test under which the plaintiff “must bring forth prima facie evidence of his expenses,” and, if he does, “[t]he burden of rebuttal then shifts to the defendant.” 1 Schoenbaum, supra, § 6-32; accord Incandela v. Am. Dredging Co., 659 F.2d 11, 14 (2d Cir. 1981) (holding that “a seaman makes out a prima facie case on the maintenance rate question when he proves the actual living expenditures which he found it necessary to incur during his convalescence,” at which point “the burden shift[s] to the defendant to demonstrate that plaintiff’s actual expenditures were excessive, in light of any realistic alternatives for room and board available to him in [the locality].”)

We agree with Hall and expressly adopt Incandela’s burden-shifting framework for determining a maintenance amount.

3. In ruling on Barnes’s first motion for summary judgment, the district court found that he established both his entitlement to maintenance and his actual living expenses of $68 per day. Under Hall, a decision which has gained widespread acceptance outside this circuit and which the district court purported to apply, defendants had the burden of showing that $68 per day was unreasonable.

Defendants submitted no such evidence. Therefore, Barnes carried his summary judgment burden of establishing that no genuine issue of material fact existed as to the reasonableness of his actual expenses. The district court should have awarded Barnes $68 per day unless it independently determined that that amount was unreasonable. See Hall, 242 F.3d at 590. Instead, the district court faulted Barnes for “fail[ing] . . . to provide . . . evidence regarding the current costs of food and lodging in Honolulu such that the Court can make a determination as to the reasonable costs in the area.” This was clear error. See Incandela, 659 F.2d at 14.

18. From the 1940s until the 1980s, the reasonable rate was generally held by courts to be eight dollars per day, despite the deteriorating value of that fixed amount over four decades. See Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943, 946 (9th Cir. 1986). More recently, “courts have allowed [a] seaman to prove that higher costs of living require a higher maintenance amount.” 8 Benedict et al., supra, § 10.02[C][4].
("[T]o require every injured seaman seeking a court award for maintenance to go to the expense of putting on expert witnesses before he will be permitted to recover more than a fixed nominal maintenance rate would be to place an unfair burden on those whom the idea of maintenance was designed to assist.").

After the district court denied Barnes’s motion for reconsideration, Barnes moved for summary judgment a second time. This time, defendants produced evidence that the reasonable cost of living in Barnes’s locality was between $24 and $34 per day. Barnes, in contrast, produced evidence that the reasonable rate was between $43 and $61 per day. Citing Glynn, the district court concluded that the dispute over a reasonable daily maintenance rate precluded summary judgment. The court subsequently denied Barnes’s motion for reconsideration, in which he requested maintenance at the rate of $24 per day—the lowest end of the range of reasonable rates offered by defendants—subject to modification after trial. Barnes repeated this request in his third motion for summary judgment, but the district court again denied it.

Like the denial of Barnes’s first motion for summary judgment, these later denials of summary judgment constituted clear error. The district court reasoned that a genuine issue of fact existed as to whether Barnes was entitled to maintenance at a rate of at least $24 per day because Barnes did not agree that $24 per day was reasonable. But Hall, which provided the applicable substantive standard at summary judgment, held that “seamen are entitled to maintenance in the amount of their actual expenses on food and lodging **up to the reason-able amount for their locality**.” 242 F.3d at 590 (emphasis added). Regardless of whether $24 per day is ultimately proven to be reasonable at trial, there is no dispute that the reasonable rate is at least $24 per day. Because Barnes is entitled to maintenance up to the reasonable rate, there is no dispute, let alone a genuine dispute, that he is entitled to maintenance at a rate of at least $24 per day.

In fact, Barnes is entitled to more than $24 per day. As we have explained, defendants had the burden of demonstrating that his actual expenses were unreasonable. Defendants produced evidence that the reasonable daily rate for living expenses in Barnes’s locality ranges from $24 per day to $34 per day. Thus, defendants produced **no** evidence disputing the reasonableness of a maintenance award in the amount of $34 per day; to the contrary, the evidence produced by defendants supported the reasonableness of a $34 daily rate. Accordingly, there is no genuine issue of fact as to Barnes’s entitlement to maintenance in the amount of at least $34 per day.19

**Glynn** is not to the contrary. There, we recognized that summary judgment would have been premature because the district court concluded “there was a material issue of fact about whether Glynn was entitled to maintenance and cure.” 57 F.3d at 1505 (emphasis added). In particular, we explained that “whether Glynn’s alleged accident aboard the [vessel] even occurred was a disputed issue of fact that had to be determined before Glynn could prevail on his claim.” Id. at 1505–06. Glynn is inapposite when, as here, it is undisputed that a seaman is entitled to maintenance and has sufficiently demonstrated his actual expenses.

Finally, we note that under the district court’s view of Hall, an injured seaman would be faced with a Hobson’s choice: He could either stipulate to the reasonableness of the rate supported by the shipowner’s evidence and thereby give up the possibility of proving a higher rate at trial, or he could decline to do so, in which case he would not receive payments for basic living expenses until after trial. Such a predicament is antithetical to the admiralty policies underlying the seaman’s right to maintenance and cure. We cannot countenance a rule under which “uncertainty would displace the essential certainty of protection against the ravages of illness and injury that encourages seamen to undertake their hazardous calling.” Vella, 421 U.S. at 4.

Because the district court clearly erred in applying Hall, the third Bauman factor favors granting the writ.

**D. Remaining Factors**

The remaining factors also support mandamus relief. Barnes moved the district court to set a maintenance rate on four separate occasions. The district court denied the first three of these motions and deemed the fourth withdrawn in light of the bankruptcy stay. Thus, the district court’s error was “oft-repeated.” And lastly, because we had not yet considered the application of Hall or expressly adopted the Incadela burden-shifting framework for determining a maintenance amount, the questions involved are ones of first impression.

**V. CONCLUSION**

Barnes, having undertaken a dangerous profession at sea, was entitled to reimbursement from the Tehani for his living and medical expenses while recovering from his injuries in its service. More than that, he was entitled to be reimbursed quickly. “The adequate protection of an injured or ill seaman against suffering and want requires more than the assurance that he will receive payments at some time in the indefinite future. Payments must be promptly made, at a time contemporaneous to the illness or injury.” Crooks v. United States, 459 F.2d 631, 634–35 (9th Cir. 1972) (quoting Vaughan, 369 U.S. at 537–38 (Stewart, J., dissenting on other grounds)). Yet after more than five years, Barnes is still waiting. We urge the district court to move quickly upon remand.

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19. To the extent that Barnes’s specific requests for maintenance of $24 per day pending trial amounted to a form of concession, courts are “not bound by a party’s concession as to the meaning of the law.” United States v. Calvillo-Palacios, 860 F.3d 1285, 1289 n.4 (9th Cir. 2017) (quoting United States v. Ogles, 440 F.3d 1095, 1099 (9th Cir. 2006) (en banc)).
The trustee’s motion to dismiss the appeal against the Tehani is denied. We reverse the district court’s order dismissing the Tehani for lack of jurisdiction. We issue a writ of mandamus directing the district court to award Barnes maintenance at the rate of $34 per day, subject to a potential upward modification after trial.\(^{20}\)

REVERSED in part and REMANDED; MANDAMUS GRANTED.

20. It appears that prior to this appeal, the district court was on track to sever the issue of maintenance and cure and set it for trial. We commend this approach and encourage the court and the parties to continue to pursue it expeditiously on remand.

COUNSEL


OPINION

M. SMITH, Circuit Judge:

In this appeal, we consider whether the virtual game platform “Big Fish Casino” constitutes illegal gambling under Washington law. Defendant-Appellee Churchill Downs, the game’s owner and operator, has made millions of dollars off of Big Fish Casino. However, despite collecting millions in revenue, Churchill Downs, like Captain Renault in Casa-blanca, purports to be shocked—shocked!—to find that Big Fish Casino could constitute illegal gambling. We are not. We therefore reverse the district court and hold that because Big Fish Casino’s virtual chips are a “thing of value,” Big Fish Casino constitutes illegal gambling under Washington law.

CHERYL KATER, individually and on behalf of all others similarly situated, Plaintiff-Appellant,

v.

CHURCHILL DOWNS INCORPORATED, a Kentucky corporation, Defendant-Appellee.

No. 16-35010
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:15-cv-00612-MJP
Appeal from the United States District Court for the Western District of Washington
Marsha J. Pechman, Senior District Judge, Presiding
Argued and Submitted February 6, 2018
Seattle, Washington
Filed March 28, 2018
Before: Milan D. Smith, Jr. and Mary H. Murguia, Circuit Judges, and Eduardo C. Robreno,* District Judge.

* The Honorable Eduardo C. Robreno, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.
FACTUAL AND PROCEDURAL BACKGROUND

Big Fish Casino is a game platform that functions as a virtual casino, within which users can play various electronic casino games, such as blackjack, poker, and slots. Users can download the Big Fish Casino app free of charge, and first-time users receive a set of free chips. They then can play the games for free using the chips that come with the app, and may purchase additional chips to extend gameplay. Users also earn more chips as a reward for winning the games. If a user runs out of chips, he or she must purchase more chips to continue playing. A user can purchase more virtual chips for prices ranging from $1.99 to nearly $250.

Big Fish Casino’s Terms of Use, which users must accept before playing any games, state that virtual chips have no monetary value and cannot be exchanged “for cash or any other tangible value.” But Big Fish Casino does contain a mechanism for transferring chips between users, which can be utilized to “cash out” winnings: Once a user sells her chips on a secondary “black market” outside Big Fish Casino, she can use the app’s internal mechanism to transfer them to a purchaser. Plaintiff-Appellant Kater alleges that Churchill Downs profits from such transfers because it charges a transaction fee, priced in virtual gold, for all transfers. In other words, Kater alleges that Churchill Downs “facilitates the process” of players cashing out their winnings.

Kater began playing Big Fish Casino in 2013, eventually buying, and then losing, over $1,000 worth of chips. In 2015, Kater brought this purported class action against Churchill Downs, alleging: (1) violations of Washington’s Recovery of Money Lost at Gambling Act (RMLGA), Wash. Rev. Code § 4.24.070; (2) violations of the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010; and (3) unjust enrichment. The district court dismissed this case with prejudice, holding that because the virtual chips are not a “thing of value,” Big Fish Casino is not illegal gambling for purposes of the RMLGA. Kater moved for reconsideration, but the district court denied her motion. Kater then timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We review the dismissal of Kater’s complaint de novo. Petrie v. Elec. Game Card, Inc., 761 F.3d 959, 966 (9th Cir. 2014). Our review “is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice.” Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008).

ANALYSIS

Pursuant to the RMLGA:

[1. The parties agree that the viability of Kater’s other claims is contingent on Big Fish Casino constituting illegal gambling.]

All persons losing money or anything of value at or on any illegal gambling games shall have a cause of action to recover from the dealer or player winning, or from the proprietor for whose benefit such game was played or dealt, or such money or things of value won, the amount of the money or the value of the thing so lost.

Wash. Rev. Code § 4.24.070. “Gambling” is defined as the “[1] staking or risking something of value [2] upon the outcome of a contest of chance or a future contingent event not under the person’s control or influence, [3] upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.” Id. § 9.46.0237; see State ex rel. Evans v. Blvd. of Friends, 247 P.2d 787, 797 (Wash. 1952) (“[A]ll forms of gambling involve prize, chance, and consideration … .” (quoting State v. Coats, 74 P.2d 1102, 1106 (Or. 1938))). All online or virtual gambling is illegal in Washington. See Rousso v. State, 239 P.3d 1084, 1086 (Wash. 2010).

I. BIG FISH CASINO’S VIRTUAL CHIPS ARE A “THING OF VALUE” UNDER WASHINGTON LAW

The parties dispute whether Big Fish Casino’s virtual chips are a “thing of value” pursuant to Washington’s definition of gambling. Pursuant to Washington law, a “thing of value” is:

[1. Any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

Wash. Rev. Code § 9.46.0285. Kater’s primary argument is that the virtual chips are a “thing of value” because they are a “form of credit … involving extension of … entertainment or a privilege of playing [Big Fish Casino] without charge.” Id.

We agree. The virtual chips, as alleged in the complaint, permit a user to play the casino games inside the virtual Big Fish Casino. They are a credit that allows a user to place an other wager or re-spin a slot machine. Without virtual chips, a user is unable to play Big Fish Casino’s various games. Thus, if a user runs out of virtual chips and wants to continue playing Big Fish Casino, she must buy more chips to have “the privilege of playing the game.” Id. Likewise, if a user wins chips, the user wins the privilege of playing Big Fish Casino without charge. In sum, these virtual chips extend the privilege of playing Big Fish Casino.

Churchill Downs contends that the virtual chips do not extend gameplay, but only enhance it, and therefore are not things of value. This argument fails because, as alleged in the complaint, a user needs these virtual chips in order to play the various games that are included within Big Fish Casino.
Churchill Downs argues that this does not matter, because users receive free chips throughout gameplay, such that extending gameplay costs them nothing. But because Churchill Downs’ allegation is not included in the complaint, we do not further address this contention. See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001).

Notably, the only Washington court to analyze section 9.46.0285 supports our conclusion. In Bullseye Distributing LLC v. State Gaming Commission, the Washington Court of Appeals held that an electronic vending machine designed to emulate a video slot machine was a gambling device. 110 P.3d 1162, 1163, 1167 (Wash. Ct. App. 2005). To use the machine, players utilized play points that they obtained by purchase, by redeeming a once-a-day promotional voucher, or by winning a game on the machine. Id. at 1163–64. In reviewing an administrative law judge’s decision, the court concluded that the game’s play points were “things of value” because “they extend[ed] the privilege of playing the game without charge,” even though they “lack[ed] pecuniary value on their own.” Id. at 1166. Because the play points were a “thing of value,” the machine fell within the definition of a gambling device, and therefore was subject to Gambling Commission regulation. Id. at 1167.

Contrary to Churchill Downs’ assertion, nothing in Bullseye conditioned the court’s determination that the play points were “thing[s] of value” on a user’s ability to redeem those points for money or merchandise. Instead, Bullseye’s reasoning was plain—“these points fall within the definition of ‘thing of value’ because they extend the privilege of playing the game without charge.” Id. at 1166. Based on the reasoning in Bullseye, we conclude that Big Fish Casino’s virtual chips also fall within section 9.46.0285’s definition of a “thing of value.”

Churchill Downs nonetheless argues that Big Fish Casino cannot constitute illegal gambling based on the position of the Washington Gambling Commission and federal district courts that have analyzed similar games. We disagree.

Churchill Downs argues that we should defer to the Gambling Commission’s conclusion that Big Fish Casino is not illegal gambling. It cites to a slideshow deck used by two non-Commission members during a presentation to the Commission, and the accompanying meeting minutes, but these documents do not indicate that the Commission adopted a formal position on social gaming platforms, let alone Big Fish Casino specifically. It also cites to a two-page Commission pamphlet discussing online social gaming. But the pamphlet provides only “general guidance,” to which we do not defer because the pamphlet “lacks an official, definitive analysis of the issue in question.” W. Telepage, Inc. v. City of Tacoma Dep’t of Fin., 998 P.2d 884, 891–92 (Wash. 2000) (requiring agency interpretation to be “clear and definitive,” such as a rule, interpretive guideline, or policy statement).

Nor are we persuaded by the reasoning of other federal courts that have held that certain “free to play” games are not illegal gambling. Each case Churchill Downs cites for this proposition involves the analysis of different state statutes, state definitions, and games. See Mason v. Mach. Zone, Inc., 851 F.3d 315 (4th Cir. 2017) (applying Maryland law); Phillips v. Double Down Interactive LLC, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (applying Illinois law); Soto v. Sky Union, LLC, 159 F. Supp. 3d 871 (N.D. Ill. 2016) (applying California law). Our conclusion here turns on Washington statutory law, particularly its broad definition of “thing of value,” so these out of state cases are unpersuasive.

Because the virtual chips are a “thing of value,” we conclude that Big Fish Casino falls within Washington’s definition of an illegal gambling game. See Wash. Rev. Code § 9.46.0237.

II. KATER CAN RECOVER THE VALUE OF THE VIRTUAL CHIPS LOST UNDER THE RMLGA

Since Big Fish Casino, as alleged in the complaint, constitutes an illegal gambling game, Kater can recover “the value of the thing so lost” from Churchill Downs. See Wash. Rev. Code § 4.24.070. Citing Mason, Churchill Downs argues that Kater did not lose money at gambling because there was no possibility of her winning money. In Mason, the plaintiff could not recover money spent on virtual gold in a different game because the Maryland statute limited recovery to individuals who “lose[] money at a gaming device.” Md. Code Crim. Law § 12-110, and did not “encompass virtual resources available and used only within [the game].” 851 F.3d at 320. But Washington’s statute is broader than Maryland’s. Washington law permits a plaintiff to recover “money or anything of value” lost from an illegal gambling game “from the dealer … or from the proprietor for whose benefit such game was played.” Wash. Rev. Code § 4.24.070. As previously stated, this language encompasses the value of the virtual chips Kater purchased.

We hold that Kater has stated a cause of action under the RMLGA. She alleges that she lost over $1,000 worth of virtual chips while playing Big Fish Casino, and she can recover the value of these lost chips from Churchill Downs, as proprietor of Big Fish Casino, pursuant to section 4.24.070.

2. Kater makes a second argument, which we reject. She argues that the chips are a “thing of value” because users can sell them for money on the “black market.” However, Big Fish Casino’s Terms of Use prohibit the transfer or sale of virtual chips. As a result, the sale of virtual chips for cash on a secondary market violates the Terms of Use. The virtual chips cannot constitute a “thing of value” based on this prohibited use. See Mason v. Mach. Zone, Inc., 851 F.3d 315, 320 n.3 (4th Cir. 2017).

3. We grant Kater’s motion to take judicial notice of the slideshow, meeting minutes, and pamphlet because they are publicly available on the Washington government website, and neither party disputes the authenticity of the website nor the accuracy of the information. See Daniels-Hall v. Nat’l Educ. Ass’n, 629 F.3d 992, 998–99 (9th Cir. 2010) (citing Fed. R. Evid. 201).

4. We deny Churchill Downs’ motion to substitute Big Fish Games, Inc. as Defendant-Appellee in place of Churchill Downs pursuant to Federal Rule of Appellate Procedure 43(b). A Rule 43(b) sub-
CONCLUSION

For the foregoing reasons, we reverse the district court’s dismissal of Kater’s complaint. We remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Cite as 18 C.D.O.S. 2963

AUDREY Fober, on behalf of herself and all others similarly situated, Plaintiff-
Appellant,

v.

MANAGEMENT AND TECHNOLOGY CONSULTANTS, LLC; DOES, 1 through 10, inclusive, Defendants-
Appellees.

No. 16-56220
United States Court of Appeals for the Ninth Circuit
D.C. No. 8:15-cv-01673-CJC-DFM
Appeal from the United States District Court for the Central District of California
Cormac J. Carney, District Judge, Presiding
Argued and Submitted February 8, 2018
Pasadena, California
Filed March 29, 2018
Before: Susan P. Graber and Andrew D. Hurwitz, Circuit Judges, and Algenon L. Marbley,* District Judge.
Opinion by Judge Graber

*The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

COUNSEL

Adrian Bacon (argued) and Todd M. Friedman, Law Offices of Todd M. Friedman, Woodland Hills, California, for Plaintiff-Appellant.

Harrison Maxwell Brown (argued), Yosef Mahmood, and Ana Tagvoryan, Blank Rome LLP, Los Angeles, California, for Defendant-Appellee.

OPINION

GRABER, Circuit Judge:

In a putative class action complaint, Plaintiff Audrey Fober alleged that Defendant Management and Technology Consultants, LLC (“MTC”) violated the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227, by calling her repeatedly through an automatic telephone dialing system. The district court entered summary judgment for MTC on the ground that Plaintiff had consented to the calls. We affirm.

FACTUAL AND PROCEDURAL HISTORY

The following facts are undisputed. At all relevant times, Plaintiff was a member of the Health Net of California, Inc.
We hold that Plaintiff, by completing and submitting the Enrollment Form, gave “prior express consent” to the calls at issue. We therefore need not and do not opine on the effect of the Intake Form.

A. Statutory and Regulatory Framework

Congress enacted the TCPA to protect the interests of telephone users by placing restrictions on “unsolicited, automated telephone calls.” Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009) (quoting S. Rep. No. 102-178, at 1 (1991)). That is, the statute aims to curb a particular type of “uninvited call.” As a result, the statute omits from its ambit those calls that a person agrees to receive. Id.

The TCPA grants the Federal Communications Commission (“FCC”) authority to implement its requirements by prescribing rules and regulations. 47 U.S.C. § 227(b)(2).2 The FCC has long interpreted the TCPA to embody the principle that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 F.C.C. Rcd. 8752, 8769 (1992). That is, in the FCC’s view, the very act of turning over one’s phone number demonstrates a willingness to be called about certain things, barring instructions to the contrary. Id.

Merely providing a phone number, however, does not evidence a willingness to be called for any reason. Van Pat ten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1045–46 (9th Cir. 2017). Thus, “FCC orders and rulings show that . . . transactional context matters in determining the scope of a consumer’s consent to contact.” Id. at 1046. To fall within the “prior express consent” exception, a call must relate to the reason why the called party provided his or her phone number in the first place. Id.

Importantly, though, the TCPA does not require any one method for obtaining “prior express consent.” In re GroupMe, Inc./Skype Commcns, 29 F.C.C. Rcd. 3442, 3444 (2014). Accordingly, as the Eleventh Circuit has explained, the analysis under the FCC’s rulings turns on whether the called party granted permission to be called concerning a particular topic and not on how the calling party received the number. Mais v. Gulf Coast Collection Bureaus, Inc., 768 F.3d 1110, 1123–24 (11th Cir. 2014). Thus, a party that receives an individual’s phone number indirectly may nevertheless have consent to call that individual. Id.

As an example, a person can consent to calls from a creditor by affirmatively giving an “intermediary” (for example, a hospital) permission to transfer her number to the creditor for billing purposes. Id. at 1124. An intermediary cannot,

(Emphases added.)

Health Net assigned Plaintiff to a medical group, Affiliated Doctors of Orange County (“ADOC”), and selected Dr. Barry Schwartz, a member of ADOC, to serve as her primary care physician. ADOC and Regal Medical Group (“Regal”) are affiliated medical groups of the Heritage Provider Network. The Heritage Provider Network has a contract with MTC, under which MTC conducts patient satisfaction surveys and quality-of-care analysis regarding the Heritage Provider Network’s affiliated medical groups, including ADOC. Regal manages that enterprise on behalf of ADOC.

Plaintiff visited Dr. Schwartz’ office twice. During her first visit, Plaintiff completed a Patient Registration Form (“Intake Form”) and, once again, provided her phone number. After each of Plaintiff’s visits, Regal gave MTC Plaintiff’s name, contact information, treating physician’s name, and date of office visit so that MTC could conduct quality assurance survey calls. Regal received Plaintiff’s contact information directly from Health Net before passing that information to MTC. MTC called Plaintiff several times to ask about the quality of her experience with Dr. Schwartz.

Plaintiff then brought this action, alleging that MTC had violated the TCPA by calling her. MTC moved for summary judgment on the ground that Plaintiff had given “prior express consent,” 47 U.S.C. § 227(b)(1), to being called. The district court granted the motion, holding that Plaintiff consented to the calls when she submitted the Enrollment Form. Plaintiff timely appeals.

DISCUSSION

The TCPA prohibits “any person within the United States” from using an “automatic telephone dialing system or an artificial or prerecorded voice” to call a phone number assigned to a “cellular telephone service.” 47 U.S.C. § 227(b)(1). But the statute excepts calls made with the recipient’s “prior express consent.” Id. The only issue before us is whether Plaintiff gave “prior express consent” to receiving MTC’s calls.

1. We review de novo an order granting summary judgment. Metro. Life Ins. Co. v. Parker, 436 F.3d 1109, 1113 (9th Cir. 2006).

2. We presume the validity of the relevant FCC rules and regulations. See USW Commcns, Inc. v. Jennings, 304 F.3d 950, 958 n.2 (9th Cir. 2002) (noting that “[p]roperly promulgated FCC regulations currently in effect must be presumed valid” for purposes of a case not brought pursuant to the Hobbs Act).

(“Health Net”) insurance plan. Upon enrolling in that plan, Plaintiff completed and signed an “Enrollment and Change Form for Small Business Group” (“Enrollment Form”). Plaintiff provided her phone number on the Enrollment Form. In the Enrollment Form, she agreed to the following terms:

THE USE AND DISCLOSURE OF PROTECTED HEALTH INFORMATION: I acknowledge and understand that health care providers may disclose health information about me . . . to Health Net Entities . . . . Health Net Entities . . . may disclose this information for purposes of treatment, payment and health plan operations, including but not limited to, utilization management, quality improvement, disease or case management programs.

(Emphases added.)

1. We review de novo an order granting summary judgment. Metro. Life Ins. Co. v. Parker, 436 F.3d 1109, 1113 (9th Cir. 2006).

2. We presume the validity of the relevant FCC rules and regulations. See USW Commcns, Inc. v. Jennings, 304 F.3d 950, 958 n.2 (9th Cir. 2002) (noting that “[p]roperly promulgated FCC regulations currently in effect must be presumed valid” for purposes of a case not brought pursuant to the Hobbs Act).
however, convey consent that has not been obtained; in every case, “the scope of consent must be determined upon the facts of [the] situation [in which the person gave consent].” In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 7990 (2015).

B. The Enrollment Form

On the Enrollment Form, Plaintiff provided her phone number and agreed that Health Net could disclose her information “for purposes of treatment, payment and health plan operations, including but not limited to, utilization management, quality improvement, disease or case management programs.” (Emphasis added.) That is exactly what happened. Health Net, albeit through an intermediary, provided MTC with Plaintiff’s phone number. MTC then called Plaintiff for a purpose expressly described in the Enrollment Form—i.e., assessing the quality of Plaintiff’s healthcare.

The key in determining whether a consumer has granted “prior express consent” to a particular call is the nature of the call. Van Patten, 847 F.3d at 1045–46. In completing the Enrollment Form, Plaintiff agreed to receive calls meant to improve the quality of her health plan. The calls that Plaintiff ultimately received—calls to assess her satisfaction with Dr. Schwartz’ services—were undoubtedly made with the purpose of improving the quality of Plaintiff’s care. We thus conclude that the calls, at least in terms of substance, fell within the scope of the consent that Plaintiff gave.

Plaintiff argues, though, that her consent extended only to calls concerning the quality of Health Net’s services and not to calls concerning the quality of Dr. Schwartz’ services. We disagree because the text in the Enrollment Form sweeps broadly. Plaintiff authorized calls pertaining to the operation of her health plan and, relatedly, to the quality of her health plan. The calls at issue were intended to measure whether Plaintiff’s experience with a doctor that Health Net assigned Plaintiff through her health plan was satisfactory. It takes little imagination to see how that feedback might assist in improving the quality of Plaintiff’s health plan generally.

Further, it does not matter that MTC, rather than Health Net itself, ultimately placed the calls. As the Sixth Circuit has explained, “[t]he FCC’s rulings in this area make no distinction between directly providing one’s cell phone number ... and taking steps to make that number available through other methods, like consenting to disclose that number to other entities for certain purposes.” Baisden v. Credit Adjustments, Inc., 813 F.3d 338, 346 (6th Cir. 2016). Plaintiff “took steps” to make her number available to MTC. True, Plaintiff could not have known the identity of the specific entity that would ultimately call her. But when Plaintiff authorized Health Net to disclose her phone number for certain purposes, she necessarily authorized someone other than Health Net to make calls for those purposes. Specifically, she authorized calls from entities to which Health Net disclosed her information.4 MTC falls within that category.

Plaintiff argues that the calls at issue nevertheless fall outside the “prior express consent” exception because MTC has not demonstrated that it called Plaintiff on Health Net’s behalf. There is no statutory or logical basis for imposing such a requirement. The TCPA aims to curb a particular kind of call: a call that a person does not expect to receive. So the statute’s applicability turns entirely on what conduct the called party authorized. Of course, as a theoretical matter, Plaintiff could have authorized only calls made on Health Net’s behalf. But that is not what happened. Instead, Plaintiff authorized callers to whom Health Net disclosed her information to make a particular type of call—one relating to the quality of Plaintiff’s healthcare. MTC falls within the group of permissible callers, and the calls that it placed were of the kind that Plaintiff agreed to receive.

The facts of Baisden provide a useful analogy. There, the plaintiff authorized a hospital to “use her health information for a range of purposes including billing and collecting money[]” and to “release her health information to such employees . . . as are necessary for these purposes.” Id. at 346 (alterations omitted). The Sixth Circuit explained that such consent permitted the hospital to give the plaintiff’s information to its anesthesiology provider for purposes of debt collection and further permitted the anesthesiology provider to pass the plaintiff’s information on to its debt collector. Id. at 347. The decision did not turn on whether the debt collector called the plaintiff on the hospital’s behalf, or even on whether the debt collector knew that the plaintiff had authorized certain calls. Rather, the dispositive factor was—as it is in every case concerning “prior express consent”—the scope of contact that the plaintiff authorized. Baisden’s reasoning applies persuasively here. Just as the Baisden plaintiff, through her hospital, granted the debt collector permission to call her about her debts, Plaintiff, through Health Net, granted MTC the right to call her about the quality of care that she received.

Our decision in Satterfield is not to the contrary. In fact, it supports our conclusion. In Satterfield, the plaintiff consented to calls from a particular entity and its “affiliates,” but the defendant, Simon & Schuster, was neither that entity nor one of its affiliates. 569 F.3d at 954–55. This case differs in that Plaintiff’s consent contained no such limitation. To the contrary, Plaintiff granted Health Net broad authority to disclose her information for certain purposes, of which quality assurance was one. We hold that Plaintiff, by completing and submitting the Enrollment Form, gave “prior express consent” to receiving the calls at issue.

AFFIRMED.

4. Plaintiff’s argument that the Enrollment Form provides for the disclosure of information only to Health Net Entities, the Safe-Guard Entities, or Fidelity Entities is unavailing. The Enrollment Form goes on to say that those entities may further disclose Plaintiff’s information.
ORDER

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.
California Courts of Appeal

Cite as 18 C.D.O.S. 2967

PAUL ARON, Plaintiff and Appellant, v.
WIB HOLDINGS et al., Defendants and Appellants.

No. B271271
In The Court of Appeal of the State of California
Second Appellate District
Division Two
(Los Angeles County Super. Ct. No. SC124344)
APPEAL from a judgment of the Superior Court of Los Angeles County. Mitchell L. Beckloff, Judge. Reverse August 8, 2016 order and affirm January 25, 2016 order. Filed March 28, 2018

COUNSEL
Campbell & Farahani, Frances M. Campbell and Nima Farahani for Plaintiff and Appellant.
Lewis Brisbois Bisgaard & Smith, Rog G. Weatherup, David B. Shapiro, Allison A. Arabian, Linda J. Kim, and V. Alan Arshansky; Rosario Perry, Rosario Perry and Steven Coard for Defendants and Appellants.
Lane Dilg, City Attorney, Adam Radinsky and Gary Rhoades, Deputy City Attorneys for City of Santa Monica and League of California Cities as Amicus Curiae.

OPINION
This appeal concerns the grant of a new trial motion after entry of an order and judgment granting a special motion to strike the complaint under Code of Civil Procedure section 425.16. The trial court granted the anti-SLAPP motion on the grounds that the plaintiff’s action arose out of an underlying unlawful detainer action, which is protected petitioning activity under section 425.16, and that the plaintiff could not establish a reasonable probability of prevailing on the merits because the defendant’s appeal of the underlying unlawful detainer judgment was pending at the time the plaintiff filed the instant action and was still pending at the time of the hearing on the anti-SLAPP motion. An order and judgment was entered granting the anti-SLAPP motion and dismissing the complaint, and the plaintiff appeals from that judgment and order.

After entry of the judgment in this case, a remittitur was issued in the underlying unlawful detainer case, affirming the judgment. The plaintiff then filed a motion for a new trial in this case, arguing that the remittitur was newly discovered evidence that he could not reasonably have discovered at the time of the anti-SLAPP hearing. The trial court granted the new trial motion on that basis. The defendants appeal from that order.

We reverse the order granting the motion for a new trial and affirm the order and judgment granting the anti-SLAPP motion and dismissing the complaint.

BACKGROUND

The parties
Plaintiff Paul Aron (tenant) lives in a rent controlled apartment in the City of Santa Monica which is owned by defendant WIB Holdings (landlord). Defendant Barbara Bills (Bills) manages the rent controlled property and is the principal of WIB Holdings.

The underlying unlawful detainer action
Landlord filed an unlawful detainer complaint against tenant on July 1, 2014, alleging that tenant was in possession of an apartment landlord owned in Santa Monica and that tenant had failed to comply with a three-day notice to perform or quit. Attached to the complaint was a three-day notice indicing it was served on tenant on June 23, 2014, and that tenant had breached the conditions of his lease by remodeling his apartment without landlord’s permission and without obtaining the requisite city permits. The notice gave tenant three days to complete several tasks, including hiring a licensed contractor at tenant’s expense, submitting the contractor’s name to landlord for its approval, and having the contractor submit a proposed scope of work and plans to restore the apartment to its original condition. The notice also stated that tenant had been given a warning letter on June 5, 2014, giving tenant until June 19, 2014, to begin restoration of the apartment to its original condition.

The matter proceeded to a jury trial. The jury was given a special verdict form containing eight questions: “1. Do you find that [tenant] … replaced his kitchen sink without first obtaining a … building permit? [¶] … [¶] 2. Did [tenant] … fail to cure the violation of installing the kitchen sink without a building permit … ? [¶] … [¶] 3. Did [landlord] … properly give [tenant] … reasonable time before serving [tenant] … with … 3-Day Notice to Cure or Quit, to enable him to cure the violation of the kitchen sink? [¶] … [¶] 4. As of June 23, 2014, had [tenant] … painted any part of his apartment; and/or altered his apartment; and/or defaced, damaged or removed any facility, equipment or appurtenance at this apartment? [¶] … [¶] 5. As of June 23, 2014, was [tenant]’s … painting … ; and/or altering … ; and/or defacing, damaging, or removal … a substantial breach of a material obligation

1. All further statutory references are to the Code of Civil Procedure, unless stated otherwise. A motion brought pursuant to section 425.16 is commonly referred to as an anti-SLAPP motion. SLAPP is an acronym for strategic lawsuit against public participation.

2. WIB Holdings and Bills are referred to collectively as defendants.
under the rental agreement? [¶] ... [¶] 6. Do you find through clear and convincing evidence that [landlord] waived ... the right to evict [tenant]?” With the exception of question 3, the jury answered “yes” to these questions.

The special verdict form instructed the jury that “If your answer to question 6 is ‘yes,’ answer no further and sign and date this form. If your answer to question 6 is ‘no,’ answer question 7.” Despite answering yes to question 6, the jury failed to follow the instructions and answered yes to question 7: “Did [landlord] maliciously bring this action based upon facts which [landlord] had no reasonable cause to believe were true?”

On February 4, 2015, the court ordered tenant’s counsel to prepare a judgment omitting any reference to the jury’s answer to question 7. The judgment entered in tenant’s favor on February 11, 2015, did not include question 7 or the jury’s answer to question 6. The judgment entered in tenant’s favor on March 19, 2015.

The instant action

While landlord’s appeal of the unlawful detainer judgment was pending, tenant filed, on June 18, 2015, the instant action for damages in violation of the Santa Monica Tenant Harassment Ordinance, Santa Monica Municipal Code (S.M.C.C.) sections 4.56.010-4.56.050 (the harassment ordinance). The harassment ordinance prohibits landlords from taking certain actions in bad faith, including actions to terminate a tenancy based on facts which the landlord has no reasonable cause to believe to be true:

“[¶] … [¶]

“(i)(1) Take action to terminate any tenancy including service of any notice to quit or other eviction notice or bring any action to recover possession of a rental housing unit based upon facts which the landlord has no reasonable cause to believe to be true or upon a legal theory which is untenable under facts known to the landlord. No landlord shall be liable under this subsection for bringing an action to recover possession unless and until the tenant has obtained a favorable termination of that action.”

(S.M.C.C., § 4.56.020(i)(1).)

The harassment ordinance imposes criminal and civil penalties on landlords who violate its provisions. It also authorizes civil actions to enforce those provisions:

“(a) Criminal Penalty. Any person who is convicted of violating this Chapter shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not greater than one thousand dollars or by imprisonment in the County Jail for not more than six months, or by both such fine and imprisonment.

“(b) Civil Action. Any person, including the City, may enforce the provisions of this Chapter by means of a civil action. The burden of proof shall be preponderance of the evidence. A violation of this Chapter may be asserted as an affirmative defense in an unlawful detainer action.

“(d) Penalties and Other Monetary Awards. Any person who violates or aids or incites another person to violate the provisions of this Chapter is liable for each and every such offense for the actual damages suffered by any aggrieved party or for statutory damages in the sum of between one thousand dollars and ten thousand dollars, whichever is greater, and shall be liable for such attorneys’ fees and costs as may be determined by the court in addition thereto. Any violator shall be liable for an additional civil penalty of up to five thousand dollars for each offense committed against a person who is disabled or aged sixty-five or over. The court may also award punitive damages to any plaintiff, including the City, in a proper case as defined by Civil Code Section 3294. The burden of proof for purposes of punitive damages shall be clear and convincing evidence.”

(S.M.C.C., § 4.56.040(a), (b), (d).)

Defendant’s anti-SLAPP motion

 Defendants filed a special motion to strike tenant’s complaint under section 425.16, arguing that the complaint was based entirely on the filing of the unlawful detainer action, a constitutionally protected right of petition, that the warning letter and three-day notice to quit were protected by the litigation privilege, and that the litigation privilege preempts the harassment ordinance. Defendants further argued that tenant could not demonstrate a reasonable probability of prevailing on the merits because the action was premature, given their appeal from the underlying unlawful detainer action was still pending.

Tenant opposed by arguing that the complaint arose, not out of protected activity, but from landlord’s violation of the harassment ordinance, and that the litigation privilege did not apply because tenant’s claim sounded in malicious prosecution, which was an exception to the privilege. Tenant also argued that he had a reasonable probability of prevailing because the jury in the underlying unlawful detainer action had found that defendants had “maliciously” brought the unlawful detainer action based upon facts which they had no reasonable cause to believe were true.
Trial court’s ruling on the anti-SLAPP motion

On January 25, 2016, the trial court granted the anti-SLAPP motion, ruling that tenant’s complaint was based on defendants’ filing of the unlawful detainer action, a protected activity under section 425.16. The trial court then determined that tenant could not establish a probability of prevailing on his claims because the underlying unlawful detainer judgment was not final in light of landlord’s pending appeal of that judgment. The trial court concluded that dismissal of the complaint was the proper remedy under section 425.16 and Pasternack v. McCullough (2015) 235 Cal.App.4th 1347 (Pasternack). An order and judgment granting the anti-SLAPP motion and dismissing tenant’s complaint was filed on March 4, 2016. Tenant filed a notice of appeal from that order and judgment on March 24, 2016.

Appellate Division affirms the unlawful detainer judgment

On March 17, 2016, the appellate division of the superior court issued an opinion affirming the underlying unlawful detainer judgment. A remittitur affirming the unlawful detainer judgment was issued on June 10, 2016.

Tenant’s motion for new trial

On June 30, 2016, tenant filed a motion for a new trial pursuant to section 657, subdivision (4), arguing that the remittitur issued by the superior court’s appellate division regarding the unlawful detainer action constituted newly discovered evidence. Tenant further argued that the anti-SLAPP ruling was “against law” under section 657, subdivision (6) because tenant’s action was based on defendants’ violation of the harassment ordinance. Tenant contended the jury’s finding of malice in the unlawful detainer action was relevant and should be considered because it established that defendants had violated the harassment ordinance, which was a criminal statute.

Defendants opposed the motion, arguing (1) that the jury’s finding of malice in the unlawful detainer action should not be considered because it was never incorporated into the unlawful detainer judgment, (2) that the alleged violation of the harassment ordinance was not “against law” within the meaning of section 657, subdivision (6), and that there had been no conclusive proof in the unlawful detainer action that defendants had engaged in illegal conduct; (3) that the appellate division’s opinion affirming the unlawful detainer judgment was not “newly discovered evidence” within the meaning of section 657, subdivision (4); and (4) tenant’s complaint should be dismissed because the judgment in the underlying unlawful detainer action established that landlord had probable cause to evict tenant as a matter of law and because the harassment ordinance was preempted by the litigation privilege.

Trial court’s ruling on the new trial motion

On August 8, 2016, the trial court granted tenant’s new trial motion, ruling that the remittitur issued on June 10, 2016, affirming the underlying unlawful detainer judgment constituted newly discovered evidence within the meaning of section 657, subdivision (4). The trial court determined that because the remittitur did not exist until June 10, 2016, it would have been impossible for tenant to have provided the court with that evidence at the time of the January 2016 hearing on the anti-SLAPP motion, and accordingly there could be “no dispute concerning [tenant’s] diligence in discovering and producing the new evidence. The trial court further determined that the remittitur was material evidence because the sole basis for the court’s decision to grant the anti-SLAPP motion was the lack of finality of the underlying unlawful detainer action, and the existence of a final judgment undermined that basis.

The trial court acknowledged that it was bound by Pasternack, in which the court held that a premature filing cannot be cured, and if the complaint was premature when it was filed, it is subject to dismissal on a special motion to strike. (Pasternack, supra, 235 Cal.App.4th at p. 1358.) The trial court reasoned, however, that Pasternack was distinguishable: “The Court of Appeal in Pasternack was not faced with a situation where the prematurity of a complaint was cured before the trial court’s order dismissing the complaint was final. The Pasternack court noted that the complaint was ‘premature when it was filed and [was] still premature when the special motions to strike were heard.’ (Ibid.) The Pasternack court did not address the legal result when the prematurity was cured by the time the court considered a special motion to strike.”

The trial court ordered tenant’s complaint to be reinstated and ordered defendants to file a responsive pleading. On September 6, 2016, defendants filed a notice of appeal from the trial court’s August 8, 2016 order granting the motion for a new trial “and from all intermediate orders and rulings embraced within it, including the order of January 25, 2016, granting defendant’s motion to strike on only one ground, and the formal order of March 4, 2016.

Tenant filed a protective cross-appeal from the judgment in this action, and moved to consolidate its previous appeal from the January 25, 2016 order granting defendants’ anti-SLAPP motion with its protective cross-appeal. We granted tenant’s motion and ordered the appeals to be consolidated.

DISCUSSION

I. LANDLORD’S APPEAL OF THE NEW TRIAL MOTION

A. APPLICABLE LAW AND STANDARD OF REVIEW

Section 657, subdivision (4) provides: “The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party...
agrieved, for any of the following causes, materially affect-
ing the substantial rights of such party: [¶] … [¶] (4) Newly dis-
covered evidence, material for the party making the applica-
tion, which he could not, with reasonable diligence, have
discovered and produced at the trial.”

“In ruling on a motion for new trial based on newly dis-
covered evidence, the trial court considers the following fac-
tors: ‘“1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative
merely; 3. That it be such as to render a different result prob-
able on a retrial of the cause; 4. That the party could not with
reasonable diligence have discovered and produced it at the
trial; and 5. That these facts be shown by the best evidence of
which the case admits.”’ [Citations.]” In addition, “the trial
court may consider the credibility as well as materiality of
the evidence in its determination [of] whether introduction
of the evidence in a new trial would render a different result
reasonably probable.”

[Citation.] [Citation.]” (People v. Howard (2010) 51
Cal.4th 15, 43.)

A motion for a new trial on the grounds of newly discov-
ered evidence is generally “a matter which is committed to
the sound discretion of the trial court,” and “a reviewing court
will not interfere unless a clear abuse of discretion is shown.
[Citation.]” (Cansdale v. Board of Administration (1976) 59
Cal.App.3d 656, 667 (Cansdale).) The instant case, how-
ever, raises issues as to what constitutes “newly discovered
evidence” within the meaning of section 657, subdivision (4),
an issue of statutory interpretation that we review de novo.
(Regents of University of California v. Superior Court (1999)
20 Cal.4th 509, 531.)

B. The remittitur is not newly discovered
evidence

Defendants argue that the appellate division’s remittitur
affirming the underlying unlawful detainer judgment, issued
after the trial court’s order granting the anti-SLAPP motion
and dismissing tenant’s complaint in the instant case, is not
newly discovered evidence and cannot be the basis for a new
trial because it did not exist at the time of the anti-SLAPP
hearing. We agree.

Although there is no definitive California case authority
on this issue, at least one appellate court has articulated the
general principle that “newly discovered evidence” within
the meaning of section 657, subdivision (4) must be evidence
that was in existence at the time of the trial or hearing on the
dispositive motion: “Normally, to support a motion for a new
trial on this ground, the court must determine if the evidence
was in existence at the time of the trial and could not have
been discovered with reasonable diligence.” (Cansdale, su-
pra, 59 Cal.App.3d at p. 667.) That a court ruling on a new
trial motion pursuant to section 657, subdivision (4) must
first determine whether the proffered evidence existed at the
time of trial is consistent with the statutory language that the
evidence be “newly discovered.” Implicit in that term is the
concept that the evidence existed, but remained undiscovered
at the time of trial. The remittitur affirming the underlying
unlawful detainer judgment is of an entirely different nature.
It did not exist at the time of the anti-SLAPP hearing, be-
cause it was based on an event that had not yet occurred.

The cases on which tenant relies in support of his posi-
tion, Kabran v. Sharp Memorial Hospital (2017) 2 Cal.5th
330 (Kabran) and Scott v. Farrar (1983) 139 Cal.App.3d 462 (Scott), are distinguishable and do not persuade us that
the remittitur should be considered newly discovered evi-
dence. In Kabran, a jury found the defendant hospital neg-
ligent in a medical malpractice action but also found that
such negligence was not a substantial factor in causing the
plaintiff’s injuries. (Kabran, supra, at p. 333.) After the trial,
the plaintiff died, and an autopsy revealed evidence that his
widow claimed undermined the jury’s causation determina-
tion. (Ibid.) The widow moved for a new trial on the basis of
this evidence, and the trial court granted the motion. (Ibid.)
The newly discovered evidence in Kabran -- the plaintiff’s
physical condition -- existed at the time of trial but could not
be discovered without an autopsy. In contrast, the remittitur
in the instant case did not exist at the time of the trial court’s
ruling on the anti-SLAPP motion.

Scott is similarly distinguishable. That case involved a
school crossing guard’s alleged negligence in an action by
an injured child. After the plaintiffs noticed the deposition
of a key witness, the defendant filed a motion for summary
judgment, noticing the motion for a date in advance of the
deposition. (Scott, supra, 139 Cal.App.3d at p. 465.) Although
the plaintiffs opposed the summary judgment motion, they
did not seek a continuance to enable them to take the deposi-
tion prior to the hearing on the motion. After judgment was
entered, the plaintiffs filed a motion for a new trial based on
evidence obtained during the witness’s post-hearing depo-
sition, but the trial court denied the motion. The Court of
Appeal reversed, concluding the plaintiffs had acted with
reasonable diligence in discovery, given the time constraints
in opposing the summary judgment motion. (Id. at p. 468.)
The evidence proffered in Scott was the testimony of a key
witness who could attest to events that occurred at the time of
the accident, and whom plaintiffs had identified and noticed
for deposition before the trial. In contrast, the remittitur pro-
fered in the instant case did not exist at the time of the anti-
SLAPP hearing, because landlord’s appeal of the underlying
unlawful detainer judgment was still pending.

Case law interpreting rule 60(b)(2) of the Federal Rules
of Civil Procedure (FRCP), an analogous federal statute,
supports our interpretation of Code of Civil Procedure sec-
tion 657, subdivision (4). FRCP rule 60(b)(2), like section
657, subdivision (4), enables a party to obtain relief from a
judgment, order, or proceeding based on “newly discovered
evidence that, with reasonable diligence, could not have been
discovered.” Federal courts construing the term “newly dis-

3. FRCP rule 60(b)(2) provides in relevant part: “On motion and
just terms, the court may relieve a party or its legal representative from
covered evidence” under FRCP rule 60(b)(2) have uniformly held that evidence of events occurring after the trial is not newly discovered evidence. (See, e.g., Corex Corp. v. United States (9th Cir. 1981) 638 F.2d 119, 121; United States ex rel. Harman v. Trinity Indus. (5th Cir. 2017) 872 F.3d 645, 652; United States v. Hall (D.C. Cir. 2003) 324 F.3d 720; 11 Wright, et al., Fed. Practice & Procedure (3d. ed. 2012) § 2859, p. 387, fn. 5.)

The remittitur affirming the underlying unlawful detainer judgment, issued after the trial court’s ruling and order granting the anti-SLAPP motion, was not “newly discovered evidence” within the meaning of section 657, subdivision (4). The trial court abused its discretion by granting tenant’s motion for a new trial on that basis.

C. The trial court’s ruling is contrary to Pasternack

The trial court’s ruling granting the new trial motion on the basis of the remittitur also conflicts with Pasternack, an appellate decision by which the trial court was bound. In that case, the plaintiff, Pasternack, was sued by a contractor in an underlying collection action concerning the construction of a home. Pasternack cross-complained against the contractor for fraudulently concealing construction defects. The contractor’s collection claim was bifurcated from Pasternack’s cross-complaint, tried separately, and adjudicated in Pasternack’s favor. No judgment was entered in favor of Pasternack on the collection claim, however, because his cross-complaint against the contractor was still pending. (Pasternack, supra, 235 Cal.App.4th at pp. 1352-1353.)

While his cross-complaint against the contractor in the underlying action was still pending, Pasternack sued the contractor and others for malicious prosecution, alleging that the underlying collection claim was filed maliciously, without probable cause, and for the sole purpose of extracting a general release. (Pasternack, supra, 235 Cal.App.4th at p. 1353.) The defendants filed special motions to strike the complaint, and the trial court granted the anti-SLAPP motions. (Ibid.) The appellate court affirmed the order granting the anti-SLAPP motions, stating as follows: “Pasternack’s malicious prosecution complaint was not rendered premature by the filing of an appeal in the underlying action; it was premature when it was filed and was still premature when the special motions to strike were heard. The proper remedy, here, we believe, is to affirm the order dismissing Pasternack’s malicious prosecution complaint …. Pasternack chose not to wait until his malicious prosecution claim had accrued before filing and proceeding on his malicious prosecution complaint. He should bear the consequences of that decision.” (Id. at p. 1358, italics added.)

The Pasternack court’s reasoning applies equally here. Tenant chose to file his complaint against landlord before his cause of action to enforce the harassment ordinance had accrued. His complaint was properly dismissed for that reason. (Pasternack, supra, 235 Cal.App.4th at p. 1358.) Reinstating the complaint because tenant’s cause of action accrued after landlord’s anti-SLAPP motion had been granted and a judgment of dismissal had been entered conflicts with the court’s holding in Pasternack.

We are not persuaded by the trial court’s reasons for distinguishing Pasternack. Tenant’s action was premature when the trial court granted the anti-SLAPP motion and remained premature when the judgment dismissing his complaint was entered. Tenant’s cause of action accrued while his appeal of the judgment entered against him in this action was pending, but for reasons discussed, the subsequent accrual of his cause of action was not a valid basis for reinstating his complaint.

The trial court abused its discretion by granting the motion for a new trial and reinstating tenant’s complaint.4

II. TENANT’S APPEAL OF THE ANTI-SLAPP RULING

Tenant argues that if the order granting his motion for a new trial is reversed, his appeal from the judgment and order granting the anti-SLAPP motion and dismissing his complaint should be heard. We therefore address tenant’s arguments that his complaint does not come within the ambit of the anti-SLAPP statute, and even if it does, he established a reasonable probability of prevailing on the merits.

A. Applicable law and standard of review

Section 425.16 was enacted “to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. [Citation.]” (Club Members for an Honest Election v. Sierra Club (2008) 45 Cal.4th 309, 315 (Club Members).) As relevant here, subdivision (b)(1) of section 425.16 provides: “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.”

Determining whether section 425.16 bars a given cause of action requires a two-step analysis. (Navellier v. Sletten (2002) 29 Cal.4th 82, 88 (Navellier).) First, the court must decide whether the party moving to strike a cause of action has made a threshold showing that the cause of action “arises[es] from any act … in furtherance of the [moving party’s] right of petition or free speech.” (§ 425.16, subd. (b)(1); Navellier,

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4. In view of our holding we do not address defendants’ arguments regarding alternative grounds on which the trial court could have denied the motion for a new trial.
A cause of action “arising from” [a] defendant’s litigation activity may appropriately be the subject of a section 425.16 motion to strike.’ [Citations.] Any act includes communicative conduct such as the filing, funding, and prosecution of a civil action. [Citation.]” (Rasheen v. Cohen (2006) 37 Cal.4th 1048, 1056 (Rasheen).) The scope of the statute is broad. In authorizing the filing of a special motion to strike, the Legislature “expressly provided that section 425.16 should ‘be construed broadly.’ [Citations.]” (Club Members, supra, 45 Cal.4th at p. 315.)

If the court finds that a defendant has made the requisite threshold showing, the burden then shifts to the plaintiff to demonstrate a “probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1); Naveilier, supra, 29 Cal.4th at p. 88.) In order to demonstrate a probability of prevailing, a party opposing a special motion to strike under section 425.16 “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.” [Citation.]” (Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal.4th 728, 741, fn. omitted)

A trial court’s order granting a special motion to strike under section 425.16 is reviewed de novo. (ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 999.)

B. Tenant’s cause of action against landlord arose from protected activity

Tenant’s cause of action asserted against landlord for violation of the harassment ordinance arises out of landlord’s filing of the underlying unlawful detainer action – protected petitioning activity under section 425.16. Filing a lawsuit is an exercise of a party’s constitutional right of petition. (Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1115 (Briggs); Chavez v. Mendoza (2001) 94 Cal.App.4th 1083, 1087 (Chavez).) “‘[T]he constitutional right to petition … includes the basic act of filing litigation or otherwise seeking administrative action.’” [Citations.]” (Briggs, supra, at p. 1115.) Thus, “a cause of action arising from a defendant’s alleged improper filing of a lawsuit may appropriately be the subject of a section 425.16 motion to strike.” [Citation.]” (Chavez, supra, at p. 1087.)

Not all petitioning activity is protected, however, by the anti-SLAPP statute. (Flatley v. Mauro (2006) 39 Cal.4th 299, 313 (Flatley).) “[S]ection 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition.” (Id. at p. 317.) “This exclusion from the anti-SLAPP statute’s protections may be applied only when ‘the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.’” [Citation.]” (Collier v. Harris (2015) 240 Cal.App.4th 41, 55, quoting Flatley, at p. 320.) “‘[I]llegal” in this context refers to criminal conduct; merely violating a statute is not sufficient because the broad protection the anti-SLAPP statute provides for constitutional rights would be significantly undermined if all statutory violations were exempt from the statute. [Citation.] In establishing this exclusion from the anti-SLAPP statute, the Supreme Court in Flatley “‘emphasize[d] that the question of whether the defendant’s underlying conduct was illegal as a matter of law is preliminary, and unrelated to the second prong question of whether the plaintiff has demonstrated a probability of prevailing, and [that] the showing required to establish conduct illegal as a matter of law -- either through [the] defendant’s concession or by uncontroverted and conclusive evidence -- is not the same showing as the plaintiff’s second prong showing of probability of prevailing.’” [Citation.]” (Collier, supra, at p. 54.)

Tenant argues that his action against defendants does not come within the ambit of the anti-SLAPP statute because it is based on acts by defendants that constitute a misdemeanor under the harassment ordinance and that are accordingly illegal as a matter of law. He cites the jury’s affirmative response to question 7 of the special verdict form asking whether the unlawful detainer action was brought with malice based upon facts which landlord had no reasonable cause to believe were true as evidence of illegality.

The jury’s answer to question 7 on the special verdict form does not conclusively establish that defendants’ actions were illegal. Rather, the jury’s responses to questions 1, 2, 4, and 5, indicate that landlord’s unlawful detainer action may justifiably have been based on tenant’s material breach of his obligations under the rental agreement. The jury’s responses on the special verdict form create questions of fact that preclude us from concluding that landlord’s conduct violated the harassment ordinance as a matter of law. (See Collier, supra, 240 Cal.App.4th at p. 56.) The evidence does not conclusively establish that defendants’ assertedly protected petitioning activity was illegal as a matter of law, and defendants do not concede illegality. The trial court accordingly did not err by concluding that tenant’s cause of action against landlord was based on protected petitioning activity that comes within the ambit of the anti-SLAPP statute.

C. Tenant failed to demonstrate a reasonable probability of prevailing

Because the trial court correctly determined that tenant’s claims against defendants arose from conduct that is protected under section 425.16, we address tenant’s arguments as to whether he met his burden of “demonstrat[ing] a probability of prevailing on the claim[s].” (Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67.) To satisfy this burden, “the plaintiff must state[] and substantiate[] a legally sufficient claim.” [Citation.] ‘Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”’ [Citation.]” (Jarrow, su-
pra, 31 Cal.4th at p. 741, fn. omitted.) In doing so, the court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant. (Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, 821.)

Because landlord’s appeal of the underlying unlawful detainer action was still pending when tenant filed the instant lawsuit, tenant’s action was premature when it was filed and remained premature when the trial court granted the special motion to strike, tenant was unable to establish at the time of the anti-SLAPP hearing that he had “obtained a favorable termination” of the underlying unlawful detainer action, a prerequisite to establishing landlord’s liability under the harassment ordinance. (S.M.C.C., § 4.56.020(i)(1).) Tenant’s inability to establish this element of his action to enforce the harassment ordinance was a valid basis for granting the anti-SLAPP motion and dismissing his complaint. (Pasternack, supra, 235 Cal.App.4th at pp. 1355-1358.) The trial court accordingly did not err by granting the anti-SLAPP motion and dismissing the complaint.5

DISPOSITION

The August 8, 2016 order granting the motion for a new trial is reversed. The January 25, 2016 order and judgment granting the anti-SLAPP motion and dismissing tenant’s complaint is affirmed. Defendants shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION

CHAVEZ, J.

We concur: ASHMANN-GERST, Acting P. J., HOFFSTADT, J.

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5. We do not address defendants’ arguments regarding alternative grounds on which the anti-SLAPP motion could have been granted.
Demeter is a musician and DJ who has worked in the music industry for thirty years. In early December 2012, Demeter purchased a one-year TAXI membership via TAXI’s website for $299.95.

When Demeter purchased his TAXI membership, he was directed to a webpage that required him to provide his name, email address, and other information. As part of the purchase process, Demeter was required to agree to TAXI’s Terms and Conditions. The webpage included the following text: “Please read these Terms and Conditions before pressing the button below. By pressing the ‘Join TAXI Now!’ button below, you agree to pay the amount shown above and abide by our terms.” The words “Terms and Conditions” in the above text were in blue, and were hyperlinked to another webpage that set forth the terms and conditions. In order to join TAXI, a prospective member was required to click the “Join TAXI Now!” button. TAXI’s user agreement provided TAXI members could request a full refund (if they were dissatisfied with TAXI’s listings, feedback, or customer service) for up to 365 days after purchasing a TAXI membership.

Demeter did not do “too much” research before joining TAXI, though he had heard about the company and read parts of TAXI’s website before signing up. Demeter did not know about the FTSL prior to joining TAXI, nor did he know of the law’s bond requirement. The day Demeter paid for his membership, the TAXI website represented TAXI had either an “A+” or “A-” rating with the Better Business Bureau.

**B. Demeter’s Complaint**

Roughly six weeks after he purchased his membership, Demeter filed a putative class action complaint alleging (1) TAXI had not procured the $50,000 bond required by the FTSL at the time Demeter paid for his membership, (2) TAXI failed to provide Demeter with a written contract that satisfied the requirements of the FTSL, including an advisement that TAXI had complied with the bonding requirement, and (3) the TAXI website represented the company had an A+ or A- rating with the Better Business Bureau (BBB) when, in truth, TAXI had no rating when his complaint was filed because “the BBB does not rate talent services that are not in compliance with California law.” The operative complaint further alleged a violation of the UCL because TAXI and Laskow “violated the FTSL . . . and therefore engaged in unfair competition.” The operative complaint’s prayer for relief sought, among other things, payment of Demeter's attorney fees, treble compensatory damages under the FTSL, and restitution and injunctive relief under the UCL.

**C. TAXI and Laskow’s Motion for Summary Judgment**

TAXI and Laskow’s motion for summary judgment (for simplicity’s sake, we will refer to it as TAXI’s motion) argued Demeter could not prevail at a trial on his cause of action alleging a violation of the FTSL because he could not establish he had been injured by TAXI’s failure to obtain the requisite bond or by the absence of any reference to the bonding requirement (and other statutorily required terms) in the terms and conditions to which Demeter agreed when purchasing his membership online.

As to the failure to obtain the bond itself, TAXI argued Demeter could not demonstrate he had suffered an injury entitling him to sue because he had not relied on the bond requirement when purchasing his membership (indeed, he was unaware of the obligation imposed by law) and he had received the services he was promised. As to the absence of a reference to the statutorily-required bond and other alleged deficiencies in TAXI’s online terms and conditions, TAXI argued the alleged violation of the FTSL’s provision governing the form of talent services contracts merely rendered TAXI’s contract with Demeter voidable, not void, which meant the contract was not illegal and could not have been injurious.

TAXI further argued, as to Demeter’s UCL claim, that he could not establish standing or causation because he could not establish he had suffered an “injury in fact” caused by the asserted violation of the FTSL.

TAXI’s summary judgment motion also maintained Demeter could not prove his suit was necessary to redress an injury because he had not availed himself of the contract provision that would permit him to obtain a full refund of the membership fee he paid. The motion cited evidence suggesting Demeter instead was a “stalking horse” for a competing company and had purchased a TAXI membership simply for the purpose of attempting to establish a predicate for bringing suit. In TAXI’s view, this meant that insofar as Demeter had suffered any injury, the injury was “self-inflicted” and therefore insufficient to support a lawsuit.

In opposition, Demeter argued he had been injured by TAXI’s alleged violations of the FTSL (and, correspondingly, the UCL) because he would not have paid TAXI’s membership fee if he had known TAXI was violating legal requirements and thus was “an illegal company.” He acknowledged he had not attempted to cancel his contract with TAXI (i.e., invoked his contractual right to a refund) prior to filing suit, but claimed a full-blown lawsuit was nevertheless a proper means for seeking to void the contract. Demeter further asserted TAXI’s “stalking horse” argument was meritless because TAXI had not presented evidence demonstrating Demeter had knowledge of TAXI’s violation before purchasing a membership.

The trial court granted TAXI’s motion for summary judgment. In doing so, the trial court found TAXI’s evidence “demonstrate[d] [Demeter’s] legal rights were not invaded by [TAXI’s] alleged failure to comply with contractual bonding requirements in the FTSL” and concluded they had “brought forth proof that plaintiff has not suffered an injury sufficient to allow him to assert his FTSL claim.” The trial court concluded TAXI had satisfied its burden to show Demeter could...
not establish the requisite element of injury for either his FTSL or UCL cause of action, and therefore could not establish a triable issue of material fact with respect to the viability of his UCL or FTSL claim.

II. DISCUSSION

Demeter claims he was injured by TAXI’s alleged violations of the FTSL—failure to provide him with an FTSL-compliant contract and failure to obtain a bond—because he would not have purchased a TAXI subscription if he had known TAXI was not complying with the law. The dispositional question before us reduces to whether that is a cognizable injury under the FTSL. We conclude it is not. Because TAXI’s alleged failure to provide Demeter with an FTSL-compliant contract rendered the contract merely voidable, not per se illegal, Demeter’s theory of injury fails as to that assertion violated. And because Demeter both admitted he did not know TAXI was required to have a bond before he purchased his membership and failed to provide any evidence he suffered some injury that might have entitled him to collect on such a bond, Demeter failed to demonstrate the existence of a triable issue of material fact regarding any injury caused by the absence of a bond. In other words, Demeter’s FTSL claim amounts to no more than an assertion Demeter was injured by TAXI’s noncompliance with the FTSL, but that mere noncompliance is not an injury caused “by a violation” of the FTSL.

For similar reasons, Demeter’s evidence also failed to raise a triable issue of material fact as to whether he suffered an economic injury caused by TAXI’s alleged violations of the FTSL, which he must to establish standing to sue under the UCL. Neither of his causes of action being viable, we affirm the trial court’s grant of summary judgment.

A. Standard of Review

“A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); [citation].) The moving party bears the burden of showing the court that the plaintiff “has not established, and cannot reasonably expect to establish,” the elements of his or her cause of action. [Citation.]” [Citation.] We review the trial court’s decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (State of California v. Allstate Ins. Co. (2009) 45 Cal.4th 1008, 1017-1018[ ].)” (Ennabe v. Manosa (2014) 58 Cal.4th 697, 705.)

B. Demeter’s FTSL Claim

1. Overview of the FTSL

The FTSL regulates the relationship between “talent services” and artists in the entertainment industry. Among the talent services regulated are “talent listing services” that provide artists with lists of auditions or employment opportunities. (Lab. Code, § 1701, subd. (g)(1)-4.) As relevant here, the FTSL requires talent services to obtain a bond or make a deposit in lieu of a bond “[p]rior to advertising or engaging in business.” (§ 1703.3, subd. (a).) The bond is required “for the benefit of any person injured by any unlawful act, omission, or failure to provide the services of the talent service.” (§ 1703.3, subd. (b).)

The FTSL also specifies, in certain respects, the form and content for contracts between talent services and artists. Any such contracts must include, as relevant here: a description of the services to be performed, when they are to be provided, and the duration of the contract; “[e]vidence of compliance with applicable bonding requirements, including the name of the bonding company and the bond number, if any, and a statement that a bond in the amount of fifty thousand dollars . . . must be posted with the Labor Commissioner” and, where the contract is to be executed over the internet, a “clear and conspicuous notice of the contract terms” with an opportunity for the artist to acknowledge receipt of the terms before acknowledging agreement thereto.” (§ 1703, subds. (a)(2)-(3), (b).)

The FTSL’s legislative history indicates it is intended to “safeguard the public against fraud, deceit, imposition, and financial hardship, and to foster and encourage competition, fair dealing, and prosperity in the field of talent services by prohibiting or restricting false or misleading advertising and other unfair, dishonest, deceptive, destructive, unscrupulous, and fraudulent business practices by which the public has been injured in connection with talent services.” (Assem. Bill No. 1319 (2009-2010 Reg. Sess.) § 1.) The FTSL expanded regulation of talent services in an effort to protect the public. (Sen. Jud. Com. Analysis of AB 1319 (2009-2010 Reg. Sess.) as amended June 15, 2009, pp. 1-2.)

2. The FTSL’s remedial provisions

In keeping with its intent to safeguard the public against injury from talent services, the FTSL provides several different enforcement mechanisms and remedies.

First, the FTSL gives artists the right to cancel talent services contracts in three circumstances. An artist may cancel a contract for whatever reason within ten business days and receive a full refund. (§ 1703, subd. (e)(1).) If a contract does not conspicuously state cancellation is prohibited after the ten-day period, an artist may cancel the contract at any time for a pro rata refund. (§ 1703, subd. (c)(2).) (TAXI’s refund policy, which allows TAXI customers a full year to request a full refund, is more generous than the statutorily required refund period.) The FTSL further provides any contract subject to section 1703 that “does not comply with subdivisions (a) to (f) i.e., the provisions governing the form and content of contracts subject to the FTSL, including the provisions that require the contract to provide evidence of compliance with

1. Undesignated statutory references that follow are to the Labor Code.
the bonding requirement] . . . is voidable at the election of the artist and may be canceled by the artist at any time without any penalty or obligation.” (§ 1703, subd. (d), italics added.)

Second, the FTSL authorizes “[t]he Attorney General, a district attorney, or a city attorney [to] institute an action for a violation of this chapter, including an action to restrain and enjoin a violation.” (§ 1704.1.)

Third, the FTSL authorizes any “person who is injured by a violation of this chapter or by the breach of a contract subject to this chapter” to bring suit “for recovery of damages or to restrain and enjoin a violation, or both.” (§ 1704.2, italics added.) It further specifies the “amount awarded for damages for a violation of this chapter shall be not less than three times the amount paid by the artist, or on behalf of the artist, to the talent service or the advance-fee talent representation service.” (§ 1704.2.)

The FTSL thus provides artists with different remedies for different types of violations of the statute. Where a talent service has failed to provide an artist with a contract that complies with the FTSL, the contract is voidable at the election of the artist—even if the artist suffered no injury as a result of the noncompliant contract. (§ 1703, subd. (d).) Where a talent service has violated any provision of the FTSL or breached a contract subject to the FTSL and that violation or breach has caused injury to an artist, the artist may sue for damages and injunctive relief. (§ 1704.2.) Implicit in the provision of different remedies to artists who were “injured by” a violation and those who were not is an acknowledgment that a violation of the FTSL does not itself constitute injury. In other words, the FTSL does not allow an individual (as opposed to one charged with the duty to prosecute on behalf of the public, as specified in section 1704.1) to seek redress in court based solely on a failure to comply with its provisions.

3. The summary judgment evidence demonstrates Demeter cannot prove he was injured by the alleged violations

In its summary judgment motion, TAXI challenged Demeter’s assertion he had suffered injury as a result of the alleged FTSL violations. As just discussed, in order to bring suit under the FTSL, Demeter would be required at trial to demonstrate more than a mere violation of the statute. (Compare § 1704.2 [permitting a person “injured by a violation” to bring suit] with § 1703, subd. (d) [permitting an artist to void a contract where there is a violation, without any requirement that “injury” be shown].) TAXI submitted excerpts from Demeter’s deposition testimony in which he admitted (a) he had not known about the FTSL or its bonding requirement when he signed up for TAXI, (b) the presence or absence of a bond had not impacted his decision to join TAXI, and (c) TAXI had not provided him with any guarantees.

Demeter provided scant evidence in response, primarily relying on his testimony that he would not have paid some $300 to join TAXI if he had known it was “operating illegally.” Demeter also relied on his testimony that the TAXI website represented it had an A+ BBB rating the day he signed up. Demeter did not provide evidence demonstrating he expected TAXI to comply with the FTSL, or that TAXI promised compliance with the FTSL, as part of his TAXI membership.

We conclude Demeter failed to provide evidence sufficient to create a triable issue of material fact as to whether he was injured by TAXI’s alleged failure to provide him with an FTSL-compliant contract. The alleged violation neither rendered Demeter’s contract with TAXI illegal nor rendered TAXI an “illegal” operation; it merely made Demeter’s contract with TAXI voidable (see § 1703, subd. (d)). Demeter’s theory of liability asserting he suffered an injury because TAXI provided an “illegal” contract therefore fails on its own terms.

Demeter argues he is nevertheless entitled to use a lawsuit as a means of voiding his contract with TAXI regardless of whether he has suffered any injury. But the FTSL does not provide a private right of action for such a claim. While the FTSL permits an artist to cancel a contract that violates section 1703, subdivisions (a) to (f) by written notice even in the absence of any injury, it does not authorize an artist to file a lawsuit to cancel an agreement in violation of the statute unless the artist suffered an injury caused by the violation.2 (§§ 1703, 1704.2.) To the extent Demeter would argue he can maintain a nonstatutory action for cancellation of the contract, the argument fails because he has not pled any such cause of action.

Demeter also did not provide evidence sufficient to create a triable issue of material fact as to his other alleged theory of liability: TAXI’s lack of a bond at the time Demeter purchased his membership. The FTSL’s required bond is “for the benefit of any person injured by any unlawful act, omission, or failure to provide the services of the talent service.” (§ 1703.3, subd. (b).) Demeter’s evidence established no “unlawful act, omission, or failure to provide” services for which he might have been eligible to seek recourse against the (nonexistent) bond. Rather, he testified during deposition that TAXI sent him emails regarding potential opportunities in the music industry, provided him with access to a database of opportunities and an online forum, and allowed him to upload songs to the TAXI website. Though Demeter testified he decided TAXI’s listings were “unprovable” and “sketchy,” he did not identify any promised services TAXI failed to provide and provided no evidence the listings were in fact illegitimate.

Demeter counters he considered the TAXI website’s representation that TAXI had an A+ BBB rating when purchasing a TAXI membership, and he contends this shows TAXI was operating illegally and he would not have joined TAXI 2. Indeed, apart from the attorney fees and treble damages that are available for a plaintiff (unlike Demeter) who actually suffers an injury, one wonders why any plaintiff would go to the trouble of filing a lawsuit to seek cancellation when a simple written notice would suffice.
if he had known it was illegal. This, however, is not sufficient to establish a trial is necessary to resolve his FTSL claim because the asserted BBB misrepresentation is not a violation of the terms of the FTSL.

At most, Demeter demonstrated he paid approximately $300 for his TAXI membership—a fee which was refundable both under the terms of the FTSL (§ 1703, subds. (d), (e)) and under the terms of TAXI’s 365-day refund policy—when, unbeknownst to him, TAXI had not complied with certain provisions of the FTSL that did not impact the service the company agreed to provide him and did not make it more difficult to recover for a harm he never suffered. The FTSL requires more; a violation of its terms alone will not suffice. (See § 1704.2 [authorizing a “person injured by a violation” to bring suit].) If an injury were held to exist based solely on an artist’s expectation that a talent service will not violate the FTSL, then injury would exist in any situation where a talent service violates the FTSL, regardless of whether there is actual harm to the artist. That is no “injury” at all.3 (See, e.g., Nunneley v. Edgar Hotel (1950) 36 Cal.2d 493, 498 [“no liability can be predicated upon noncompliance with a statutory command if the act or omission had no causal connection with the plaintiff’s injury”]; Richter v. CC-Palo Alto, Inc. (N.D.Cal. 2016) 176 F.Supp.3d 877, 893 [noting “noncompliance with a statutory scheme is not an independent injury that itself confers standing” and holding plaintiffs lacked standing where they had not “alleged any distinct injury as a result of Defendants’ purported non-compliance” with provisions of the Health and Safety Code]; Boorstein v. Men’s Journal LLC (C.D.Cal. June 14, 2012, No. CV 12-771 DSF) 2012 U.S. Dist. LEXIS 83101, *4, *10 [“If injury exists based solely on the consumer’s expectation that the defendant will not violate a law, then injury exists in any situation where a business violates a law, regardless of whether there is actual harm to the consumer. This type of injury is not cognizable under the [Shine the Light] law” which provides a private right of action to consumers “injured by a violation” of the statute].)

C. Demeter’s UCL Claim

“The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as ‘any unlawful, unfair or fraudulent business act or practice.’” ([Bus. & Prof. Code, §] 17200.) Its purpose ‘is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.’” [Citations.]” (Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 320 (Kwikset.).) “A ‘private person has standing to sue under the UCL only if that person has suffered injury and lost money or property “as a result of such unfair competition.”’ [Citation.]” (Daro v. Superior Court (2007) 151 Cal.App.4th 1079, 1098, italics omitted.) To satisfy the UCL standing requirement, the plaintiff must ‘(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that that economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim.’” [Citation.]” (Two Jinn, Inc. v. Government Payment Service, Inc. (2015) 233 Cal.App.4th 1321, 1331 (Two Jinn.) “In order to pursue a UCL claim, the plaintiff must show that the practices that it characterizes as unlawful caused it to suffer an actual economic injury.” (Id. at p. 1333.)

As we have explained, the only loss of money or property asserted by Demeter was the money he spent to purchase his TAXI membership. But the evidence before the trial court on summary judgment was inadequate to establish a factual dispute concerning whether the practices he characterizes as unlawful (the failure to provide an FTSL-compliant contract and the absence of a bond) caused him to suffer an actual economic injury. Demeter adduced no evidence that TAXI’s alleged failure to provide him with a written contract containing the terms required by the FTSL (such as a description of the services to be performed or evidence of the bond requirement) caused him to pay for his TAXI membership. Similarly, he provided no evidence he expected TAXI to have a bond when he purchased his membership. To the contrary, his deposition testimony indicated he did not know about the FTSL when he purchased his membership, did not know the FTSL applied to TAXI, and did not know the FTSL required talent services to post a bond. Because Demeter admitted he did not know about the bond requirement when he purchased his TAXI membership, he cannot establish “the practices that [he] characterizes as unlawful caused [him] to suffer an actual economic injury.” (Two Jinn, supra, 233 Cal.App.4th at p. 1333.)

Demeter’s evidence regarding TAXI’s BBB rating cannot save the lack of the requisite injury for UCL purposes because Demeter’s operative complaint did not allege a UCL violation based on that misrepresentation. Instead, the UCL cause of action was expressly premised only on the allegation that “Defendants violated the FTSL . . . and therefore engaged in unfair competition.” Because the BBB representation is not an actionable violation of the FTSL, Demeter cannot now rely on that allegation to argue a jury must decide whether he was injured for purposes of the UCL.4 (See Hut-

Demeter’s citations to In re Steroid Hormone Product Cases (2010) 181 Cal.App.4th 145 and Kwikset are accordingly inapposite. In re Steroid Hormone Product Cases discussed the plaintiff’s theory of injury and damage in the context of determining whether reliance on the alleged misrepresentation could be inferred on a classwide basis, not whether the plaintiff had demonstrated an injury sufficient to confer statutory standing. (In re Steroid Hormone Product Cases, supra., at p. 157.) Kwikset considered a demurrer challenging a plaintiff’s standing to bring a UCL claim where the plaintiff alleged reliance on a label that stated the product he purchased was “made in the USA,” and our Supreme Court concluded the allegation was sufficient to demonstrate an injury at the pleading stage because the plaintiffs alleged they had purchased the product in reliance on a misrepresentation and had not received the benefit of the bargain. (Kwikset, supra., 51 Cal.4th at p. 332.) The facts here are entirely dissimilar where it is undisputed at summary judgment that TAXI made no affirmative representation concerning the FTSL’s bond requirements and Demeter was unaware of those requirements when he opted to purchase a TAXI membership.

Instead, this case is more analogous to Medina v. Safe-Guard Products (2008) 164 Cal.App.4th 105. In that case, the plaintiff purchased a vehicle service contract, which was allegedly an insurance contract, from a company not licensed to sell insurance in California. (Id. at 108.) The plaintiff alleged he had demonstrated injury-in-fact simply by paying for the contract. (Id. at 114.) The Court of Appeal disagreed, noting “Medina has not alleged that he didn’t want wheel and tire coverage in the first place, or that he was given unsatisfactory service or has had a claim denied, or that he paid more for the coverage than what it was worth because of the unlicensed status of Safe-Guard.” (Ibid.) Similarly here, Demeter has not provided evidence that the service he purchased from TAXI was somehow not up to par, nor has he established a dispute of fact concerning whether the amount he paid for his TAXI membership was more than it was worth because of TAXI’s (then) unbonded status.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION

BAKER, J.

We concur: KRIEGLER, Acting P.J., DUNNING, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
OPINION

INTRODUCTION

The City of Pasadena filed a nuisance abatement action against several businesses and individuals related to medical marijuana dispensaries, which are prohibited by the Pasadena Municipal Code (PMC). The defendants in that action later filed a lawsuit against the City of Pasadena, and the two cases were deemed related. In each of the two actions, the trial court granted Pasadena’s request for injunctions, prohibiting defendants from operating their medical marijuana dispensaries in Pasadena. The defendants appealed from each order, and we consolidated the appeals.

On appeal, defendants assert three main arguments: that the relevant Pasadena Municipal Code ordinance sections do not render medical marijuana dispensaries a nuisance per se, one relevant ordinance section was not properly enacted, and counsel for Pasadena lacked authorization to bring the actions. We disagree on each point, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 9, 2015, Pasadena and the People of the State of California (collectively, Pasadena) filed a second amended complaint seeking injunctive relief and nuisance abatement.1 Because this appeal arises from multiple superior court cases, we will refer to the action initiated by Pasadena as the injunction action. Pasadena named the following parties as defendants: Medical Cannabis Caregivers Institute, Good Leaf Collective, Landmark Research Collective, Liz McDuffie, Sunny Chan, Shaun Szameit, Karen Pike, Urban Farms Delivery, Liz McDuffie/Szameit Trust, and Pasadena ECB Mall, LLC. Golden State Collective was included as a defendant in the body of the complaint, but not listed on the title page. Pasadena’s complaint alleged that defendants were the owners, occupiers, and/or users of certain commercial properties that were “using the land and premises as a medical marijuana dispensary. The use of land and premises for a medical marijuana dispensary is prohibited by the Zoning Code of the City of Pasadena.” The complaint alleged that the use of the property was in violation of various sections of the PMC, and was a nuisance per se and a public nuisance. Pasadena asked that defendants’ actions be abated and enjoined.

On December 23, 2015 Pasadena moved ex parte for a temporary restraining order and preliminary injunction prohibiting defendants from violating the PMC’s Zoning Code by “operating a prohibited use, to wit, a medical marijuana dispensary . . . . Specifically, to provide, make available, or distribute medical marijuana to a primary caregiver, a qualified patient, or a person with an identifications [sic] card issued in accordance with California Health and Safety Code Section 11362.5 et seq.” Pasadena asserted that PMC section 17.80.020M defined “medical marijuana dispensary (land use)” and within that definition stated, “This use is prohibited in the City of Pasadena.” Pasadena also stated that “Section 17.78.060A of the Zoning Code states in pertinent part that any use contrary to the code is unlawful and a public nuisance.” Pasadena also noted that other PMC sections defined violations of the PMC as nuisances.

Pasadena’s application was supported by the declarations of David Reavis, a sergeant with the Pasadena Police Department, and Luis Lopez, an investigator for the city attorney/city prosecutor’s office. Both Reavis and Lopez stated that marijuana was being sold on the premises named in the injunction application.

Defendants opposed the ex parte application for an injunction. They argued that the application was not supported by sufficient evidence because the Reavis and Lopez declarations contained hearsay. Defendants also argued there was no showing of immediate and irreparable harm. In addition, defendants asserted that Pasadena could not demonstrate a likelihood of success on the merits because the relevant Pasadena ordinance 7018, which was eventually codified as PMC section 17.80.020, “was not adopted consistent with state law: no proper noticed hearing occurred, the matter was continued in violation of the Pasadena municipal code, and the substance was not addressed by the Planning Commission.”

Defendants’ opposition was supported by the declaration of defendants’ attorney, Stanley H. Kimmel. Kimmel stated that the Planning Commission proposed a revision to the Zoning Code to define medical marijuana dispensaries on January 26, 2005. The Planning Commission then forwarded that recommendation to the City Council, which noticed a hearing on the issue, but continued the hearing several times. Kimmel stated that the hearing regarding the proposed rule was eventually held on July 18, 2005, and that the hearing was included in the agenda for the meeting on that date. Kimmel argued that the schedule for adoption of the ordinance violated hearing and notice requirements in the PMC. Kimmel also asserted that the initial language defined “medical marijuana dispensary,” but did not ban such a land use. Kimmel said that ordinance 7018, which included language prohibiting medical marijuana dispensaries, was adopted without a required public hearing in September 2005. Although Kimmel quoted several documents throughout his declaration, such as City Council agenda statements, none of the documents is included as an exhibit.

On February 16, 2016, in a separate lawsuit, defendants and several others2 sued Pasadena and Pasadena mayor Terry Tornek seeking declaratory and injunctive relief. We will refer to this as defendants’ action. Defendants’ complaint alleged that customers of the marijuana dispensaries had serious medical issues and benefited from cannabis products.

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1. Earlier versions of the complaint are not in the record on appeal. The superior court case summary included in the record indicates that the case was initially filed on July 23, 2014.

2. The plaintiffs listed in this complaint are Urgent Care Medical Services, Inc.; Robert Zohrabyan; Isaac Moreno Alfaro; Shaun Szameit; Peter Giron; Golden State Collective; Hallmark Research Collective; Urban Farms Delivery; Kevin Huebner; Mike Boonthawesuk; Nu Remedy Collective; Lotus Entertainment Corp.; and Jesse Boggs.
Defendants alleged that Pasadena was improperly enforcing the PMC ban on medical marijuana dispensaries. Defendants’ complaint also alleged that PMC section 17.80.020M, defining a medical marijuana dispensary, was not enacted in compliance with relevant laws, and therefore was void. Defendants requested, in part, a declaration stating that the PMC does not ban medical marijuana dispensaries. Defendants also filed a notice of related cases for Pasadena’s injunction action and two additional cases. The superior court deemed the cases related and assigned them to the same judge.

On March 1, 2016, Pasadena filed its reply to defendants’ opposition in the injunction action. Pasadena noted that defendants did not refute that defendants are operating medical marijuana dispensaries in the City of Pasadena. Pasadena further argued that it employs “permissive zoning,” which means that if a land use is not specifically listed in the Zoning Code, it is prohibited. Because a medical marijuana dispensary was not listed as an allowed use in the Zoning Code, such a use was not allowed. In 2005, Pasadena added the definition of a medical marijuana dispensary to the PMC by enacting section 17.80.020M. Pasadena pointed out that because the ordinance was adopted in 2005, defendants’ challenge to it was time-barred because “facial challenges to zoning provisions are subject to the 90-day limitation period” under Government Code section 65009, subdivision (c)(1) (B). Pasadena also stated that the City Council authorized the actions to abate illegal medical marijuana dispensaries.

In the injunction action, Pasadena filed a supplemental brief in support of its motion for an injunction on March 14, 2016. Pasadena noted that a hearing was held on March 2, and “at that time the defendants . . . raised the question whether the City had authority to initiate the instant lawsuit.” The court asked for supplemental briefing. Pasadena stated that according to the PMC, “An injunction and an abatement proceeding require authorization from the City Council.” It stated that the City Council authorized the initiation of two legal actions during its closed session meeting on July 21, 2014. Pasadena also submitted a declaration attaching a public report of action, stating that in 2014 the City Council “authorized and directed the City Attorney to initiate civil abatement actions, to include injunction, abatement proceeding, and/or nuisance abatement, against illegal marijuana dispensaries operating in the City.”

The court granted Pasadena’s motion for a preliminary injunction on April 4, 2016. The injunction prohibited defendants from “providing, making available, or distributing medical marijuana to a primary caregiver, a qualified patient, or a person with an identification card . . . and/or allowing such activity to occur on their property.” The order was stayed and vacated for reasons not relevant to the issues on appeal. The court signed a modified preliminary injunction on September 14, 2016.

Meanwhile, on April 28, 2016, Pasadena cross-complained in defendants’ action, seeking injunctive relief and nuisance abatement. On July 15, 2016, Pasadena filed a motion for a preliminary injunction in defendants’ action. Defendants noted that there already was a preliminary injunction in place affecting many of the defendants. However, Pasadena was seeking an additional injunction because “medical marijuana dispensaries are trying to circumvent the preliminary injunctions already issued by either renaming the dispensary or allowing other dispensaries to occupy and use their location.”

Defendants opposed Pasadena’s motion, arguing that Pasadena failed to demonstrate a likelihood of success on the merits and failed to present evidence to support a balance-of-the-harms analysis. Defendants also argued that the City Council did not authorize the filing of a request for an injunction. Defendants further contended that Pasadena failed to demonstrate that the businesses met the definition of a nuisance.

On September 14, 2016, the court granted Pasadena’s motion for a preliminary injunction in defendants’ action. On September 20, 2016, defendants filed a notice of appeal in defendants’ action. The following day, defendants filed a notice of appeal in the injunction action.

STANDARD OF REVIEW

“Pursuant to longstanding Supreme Court case law, ‘trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued.’ [Citation.] We review a trial court’s application of these factors for abuse of discretion. [Citation.]” (ITV Gurney Holding Inc. v. Gurney (2017) 18 Cal.App.5th 22, 28-29.) In addition, “questions underlying the preliminary injunction are reviewed under the appropriate standard of review. Thus, for example, issues of fact are subject to review under the substantial evidence standard; issues of pure law are subject to independent review.” (People ex rel. Gallo v. Acuna (1997) 14 Cal.4th 1090, 1136-1137.)

“[W]here a legislative body has specifically provided injunctive relief for a violation of a statute or ordinance, a showing by a governmental entity that it is likely to prevail on the merits should give rise to a presumption of public harm.” (IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 71.)

DISCUSSION

“In 1996, the voters of California adopted an initiative measure permitting medicinal use of marijuana and, in 2004, the Legislature enacted a statute to enhance access to medicinal marijuana. [Citation.] In 2016, the voters approved Proposition 64 legalizing marijuana for recreational use by adults, subject to various conditions. (See, e.g., Health & Saf. Code, §§ 11358-11359.)” (City of Vallejo v. NCORP4, Inc.)
We disagree. Defendants cite no authority for their contention that a finding of nuisance per se must be based on a single statute as opposed to a statutory scheme. Here, the PMC states that medical marijuana dispensaries are a nuisance, albeit through multiple ordinance sections.

PMC section 17.80.020M states in part, “Medical Marijuana Dispensary (land use). A facility or location which provides, makes available or distributes medical marijuana to a primary caregiver, a qualified patient, or a person with an identification card issued in accordance with California Health and Safety Code Section 11362.5, et seq. This use is prohibited in the City of Pasadena.”

Pasadena asserts that it employs a permissive zoning system, in that the “zoning regime prohibits any land use that is not specifically enumerated in the Zoning Code.” PMC section 17.21.030(A) states that “uses of land allowed by this Zoning Code in each zoning district are listed” in tables included in the PMC Zoning Code. That section continues, “Land uses that are not listed in tables or are not shown in a particular zoning district are not allowed . . .” (PMC 17.21.030(A)(1).) Medical marijuana dispensaries are not listed in tables or otherwise allowed in the PMC.

PMC section 17.78.060(A)(3) states that “[a]ny use or structure which is altered, constructed, converted, enlarged, erected, established, installed, maintained, moved, operated, set up, or used contrary to the provisions of this Zoning Code . . . is hereby declared to be unlawful and a public nuisance . . . and shall be . . . summarily abated by this City.”

The PMC therefore states that medical marijuana dispensaries are not permitted, and non-permitted uses are nuisances. This was sufficient to support the trial court’s finding that the dispensaries constituted nuisances per se. “[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this sense its mere existence is said to be a nuisance per se.” (Beck, supra, 44 Cal.App.4th at p. 1207; see also City of Monterey v. Carrnishimba (2013) 215 Cal.App.4th 1068, 1086 [“An act or condition legislatively declared to be a public nuisance is ‘a nuisance per se against which an injunction may issue without allegation or proof of irreparable injury.’”].) Defendants have cited no authority in support of their position that a nuisance must be enumerated in a single ordinance section in order to be deemed a nuisance per se, and we have found none.

Defendants argue that Pasadena’s permissive zoning structure is insufficient to establish a nuisance per se, because “[p]ermissive zoning by definition creates only a presumed prohibition, but not an explicit legislative determination that the use in question, medical marijuana dispensary, is a nuisance.” Pasadena asserts that courts have recognized permissive zoning as a valid method of prohibiting dispensaries.

4. For the first time at oral argument, counsel for defendants asserted that in City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc. (2013) 56 Cal.4th 729, the Supreme Court held that state marijuana laws did not permit a municipality to implement a “total ban” on medical marijuana dispensaries. This is incorrect. In City of Riverside, the Court stated that state marijuana law “neither . . . expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions.” (Id. at p. 762 [emphasis added].)

5. Pasadena submitted a request for judicial notice attaching relevant parts of the PMC. Defendants did not oppose the motion. Pasadena’s request to judicially notice relevant portions of the PMC is granted.
Pasadena is correct. For example, in City of Monterey v. Carrnshimba, supra, 215 Cal.App.4th at p. 1095, the Court of Appeal held that the municipality’s permissive zoning code, combined with a code section stating that all unauthorized uses were nuisances, established that the dispensary at issue was a nuisance per se. (Ibid.) Other cases also have found that permissive zoning sufficiently bars the establishment of medical marijuana dispensaries. (See, e.g., The Kind and Compassionate v. City of Long Beach (2016) 2 Cal.App.5th 116, 128 [a permissive zoning scheme meant that the dispensaries “never had a vested property right to operate a medical marijuana dispensary in the city”]; City of Corona v. Naulls (2008) 166 Cal.App.4th 418, 433 [“where a particular use of land is not expressly enumerated in a city’s municipal code as constituting a permissible use, it follows that such use is impermissible”]; City of Claremont v. Kruse (2009) 177 Cal. App.4th 1153, 1165 [where the “Claremont Municipal Code expressly states that a condition caused or permitted to exist in violation of the municipal code provisions may be abated as a public nuisance,” the “operation of a nonenumerated and therefore expressly prohibited use . . . created a nuisance per se.”].)

Defendants also argue that the trial court erred because “Pasadena shows neither nuisance conduct nor an explicit declaration by the City Council that a medical marijuana dispensary is a nuisance.” However, “[N]uisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance.” (City of Costa Mesa v. Soffer (1992) 11 Cal.App.4th 378, 382.) Here, defendants did not dispute that they operate medical marijuana dispensaries, and the PMC stated that medical marijuana dispensaries are not allowed and therefore a nuisance. Thus, there was no need for additional evidence or any determination of facts regarding whether the dispensaries created a nuisance.

Because defendants operated medical marijuana dispensaries, which was prohibited, and the PMC states that the operation of a prohibited use is a nuisance, the trial court did not abuse its discretion by finding that the dispensaries were nuisances per se under the PMC.

B. Adoption of Ordinance 7018

Defendants argue that ordinance 7018 was adopted “in conflict with general laws” because the PMC and the Government Code require notice and a hearing. They argue that the insufficiency in public notice also violated PMC section 17.76.040. (6) They assert, without citation to any evidence, that “no Public Notice of the 9/12/2005 City Council hearing was given, and no Public Hearing was held.”

Pasadena asserts that defendants’ challenge to the procedural enactment of section is time-barred: “Legislative decisions, such as zoning ordinances like Ordinance 7018, are subject to the 90-day limitations period that run from the date the ordinance was adopted.” Defendants do not address this argument; they did not file a reply brief, and although Pasadena made this argument in the trial court, defendants did not address it in their opening brief.

Government Code section 65009, subdivision (c)(1)(B) states, “[N]o action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body’s decision: . . . To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance.”

The parties agree that ordinance 7018 was adopted in 2005, and that it amended the PMC zoning ordinance. Because defendants did not challenge ordinance 7018 within the 90-day period allowed by Government Code section 65009, subdivision (c)(1)(B), their procedural challenge is time-barred.

C. Authorization by the City Council

Defendants assert that Pasadena’s initiation of legal action against defendants was not authorized by the City Council, as required by the PMC. They argue that “absent an order of the Council, an application for injunctive relief is not permitted.” PMC section 17.78.110(a)(1) states, “The City Attorney, upon order of the Council, may apply to the Superior Court for injunctive relief to terminate a violation of this Zoning Code.”

Defendants acknowledge that the City Council has approved the actions against them, citing documents submitted with Pasadena’s supplemental briefing. City Council meeting minutes from July 21, 2014, states that the City Council had a conference with legal counsel, and authorized the initiation of two legal actions. A “Council Meeting Recap” of the February 29, 2016 meeting notes several pending cases, and states, “City Council reiterated the direction given on July 21, 2014 to initiate civil abatement actions against illegal marijuana dispensaries, and gave direction to initiate additional civil abatement actions.” (Capitalization removed.) A document dated March 9, 2016, titled “Public Report of Action Taken by the City Council of the City of Pasadena,” states that on July 21, 2014, the City Council “authorized and directed the City Attorney to initiate civil abatement actions, to include injunction, abatement proceeding, and/or nuisance abatement, against illegal marijuana dispensaries operating in the City.” The Public Report continues, “In accordance with said authority and direction, the City Attorney has initi-
We concur: EPSTEIN, P. J., WILLHITE, J.

Pasadena is entitled to its costs on appeal.

By finding that the actions here were authorized by the City Council, defendants have therefore failed to demonstrate that the trial court abused its discretion. However, defendants give no indication that the City Council did not approve the initiation of the legal actions at issue here. Defendants’ arguments are unpersuasive.

Defendants contend that according to the roll call at the City Council meeting on July 21, 2014, Rhemrev was not present at that meeting. Defendants do not contend that the City Council minutes of July 21, 2014 are incorrect regarding the initiation of the legal actions. The minutes state that the injunction action was authorized, and defendants have provided no evidence to the contrary. The February 29, 2016 meeting recap reiterates that such actions were authorized, and defendants also do not contend that this document is incorrect. Rhemrev’s presence at the City Council meeting in 2014 is not relevant to whether the injunction action was authorized by City Council.

Defendants also argue that the March 2016 Public Reports are unreliable because the case numbers were not assigned at the time of the 2014 authorization, and “[t]he City Council could not have referenced actions by case numbers not yet assigned.” However, those documents are dated and signed in March 2016, and merely state the actions that were taken in 2014 and afterward. The documents do not purport to be written before case numbers were assigned. Thus we find no fault with the fact that the documents written in 2016 include case numbers that were assigned after the July 21, 2014 authorization.

In short, defendants have not set forth any persuasive arguments that the legal actions here were not authorized by the City Council. To the contrary, the evidence shows that City Council did authorize the actions. Defendants have therefore failed to demonstrate that the trial court abused its discretion by finding that the actions here were authorized by the City Council.

DISPOSITION

The order issuing the injunction is affirmed. The City of Pasadena is entitled to its costs on appeal.

COLLINS, J.

We concur: EPSTEIN, P. J., WILLHITE, J.

COUNSEL

Alexandra Krakovsky for Appellant.

D.M., in pro. per., for Respondent.

OPINION

In this complex custody proceeding involving two states and three different venues, N.S. (Mother) appeals the denial of her motion to recover attorney’s fees, travel expenses, and childcare costs from D.M. (Father) associated with the parties’ litigation in Santa Clara County and Illinois. She claims she incurred expenses in both places to challenge Father’s Illinois petitions and return the custody case to Santa Clara County, where the initial custody determination was made. On appeal, she argues the trial court erred in denying expenses under Family Code sections 7605, subdivision (a) and section 3452, subdivision (a). As we explain, Mother is not entitled to recover expenses under section 3452, but she may seek a need-based fee and cost award under section 7605. We therefore vacate the order and remand for the trial court to consider her request under that statute.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father were never married and are the parents of two minor children. They separated and in September

1. Further statutory references are to the Family Code unless otherwise indicated.
2. Father filed a motion to augment the record, which we denied under rule 8.155(a)(1) of the California Rules of Court. Mother filed separate augmentation motions on September 8, 2017, November 27, 2017, and December 8, 2017. We granted her first request solely as to the trial court’s May 2016 ruling on custody and stated we would consider the remainder of her requests concurrently with the appeal. Father has not objected, although some of the materials Mother submitted appear incomplete or irrelevant. Rather than parse her requests page by page, we will grant her pending motions. We rely on court filings from Illinois and Santa Clara County contained within those motions solely to provide relevant background and necessary context.
2012 filed a Stipulation and Order for Custody and/or Visitation of Children in Santa Clara County agreeing to joint legal and physical custody with the children residing primarily with Mother. The Santa Clara court entered a judgment of parentage the same day that contains no additional custody or visitation orders.

Mother and Father reconciled by early 2013 and moved with their children to Illinois. They separated again later that year but continued to share parenting time.

In May 2014, Mother relocated to San Diego with the children. Father filed a petition in Kane County, Illinois on June 6, 2014 to enforce the California custody order and return the children to Illinois. He filed a separate petition that same day seeking to modify custody on the basis that Illinois had become the children’s home state. Mother hired Illinois counsel and moved to dismiss and/or quash service, arguing Santa Clara County retained exclusive jurisdiction to modify custody. She also filed a motion in Santa Clara County to transfer venue to San Diego.

After a telephonic conference between the Illinois and Santa Clara County courts, both courts concluded that California maintained exclusive jurisdiction over custody under the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act). The Illinois court denied both of Father’s petitions on October 6, 2014, and Santa Clara County assumed exclusive jurisdiction three weeks later.

In January 2015, Mother filed a motion for reimbursement of certain expenses, which the court denied pending a hearing. Venue was transferred to San Diego County in February 2015. The record does not indicate whether Santa Clara County considered Mother’s expense request before the transfer.

Father filed a motion to modify custody and visitation and relocate the children to Illinois. On May 20, 2016, the San Diego County Superior Court awarded Mother sole legal and primary physical custody and ordered Father to undertake conjoint counseling.

On June 3, 2016, nearly 20 months after dismissal of the Illinois action, Mother filed a request for order in San Diego seeking fees and costs associated with the 2014 litigation in both Illinois and Santa Clara. Specifically, she identified travel expenses to Santa Clara, California attorney consultation fees, Illinois attorney’s fees, court-related childcare expenses, and court costs. She also sought to recover her moving expenses to relocate from Illinois to California. Mother’s points and authorities consisted in its entirety of four statutes pertaining to attorney’s fees and costs in various family law contexts. (§§ 2030, subd. (a)(1), 3452, subd. (a), 271, subd. (a), 4900 et seq.) She filed a later document in “reply” adding section 7605, subdivision (a) to the list.

The court held a hearing in September 2016 and denied Mother’s motion. It analyzed Mother’s Santa Clara requests under section 7605 and found that statute only allowed Mother to recoup attorney’s fees, not childcare or travel expenses. Because Mother was self-represented throughout the Santa Clara proceedings, it held she could not seek reimbursement of attorney’s fees. As to her request for fees in Illinois, the court determined venue was improper because “this is not the appropriate place to . . . seek attorney’s fees from a case that was heard in Illinois.”

**DISCUSSION**

“Under the American rule, each party to a lawsuit ordinarily pays its own attorney fees.” (Mountain Air Enterprises, LLC v. Sundowner Towers, LLC (2017) 3 Cal.5th 744, 751.) This default rule can be modified by contract, statute, or rule. (Travelers Cas. & Sur. Co. of Am. v. PG&E (2007) 549 U.S. 443, 448.) Mother seeks to recover the expenses related to 2014 litigation in Santa Clara and Illinois based on two Family Code provisions, section 7605, subdivision (a) and section 3452, subdivision (a). As we explain, the trial court properly denied Mother’s request for expenses under section 3452 but failed to exercise its discretion to fully consider her need-based fee and cost request under section 7605.

1. Mother is not entitled to expenses under section 3452, subdivision (a)

In her request for order, Mother cited section 3452, subdivision (a), the statute pertaining to the UCCJEA (§ 3400 et seq.). Section 3452 provides, in relevant part,

“[t]he court shall award the prevailing party . . . necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney’s fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.” (§ 3452, subd. (a).)

Mother urges that section 3542 entitled her to recover various attorney’s fees and expenses she incurred after Father initiated proceedings in Illinois. As we explain, however, Mother is not entitled to recover under this section because she was not a prevailing party in a UCCJEA enforcement proceeding within the meaning of that statute.

The interpretation of a statute is a legal issue, which we review de novo. (Ghirardo v. Antonioli (1994) 8 Cal.4th 791, 800.) “We begin with the fundamental rule that our primary task is to determine the lawmakers’ intent.” (In re B.A. (2006) 141 Cal.App.4th 1411, 1418.) “Where the language of the statute is clear and unambiguous, we follow the plain meaning of the statute and need not examine other indicia of legislative intent.” (In re J.P. (2014) 229 Cal.App.4th 108, 123.) Where appropriate, we turn to legislative history as an extrinsic aid to evaluate legislative intent. (In re J.W. (2002) 29 Cal.4th 200, 210.)

3. Although her trial court motion included other statutes, they are not referenced on appeal.
The UCCJEA is a uniform act that serves to avoid jurisdictional conflict and promote interstate cooperation by litigating custody where the child and family have the closest connections. (In re M.M. (2015) 240 Cal.App.4th 703, 715.) California and Illinois have both adopted the UCCJEA. (§ 3400 et seq.; 750 Ill. Comp. Stats. Ann. 36/101 et seq.) The act is divided into four chapters. The first contains definitions and general provisions (§§ 3400–3412), and the last contains miscellaneous provisions (§§ 3461–3465). Chapters 2 and 3 contain the core substantive provisions. We explore these chapters in some detail to explain why Mother is not entitled to recover expenses under section 3452.

Chapter 2 of the UCCJEA is titled “Jurisdiction” and defines the circumstances in which a trial court has jurisdiction to make a child custody determination. (§§ 3421–3430.) Once a state makes an initial child custody determination (§ 3421), it retains exclusive continuing jurisdiction over custody matters until it no longer has a significant connection with the parties or all parties move outside the state. (§ 3422, subd. (a).) Other sections in Chapter 2 explain when a court may modify another state’s custody order (§ 3423), assume temporary emergency jurisdiction (§ 3424), and decline to exercise jurisdiction on the grounds of inconvenient forum or unjustifiable conduct by a party (§§ 3427–3428).

Chapter 3 is titled “Enforcement” and deals with enforcement of out-of-state custody orders. (§§ 3441–3457.) Before the UCCJEA, there was no uniform procedure to enforce a valid custody order issued in another state. (9 pt. 1A West’s U. Laws Ann. (1999) U. Child Custody Jurisdiction Act, Prefatory Note.) This lack of uniformity led to inconsistent results and allowed one parent to stall enforcement proceedings for months or even years. (Ibid.) A major purpose behind the UCCJEA was to create a uniform method for enforcement across states. (Ibid.)

The UCCJEA creates two basic enforcement methods. First, a party can file a petition to register an out-of-state custody order. (§ 3445, subd. (a).) Once it receives the paper work, the court registers the out-of-state order and notifies the parties that unless a hearing is requested in 20 days, registration will be confirmed and further contest precluded. (§ 3445, subds. (b), (c), (e).) If a hearing is requested, the court must confirm registration unless the objecting parent can establish that the issuing court lacked jurisdiction; a court of competent jurisdiction has vacated, stayed, or modified the order; or the order was obtained without proper notice. (§ 3445, subd. (d)(1)–(3).) Once registered and confirmed, an out-of-state custody order must be enforced and may not be modified except as allowed under Chapter 2. (§ 3446, subd. (b).) The commentary to the UCCJEA explains that the registration and confirmation process “will allow a party to know in advance whether the State will recognize the party’s custody determination. This is extremely important in estimating the risk of the child’s non-return when the child is sent on visitation.” (9 pt. 1A West’s U. Laws Ann. (1999) U. Child Custody Jurisdiction Act, Prefatory Note.)

As an alternative to advance registration, the UCCJEA provides an expedited enforcement method “along the lines of habeas corpus.” (9 pt. 1A West’s U. Laws Ann. (1999) U. Child Custody Jurisdiction Act, Prefatory Note.) A party seeking swift enforcement without going through the registration process can file a verified “petition for enforcement of a child custody determination” enclosing the order sought to be enforced. (§ 3448, subds. (a)–(b).) The court schedules a hearing “the next judicial day.” (§ 3448, subd. (c).) If it finds the petitioner entitled to immediate physical custody, the court must order return of the child plus expenses under section 3452 unless the respondent appears and establishes that the issuing court lacked jurisdiction; the respondent did not receive proper notice; and the order has been vacated, stayed, or modified by a court with jurisdiction. (§ 3448, subd. (d) (1).)

As the official commentary to the uniform act explains,

“The scope of the enforcing court’s inquiry [at the expedited enforcement hearing] is limited to the issue of whether the decree court had jurisdiction and complied with due process in rendering the original custody decree. No further inquiry is necessary because neither [Chapter] 2 nor the [federal Parental Kidnaping Prevention Act] allows an enforcing court to modify a custody determination.” (9 pt. 1A West’s U. Laws Ann. (1999) U. Child Custody Jurisdiction Act, Prefatory Note.)

In this case, Father filed two separate petitions in Illinois. The first was a “Petition to Enroll Foreign Judgment” that asked the Kane County court to “enroll” the 2012 California custody order as a judgment of the court. Although “enrollment” is not a concept defined in the UCCJEA, we view Father’s petition as a request to register the California order. On the same day, Father also filed a petition to modify custody, stating the children had resided in Illinois for 19 months before Mother’s recent move to California. Mother moved to dismiss and/or to quash service of these petitions on the ground California retained continuing exclusive jurisdiction. After conferencing with the Santa Clara court, the Illinois court denied Father’s petitions and rejected jurisdiction.

Mother argues she had to retain an Illinois attorney to respond to motions filed in a court “that never had jurisdiction over the case.” She seeks expenses in connection with proceedings in Illinois and Santa Clara County. She claims to have incurred attorney’s fees and related expenses in both jurisdictions to challenge Father’s petitions in Kane County, Illinois and return the custody matter to Santa Clara County, where the initial custody determination was made. As we explain, Mother cannot recover these expenses under section 3452 because Father’s attempt to modify the custody order implicated the jurisdiction provisions—and not the enforce-
ment provisions—of the UCCJEA. Section 3452 only allows recovery of expenses in UCCJEA enforcement proceedings. Moreover, to the extent Father brought an enforcement proceeding in Illinois, Mother was not the prevailing party within the meaning of the statute.

The UCCJEA contains three separate statutory provisions for the recovery of expenses. Two are in Chapter 2 (Jurisdiction), and one is in Chapter 3 (Enforcement). A state that has jurisdiction but declines it on the basis it is an inconvenient forum may award expenses under section 3427, subdivision (e). Likewise, a state that has jurisdiction but declines it due to unjustifiable conduct by a party must award “necessary and reasonable expenses” unless the award would be “clearly inappropriate.” (§ 3428, subd. (c).) Neither of these provisions apply here because both require that the relevant court had jurisdiction to make a child custody determination but declined jurisdiction. (§§ 3427, subd. (a), 3428, subd. (a).) Illinois did not have jurisdiction to make a child custody determination because of California’s “exclusive, continuing jurisdiction.” (§ 3422, subd. (a).)

The third expense provision lies in Chapter 3—section 3452, subdivision (a). It requires the court to award “necessary and reasonable expenses” to the “prevailing party” unless the other party “establishes that the award would be clearly inappropriate.” (§ 3452, subd. (a).) On its face, this statute does not expressly limit its application to any particular proceeding. But it cannot apply to all proceedings under the UCCJEA, as that would render Chapter 2’s separate expense provisions superfluous. (Wells v. One2One Learning Foundation (2006) 39 Cal.4th 1164, 1207 (“interpretations which render any part of a statute superfluous are to be avoided.”).) Section 3452 is cross-referenced in only one place, the statute detailing expedited enforcement procedures under the UCCJEA. (§ 3448, subd. (d).) The structure of the statute indicates that section 3452 applies only to enforcement proceedings under Chapter 3.

“Title or chapter headings are unofficial and do not alter the explicit scope, meaning, or intent of a statute.” (DaFonte v. Up-Right, Inc. (1992) 2 Cal.4th 593, 602.) Nevertheless, the words of a statute must be construed in context and statutory provisions relating to the same subject should be harmonized, both internally and with each other. (Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal.3d 245, 268.) The only reasonable construction of section 3452, subdivision (a) is that the provision applies solely to enforcement proceedings under Chapter 3 and not to jurisdictional proceedings under Chapter 2. In other words, a party who prevails in custody modification proceedings under Chapter 2 cannot recover expenses under section 3452.


Given “the need to promote uniformity of the [UCCJEA] with respect to its subject matter among states that enact it” (§ 3461), we likewise hold that section 3452 applies only to the prevailing party in an enforcement proceeding.

Accordingly, Mother cannot rely on section 3452 to recover expenses she incurred to oppose Father’s Illinois modification petition, which appears to have been at the center of the parties’ dispute. Father’s modification petition was brought under (the Illinois variant of) section 3423, which deals with a court’s jurisdiction to modify an existing custody order. Mother defeated the modification petition by correctly arguing that California had exclusive continuing jurisdiction to make a child custody determination. The statutory provisions governing modification and continuing jurisdiction are both contained in Chapter 2, outside the UCCJEA’s enforcement chapter. (§§ 3422–3423.) Therefore, section 3452 is inapplicable.

Father’s “Petition to Enroll” presents a different issue. Because section 3452 is a prevailing party expense provision, it would presumably authorize attorney’s fees and expenses for a responding party who successfully resisted the petitioning party’s attempt to enforce an out-of-state custody order. Although Father’s “Petition to Enroll” did seek to recognize and enforce an out-of-state custody order, Mother in no way challenged the validity of that (California) order. Indeed, the California order was the basis for her argument that California retained exclusive continuing jurisdiction. So although we lack an adequate record to determine the exact basis for the Illinois court’s denial of Father’s petitions, we can confidently say that Mother was not a prevailing respondent in an enforcement proceeding within the meaning of section 3452.

6. We are not required to decide under what circumstances a prevailing respondent could ever recover expenses under section 3452, although the legislative history raises certain conceptual questions. The statute derives from a federal scheme dealing with the International Child Abduction Remedies Act (ICARA; 22 U.S.C. § 9001 et seq.). (9 pt. 1A West’s U. Laws Ann. (1999) U. Child Custody Jurisdiction Act, com. to § 312, p. 700.) ICARA sets forth a procedure to seek the return of a child who has been wrongfully abducted or retained, and it contains a fee shifting provision awarding expenses to a prevailing petitioner when a court orders a child returned. (22 U.S.C. §§ 9003, 9007, subd. (b)(3); White v. White (E.D.Va. 2012) 893 F.Supp.2d 755, 758.) “The sparse legislative history of the [federal] provision reveals it was ‘intended to provide an additional deterrent to wrongful international child removals and retentions.’ “ (Sourtagar v. Lee Jen Fair (2d Cir. 2016) 818 F.3d 72, 80.) The UCCJEA departs from ICARA in adopting a two-way expense provision to the “prevailing party.” (§ 3452.) Nevertheless, the UCCJEA’s only illustration of that provision envisions granting expenses to a prevailing petitioner in an expedited enforcement proceeding. (§ 3448, subd. (d).)

In the typical scenario, expenses may be warranted when a parent
2. Mother may be entitled to fees and costs under section 7605, subdivision (a)

Mother argues that the trial court erroneously denied her request for a need-based fee and cost award under section 7605, subdivision (a). Applying that statute, the court found her ineligible for California fees as a self-represented litigant and deemed venue improper as to her request for Illinois attorney’s fees. Section 7605, subdivision (a) provides:

“In any proceeding to establish physical or legal custody of a child or a visitation order under this part, and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation to preserve each party’s rights by ordering, if necessary based on the income and needs assessments, one party, except a government entity, to pay to the other party, or to the other party’s attorney, whatever amount is reasonably necessary for attorney’s fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.”

A court must order a need-based fee and cost award “if necessary” based on the parties’ income and needs assessments, to the extent such fees and costs are “reasonably necessary” to maintain or defend the proceeding. “When a request for attorney’s fees and costs is made under [§ 7605, subd. (a)], the court shall make findings on whether an award of attorney’s fees and costs is appropriate, whether there is a disparity in access to funds to retain counsel, and whether one party is able to pay for legal representation of both parties. If the findings demonstrate disparity in access and ability to pay, the court shall make an order awarding attorney’s fees and costs.” (§ 7605, subd. (b.)

Section 7605 allows fee shifting in both an initial proceeding to establish custody or visitation under the Uniform Parentage Act (UPA, § 7600 et seq.) and in “any proceeding subsequent to entry of a related judgment.” (§ 7605, subd. (a).) Although the parties stipulated to paternity in 2012, subsequent proceedings on custody, visitation, and support are considered part of an action under the UPA for purposes of a fee request. (Robert J. v. Catherine D. (2005) 134 Cal.App.4th 1392, 1399–1400 & fn. 5 [applying § 7640].)

Because there is little case authority interpreting section 7605, we look to a “virtually identical” statute that applies in dissolution cases, section 2030. (Kevin Q. v. Lauren W. (2011) 195 Cal.App.4th 633, 640, 643–644 [standards for fee awards in a dissolution proceeding are relevant to section 7605]) (Kevin Q.). The aim of both statutes “is not the redistribution of money from the greater income party to the lesser income party” but instead “parity: a fair hearing with two sides equally represented.” (Alan S., Jr. v. Superior Court (2009) 172 Cal.App.4th 238, 251 (Alan S.)) “The idea is that both sides should have the opportunity to retain counsel, not just (as is usually the case) only the party with greater financial strength.” (Ibid.)

We review a denial of fees under section 7605 for abuse of discretion but apply de novo review to questions of statutory interpretation. (Kevin Q., supra, 195 Cal.App.4th at p. 642.) Section 7605 only allows fee-shifting of attorney’s fees and costs. (§ 7605, subd. (a).) Therefore, the trial court properly found that Mother could not seek to recover child care, travel, relocation, or other expenses identified in her motion under the statute. We therefore limit our inquiry to the trial court’s denial of her request to recover $500 in California attorney consultation fees, $12,457.83 in Illinois attorney’s fees, and $446.21 in costs.

A party requesting attorney’s fees and costs under section 7605 must comply with California Rules of Court, rule 5.427(b)(1). Mother submitted a current income and expense declaration as required under the rule. (Cal. Rules Court, rule 5.427(d)(1) [“Current” is defined as being completed within the past three months, provided that no facts have changed”].) But she did not submit a form FL–319 (Request for Attorney’s Fees and Costs Attachment) or FL–158 (Supporting Declaration for Attorney’s Fees and Costs), and the documents she filed did not otherwise include all the information requested in those forms. These deficiencies are particularly acute as to the California attorney consultation fees and costs. In seeking consultation fees, Mother did not “provide the court with sufficient information about the attorney’s hourly billing rate; the nature of the litigation; the attorney’s experience in the particular type of work demanded; the fees and costs incurred or anticipated; and why the requested fees and costs are just, necessary, and reasonable.” (Cal. Rules of Court, rule 5.427(b)(2).) As to the Illinois attorney’s fees, Mother at least provided billing records that contain hourly billing rates and specify tasks counsel performed.

The trial court implicitly excused Mother’s procedural noncompliance by not rejecting her motion on that basis. Procedural defects aside, we conclude Mother was potentially entitled to recover fees and costs under section 7605, subdivision (a). California consultation fees and costs were recoverable to the extent “reasonably necessary,” provided the court found a “disparity in access and ability to pay.” (§ 7605, subds. (a)–(b); see Mix v. Tumanjan Development

is forced to travel to another state to enforce a valid order governing custody or visitation. The types of expenses listed in the statute—child care, investigative fees, travel expenses—envision this scenario. An award of expenses to the prevailing petitioner achieves the same purpose as it would under ICARA, to deter wrongful child removals and relocations and ensure compliance with existing child custody orders. One can question whether the same purposes are achieved by awarding expenses to a prevailing respondent in a UCCJEA enforcement action.

7. As to California consultation fees, Mother merely submitted two credit card receipts for $250 and stated a lawyer helped her “determine jurisdiction” and file a brief in Santa Clara. Mother’s cost request does not indicate why those costs were incurred or what they pertain to. She seeks $69 for an unspecified court transcript, which she must repay if awarded fees and costs. She also seeks $212.41 for unspecified “court related postal expenses” and $164.80 for unspecified “court related stationary expenses.”
In Alan S., supra, Askew, supra, proceedings were not sufficiently “related” to the dissolution proceeding to permit the recovery of fees. (In re Marriage of Seamen & Menjou, supra, at p. 1499.)

Another way two suits might be “related” is if the separate civil suit intends an effect on the family law action. (In re Marriage of Seamen & Menjou, supra, 1 Cal.App.4th at p. 1497.) For example, in In re Marriage of Green (1992) 6 Cal.App.4th 584, the wife was entitled to recover fees incurred to defend a malicious prosecution suit that was brought to dissuade her counsel from pursuing the family law matter. (Id. at p. 591.) Nevertheless, although improper motive may be the “‘glue’ “that connects a civil proceeding with a family law action, it is not a prerequisite to a relatedness finding. (Askew, supra, 22 Cal.App.4th at p. 965.)

“Normally, whether an action is ‘related’ to the marital case within the meaning of section [2030] is a factual question for determination by the trial court.” (In re Marriage of Green, supra, 6 Cal.App.4th at p. 591.) Here however, there is only one possible finding from the record: Father’s Illinois petitions to modify custody were “related” to the California custody case for purposes of section 7605, subdivision (a). Here, as in Askew, Father filed a separate action as to matters that should have been—indeed, could only have been—litigated in the California family law case. (Askew, supra, 22 Cal.App.4th at p. 965.) Just as change of custody proceedings are “related” in the dissolution context for purposes of section 2030 (Alan S., supra, 172 Cal.App.4th at p. 251), they are related for purposes of a fee award under section 7605.

The trial court found that to the extent Mother could recover Illinois attorney’s fees, that request should have been brought in Illinois. Notwithstanding Mother’s counsel’s statements during oral argument, the record does not indicate that Mother filed a motion requesting fees from Father in Illinois. The only request appears to have been made by Mother’s counsel, seeking unpaid fees from Mother. Nevertheless, a request for fees and costs incurred in “related” proceedings must be brought in the family law action, not in the “related” proceeding. (See In re Marriage of Green, supra, 6 Cal. App. 4th at p. 591 [husband “should have sought relief ‘not through an independent action but through an award of attorney fees and sanctions . . . within the dissolution action’ ”]; Neal v. Superior Court (2001) 90 Cal.App.4th 22 [directing the family law court to award attorney’s fees to wife for defending husband’s related civil action].) Mother’s

8. In re Marriage of Seamen & Menjou, Askew, and In re Marriage of Green were decided under Civil Code section 4730, the predecessor to Family Code section 2030. (Cal. Law Revision Com., com., 29D West’s Ann. Fam. Code (2004), foll. § 2030 (“Section 2030 continues former Civil Code Section [4370 subdivision (a)] without substantive change.”).) In 2004, the Legislature amended section 2030 through the same legislation that adopted section 7605. (Kevin Q., supra, 195 Cal. App.4th at p. 639.) Nothing in the amendments or legislative history indicates an intent to change the law as to what constitutes a “related” proceeding warranting attorney’s fees and costs. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2017) ¶ 14:15 [“it is believed that the pre-2005 line of authority dealing with fees/costs awards in connection with ‘related’ proceedings . . . remains valid”].)
failure to bring a motion in Illinois does not preclude recovery under section 7605.

Because the trial court did not exercise its discretion to consider Mother’s request under section 7605, subdivision (a), remand is necessary for the court to determine using appropriate needs-based criteria whether an award of fees and costs is appropriate. We emphasize that section 7605, like section 2030, is aimed at parity—i.e., ensuring “a fair hearing with two sides equally represented”—not redistribution to the party with less income. (Alan S., supra, 172 Cal. App.4th at p. 251.)

We express no view as to whether an award of fees and costs is appropriate in this case. The trial court must determine whether Mother’s identified fees and costs were “reasonably necessary” and whether fee shifting is “necessary based on the income and needs assessments.” (§ 7605, subd. (a).) In making this determination, it should consider whether there was a “disparity in access and ability to pay” for legal representation at the time Mother filed her motion in June 2016. (§ 7605, subd. (b).) The court must make necessary findings under section 7605, subdivision (b) and may rely on the more detailed provisions of sections 2032 and 4320 in doing so. (Kevin Q., supra, 195 Cal.App.4th at pp. 643–644.)

**DISPOSITION**

The September 29, 2016 order denying Mother’s expense request is vacated, and the matter is remanded for further proceedings to determine whether Mother may recover California attorney consultation fees, Illinois attorney’s fees, and costs from Father pursuant to section 7605. Mother is entitled to recover her costs on appeal.

Father’s request for sanctions is denied. Mother’s appeal is not frivolous.

**DATE, J.**

**WE CONCUR: NARES, Acting P. J., HALLER, J.**