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SUMMARIES

Civil Appeals

Limited remand appropriate to allow defendants to move for dismissal of claims on appeal based on district court’s dismissal of all other claims (Tallman, J.)

**Mendia v. Garcia**

9th Cir.; November 3, 2017; 16-15742

The court of appeals granted a motion for remand. The court held that it was appropriate to grant a limited remand to allow defendants to move for dismissal of claims on appeal based on the district court’s dismissal of all remaining claims due to plaintiff’s discovery abuses.

Naturalized U.S. citizen Bernardo Mendia sued Immigration and Customs Enforcement (ICE) agents John Garcia and Ching Chang, as well as the Department of Homeland Security, under Bivens and the Federal Tort Claims Act (FTCA), alleging the agents violated his constitutional rights when they lodged an immigration detainer against him, erroneously believing he was subject to removal, while he was being held in a county jail. The agents moved to dismiss Mendia’s Bivens claims on qualified immunity grounds. When the district court denied their motion, they filed an interlocutory appeal. While that appeal was pending, discovery proceeded on the FTCA claims. After Mendia repeatedly failed to comply with discovery orders, the district court dismissed the FTCA claims with prejudice.

Defendants then moved the court of appeals for a limited remand to allow the district court to consider applying the sanction to Mendia’s Bivens claims, as authorized under Fed. R. App. Proc. 12.1(b).

The court of appeals granted the motion for remand, holding that a limited remand was appropriate. Under Rule 12.1(b) a court of appeals may remand a case to the district court, while still retaining jurisdiction, for the limited purpose of allowing that court to enter a final ruling based on an earlier indicative ruling. This procedure is employed in conjunction with Fed. R. Civ. Proc. 62.1, which permits a party to request an “indicative ruling” from the district court when that court lacks jurisdiction in the matter based on a pending appeal. At issue here was whether a limited remand may be granted where the party has not previously moved the district court for such a targeted “indicative ruling.” The court joined its sister circuits in holding that a FRCP 62.1 motion is not a prerequisite for a limited remand under FRAP 12.1(b) where the district court has already indicated it would grant a motion for the requested relief. Here, although the district court did not explicitly state it would have dismissed Mendia’s Bivens claims had it retained jurisdiction over those claims, it nonetheless made its intentions sufficiently clear in its dismissal order. The court accordingly granted defendants’ motion for a limited remand so they could move the district court for dismissal of the remaining claims.

**Fernandes v. Singh**

C.A. 3rd; October 5, 2017; C080264

The Third Appellate District affirmed a judgment. The court held that the defendants’ failure to comply with the trial court’s discovery order for disclosure of their financial condition barred them from challenging the sufficiency of the evidence to support the trial court’s punitive damages award against them.

Tammy Fernandes sued former landlords Raj Singh and Kiran Rawat for wrongful eviction and related claims. The trial court rendered judgment in favor of Fernandes and awarded her compensatory damages of $87,894. The court further found that Singh had acted with oppression, fraud or malice, both actual and implied, based on his “despicable conduct” and “willful and conscious disregard” of Fernandes’ rights and safety. The court found further that Rawat had ratified and approved Singh’s malicious, fraudulent, and oppressive conduct. The court ordered defendants to appear at a hearing on punitive damages and to present evidence of their financial condition. Singh appeared, but produced no evidence of his financial condition. Rawat failed to appear. The court awarded punitive damages of $350,000.

The trial court denied defendants’ motions to modify, set aside and/or vacate the judgment, rejecting Rawat’s claim that she was never served. Rawat appealed, challenging both the denial of her motion to vacate and the trial court’s calculation of punitive damages. Singh, appealing separately, also challenged the punitive damages award.

The court of appeal affirmed, holding that Rawat forfeited any contention of error with regarding to the trial court’s ruling on her motion to vacate. Instead of stating the facts, as she was bound to do on appeal, she instead reiterated the evidence set forth in her declarations in the trial court, declarations that the trial court expressly discredited in rejecting her claim that she was never properly served. As to both defendants’ challenges to the award of punitive damages, the court found their failure to comply with the trial court’s discovery order, and present evidence of their financial condition, precluded any challenge to the sufficiency of the evidence to support the award of punitive damages.
Employment Litigation

Prevailing Title VII case may be awarded “gross up” to compensate for increased tax liability resulting from lump-sum back-pay award (Owens, J.)

*Clemens v. Centurylink Inc.*

9th Cir.; November 3, 2017; 15-35160

The court of appeals vacated a district court order and remanded. The court held that a prevailing employee in a Title VII case who is awarded back pay may also be awarded a “gross up” to account for the increased tax liability resulting from the lump-sum back-pay award.

Arthur Clemens sued employer Qwest Corporation for race discrimination and retaliation in violation of Title VII. A jury awarded him damages for back pay and emotional distress, as well as punitive damages.

Clemens moved the court to adjust his lump-sum back-pay award to account for the corresponding increase in his tax liability. The district court denied the motion, finding the Ninth Circuit had never authorized such an adjustment.

The court of appeals vacated the district court order and remanded, holding that parties who prevail on a claim under Title VII may, in appropriate circumstances, be awarded an adjustment to account for the increased tax liability resulting from a lump-sum award of back pay. The increased tax burden resulting from a lump-sum back-pay award can effectively deny the litigant what Title VII promises: full relief that puts the litigant where he or she would have been had the unlawful employment discrimination never occurred. The court accordingly joined the Third, Seventh, and Tenth Circuits in expressly authorizing a “gross up” to account for a prevailing litigant’s increased tax burden. The court remanded to the district court to exercise its discretion to determine whether Clemens was entitled to such an award in this case.

Environmental Law

Clean Water Act did not bar citizen suit under Resource Conservation and Recovery Act (Berzon, J.)

*Ecological Rights Foundation v. Pacific Gas & Electric Company*

9th Cir.; November 2, 2017; 15-15424

The court of appeals reversed in part a judgment. The court held that where the Environmental Protection Agency (EPA) had elected not to exercise its power under the Clean Water Act (CWA) to require permits for certain stormwater discharges, a citizen group could challenge those discharges under the Resource Conservation and Recovery Act (RCRA).

Ecological Rights Foundation (EcoRights) sued Pacific Gas & Electric Company (PG&E), alleging it had violated both the CWA and the RCRA by dispersing wood treatment chemicals from various of its facilities into San Francisco and Humboldt Bays via indirect and direct stormwater discharges.

The district court granted summary judgment in favor of PG&E, finding no violation of the CWA because, although the CWA allows the EPA to require permits before such discharges are allowed, it does not mandate that the EPA require such permits, and the EPA had decided not to require permits. The court found further that the RCRA’s “antiduplication” provision, at 42 U.S.C. §6905(a), precluded the RCRA’s application because of the EPA’s unexercised authority to regulate the discharges.

The court of appeal reversed in part, holding that the RCRA’s antiduplication provision did not bar EcoRights’ lawsuit. Section 6905(a) bars application of the RCRA to any activity subject to the Clean Water Act “except to the extent that such application...is not inconsistent with the requirements of” the CWA. Here, the district court reasoned that the antiduplication provision applied because the EPA had the power under the CWA to require permits the discharges at issue, even though it had opted not to do so. The court disagreed, finding the anti-duplication provision does not reach so far. At issue here was whether the CWA actually imposed any specific statutory requirements on PG&E’s stormwater discharges, and, if so, whether those requirements were inconsistent with any possible remedy under EcoRights’ RCRA suit. The answer was no. Because the CWA and its implementing regulations did not require PG&E to obtain a permit for its stormwater discharges, no CWA-grounded requirement was imposed here. Accordingly, there was no requirement with which the RCRA suit could be inconsistent.
**Personal Injury**

Trial court erred in finding private contractor charged with maintaining traffic lights owed no duty to motorists (Dunning, J.)

*Lichtman v. Siemens Industry Inc.*

C.A. 2nd; November 2, 2017; B265373

The Second Appellate District reversed a judgment. The court held that a private contractor charged with maintaining city traffic lights could not be found, as a matter of law, not to owe a duty to motorists injured when one of those lights failed to operate.

The City of Glendale installed battery backup units for traffic signals at various intersections to promote community safety by providing power in the event of a power outage. It contracted with Siemens Industry Inc. to maintain those units. Several of the units suffered battery issues. Siemens was aware of the issue, and removed the batteries from several units, including the one at the intersection of Glendale and Broadway. As a result, during a subsequent power outage on September 4, 2011, the traffic signal at that intersection went dark. In attempting to traverse the intersection in their car, Joanne Lichtman and her family were broadsided by another vehicle. They were all injured, Lichtman severely. They sued Siemens for their injuries.

The trial court granted summary judgment in favor of Siemens, finding it owed no duty to plaintiffs as a matter of law.

The court of appeal reversed, holding that Siemens failed to establish it was entitled to judgment as a matter of law. First, Siemens’ contract with the city was clearly intended to affect motorists such as plaintiffs. Second, it was foreseeable that motorists entering an intersection when traffic signals were not operating due to a power outage, particularly at night, might become confused and suffer harm if the battery backup unit was not operational. Third, it was beyond dispute that plaintiffs suffered injury. Further, there was a triable issue of material fact as to whether Siemens’ conduct was a proximate cause of plaintiffs’ injuries. Finally, neither an analysis of the moral blame attached to Siemens’ conduct, nor the public interest in preventing future harm supported a finding of an absence of duty as a matter of law. On this record, the trial court erred in finding, as a matter of law, that Siemens owed no duty to plaintiffs.

**Securities Litigation**

Doctrine of exhaustion of remedies barred challenge to FINRA’s publication of securities broker’s disciplinary history (Benke, J.)

*Flowers v. Financial Industry Regulatory Authority, Inc.*

C.A. 4th; October 20, 2017; D071392

The Fourth Appellate District affirmed a judgment. The court held that the doctrine of exhaustion of remedies barred a broker’s challenge to the publication of his disciplinary history by the Financial Industry Regulatory Authority, Inc. (FINRA).

Troy Flowers filed a complaint against FINRA, seeking an order requiring that it expunge his disciplinary history from its records.

The trial court sustained FINRA’s demurrer without leave to amend.

The court of appeal affirmed, holding that Flowers’ complaint was barred by the doctrine of exhaustion of remedies. With respect to disciplinary actions against participants in the securities industry, the doctrine of exhaustion of remedies requires that a determination of the propriety of such actions be made in the first instance in the forums to which Congress has assigned the task of resolving those issues. The Securities Exchange Act of 1934 and related regulations provide a remedial scheme by which the subject of disciplinary action may seek to expunge his or her disciplinary history or to challenge FINRA’s publication of that history. Requiring Flowers to utilize that process not only assures that the expertise and interests of the institutions to which Congress has delegated the task of policing the securities industry are brought to bear, but also diminishes the risk of intruding into areas where state law has been preempted by federal securities statutes and regulations. Because federal securities laws and regulations provide Flowers with a process by which he may challenge FINRA’s publication of his disciplinary history, and Flowers did not pursue that process, he could not now, by way of a civil action, seek that relief from the trial court.
Our principal question is whether the citizen suit provision of a different statute, the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 et seq., may be applied to limit such discharges, or whether RCRA’s “anti-duplication” provision, 42 U.S.C. § 6905(a), precludes RCRA’s application because of EPA’s unexercised authority to regulate the discharges. The district court determined that RCRA’s anti-duplication provision does preclude that statute’s application to the stormwater discharges here at issue. We do not agree.

I. STATUTORY BACKGROUND

At the heart of this case is the overlap between two statutory schemes, the Resource Conservation and Recovery Act and the Clean Water Act. We begin by outlining the statutes and identifying the provisions most relevant here.

A. The CWA and stormwater discharges

The Clean Water Act, enacted in 1972 as an amendment to the Federal Water Pollution Control Act, was designed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a); see Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. The CWA generally prohibits the unregulated “discharge of any pollutant” from any “point source” into the navigable waters of the United States, although such discharges are allowed if made in compliance with a CWA permit program. 33 U.S.C. § 1311(a), (e).

The principal permitting program, the National Pollution Discharge Elimination System (“NPDES”), is defined in CWA section 402, 33 U.S.C. § 1342. EPA or EPA-authorized states, including California, issue and enforce permits under the program. See 33 U.S.C. § 1342(b); Nat. Res. Def. Council, Inc. v. Cty. of Los Angeles, 725 F.3d 1194, 1198 (9th Cir. 2013). California has authorized regional water boards to act as NPDES permitting authorities. Id. at 1198–99.


Specifically, the 1987 Act established a moratorium on NPDES permit requirements for most types of stormwater discharges. 33 U.S.C. § 1342(p)(1), (p)(2); see Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 603 (2013). Exempted from this moratorium were discharges from industrial activity, large and medium-sized municipal storm sewer systems, and sources previously subject to permits.3 33 U.S.C. § 1342(p)

The 1987 Act also identified the next phase of stormwater requirements, which became known as “Phase II.” See id. at 840. During that phase, EPA was required to “designate stormwater discharges . . . to be regulated” and then to “establish a comprehensive program to regulate such designated sources.” 33 U.S.C. § 1342(p)(6). EPA was directed to, “at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines.” Id. The Act authorized EPA to implement this program by setting “performance standards, guidelines, guidance, and management practices and treatment requirements,” id., and, as needed, by imposing permit requirements, Envr. Def. Ctr., 344 F.3d at 844.

EPA promulgated its “Phase II Regulations” in 1999. See National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (“Phase II Regulations”). In those regulations, EPA designated only two categories of stormwater discharges as coming within its Phase II-required permitting program: discharges from small municipal sewer systems and discharges associated with small construction activity. Id.

PG&E’s stormwater discharges do not fall into either Phase II-regulated category. It is also common ground for purposes of this appeal that the Phase I Regulations—and all other relevant provisions in the CWA—do not require PG&E to get a permit for its stormwater discharges. See n. 6, infra. The upshot is that no CWA-grounded permit requirement applies to PG&E’s stormwater discharges.

B. RCRA, citizen suits, and anti-duplication

RCRA has a different focus than the CWA. RCRA “is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste.” Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996). Enacted in 1976, RCRA aimed to

eliminate[] the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. . . . [T]he relevant Committee believe[d] that [RCRA was] necessary if other environmental laws [were] to be both cost and environmentally effective. . . . [T]he federal government [was] spending billions of dollars to remove pollutants from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner . . . . often result[ing] in air pollution, subsurface leachate and surface run-off, which affect air and water quality. [RCRA aimed to] eliminate this problem and permit the

environmental laws to function in a coordinated and effective way.


As here relevant, RCRA provides for private enforcement via citizen suit. It allows, first, for private actions against entities “alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to [RCRA].” 42 U.S.C. § 6972(a)(1)(A). It also creates a private cause of action against a person “who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B). We refer to the latter RCRA section in this opinion as the “endangerment provision.”

The endangerment provision does not require a private plaintiff to show that the defendant’s actions violated any specific RCRA requirement or any RCRA-mandated order or permit. See Goldfarb v. Mayor & City Council of Baltimore, 791 F.3d 500, 505 (4th Cir. 2015); see also AM Int’l, Inc. v. Datacard Corp., DBS, 106 F.3d 1342, 1349 (7th Cir. 1997). Rather, the endangerment provision broadly permits relief “that ameliorates present or obviates the risk of future ‘imminent’ harms.” Meghrig, 516 U.S. at 486.

Notwithstanding RCRA’s overarching goals and its expansive citizen suit provisions, RCRA does not supersede conflicting requirements established under other environmental statutes, including the CWA. Toward that end, RCRA section 1006 contains two provisions addressing the potential duplicative regulation that might otherwise result from RCRA’s application alongside substantively overlapping environmental statutes.

First, the statute’s “integration” provision, RCRA section 1006(b)(1), requires:

The [EPA] Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of the Clean Air Act, the Federal Water Pollution Control Act [i.e., CWA], the Federal Insecticide, Fungicide, and Rodenticide Act, the Safe Drinking Water Act, the Marine Protection, Research and Sanctuaries Act of 1972, and such other Acts of Congress as grant regulatory authority to the Administrator. Such integration shall be effected only to the extent that it can be done in a manner

2. Although both RCRA section 1006 provisions, together, have sometimes been called RCRA’s “anti-duplication provisions,” see, e.g., S.F. Herring Ass’n v. Pac. Gas & Elec. Co., 81 F. Supp. 3d 847, 865 (N.D. Cal. 2015), we differentiate between the distinct provisions by referring only to section 1006(a) as RCRA’s “anti-duplication provision” and by using a separate moniker, “integration provision,” for RCRA section 1006(b)(1).
consistent with the goals and policies expressed in this chapter and in the other acts referred to in this subsection.

42 U.S.C. § 6905(b)(1) (emphasis added) (internal citations omitted).

Second, the statute’s “anti-duplication” provision, RCRA section 1006(a), states:

Nothing in this chapter shall be construed to apply to . . . any activity or substance which is subject to the Federal Water Pollution Control Act [i.e., CWA], the Safe Drinking Water Act, the Marine Protection, Research and Sanctuaries Act of 1972, or the Atomic Energy Act of 1954 except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

42 U.S.C. § 6905(a) (emphasis added) (internal citations omitted). The RCRA anti-duplication section is the statutory focus of this appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Pleadings and Fact Discovery

Ecological Rights Foundation (“EcoRights”) filed suit against PG&E under the citizen suit provisions of both the CWA and RCRA. See 33 U.S.C. § 1365(a); 42 U.S.C. § 6972(a)(1)(B). In its operative complaint, EcoRights alleged that PG&E violated the CWA and RCRA by discarding toxic wood treatment chemicals at thirty-one of its Northern California corporation yards and service centers. Those facilities “provide service and maintenance on [PG&E’s] electric and gas distribution system.” According to the complaint, PG&E uses the service yards to store and handle new, used, and discarded wooden utility poles that have been treated with a wood preservative called pentachlorophenol (“PCP”). PCP contains dioxins, chemical impurities known to increase cancer risk and cause “adverse non-cancer effects in animals and humans,” including reproductive harms.

Drilling, cutting, moving, and storing the treated wood, EcoRights alleged, leads to the spread of chemically treated sawdust and woodchips on the PG&E facilities’ grounds. Additionally, at some service facilities, PG&E treats new poles with PCP-infused oils and then cleans or stores the newly treated poles in a manner that allows excess oil to drip to the pavement. EcoRights further identified several methods of handling, storage, or disposal of solid waste disposal which may present an imminent and substantial endangerment to health and the environment in and around the Bays. EcoRights’ RCRA claim rests on the allegation that PG&E’s stormwater conveyance systems or vehicle tires carried the PCP-infused waste offsite, with the result that the waste ended up in the Bays.

The district court confined initial fact discovery to four of the thirty-one Northern California facilities listed in EcoRights’ complaint. The parties accordingly proceeded with discovery only as to one PG&E facility in Oakland, one in Hayward, and two in Eureka.

B. Summary Judgment Orders

After discovery concerning the four facilities, the parties filed cross-motions for partial summary judgment as to EcoRights’ standing. EcoRights’ RCRA claim was founded on PG&E’s “on-site waste disposal practices [that] present an imminent and substantial endangerment to health or the environment with respect to . . . San Francisco and Humboldt Bays.” Members of EcoRights filed declarations attesting that their aesthetic and recreational enjoyment of the Bays had been and would continue to be impaired by pollution traceable to PG&E discharges. Based on the member declarations, the district court concluded that EcoRights had organizational standing to pursue the RCRA claim.

The parties next filed cross-motions for summary judgment on EcoRights’ claim that stormwater discharges from the facilities violated the CWA. Citizen suits against private parties under the CWA are authorized only for alleged violations of an effluent standard or limitation imposed under the statute—here, an alleged failure to obtain required NPDES permits. See 33 U.S.C. § 1365(a). The district court held that, under EPA’s Phase I Regulations addressing industrial activity, 40 C.F.R. § 122.26(b)(14), PG&E was not required to obtain NPDES permits for stormwater discharges from the four facilities. The district court therefore granted PG&E’s motion for summary judgment on the CWA claim.

Cross-motions for summary judgment on the RCRA claim followed. The district court held “[t]he basic facts regarding PG&E’s handling of utility poles at its facilities . . . largely undisputed, at least for the purposes of [the] motion[s].” The undisputed evidence, the district court held, indicated that (1) PCP-laden oils drip off of new poles that are stored outdoors on uncovered racks; (2) used poles are sometimes cut into smaller pieces at the facilities, leaving PCP-treated sawdust on the ground; and (3) all retired, chopped-up poles are supposed to be stored in watertight waste bins, but such PCP-treated waste products are sometimes left directly on the ground. In sum, the district court concluded, PCP oils and PCP-treated wood waste end up on the ground at the PG&E facilities.

The district court divided its analysis of the RCRA claim into two parts, based on the two different “pathways” by which PCP-infused wastes allegedly travel offsite and into the Bays. The district court held, first, that the tire-tracking theory failed because EcoRights had not “come forward with
actual evidence, as opposed to speculation,” regarding vehicle tracking at PG&E sites. Second, the district court concluded that EcoRights’ stormwater-based pathway failed because "there is no question that stormwater discharged from point sources like the PG&E facilities is subject to regulation under the Clean Water Act,” and it interpreted RCRA’s anti-duplication provision to prevent the creation under RCRA of “an additional avenue to impose a different regulatory requirement.” These holdings applied only to the four facilities for which discovery had occurred, but the district court noted that “the conclusions presumptively apply equally to the remaining sites.” In so disposing of the case, the district court did not decide whether the PCP-infused materials were “solid wastes” within the meaning of RCRA, or whether PG&E’s handling or disposal of the materials may present an “imminent and substantial endangerment to health or the human environment.”

C. Appeal

EcoRights appeals the grant of summary judgment to PG&E on the RCRA claim only. Its primary assertion is that the district court erroneously interpreted RCRA’s anti-duplication provision, RCRA section 1006(a). See 42 U.S.C. 6905(a). EcoRights also appeals the denial of its motion for summary judgment on the RCRA claim with respect to both the stormwater and tire-tracking pathways.

EPA filed a brief as amicus curiae and appeared at argument in support of EcoRights. EPA maintains that PG&E did not identify an actual inconsistency between the CWA and RCRA, and that the district court therefore erred in holding that RCRA’s anti-duplication provision restricted the reach of EcoRights’ citizen suit under RCRA.

In its answering brief, PG&E disagrees with EcoRights and EPA as to the impact of the RCRA anti-duplication provision. PG&E also renews, with respect to the Hayward facility only, its argument that EcoRights lacks organizational standing to sue.

III. STANDING

We consider first whether EcoRights has standing to sue PG&E regarding PG&E’s disposal activities at its Hayward facility. It does.

To have organizational standing, at least one EcoRights member must “have standing to sue in [his] own right.” Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000); see also Warth v. Seldin, 422 U.S. 591, 511 (1975). Thus, EcoRights must show that (1) a member has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., TOC, Inc., 528 U.S. 167, 180–81 (2000) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–51 (1992)); see also Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1547–50 (2016).

PG&E maintains that EcoRights failed to demonstrate that any of its members suffered an injury in fact with respect to the Hayward facility. Not so.

EcoRights presented declarations from several of its members alleging particularized harms resulting from pollution in the San Francisco Bay. In these declarations, some EcoRights members reported they “avoid” local seafood “due to . . . concerns about pollution in San Francisco Bay.” A member identified “activities, such as wading or swimming in the Bay, that I will not do because I am concerned about being exposed to the pollutants in the Bay,” another expressed similar concerns about “risk to [her] daughter’s health in regularly swimming in San Francisco Bay given the presence of pollutants.” One member noted that alleged pollution in the Bay “decreases my enjoyment of sailing in San Francisco Bay and my enjoyment of viewing birds and other wildlife in the San Francisco Bay,” and other bird- and wildlife-watching members agreed. One member, summarizing her concerns, stated that despite “gain[ing] significant personal feelings of well-being, including relaxation and spiritual enrichment from time spent in unspoiled natural environments,” her “enjoyment of the Bay and its tributaries has been substantially diminished by . . . increasing knowledge of how polluted the Bay is, including from storm water runoff pollution.”

PG&E maintains that these injury allegations are too generalized, as such injuries may be shared by millions of people who live in or travel to the San Francisco Bay Area. That contention falls short.

“[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance.” Novak v. United States, 795 F.3d 1012, 1018 (9th Cir. 2015) (internal citations and quotation marks omitted). Rather, a grievance too “generalized” for standing purposes is one characterized by its “abstract and indefinite nature—for example, harm to the common concern for obedience to law.” Id. (internal citation and quotation marks omitted). Here, several EcoRights members have attested to concrete and particularized harm to their own “recreational, aesthetic, and spiritual” uses and enjoyment of “the waters of San Francisco Bay adjacent to Alameda County and Central San Francisco Bay.” That alleged injury is neither abstract nor indefinite, so the generalized grievance bar does not apply.

PG&E also proposes that for the alleged injury to be “credible,” EcoRights’ members must demonstrate that their
uses or enjoyment of San Francisco Bay are near PG&E's facilities. That contention too misses the mark.

“The ‘injury in fact’ requirement in environmental cases is satisfied if an individual adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant’s conduct.” *Pac. Lumber Co.* 230 F.3d at 1147.

A proximity concern arises only where “a plaintiff claiming injury from environmental damage [fails to demonstrate] use [of] the area affected by the challenged activity,” and instead only shows that she uses “an area roughly ‘in the vicinity’ of it.” *Lujan*, 504 U.S. at 565–66 (citation omitted) (emphasis added). Whether the members use an area near the source of environmental damage elsewhere is of no moment.

Here, EcoRights’ RCRA suit is based on alleged endangerment to San Francisco Bay as a whole posed by PG&E’s onsite waste disposal practices at its facilities. So it suffices for EcoRights to demonstrate concrete and particularized injuries to its members’ aesthetic and recreational enjoyment of San Francisco Bay as a whole.

At bottom, PG&E’s arguments appear to challenge as implausible the notion that polluted stormwater from the Hayward facility could possibly have an environmental impact on a body of water as large as San Francisco Bay. “Requiring the plaintiff to show actual environmental harm as a condition for standing,” however, “confuses the jurisdictional inquiry (does the court have power under Article III to hear the case?) with the merits inquiry (did the defendant violate the law?).” *Pac. Lumber Co.*, 230 F.3d at 1151.

Moreover, “[t]he ‘injury in fact’ requirement in environmental cases is not . . . reducible to inflexible, judicially mandated time or distance guidelines. . . .” *Id.* at 1148. For instance, in *Laidlaw*, a Sierra Club member who “claimed only that he ‘had canoed’ on the river some 40 miles down-stream from the incinerator” afforded the Sierra Club standing to bring a CWA action against the incinerator’s owner. *Pac. Lumber Co.*, 230 F.3d at 1149 (citing *Laidlaw*, 528 U.S. at 183).

By attesting to their reduced ability to enjoy eating local seafood in Bay Area restaurants, observing birds and other wildlife from the air or from the wetlands around Oakland Airport, or sailing and swimming safely in San Francisco Bay, among other harms, EcoRights members have alleged concrete and particularized injuries from the alleged migration of PCP and dioxins from PG&E’s Hayward facility to the affected area, San Francisco Bay. Whether that inflow of pollutants from PG&E’s Hayward facility is actually significant enough to harm the affected area is a merits question, not a standing question.

IV. STORMWATER PATHWAY

We turn now to the core of this appeal—whether PG&E was entitled to summary judgment with respect to EcoRights’ stormwater RCRA claim in light of RCRA’s anti-duplication provision. The district court reasoned that stormwater discharge into navigable waters is “subject to [the CWA]” under RCRA’s anti-duplication provision, 42 U.S.C. § 6905(a), in the sense that EPA could require NPDES permits for the types of stormwater discharges like those challenged here, although it has not.

The anti-duplication provision in RCRA section 1006(a) does not reach so far. The language, context, and persuasive authorities interpreting that provision, we conclude, require us to determine whether the CWA actually imposes any specific statutory “requirements” on PG&E’s stormwater discharges, and, if so, whether those “requirements” are “inconsistent” with any possible remedy under EcoRights’ RCRA citizen suit. 42 U.S.C. § 6905(a). That inquiry reveals that, because the CWA and its implementing regulations do not require PG&E to obtain a permit for its stormwater discharges, there is no CWA-grounded requirement here imposed, and so none can be inconsistent with the RCRA citizen suit section.

A. Insufficiency of Potential Regulation As a Trigger of RCRA’s Anti-Duplication Provision

To construe RCRA’s anti-duplication provision, we first consider whether its meaning is clear. See *Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936, 941 (9th Cir. 2017). “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.” *Geo–Energy Partners–1983 Ltd. v. Salazar*, 613 F.3d 946, 956 (9th Cir. 2010) (internal quotation marks and citation omitted).

1. Text of RCRA’s Anti-Duplication Provision

RCRA’s anti-duplication provision, section 1006(a), initially curtails RCRA’s application with respect to “any activity or substance which is subject to” the CWA, the Safe Drinking Water Act, the Atomic Energy Act, and the Marine Protection, Research and Sanctions Act. 42 U.S.C. § 6905(a). The provision then goes on to carve out a substantial exception: RCRA can overlap with the four named statutes to the extent that its application is “not inconsistent with the requirements” of those other statutes. See *id.*

“[I]nconsistent” is not defined in section 1006(a) or anywhere else in RCRA. See *Goldfarb*, 791 F.3d at 509–10. After consulting the dictionary definition of the term, the Fourth Circuit concluded that the “CWA must require something fundamentally at odds with what RCRA would otherwise require” to be “inconsistent” for the purposes of RCRA’s anti-duplication provision. *Id.* at 510 (citations omitted). We agree. According to the dictionary definition of “inconsistent,” the application of RCRA must be “incompatible, incongruous, [or] inharmonious” with CWA requirements for the anti-duplication provision to apply. Webster’s Third New Int’l Dictionary (1971) at 1144; accord Webster’s Third New Int’l Dictionary (2002) at 1144. Put another way, section 1006(a) does not bar RCRA’s application unless require-
ments under RCRA and the CWA are “[m]utually repugnant or contradictory,” such that the application of “one implies the abrogation or abandonment of the other.” Black’s Law Dictionary 907 (4th ed. rev. 1968); see also Black’s Law Dictionary (10th ed. rev. 2014) (defining “inconsistent” as “[l]acking agreement among parts; not compatible with another fact or claim”).

The anti-duplication provision also does not provide a definition of the term “requirements.” But the reference to the “requirements” of certain statutes must refer to legal requirements. A legal requirement is “a rule of law that must be obeyed,” Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1171 (9th Cir. 2009) (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 445 (2005)) (internal quotation marks omitted)—in other words, “[s]omething that must be done because of a law or rule; something legally imposed, called for, or demanded.” Black’s Law Dictionary (10th ed. 2014); see also Black’s Law Dictionary 1468 (4th ed. rev. 1968) (defining “require” as “[t]o direct, order, demand, instruct, command, claim, compel, request, need, exact”).

Taking the terms together, then, RCRA’s anti-duplication provision does not bar RCRA’s application unless that application contradicts a specific mandate imposed under the CWA (or another statute listed in RCRA section 1006(a)).

2. Context of RCRA’s Anti-Duplication Provision

The pertinent contexts—RCRA section 1006 as a whole and RCRA’s overall statutory scheme—support this reading. Two provisions in RCRA are meaningful only if the CWA’s potential application to a waste product does not, on its own, bar RCRA’s application.

First, the CWA and two other statutes listed in RCRA section 1006(a) are also listed in RCRA section 1006(b)(1), RCRA’s “integration” provision. See 42 U.S.C. § 6905(b)(1). This provision requires EPA to administer RCRA in a coordinated manner, “avoid[ing] duplication, to the maximum extent practicable, with the appropriate provisions” of the CWA, the Safe Drinking Water Act, the Marine Protection, Research and Sanctuaries Act of 1972, and other environmental statutes. Id. But the provision directs EPA to integrate application or enforcement of the various statutes only when doing so is “consistent with the goals and policies expressed” in RCRA and the other environmental statutes. Id.

By including the CWA in the integration provision, Congress recognized that there would be overlapping coverage between the CWA and RCRA, the anti-duplication provision notwithstanding. This understanding of RCRA’s integration provision is hard to reconcile with PG&E’s proposed interpretation of the anti-duplication provision. If RCRA’s application were prohibited as to all matters potentially regulable under the CWA, as PG&E supposes, the integration clause in RCRA section 1009(b)(1) would serve little purpose.

Second, PG&E’s interpretation would also render meaningless specific exclusions from RCRA coverage. RCRA extends only to “solid wastes.” 42 U.S.C. § 6903(27); see also 42 U.S.C. § 6903(5) (defining hazardous waste as a type of solid waste); Meghrig, 516 U.S. at 483. The statute’s definition of “solid wastes” specifically excludes “industrial discharges which are point sources subject to permits under [CWA section 402] or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 . . . .” 42 U.S.C. § 6903(27) (emphasis added). If any potential regulation of any substance under the CWA or the Atomic Energy Act were enough to trigger the RCRA anti-duplication provision and so bar RCRA coverage, RCRA’s narrower exclusion of certain substances actually “subject to permits under” the CWA and the Atomic Energy Act would be superfluous. Id.

3. Persuasive Authorities

In line with our analysis of the statute’s language and context, most other courts have applied RCRA’s anti-duplication provision only where there is an inconsistency with specific mandates, such as permit requirements and consent orders, imposed under a listed statute. See Edison Elec. Inst. v. U.S. EPA, 996 F.2d 326, 337 (D.C. Cir. 1993); S.F. Herring Ass’n v. Pac. Gas & Elec. Co., 81 F. Supp. 3d 847, 866 (N.D. Cal. 2015); Cnty. Ass’n for Restoration of the Env’t, Inc. v. George & Margaret LLC, 954 F. Supp. 2d 1151, 1160 (E.D. Wash. 2013); Raritan Baykeeper, Inc. v. N.L. Indus., Inc., No. 09-cv-4117, 2013 WL 103880, at *27 (D.N.J. Jan. 8, 2013) (unpublished).

Similarly, courts generally have held that there is no “inherent inconsistency of applying RCRA to activities already regulated by [one of the statutes listed in RCRA section 1006(a)].” Vernon Vill., Inc. v. Gottier, 755 F. Supp. 1142, 1154 (D. Conn. 1990) (emphasis omitted). For example, in Edison Electric Institute, the D.C. Circuit rejected the defendant’s “generalized claim that the Agency’s interpretation [which applied RCRA to “impose additional burdens on nuclear power generators”] interferes with the ‘primary purpose’ of the AEA.” 996 F.2d at 337 (citations omitted).

Additionally, in 1984, the Department of Justice’s (“DOJ”) Office of Legal Counsel (“OLC”) determined that RCRA’s anti-duplication provision does not come into play simply because there are “overlapping regulatory schemes.” See Application of the Res. Conservation and Recovery Act to the
Dep’t of Energy’s Atomic Energy Act Facilities, 8 Op. O.L.C. 6, 11, 13, 1984 WL 178349 (1984) (“OLC Opinion”). The OLC Opinion was issued to address a disagreement between EPA and the Department of Energy concerning whether waste treatment and disposal activities at the Department of Energy’s nuclear facilities were subject to RCRA regulations. Id. at 6. The OLC sided with EPA, concluding that the “requirements” language of RCRA section 1006(a) “implies some prescriptive content, i.e., specific directives that require an agency or a person to take or refrain from taking certain actions, to follow certain procedures, or to meet certain standards and regulations.” Id. at 16. And, said OLC, section 1006(a)’s “not inconsistent” language requires determining whether there is a conflict “between individual regulations or requirements imposed by” the statutes listed in section 1006(a) and the would-be requirements imposed under RCRA. Id. at 11, 13, 16. Under the OLC interpretation—as under ours—the potential for inconsistent overlap is insufficient; only an actual, and actually inconsistent, requirement triggers the RCRA anti-duplication provision.5

These persuasive authorities support our reading of the text of RCRA section 1006(a) and its statutory context. RCRA’s anti-duplication provision does not bar RCRA’s application unless the specific application would conflict with identifiable legal requirements promulgated under the CWA or another listed statute.

B. Application of RCRA’s Anti-Duplication Provision Here

We next consider whether PG&E has identified such legal requirements.

What CWA legal requirements might apply here? PG&E has not identified any CWA permits that establish particular requirements for its stormwater discharges. That gap is not an oversight. The Clean Water Act does not require PG&E to get a permit for these discharges.6 And, although the CWA provides EPA authority to require such permits under its Phase II authority, the Agency, following the protocol set out by Congress for making decisions, see 33 U.S.C. § 1342, has decided not to require such permits.

Given these circumstances, PG&E’s argument centers on EPA’s decision not to impose a Phase II CWA permit requirement on discharges like its own. That decision, PG&E maintains, bars any application of RCRA, including the RCRA endangerment provision. We cannot agree.

CWA section 402(p)(6) directed EPA to establish a “comprehensive program” for Phase II-covered stormwater discharges 33 U.S.C. § 1342(p)(6). But the reach of that “comprehensive program” was limited to the discharges EPA “designate[s] . . . to be regulated.” Id. The CWA instructs EPA to “establish priorities” for implementing the comprehensive program. Id. The statute thus authorizes EPA to develop a stormwater discharge regulatory program by regulating Phase II-covered stormwater sources in stages, relegating some sources to a lower regulatory “priority” and leaving some un-designated altogether. Id.; see Envtl. Def. Ctr., 344 F.3d at 875. Under such an incremental regulatory structure, EPA’s decision not to impose a permit requirement on stormwater discharges like PG&E’s is not a “rule of law that must be obeyed,” Gorman, 584 F.3d at 1171 (internal quotation marks and citation omitted). It is, instead, a decision to impose no such “rule of law,” id., even though EPA is empowered to do so. There is no “mutual[] repugnan[cy]” between the current absence of a permit requirement and compliance with RCRA as enforced through a citizen suit. Black’s Law Dictionary 907 (4th ed. rev. 1968).

Notably, the Phase II Regulations indicate that EPA considered RCRA’s application to stormwater discharges while deciding the types of stormwater given priority for designation. The agency decided to exclude at least some discharges from its Phase II Regulations because RCRA and other statutes would still apply to those discharges.

In EPA’s final Phase II Regulations, the Agency designated two types of stormwater discharges as subject to permits: discharges from small municipal sewer systems and discharges associated with small construction activity. See Phase II Regulations, 64 Fed. Reg. at 68,722. In the lead up therefor assume it correct for purposes of this case. See, e.g., Wagner v. Prof’l Eng’s in Cal. Gov’t, 354 F.3d 1036, 1040–41 (9th Cir. 2004) (assuming the district court’s unappealed merits determination was correct and proceeding to the remaining remedies question on appeal).

5. DOJ, not EPA, issued the OLC Opinion. As that opinion is not an agency interpretation of its own enabling statute, we do not afford it Chevron deference. See Ass’n of Civilian Technicians, Silver Barons Chapter v. Fed. Labor Relations Auth., 200 F.3d 590, 592 (9th Cir. 2000). And, under Auer v. Robbins, while “we defer to an agency’s interpretation of its own regulation, advanced in a legal brief, unless that interpretation is ‘plainly erroneous or inconsistent with the regulation,’” “no deference [is] warranted to an agency interpretation of what [are], in fact, Congress’ words.” Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 208, 210 (2011) (citing Gonzales v. Orzene, 546 U.S. 243, 257 (2006))). It is thus not enough to trigger Auer deference that DOJ, acting as counsel for EPA in its amicus appearance in this case, favorably cites the OLC Opinion. And we are not aware of any EPA regulations, rulings, or specific administrative practices that rely on the OLC’s 1984 interpretation. We therefore treat the OLC Opinion similarly to the persuasive authority provided in decisions from other courts—that is, as some corroboration that our own reasoning is sound. Cf. Andersen v. DHL Ret. Pension Plan, 766 F.3d 1205, 1213 (9th Cir. 2014) (relying on a government amicus brief’s position as “reasonable and persuasive” even though not entitled to deference).

6. The district court’s determination that PG&E’s stormwater discharges do not fall within the ambit of EPA’s regulations of industrial sources (so-called Phase I regulations) has not been appealed. We therefore assume it correct for purposes of this case. See, e.g., Wagner v. Prof’l Eng’s in Cal. Gov’t, 354 F.3d 1036, 1040–41 (9th Cir. 2004) (assuming the district court’s unappealed merits determination was correct and proceeding to the remaining remedies question on appeal).

7. CWA section 402(p)(6) provides in full: “Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5) [of CWA section 402(p)] which designate stormwater discharges, other than those discharges described in paragraph (2) [of CWA section 402(p)], to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.” 33 U.S.C. § 1342(p)(6).
to those regulations, EPA considered whether it should also
designate other types of industrial and commercial sources
as requiring permits. Because the Phase I Regulations classi-
fied “industrial sources” based on standardized industry clas-
sifications, EPA first considered the industrial sources with
environmental impacts most similar to the sources regulated
under Phase I. See id. at 68,779–80.

The agency determined that many of these “unregulated”
industrial and commercial sources had “a high likelihood of
exposure of pollutants.” Id. at 68,780. Nevertheless,

EPA assessed the likelihood that pollutant sources are
regulated in a comprehensive fashion under other envi-
ronmental protection programs, such as programs under the
Resource Conservation and Recovery Act (RCRA) or the
Occupational Health and Safety Act (OSHA). If EPA concluded that the category of sources was suffi-
ciently addressed under another program, the Agency
rated that source category as having “low” potential for
adverse water quality impact.

Id. Ultimately, EPA did

not designate any additional industrial or commercial
category of sources [in its Phase II Regulation,] either
because EPA currently lack[ed] information indicating
a consistent potential for adverse water quality impact or
because of EPA’s belief that the likelihood of adverse
impacts on water quality is low, with some possible ex-
ceptions on a more local basis.

Id.8

The Phase II Regulations’ preamble further underscores
that the Regulations addressed undesignated sources only
to the extent that they “encourage[d] control of storm water
discharges from [undesignated industrial and commercial
sources] through self-initiated, voluntary [best management
practices], unless the discharge (or category of discharges) is
designated for permitting by the permitting authority.” Id. A
policy of encouraging voluntary practices imposes no legal
requirement. See Gorman, 584 F.3d at 1171.

In sum, neither CWA section 402(p)(6) nor the Phase II
Regulations promulgated under it impose any legal require-
ment on undesignated sources of stormwater discharges.
Instead, the Regulations rest in part on the assumption that
RCRA and other statutes would still apply to undesignated
sources. As there is no requirement, there can be no inconsis-
tent requirement barring RCRA’s application.

C. Municipal Permits

Our principal question answered, we proceed to the re-
main ing issues on appeal. We consider PG&E’s alternative
anti-duplication contention—that its stormwater discharges
are subject to CWA requirements via the municipal storm
sewer system permits required of and held by local gov-
ernment agencies—and conclude it fares no better than the
broader position we have rejected.9

As a preliminary matter, EcoRights points to evidence
that at least some PG&E discharges at its Oakland facility
do not flow through municipal storm sewer systems at all.
According to EcoRights’ expert, the facility’s drainage map
indicates two points at which its stormwater discharges en-
ter navigable waters, including one point that “discharges
directly into San Leandro Bay.” PG&E’s Environmental Op-
erations Supervisor for the Oakland facility similarly testified
that the facility’s storm drain “feeds directly into the bay.”
This evidence indicates that any potential requirements under
Oakland’s storm water permit are not relevant to RCRA’s ap-
plication to the Oakland facility.

In any event, although the permits and ordinances to which
PG&E alludes are judicially noticeable public records, see
Fed. R. Evid. 201(b), PG&E has not in its briefs presented
any specific factual or legal argument concerning require-
ments—consistent or inconsistent with RCRA—imposed
on it under those permits and ordinances. We “will not do
an [appellee’s] work for it, either by manufacturing its legal
arguments, or by combing the record on its behalf for factual
support.” W. Radio Servs. Co. v. Qwest Corp., 678 F.3d 970,
979 (9th Cir. 2012) (citations omitted).

PG&E highlights a few requirements that the San Fran-
cisco Bay Region Municipal Regional Stormwater Permit
imposes on the cities of Oakland and Hayward as permittees.
Under the regional permit, PG&E states, the cities must “im-
plement an industrial and commercial site control program”
and develop “an Enforcement Response Plan (ERP) to pre-
vent discharge of pollutants and impact on beneficial uses of
receiving waters.” PG&E also points to a Eureka ordinance
enacted as part of that city’s compliance with California’s
general NPDES permit for small municipal storm systems;
that ordinance prohibits “illicit connections” and “establishes
requirements for reducing pollutants in storm water.”

At this level of generality, such requirements are not in-
consistent with the injunctive relief EcoRights seeks under
RCRA against PG&E. Nor is it obvious how some of these
NPDES requirements for municipalities would be relevant to
a private party’s—here, PG&E’s—legal responsibilities. As
PG&E has not pointed to any specific stormwater discharge

8. EPA, appearing in this case as amicus curiae, relies on this
rulemaking history in support of its position that RCRA can and does
apply to point-source industrial stormwater discharges not subject to
CWA permit requirements under the Phase II Regulations.

9. In its answering brief, PG&E makes this municipal permit argu-
ment only obliquely. Although we consider the argument on the
merits, we note PG&E came close to waiving it through inadequate
briefing. See Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir. 1994)
(holding that “[w]e review only issues which are argued specifically and
distinctly in a party’s . . . brief,” and finding the plaintiff’s broad
challenge to a provision of the Federal Aviation Act “waived due to his
failure to present a specific, cogent argument for our consideration”).
requirement with which it must comply imposed by or pursuant to any CWA municipal storm system permits, it was not entitled to summary judgment on the basis of those permits.

V. TIRE TRACKING PATHWAY

Finally, we address the district court’s conclusion that EcoRights “failed to come forward with evidence sufficient to create a triable issue of fact that the waters of San Francisco or Humboldt Bays are endangered by [PCP] dispersed from the corporation and service yards by tracking on vehicle tires,” as there was “no evidence of actual transmission of the pollutants from PG&E’s facilities to municipal stormwater systems via the . . . tire tracking [pathway], much less of resulting Bay pollution at a level sufficient to support a RCRA claim.” We agree with this assessment of the summary judgment record.

In a RCRA endangerment citizen suit like this one, the plaintiff must show: [1] the defendant is “any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, [2] who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste [3] which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B); see also ERF I, 713 F.3d at 514. Whether PG&E allowed PCP-infused wastes to travel offsite via vehicle tires implicates the second prong of EcoRights’ RCRA substantial endangerment claim—i.e., whether PG&E contributed to the handling or transporting of PCP-infused waste through attachment to vehicle tires.

The second endangerment prong requires the plaintiff to show “that a defendant be actively involved in or have some degree of control over the waste disposal process.” Hinds Inv., L.P. v. Angioli, 654 F.3d 846, 851 (9th Cir. 2011). So EcoRights had to present evidence showing that PG&E is involved in or has control over the actual waste disposal activities challenged as imminently dangerous. Only at the third prong, with regard to the likely health or environmental impact of those activities, does a risk-based showing—whether the activities “may present an imminent and substantial endangerment to health or the environment”—suffice. 42 U.S.C. § 6972(a)(1)(B) (emphasis added).

Viewing the facts in the light most favorable to EcoRights, there is no evidence that PG&E trucks actually picked up contaminants on their tires and carried them offsite. EcoRights’ expert witness on the matter testified only that tire-tracking “could be a concern,” based on his “experience at other facilities where tracking is an issue.” Those other sites, which were undergoing cleanup processes for dioxin contamination, had controls in place to reduce tire-tracking. Such controls included rumble strips—to vibrate off accumulated materials as trucks pass over them—and wheel washing. The EcoRights expert witnessed no rumble strips or wheel washing while onsite at the PG&E facilities. Moreover, although company policy recommends wheel-washing as a best practice, PG&E employees admitted that the practice is rarely implemented.

But EcoRights’ expert did not observe any trucks driving through areas where there may have been contaminants. Nor did he witness any tire track-marks that indicated the spread of contaminated soils or water. Finally, EcoRights’ expert did not sample for contamination the areas where trucks were likely to pass. Moreover, he provided no standard for the level of contamination necessary to require tire-tracking controls.

Given these investigatory gaps and the “could have” language used by its expert, we conclude that EcoRights’ evidence identified tire-tracking only as a potential mechanism by which PG&E might have contributed to the transportation and dispersal of PCP-infused wastes. That showing does not establish that PG&E actually contributed to the handling, transportation, or disposal of solid waste via vehicle tire-tracking. Summary judgment for PG&E was warranted as to that aspect of EcoRights’ RCRA claim.

VI. ECORIGHTS’ MOTION FOR SUMMARY JUDGMENT

The district court did not decide whether the PCP-infused wood or oil wastes at PG&E sites were “solid wastes” subject to RCRA. It also did not determine whether PG&E’s present or past handling, storage, treatment, transportation, or disposal of those wastes, overall, creates an imminent and substantial endangerment to health or the environment because of its impact on the Bays.10 Because the district court did not reach these merits-related questions, we remand so that they may be considered. See Voggenthaler v. Maryland Square LLC, 724 F.3d 1050, 1066 (9th Cir. 2013).

VII. CONCLUSION

The district court erred in applying RCRA’s anti-duplication provision, RCRA section 1006(a), with respect to the stormwater pathway. The absence of a CWA permit requirement does not trigger RCRA’s anti-duplication provision. Further, PG&E has failed to identify any legal requirements under municipal permits applicable to it and inconsistent with EcoRights’ requested RCRA relief. We therefore reverse the district court’s grant of summary judgment to PG&E and denial of summary judgment to EcoRights with respect to the stormwater pathway. We remand for the district court to consider EcoRights’ arguments with respect to the stormwater pathway that the relevant wastes are “solid wastes” and that PG&E’s actions present an imminent and substantial endangerment to health or the environment under RCRA. Finally, we affirm the district court’s grant of partial summary judgment as to the tire-tracking pathway.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

10. In particular, the district court did not address the admissibility or persuasiveness of expert evidence concerning PCP-contamination levels at PG&E’s sites.
I. FACTS AND PROCEDURAL HISTORY

In 2008, Qwest initiated disciplinary proceedings against Clemens, a long-time employee and active union member. For a period longer than the American Civil War, Clemens and Qwest contested his work performance in internal proceedings and interviews, in arbitration, and before the Washington State Human Rights Commission.

In September 2013, Clemens sued Qwest for race discrimination and retaliation in violation of Title VII (42 U.S.C. §§ 2000e et seq.). After removal from state to federal court, the parties consented to a jury trial before a magistrate judge. The jury found for Clemens on his retaliation claim and awarded him over $157,000 for lost wages and benefits, over $275,000 for emotional distress, and $100,000 in punitive damages. The district court reduced the latter two awards to $300,000 to comply with Title VII’s cap on compensatory and punitive damages. See 42 U.S.C. § 1981a(b)(3)(D).

The district court also granted Clemens’s motions for attorney’s fees and, in part, an interest award. However, it denied his request for a “tax consequence adjustment” or “gross up” to compensate for increased income-tax liability resulting from his receipt of his back-pay award in one lump sum. The district court explained that “[g]iven the lack of authorization from the Ninth Circuit, the split among other Circuits on this issue, and the parties’ disagreement regarding an appropriate methodology for calculating the tax consequences of a lump sum payment,” it declined “to exercise its discretion to ‘gross up’ plaintiff’s damages award.” Clemens now challenges that decision.

II. DISCUSSION

A. Standard of Review

Whether Title VII permits gross-up adjustments is a legal question which we review de novo. See, e.g., Ileto v. Glock, Inc., 565 F.3d 1126, 1131 (9th Cir. 2009).

B. Title VII Grants Courts the Authority To Award Back-Pay “Gross Ups”

Title VII exists in large part “to make persons whole for injuries suffered on account of unlawful employment discrimination.” Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); accord, e.g., Rivera v. NIBCO, Inc., 364 F.3d 1057, 1069 (9th Cir. 2004) (“Title VII’s central statutory purpose is eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”) (internal quotation marks omitted); Kraszewski v. State Farm Gen. Ins. Co., 912 F.2d 1182, 1184–86 (9th Cir. 1990) (endorsing granting of equitable relief under Title VII where it is “necessary to put the victim in the place he would have been—to make him whole”); Thorne v. City of El Segundo, 802 F.2d 1131, 1133–34 (9th Cir. 1986) (to the same effect). And Title VII provides courts with considerable equitable discretion to ensure adequate compensation. See 42 U.S.C. § 2000e-5(g)(1) (authorizing “any other equitable
relief as the court deems appropriate”); see also, e.g., Albermarle, 422 U.S. at 418–21; Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 364–65 (1977) (confirming that Title VII “vest[s] broad equitable powers in . . . courts”; Franks v. Bowman Transp. Co., 424 U.S. 747, 763–64 (1976) (same); EEOC v. Gen. Tel. Co. of the Nw., 599 F.2d 322, 334–35 (9th Cir. 1979) (“Congress armed the courts with full equitable powers in Title VII cases. . . . The courts will be alert to adjust their remedies so as to grant the necessary relief.”).

Indeed, we recently reiterated that “[i]t is the historic purpose of equity to secure complete justice,” and that “[i]n the context of a claim brought under a federal statute intended to combat discrimination, the phrase ‘complete justice’ has a clear meaning: ‘the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.’” Bayer v. Neiman Marcus Grp., Inc., 861 F.3d 853, 873 (9th Cir. 2017) (some alterations in Bayer) (footnote, citations, and some internal quotation marks omitted) (quoting Gen. Tel. Co., 599 F.2d at 334, and Albemarle, 422 U.S. at 418); see also Kraszewski, 912 F.2d at 1185–86. Back pay is one manifestation of this principle, see Loeffler v. Frank, 486 U.S. 549, 558 (1988), as is prejudgment interest on back-pay awards, see id. at 557 (recognizing that the courts of appeals unanimously hold “that Title VII authorizes prejudgment interest as part of [back-pay awards]”).

But unfortunately for successful Title VII plaintiffs, back-pay awards are taxable. See Comm’r v. Schleier, 515 U.S. 323, 327 (1995); see also 26 U.S.C. § 104(a)(2) (restricting income-tax exclusion for personal-injury awards to those “received . . . on account of personal physical injuries or physical sickness” (emphasis added)). And a lump-sum award will sometimes push a plaintiff into a higher tax bracket than he would have occupied had he received his pay incrementally over several years. Clemens claims that very side effect here. He argues that the taxman’s expanded cut effectively denies him what Title VII promises—full relief that puts Clemens where he would be had the unlawful employment discrimination never occurred.

As the district court recognized, we are not the first tribunal to confront this issue. The Third, Seventh, and Tenth Circuits have all held that district courts have the discretion to “gross up” an award to account for income-tax consequences. See Eshelman v. Agere Sys., Inc., 554 F.3d 426, 440–43 (3d Cir. 2009) (“[A] district court may, pursuant to its broad equitable powers granted by [42 U.S.C. § 2000e-5], award a prevailing employee an additional sum of money to compensate for the increased tax burden a back pay award may create.”); EEOC v. N. Star Hosp., Inc., 777 F.3d 898, 903–04 (7th Cir. 2015) (agreeing with Third and Tenth Circuits that “without the tax-component award, [the plaintiff] will not be made whole, a result that offends Title VII’s remedial scheme”); Sears v. Atchison, Topeka & Santa Fe Ry., Co., 749 F.2d 1451, 1456–57 (10th Cir. 1984) (upholding a tax gross up because under Title VII, “the trial court has discretion in fashioning remedies to make victims of discrimination whole”); see also Thomas R. Ireland, Tax Consequences of Lump Sum Awards in Wrongful Termination Cases, 17 J. Legal Econ. 51, 53–54 (2010) (explaining the circuits’ approaches to equitable tax adjustments).

The D.C. Circuit, however, does not permit such gross ups. In a per curiam opinion (and a mere one paragraph), it rejected gross ups because it knew “of no authority for such relief” and “[g]iven the complete lack of support in existing case law for tax gross-ups,” it “decline[d] so to extend the law in this case.” Dashnow v. Pena, 12 F.3d 1112, 1116 (D.C. Cir. 1994) (per curiam), abrogated on other grounds by Rann v. Chao, 346 F.3d 192, 197–98 (D.C. Cir. 2003). Of course, that paragraph ignored the Tenth Circuit’s decision in Sears and the Supreme Court’s reasoning in cases like Albermarle, Loeffler, and Franks, as well as Title VII’s equitable underpinnings.

We join the thoughtful analysis of the Third, Seventh, and Tenth Circuits, and reject the matchbook musings of the D.C. Circuit. In so doing, we also agree with those courts that the decision to award a gross up—and the appropriate amount of any such gross up—is left to the sound discretion of the district court. As the Third Circuit put it, “we do not suggest that a prevailing plaintiff in discrimination cases is presumptively entitled to an additional award to offset tax consequences. . . . The nature and amount of relief needed to make an aggrieved party whole necessarily varies from case to case,” Eshelman, 554 F.3d at 443, and the “circumstances peculiar to the case” drive that decision, id. (quoting Albemarle, 422 U.S. at 424).

There may be many cases where a gross up is not appropriate for a variety of reasons, such as the difficulty in determining the proper gross up or the negligibility of the amount at issue. In any case, the party seeking relief will bear the burden of showing an income-tax disparity and justifying any adjustment. We express no opinion on whether a gross up is appropriate here—that is for the district court to decide on remand.

Acknowledging the circuit split, Qwest puts up little resistance to the majority view. It argues for the first time on appeal that monetary relief is legal, not equitable. That argument is both waived, see Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[A]n appellate court will not consider issues not properly raised before the district court.”), and at odds with the controlling Title VII case law discussed above. Qwest also suggests that only a jury can award a back-pay tax adjustment—another argument that is both waived because it is made to our court first, see id., and wrong under Title VII case law, see Lutz v. Glendale Union High Sch., 403 F.3d 1061, 1068–69 (9th Cir. 2005) (“[T]here is no right to have a jury determine the appropriate amount of back pay under Title VII . . . . Instead, back pay remains an equitable remedy to be awarded by the district court in its discretion.”).
Qwest finally argues that the district court did exercise its discretion in refusing Clemens a tax gross up. While we appreciate that the district court’s ruling on this issue was somewhat opaque, what is clear is that the court declined to consider a gross up in part because the Ninth Circuit had never authorized one. Consistent with all of the courts that have thoughtfully addressed this issue, we do so now.

The district court’s order denying an adjustment is vacated and the case remanded for further proceedings.

VACATED AND REMANDED.


No. 16-15742, 16-16184
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:10-cv-03910-MEJ
Appeal from the United States District Court for the Northern District of California
Maria-Elena James, Magistrate Judge, Presiding
Argued and Submitted September 11, 2017
San Francisco, California
Filed November 3, 2017
Opinion by Judge Tallman

*The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

COUNSEL
Daniel Aguilar (argued) and H. Thomas Byron III, Appellate Staff; Brian Stretch, United States Attorney; Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellants.
David R. Williams (argued), Ann M. Koppuzha, and Michael J. Shepard, Hogan Lovells US LLP, San Francisco, California, for Plaintiff-Appellee.

OPINION
TALLMAN, Circuit Judge:

Bernardo Mendia, a naturalized U.S. citizen, was detained in county jail when Immigration and Customs Enforcement (“ICE”) agents John Garcia and Ching Chang lodged an immigration detainer placing a federal hold to pick him up when state authorities were ready to release him. Mendia sued Garcia, Chang, and the Department of Homeland Security under Bivens1 and the Federal Torts Claims Act (“FTCA”), 28 U.S.C. § 1346(b), asserting violations of his constitutional rights as a U.S. citizen. The district court found that the in-

individual defendants were not entitled to qualified immunity on Mendia’s *Bivens* claims, and this interlocutory appeal followed. Discovery proceeded on the remaining claims in district court. After the notice of appeal on the *Bivens* ruling was filed, however, the district court sanctioned Mendia for egregious misconduct during that discovery and ultimately dismissed his FTCA claims. Defendants then immediately moved in our court for a limited remand to allow the district court to consider applying the sanction to Mendia’s remaining claims. See Federal Rule of Appellate Procedure (“FRAP”) 12.1(b).

Under FRAP 12.1(b), a court of appeals may remand a case to the district court, while still retaining jurisdiction, for the limited purpose of allowing that court to make a final ruling on the matter based on an earlier indicative ruling. This procedure is employed in conjunction with Federal Rule of Civil Procedure (“FRCP”) 62.1, which permits a party to request an “indicative ruling” from the district court when that court lacks jurisdiction in the matter based on a pending appeal. Unlike our sister circuits, we have never addressed whether a limited remand is permissible without first moving in the district court under FRCP 62.1 for a targeted “indicative ruling.” We hold that it is permissible, and in this case, a limited remand is appropriate so the government can move for dismissal of the remaining claims.

I

Plaintiff-appellee Mendia alleges he was being held in pretrial detention in Contra Costa County, California, when the two ICE agents lodged an immigration detainer, erroneously believing he was subject to removal. Mendia sued the agents and the Department of Homeland Security under *Bivens* and the FTCA. The individual defendants then moved to dismiss the *Bivens* claims on qualified immunity grounds, which the court denied. After Garcia and Chang filed an interlocutory appeal from that denial, the case proceeded to discovery on Mendia’s remaining FTCA claims.

During discovery, Mendia repeatedly failed to comply with orders to compel discovery. His misconduct included failing to produce requested documents to support his damages calculations, refusing to attend meet and confer sessions, and failing to appear for his own deposition. When he finally appeared at his rescheduled deposition, Mendia was completely uncooperative and claimed he was unable to recall basic information such as his immediate family members’ names, his education and work histories, his current address, or whether he had ever owned a bank account or paid taxes. After giving him several warnings, imposing a $3500 fine, and ordering Mendia to show cause as to why further sanctions should not be imposed for his repeated noncompliance with his discovery obligations, Magistrate Judge Maria-Elena James finally dismissed Mendia’s case with prejudice on May 31, 2017. See Fed. R. Civ. P. 37(b)(2) (A)(v). Defendants’ pending appeal, however, deprived the district court of authority to dismiss the suit in its entirety. As soon as the district court entered its partial dismissal of the FTCA claims, defendants moved for a limited remand under FRAP 12.1(b) to file a motion in the district court to enter the same sanction as to the *Bivens* claims consistent with the May 31 order.

II

In opposing defendants’ motion, Mendia maintains that a limited remand is unavailable here because defendants never asked for an indicative ruling from the district court under FRCP 62.1. In other words, Mendia reads FRAP 12.1 to require, as a prerequisite to a limited remand, a formal FRCP 62.1 motion. Mendia further argues that, even if we decide a prior FRCP 62.1 motion is not required, we should still decline to construe the district court’s May 31 order as an “indicative ruling” that it would impose the same sanction as to Mendia’s remaining *Bivens* claims on remand. We find these arguments unpersuasive.

A

FRAP 12.1 permits us to remand a case to the district court, while retaining jurisdiction, for the limited purpose of allowing the district court to take action consistent with an earlier indicative ruling. The advisory committee notes to FRAP 12.1 explain that the rule is intended to work in conjunction with FRCP 62.1, which allows a party to ask the district court for an “indicative ruling” on an issue the court is without jurisdiction to decide because of a pending appeal. Fed. R. App. P. 12.1 advisory committee’s notes to 2009 adoption; see also *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (holding that the filing of a notice of appeal “confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal”).

FRAP 12.1’s text clearly contemplates that its procedures in tandem with FRCP 62.1. FRAP 12.1(a) provides that if a party makes a FRCP 62.1 motion in district court, and the district court “states either that it would grant the motion or that the motion raises a substantial issue,” the party is to notify the circuit clerk. Then, “the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal.” FRAP 12.1(b). The parties are to notify the court of appeals when the district court has decided the motion after remand. Fed. R. App. P. 12.1(b).

B

Although this is an issue of first impression for us, other circuits have not treated a FRCP 62.1 motion as a prerequisite for ordering a limited remand. Instead, courts have been willing to construe district court actions as indicative rulings even when no FRCP 62.1 motion (or, in the criminal context, a resentencing motion under 18 U.S.C. § 3582(c)) was filed. *See, e.g., Smitherman v. Bayview Loan Servicing, LLC*, 683 F. App’x 325, 326 (5th Cir. 2017) (construing a district court order vacating its judgment and remanding to state court as
an indicative ruling under FRCP 62.1(a)(3)); United States v. Cardoza, 790 F.3d 247, 248 (1st Cir. 2015) (treating a district court’s sua sponte resentencing order as an indicative ruling); United States v. Maldonado-Rios, 790 F.3d 62 (1st Cir. 2015) (construing a district court’s grant of defendant’s resentencing motion as an indicative ruling); Mendez v. Republic Bank, 725 F.3d 651, 656 (7th Cir. 2013) (remanding case under FRAP 12.1 in anticipation of FRCP 60(b) motion).

In Maldonado-Rios, for example, the First Circuit noted that while the parties should have followed the procedures contemplated in FRAP 12.1, the district court “could hardly have more clearly stated ‘that it would grant the motion,’ as Rule 12.1 requires, given that the district court purported to grant the requested relief directly.” 790 F.3d at 65. Accordingly, the court construed the district court’s action as an indicative ruling, and granted a limited remand to permit the district court to enter its modification order. Id. The appellate court further noted that allowing a limited remand under the circumstances would serve FRAP 12.1’s purpose of promoting judicial efficiency. Id. (“[The rule] provides an efficient means of resolving an issue on appeal that the district court is willing to render moot.”). Therefore, in the interest of effectively using our time and resources, as well as a means of legitimate case management, we join our sister circuits in holding that a FRCP 62.1 motion is not a prerequisite for a limited remand under FRAP 12.1(b) where the district court has already indicated it would grant a motion for the requested relief.

C

Next, we must determine whether the district court’s ruling in this case indicates “that it would grant the motion” when it “did not ‘actually issue an indicative ruling.’” Fed. R. App. P. 12.1 advisory committee’s notes to 2009 adoption; Cardoza, 790 F.3d at 248 (quoting Maldonado-Rios, 790 F.3d at 65). Mendia maintains that the district court has not indicated that it would impose the same sanction related to Mendia’s Bivens claims. Mendia points out, for example, that the May 31 order fails to make mention of Mendia’s Bivens claims. The district court did, however, say that Mendia’s refusal to cooperate in discovery affected all of his constitutional claims. The court also observed that, because Mendia claims U.S. citizenship derivatively through his mother, his refusal to provide even basic information about his mother (with whom he remains in frequent contact) struck at the “core” of Mendia’s action—specifically, his contention that the defendants “violated his constitutional rights by placing an immigration detainer on him despite his United States citizenship.” That is sufficient for us to infer that Mendia’s intransigent behavior during discovery was related to seeking relevant information concerning all of his claims, and it gives us sufficient insight into how the district court would rule on remand.

Although the district court did not explicitly state it would have dismissed Mendia’s Bivens claims had it retained jurisdiction over those claims, it would be reasonable for the district court to decline to make such a statement, knowing it lacked authority to address them while this appeal was pending, and that such a ruling would have been in excess of its power at that time. We are satisfied the district court made its intentions sufficiently clear in the May 31 order and we will treat that order as an indicative ruling for the purposes of applying FRAP 12.1.

We retain jurisdiction of the case and remand Mendia’s Bivens claims for the limited purpose of permitting the government to move, and the district court to rule, on the application of its earlier order. The appeal on the merits shall be held in abeyance without prejudice to each party’s position on the merits pending the results of the limited remand we have ordered. Consistent with FRAP 12.1(b), the parties shall notify the circuit clerk when the district court has decided the motion on remand.

Each party shall bear its own costs.

REMANDED with instructions.
ORDER

Judges Wardlaw and Gould AMEND their majority opinion in the above captioned case filed September 20, 2017 as follows:

The paragraph on page 55 of the slip opinion that begins with the sentence <Finally, Browning lists in a footnote of his brief a litany of other asserted deficiencies in Pike’s representation.> shall be deleted in its entirety and replaced with the following language:

<Finally, in arguing for an expansion of the COA, Browning lists a number of other alleged deficiencies in Pike’s representation. Because we find that Browning’s ineffective assistance of counsel claim succeeds on other grounds, we do not here assess these other alleged deficiencies.>

Existing footnote 19 shall be inserted in its entirety after <Pike’s representation.> in the above-inserted text.

Judge Callahan objects to any basis for expanding the COA, does not concur in amending the majority opinion, and stands by her dissent.

Judges Wardlaw, Gould, and Callahan vote to deny the Petition for Panel Rehearing.

The Petition for Panel Rehearing is DENIED. No further petitions for panel rehearing or rehearing en banc will be accepted.
California Courts of Appeal

Cite as 17 C.D.O.S. 10582

JOANNE LICHTMAN et al., Plaintiffs and Appellants,
v. 
SIEMENS INDUSTRY INC., Defendant and Respondent.

No. B265373
In The Court of Appeal of the State of California
Second Appellate District
Division Five
(Los Angeles County Super. Ct. No. BC492694)
APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Reversed and remanded with directions.
Filed November 2, 2017

COUNSEL
Shernoff Bidart Echeverria Bentley, Gregory L. Bentley, Steven Schuetze; Shernoff Bidart Echeverria, Michael J. Bidart, Steven Schuetze; The Ehrlich Law Firm, Jeffrey I. Ehrlich, for Plaintiffs and Appellants Joanne Lichtman, Douglas Evans, and Samuel Evans.

OPINION
INTRODUCTION
On the night of plaintiffs’ accident, there were no batteries in a traffic signal’s battery backup unit. During a power outage, plaintiffs’ vehicle entered the dark intersection and was struck by another car. Plaintiffs sued the entity responsible for maintaining the battery backup system, alleging its negligence proximately caused their injuries. The trial court granted defendant’s motion for summary judgment on the basis defendant owed no duty of care to plaintiffs as a matter of law. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND
In 2004, the City of Glendale (the City) installed battery backup units for traffic signals at various intersections to promote community safety by providing power in the event of a power outage.1 Four years later, the City contracted with Siemens Industry Inc., doing business as Republic ITS (defendant), to perform preventive and extraordinary maintenance, service, and repairs on electrical traffic-related devices at intersections in the City, including the battery backup system.

According to the City’s traffic engineer, Khang Vu, the City expected defendant to provide notification when there was a problem with a traffic signal, including whether a backup system battery required replacement at a particular location. Defendant needed authorization from the City’s traffic engineer to replace a battery.

On January 12, 2011, the battery backup unit for the traffic signal at the Glendale Avenue/Broadway intersection indicated “low voltage.” Batteries at this and other locations were failing to hold their charges, and defendant removed a number of units for testing. In August 2011, a unit with new batteries and a new battery temperature sensor was installed at one intersection to see if the problem had been resolved. Defendant reinstalled a battery backup unit in the Glendale Avenue/Broadway traffic signal at the same time, but did not insert any batteries. The unit remained inoperable until batteries were inserted 11 months later, in July 2012.

On September 4, 2011, a power outage caused the traffic signal at the Glendale Avenue/Broadway intersection to go dark. Because there were no batteries in the backup unit for that intersection, the traffic signal did not function in any direction. At approximately 11:00 p.m., the vehicle driven by Joanne Lichtman, with her spouse Douglas Evans and son Samuel Evans (plaintiffs) as passengers, entered the intersection. Plaintiffs’ car was broadsided on the driver’s side by another vehicle, careened sideways, and hit a pole. All plaintiffs were injured, Lichtman severely.

Plaintiffs sued several entities to recover damages for their personal injuries.2 Against defendant, plaintiffs asserted three causes of action based on negligence theories. They resolved their suit against all parties except defendant.

Defendant moved for summary judgment, contending it owed no duty of care to plaintiffs and its actions were not a proximate cause of plaintiffs’ injuries. The trial court ruled as a matter of law defendant did not owe plaintiffs a duty of care, but also concluded plaintiffs raised a triable issue of material fact as to proximate cause. The first ruling was disposi-

DISCUSSION
The elements for negligence causes of action are the existence of a duty of care, breach of that duty, and an injury proximately caused by the breach. (Ladd v. County of San Mateo (1996) 12 Cal.4th 913, 917.) The defendant in a negligence action is entitled to summary judgment if it demonstrates “one or more elements of the cause of action, even if

1. Notwithstanding deposition testimony by its own personnel, defendant disputes that traffic signals and a battery backup system are in place to promote public safety rather than merely maintain traffic.
2. The other defendants were the seller of the battery backup system and the entity that serviced and maintained the City’s power grid. The City was not a party.
not separately pleaded, cannot be established.” (Code Civ. Proc., § 437c, subd. (p)(2).)

The trial court found as a matter of law plaintiffs could not establish a duty of care and granted summary judgment in defendant’s favor. That ruling presents a question of law for our de novo review. (Cabral v. Ralphs Grocery Co. (2011) 51 Cal.4th 764, 770-771 (Cabral).)

For the reasons that follow, we reverse. Because the trial court was not presented with cross-motions for summary judgment, we do not find defendant owed plaintiffs a duty of care as a matter of law. Rather, we hold defendant failed to establish it was entitled to judgment as a matter of law. (Laabs v. Southern California Edison Co. (2009) 175 Cal. App.4th 1260, 1269 (Laabs).)

I. DUTY — OVERVIEW


When the duty question concerns “the management of [a defendant’s] person or property,” courts look to Civil Code section 1714. (See Cabral, supra, 51 Cal.4th at p. 768.) Per Civil Code section 1714, everyone owes everyone else a duty to exercise ordinary care “in the management of his or her person or property.” Accordingly, the existence of a duty is the rule.

Unless there is a statutory exception to the general rule of duty, courts fashion one only “where ‘clearly supported by public policy.’” (Cabral, supra, 51 Cal.4th at p. 771.) Almost 50 years ago, in Rowland v. Christian (1968) 69 Cal.2d 108 (Rowland), our Supreme Court identified the public policy considerations that may result in a court’s conclusion that no duty exists: “[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.” (Id. at p. 113.)

A duty running from a defendant to a plaintiff may arise from contract, even though the plaintiff and the defendant are not in privity. (Biakanja v. Irving (1958) 49 Cal.2d 647 (Biakanja); Bily v. Arthur Young & Co. (1992) 3 Cal.4th 370.) Under these circumstances, the existence of a duty is not the general rule, but may be found based on public policy considerations.

In Biakanja, decided a decade before Rowland, our Supreme Court identified the factors that may result in a court’s conclusion a duty exists: “The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.” (Biakanja, supra, 49 Cal.2d at p. 650.)

It is no coincidence many of the factors courts consider to recognize an exception to the general duty rule in Civil Code section 1714 mimic those courts consider to impose a duty to a third person when the issue is the negligent breach of contractual obligations. Also, in the Biakanja context, the consideration concerning “the extent to which the transaction was intended to affect the plaintiff” serves as a bridge between the absence of privity and liability, particularly in situations where the only claimed losses are economic. (Biakanja, supra, 49 Cal.2d at p. 650.)

Not surprisingly, when one turns to common law, the considerations are again similar. Section 324A articulates what is typically referred to as the Good Samaritan rule or the negligent undertaking theory of liability.5 (Paz v. State of California (2000) 22 Cal.4th 550, 559 (Paz).) Section 324A is applied to determine the “duty element” in a negligence action where the defendant has “specifically . . . undertaken to perform the task that he is charged with having performed

4. Biakanja involved economic losses only, but the evolution in legal reasoning that allowed the Biakanja court to permit a plaintiff with only economic losses to recover for negligent performance of a contract where the plaintiff and defendant are not in privity was based on case law that permitted a personal injury plaintiff not in privity with the defendant to recover. (Biakanja, supra, 49 Cal.2d at p. 649; see also Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP (2014) 59 Cal.4th 568, 574 (“the significance of privity has been greatly eroded over the past century.”).)

5. Section 324A provides, “One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if [¶] (a) his failure to exercise reasonable care increases the risk of such harm, or [¶] (b) he has undertaken to perform a duty owed by the other to the third person, or [¶] (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.”

3. The “special-relationship-based duty” typically applies to hold a defendant liable for the criminal acts of third persons. (Delgado v. Trax Bar & Grill (2005) 36 Cal.4th 224, 235 (Delgado).) It also applies in pure economic loss cases. (J’Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 804 (J’Aire).)
negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully.” (Artiglio, supra, 18 Cal.4th at pp. 614-615.) The negligent undertaking theory of liability applies to personal injury and property damage claims (Mukthar v. Latin American Security Service (2006) 139 Cal.App.4th 284, 290 (Mukthar); FNS Mortgage Service Corp. v. Pacific General Group, Inc. (1994) 24 Cal.App.4th 1564, 1572), but not to claims seeking only economic loss (State Ready Mix, Inc. v. Moffatt & Nichol (2015) 232 Cal.App.4th 1227, 1235). Our Supreme Court has described the negligent undertaking and special relationship doctrines as “related but separate.” (Delgado, supra, 36 Cal.4th at pp. 248-249.) A finding of liability to third persons under the negligent undertaking theory “requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor’s failure to exercise reasonable care resulted in physical harm to the third persons; and (5) either (a) the actor’s carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor’s undertaking.” (Paz, supra, 22 Cal.4th at p. 559.) Unless all three predicate alternatives in the fifth factor are negated, a defendant may be found to owe a duty to third persons under the negligent undertaking theory.

II. ANALYSIS

A. Civil Code Section 1714

This case does not involve defendant’s management of its own property. Accordingly, our inquiry does not involve a determination as to whether public policy supports an exception to the general duty rule. (Cabral, supra, 51 Cal.4th at p. 771; Rowland, supra, 69 Cal.2d at p. 112.) Nonetheless, appellate decisions analyzing the Cabral/Rowland factors are useful for our purposes because of the considerable overlap with the Biakanja factors. (Forment v. Lloyd Termite Control Co. (2010) 185 Cal.App.4th 595, 604.) In this context, we briefly digress to examine White v. Southern Cal. Edison Co. (1994) 25 Cal.App.4th 442 (White), a decision relied upon by defendant and the trial court. In White, the plaintiff’s moped collided at night with a left-turning van in an intersection. The nearest streetlight, which was more than 130 feet away, was not functioning at the time of the accident and the plaintiff contended the lack of illumination proximately caused his injuries. The plaintiff sued the public utility that owned and maintained the streetlight. The trial court granted the public utility’s motion for summary judgment and this court affirmed.

White was decided after Rowland. This Division acknowledged Civil Code section 1714’s general duty rule applied to public entities, which on occasion are found liable to injured plaintiffs. (White, supra, 25 Cal.App.4th at pp. 447-448.) We also recognized public policy considerations on occasion justify a departure from the general duty rule and result in the conclusion that a public utility owed no duty. (Id. at pp. 448-449.) We framed the issue in White as follows: “Does an electric utility company owe a duty to motorists injured in motor vehicle collisions caused in part by an inoperative streetlight which the utility [owns and] has contracted to maintain?” (White, supra, 25 Cal.App.4th at p. 447.) Our court then engaged in a Rowland analysis and concluded an exception to the general rule of duty was appropriate.

White is distinguishable from this case in two principal respects. First, White involved the general duty rule in Civil Code section 1714. Second, the defendant was a public utility. Nothing in the White decision suggests a private entity like defendant shares the same policy considerations as a public utility.

B. Biakanja, supra, 49 Cal.2d 647

Biakanja guides us in cases involving contracts between a defendant and a person other than the plaintiff. As already mentioned, the absence of privity presents no hurdle. Rather, we examine the Biakanja factors to determine whether defendant established as a matter of law that it owed no duty to plaintiffs.

I. Biakanja Factors and Analysis

a. The Extent to Which the Transaction Was Intended to Affect Plaintiffs

Whether one views a battery backup system as promoting public safety or merely regulating traffic flow, the units help drivers and pedestrians safely traverse traffic intersections during power outages. The contract between defendant and the City was clearly intended to, and does, affect plaintiffs. This factor fails to support the conclusion that defendant owed no duty as a matter of law.

b. Foreseeability of Harm

Drivers approaching a signalized intersection in the dark when the traffic signals are not working are supposed to treat the intersection as a four-way stop and proceed only when it is safe. (Veh. Code, § 21800, subd. (d)(1).) As in many aspects of daily life, however, “common experience shows they do not always do so.” (Cabral, supra, 51 Cal.4th at p. 775.) It is foreseeable motorists and pedestrians entering an intersection when the traffic signals are not operating due to a power outage, particularly at night, may become confused and suffer harm if the battery backup unit is not operational. The foreseeability factor does not support an absence of duty as a matter of law.
c. The Degree of Certainty that Plaintiffs Suffered Injury

Unquestionably, these plaintiffs sustained injuries in the intersection collision. Examining this factor from a broader perspective, the likelihood of injury when vehicles collide in an intersection normally controlled by traffic signals is not subject to reasonable dispute. (See, e.g., Laabs, supra, 175 Cal.App.4th at p. 1278.) This factor also does not support an absence of duty as a matter of law.

d. The Closeness of the Connection Between

Defendant’s Conduct and the Injury Although not in so many words and not in the context of a Cabral/Rowland/Biakanja analysis, the trial court addressed this factor and found a triable issue of material fact as to whether defendant’s conduct was a proximate cause of plaintiffs’ injuries. We agree. Defendant cannot rely on this factor to conclude there is an absence of duty as a matter of law.

e. Moral Blame Attached to Defendant’s Conduct

This factor traditionally requires little discussion. “Negligence in the execution of contractual duties is generally held to be morally blameworthy conduct.” (National Union, supra, 171 Cal.App.4th at p. 47.) The National Union holding vis-à-vis moral blame is noteworthy because that case involved economic loss only. (See also J’Aire, supra, 24 Cal.3d at p. 805 [another case involving only economic loss, where our Supreme Court noted defendant’s “lack of diligence . . . was particularly blameworthy since it continued after the probability of damage was drawn directly to [the defendant’s] attention”]; Mintz v. Blue Cross of California (2009) 172 Cal.App.4th 1594, 1612 (Mintz) [“‘moral blame’ from an erroneous decision to withhold a medical treatment is equally apparent”; case involved personal injury and emotional distress damages].) Again, this factor does not justify concluding as a matter of law that defendant owed no duty to plaintiffs.

f. Preventing Future Harm

Cabral, supra, 51 Cal.4th at pages 781-782, explained, “The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible. The policy question is whether that consideration is outweighed, for a category of negligent conduct, by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability.”

In this case, the analysis is primarily one of common sense. A battery backup system exists to keep traffic signals operational for a period of time during a power outage. The City paid defendant to maintain the battery backup system in working condition. Under these circumstances, the public policy to prevent future harm outweighs any perceived unfairness in imposing liability should the trier of fact deter-
defendant negligently failed to install the batteries, a trier of fact could reasonably conclude defendant’s conduct increased the risk of harm to plaintiffs.

Nor did defendant negate as a matter of law element (c), that “the harm is suffered because of the reliance of the other [in this case, the City] or the third persons upon the undertaking.” A reasonable inference from the evidence is that the City relied on the battery backup system to illuminate traffic signals when portions of the electrical grid were dark as the result of a power outage. The City was confronted with a known risk—power outages will happen and traffic signals will stop operating. The City’s response to ameliorate the harmful effects of that risk was to install a battery backup system and enter into a contract with defendant to maintain it. The City could reasonably expect defendant would perform its contractual obligations in a non-negligent manner.

The undisputed facts here present a classic scenario for consideration of the negligent undertaking theory. This theory of liability is typically applied where the defendant has contractually agreed to provide services for the protection of others, but has negligently done so. For example, the defendant in Mukthar, supra, 139 Cal.App.4th 282 contracted with a convenience store owner to provide armed, uniformed security guards between 9:00 p.m. and 5:00 a.m. No guard was on duty after 9:00 p.m. on the evening the store clerk was assaulted by several customers. The injured clerk sued the security company, and the trial court granted the defendant’s motion for summary judgment.

The Court of Appeal reversed, noting, “the harm that befell [the plaintiff] was precisely the kind of harm that [the defendant] was there to prevent, i.e., an assault on a store employee.” (Mukthar, supra, 139 Cal.App.4th at p. 291.) The Court of Appeal then explained, “it is a reasonable inference that the presence of an armed guard in close proximity to [the clerk] would have prevented the assault. Whether the trier of fact will actually draw that inference [is left for another day].” (Id. at p. 292.)

Mukthar provides a good analytical contrast to the facts in Dekens v. Underwriters Laboratories Inc. (2003) 107 Cal. App.4th 1177 (Dekens). The plaintiffs’ decedent in Dekens repaired small appliances. He died of mesothelioma, contracted as a result of exposure to asbestos, which was then a not-uncommon component in small electrical appliances. His heirs sued Underwriters Laboratories (U.L.) on a negligent undertaking theory, contending the defendant undertook a certification process to safeguard the health of consumers, including those individuals who repaired U.L.-certified appliances. (Id. at p. 1179.)

The defendant successfully moved for summary judgment, and the Court of Appeal affirmed. The appellate panel posed two threshold questions: “Did U.L. undertake to provide services [to the decedent] and, if so, what was the scope of that undertaking?” (Dekens, supra, 107 Cal.App.4th at p. 1182.) The Court of Appeal agreed U.L. tested and certified appliances for safety based on electrical shock, heat, and fire, but found the undertaking did not include a “guarantee [of] safety from cancer-causing asbestos.” (Id. at p. 1187.) The appellate panel explained, “U.L. met its burden on summary judgment by showing through admissible evidence that it never undertook to test small appliances for medical safety or to certify the appliances would not cause cancer. Plaintiffs failed to show a triable issue of material fact regarding the existence and scope of any such undertaking by U.L. The trial court properly granted summary judgment.” (Id. at p. 1180.)

Unlike the Dekens circumstances, defendant here did not meet its burden on summary judgment to show it never undertook to maintain the City’s battery backup system. Mukthar is instructive on this point. Plaintiffs’ injuries were caused by a nighttime intersection collision during a power outage. Defendant was not responsible for the power outage, but by contract it undertook to maintain the battery backup unit at the intersection to prevent—or at least mitigate—the foreseeable and increased risk of intersection collisions when an entire area is dark as the result of a power grid failure. A reasonable inference from the evidence before the trial court is that an operational battery backup unit would have prevented the collision. (Mukthar, supra, 139 Cal.App.4th at p. 292.) Under a section 324A analysis, the evidence did not support the trial court’s conclusion that no duty existed as a matter of law.

In this regard, defendant’s reliance on Paz, supra, 22 Cal.4th 550 is misplaced. The plaintiff in Paz was injured in a traffic accident in an intersection all parties agreed was in a dangerous condition. Sometime before the accident, a developer sought approval for a residential project near the intersection. The City of Los Angeles conditioned permit approvals for the housing project on the developer’s agreement to signalize the intersection and improve lane striping. (Id. at pp. 554-555.) The developer agreed to those terms, but the accident occurred before the developer obtained all the necessary permits for the signal and street work.

The plaintiff sued the developer and its contractors (collectively, nongovernmental defendants) under negligence theories, asserting they negligently delayed installing the traffic signals. The trial court granted summary judgment for the nongovernmental defendants and the Court of Appeal majority reversed, basing its decision on a Biakanja analysis. (Paz, supra, 22 Cal.4th at pp. 553-554, 557.)

The Supreme Court reversed the decision of the Court of Appeal and directed that judgment be entered in favor of the nongovernmental defendants. The Supreme Court majority opinion framed and analyzed the duty issue as follows: “This case concerns the duty private contractors owe the general public when they undertake work that might affect an allegedly dangerous condition of public property. Consequently, we consider the negligent undertaking theory of liability articulated in Restatement Second of Torts, section 324A (section 324A), and its application in this context.” (Paz, supra, 22 Cal.4th at p. 553.) The Paz majority assumed the first four section 324A elements were satisfied. (Paz, supra, 22 Cal.4th...
at p. 559.) Turning its attention to the alternate predicates in the fifth element, a majority of the justices concluded none of the three alternative predicates for the application of section 324A was met. Insofar as alternative (a) was concerned, no evidence supported an inference the nongovernmental defendants’ conduct increased the risk of physical harm to plaintiff beyond that which already existed in the dangerous intersection. (Paz, supra, 22 Cal.4th at p. 560.) The nongovernmental defendants did not undertake to perform a duty the city owed to the plaintiff, eliminating alternative (b). (Id. at p. 561.) And there was no evidence the plaintiff or the city relied on the nongovernmental defendants to install the traffic signals by any particular date, negating application of alternative (c). (Ibid.)

Here, as in Paz, the first four section 324A factors tend to support the conclusion that defendant owed a duty of care to plaintiffs, but these factors are not determinative of the duty issue. Unlike the situation in Paz, the evidence in this case raises inferences that defendant increased the risk of harm during a power outage and the City relied on the battery backup system to promote public safety. No more is needed to defeat summary judgment on the duty issue.

III. STATUTORY IMMUNITY NOT APPLICABLE

In presenting the motion for summary judgment, defendant did not engage in analyses under Cabral, Rowland, Biakanja or section 324A. Instead, defendant asserted the absence of duty was established by a statutory presumption applicable to public entities (Gov. Code, § 830.4), the holding in Chowdhury v. City of Los Angeles (1995) 38 Cal.App.4th 1187 (Chowdhury), and the results in White, supra, 25 Cal. App.4th 442 and Paz, supra, 22 Cal.4th 550.

For the reasons we have already discussed, White and Paz are distinguishable. Defendant’s reliance on Government Code section 830.4 to provide the statutory exception to the general duty rule in Civil Code section 1714 is also unavailing.

Government Code section 830.4 provides in part, “A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals . . . .” This provision is part of the Government Claims Act (Gov. Code, § 810 et seq.) and provides immunity to government entities under certain circumstances. It does not provide a blanket immunity to government entities under all circumstances, however. (De La Rosa v. City of San Bernardino (1971) 16 Cal.App.3d 739, 746 [“although a public entity is not liable for failure to install traffic signs or signals . . . . when it undertakes to do so and invites public reliance upon them, it may be held liable for creating a dangerous condition in so doing”].) Moreover, defendant did not cite, nor have we located, any authority to extend this statutory immunity to a private entity alleged to have been negligent. To the contrary, a defendant that “is not a ‘public entity’ . . . is not entitled to claim the immunity set forth in the Tort Claims Act.” (Lawson v. Superior Court (2010) 180 Cal.App.4th 1372, 1397 (Lawson).)

Defendant’s reliance on Chowdhury, supra, 38 Cal. App.4th 1187 is similarly flawed. Chowdhury involved a vehicle collision that occurred in an intersection when traffic signals were not functioning due to a power outage. The plaintiffs successfully sued the city on the theory it failed to correct a dangerous condition of public property. The Court of Appeal reversed.

The sole defendant in Chowdhury was a public entity. The appellate panel first found the public property was not, by statute, in a dangerous condition (Gov. Code, § 830) and then applied the city’s statutory immunity under the Government Claims Act to reverse the judgment in the plaintiffs’ favor. (Chowdhury, supra, 38 Cal.App.4th at p. 1195.)

Chowdhury provides no assistance to defendant. As noted, the statutory immunities available to public entities do not extend to private entities that contract with them. (Lawson, supra, 180 Cal.App.4th at p. 1397.) More to the point, however, Chowdhury was resolved on the basis of statutory immunity, not the legal question of duty. As our Supreme Court held in Davidson v. City of Westminster (1982) 32 Cal.3d 197, “the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.” (Id. at pp. 201-222.)

IV. CONCLUSION

“The existence of a duty of care is a question of law decided on a case-by-case basis.” (M.W. v. Panama Buena Vista Union School Dist. (2003) 110 Cal.App.4th 508, 516.) Here, whether the duty question is analyzed under either Biakanja or section 324A criteria, defendant failed to establish as a matter of law the absence of a duty to plaintiffs. Defendant was not entitled to summary judgment.

DISPOSITION

The judgment is reversed with directions to vacate the judgment in favor of defendant and enter a new order denying defendant’s motion for summary judgment. Plaintiffs are awarded their costs on appeal.

CERTIFIED FOR PUBLICATION

DUNNING, J.*

We concur: KRIEGLER, Acting P. J., BAKER, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
Cite as 17 C.D.O.S. 10588

TAMMY FERNANDES, Plaintiff and Respondent,

v.

RAJ SINGH et al., Defendants and Appellants.

No. C080264
In The Court of Appeal of the State of California
Third Appellate District
(Sacramento)
(Super. Ct. No. 34-2013-00146694-CU-BC-GDS)
APPEAL from a judgment of the Superior Court of Sacramento County, David W. Abbott, Judge. Affirmed.
Filed October 5, 2017
Modified and Certified for Pub. November 2, 2017

COUNSEL

Raj Singh, in pro. per., for Defendant and Appellant Raj Singh.

Kiran Rawat, in pro. per.; Cable Gallagher and Keith D. Cable for Defendant and Appellant Kiran Rawat, individually and as Trustee of the Sita Ram Trust.

Law Offices of Andrew Wolff, Andrew Wolff, David Lavine; Siegel & Callahan and Caleb Andrew Rush for Plaintiff and Respondent.

ORDER GRANTING PUBLICATION;
MODIFICATION OF OPINION;
AND DENIAL OF PETITION FOR REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

Defendants Raj Singh et al. have filed petitions for rehearing with this court. Respondent Fernandes and nonparties City of Elk Grove, County of Sacramento, and City of Sacramento have filed requests for publication with this court. It is hereby ordered:
1. Defendants’ petitions for rehearing are denied.
2. The opinion in the above-entitled matter filed October 5, 2017, was not certified for publication in the Official Reports. For good cause it now appears the opinion should be published in the Official Reports, and it is so ordered.
3. It is also ordered that the opinion filed herein be modified as follows:

On page 14 in footnote 8, a sentence is to be inserted at the end of the footnote reading: “To the extent Singh relies on the $600 cap on statutory damages provided by Code of Civil Procedure section 1174, subdivision (b), that provision applies to unlawful detainer actions, and he has not explained how it is relevant to this regular civil action based on wrongful eviction and related claims.” The footnote shall now read:

8. Singh also argues that because the trial court imposed statutory penalties it could not award punitive damages under Civil Code section 3294. But Civil Code section 1942.5, subdivision (h), provides that statutory penalties are “in addition to any other remedies” provided by law. Singh’s reliance on Cyrus v. Haveson (1976) 65 Cal. App.3d 306 is also unhelpful. That case held malice was not well-pled, and also addressed a forcible entry claim for which statutory damages were then capped at three times actual damages. (Id. at pp. 316-317.) In this case Fernandes pleaded and proved malice, and several torts not subject to that damages cap. (See e.g., id. at p. 316 [conversion]; Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1055-1056 [retaliatory eviction].) To the extent Singh relies on the $600 cap on statutory damages provided by Code of Civil Procedure section 1174, subdivision (b), that provision applies to unlawful detainer actions, and he has not explained how it is relevant to this regular civil action based on wrongful eviction and related claims.

This modification does not change the judgment.

Blease, Acting P. J.

Nicholson, J., Duarte, J.

OPINION

Tammy Fernandes successfully sued vexatious litigant Raj Singh and his wife Kiran Rawat individually and as trustees of the Sita Ram— or “Sitaram”—Trust (Trust), for wrongful eviction and related claims. She obtained an award of compensatory and punitive damages, as well as costs and attorney fees. All defendants filed a joint notice of appeal through counsel. While Rawat and the Trust remain represented by counsel on appeal, Singh now represents himself.1

On appeal, Rawat claims error in the trial court’s denial of her motion to vacate the judgment based on lack of service, and attacks the punitive damage award. Singh also challenges the punitive damage award, disputes service on Rawat, and contends the attorney fee award was excessive. Finding no merit in defendants’ claims, we shall affirm.

1. Singh’s vexatious litigant status is explained in Singh v. Lipworth (2014) 227 Cal.App.4th 813 (Singh). (See also Singh v. Lipworth (2005) 132 Cal.App.4th 40.) Singh’s former attorney, Keith Oliver, mentioned again post, was later disbarred, in part for failing to pay the sanctions we ordered for filing a frivolous appeal in Singh. (See In re Oliver, State Bar Court No. 14-O-03153 (Sep. 9, 2015) p. 6.)
BACKGROUND

On June 17, 2013, Fernandes sued Singh and Rawat, both as individuals and as trustees of the Trust, alleging (among other theories) breach of the warranty of habitability, conversion of personal property, and wrongful eviction. The lawsuit followed three unlawful detainer complaints filed by defendants after Fernandes exercised her right to complain about the substandard conditions of her rental unit.

Former attorney Oliver filed an answer “for Defendants,” denying the allegations and raising the affirmative defense that Fernandes breached the rental agreement. He also filed a cross-complaint “for Defendants,” purportedly in the name of “Raj Singh, on behalf of himself and all others similarly situated.”

On January 23, 2014, Singh substituted himself in propria persona. He then began to file various bizarre pleadings.

Trial on Liability

The trial court’s March 26, 2015 statement of decision found as follows.

Singh held himself out as the owner of the property when he rented it to Fernandes in 2010, although the property was not habitable. On November 12, 2010, Singh filed an unlawful detainer action against her by using a false name to evade the prefiling requirements of the vexatious litigant statutes. That case was dismissed for “nonappearance of the parties, though Singh, accompanied by attorney Paul Hoff, was present when the case was called for trial.” On September 20, 2011, Singh filed a second unlawful detainer action via counsel Hoff, naming the Trust as plaintiff and identifying himself as the landlord. Fernandes prevailed and obtained a conditional judgment reducing her rent and ordering the Trust to repair the premises. “Singh was present at this hearing as the agent for the trust, accompanied by attorney Hoff.” At a November 21, 2011 progress hearing on the repairs, no repairs had been undertaken or completed. On that date, Hoff dropped out of the case, and Singh unsuccessfully moved to dismiss it.

On April 11, 2012, Singh filed a third unlawful detainer action against Fernandes, listing himself and Rawat as a trustee for the Trust. He falsely stated an amount of unpaid rent (disregarding the conditional judgment), filed a fraudulent proof of service, took her default, obtained an eviction order, had the sheriff evict her, and then changed the locks. Fernandes returned home after working a graveyard shift as a waitress at a Denny’s restaurant to find herself locked out, with deputies barring her entrance, so she could not “retrieve even her most rudimentary belongings” including “necessities of life, like food and clothing.” She had nowhere to live, stayed with friends, and struggled to keep her job.

On April 30, 2013, a County of Sacramento code officer inspected the property at the request of subsequent tenants, and found “the very same defects present when Fernandes” was living there, and noted that Singh refused to make repairs and tried to serve a three-day notice to quit on the current occupants, misstating the date.

Singh never complied with a court order to return the property Fernandes had left in her unit, although she found some of her property in a trash can. The estimated value of the missing property was nearly $21,000. Her ordeal at Singh’s hands caused Fernandes “great emotional distress.”

The trial court found “Singh rented uninhabitable premises to Fernandes at an exorbitant rental rate and then retaliated against her when she complained about the uninhabitable conditions. His conduct is utterly indefensible.” The total award for compensatory damages was $87,894.

The trial court found four retaliatory acts: the three unlawful detainer actions, plus the repeated demands for payment of rent despite the conditional judgment in favor of Fernandes. The statutory penalty was $2,000 per act, or $8,000. (See Civ. Code, § 1942.5, subd. (f).) By clear and convincing evidence, the trial court found Singh acted with oppression, fraud or malice, both actual and implied, based on his “despicable conduct . . . with a willful and conscious disregard of the rights or safety of Fernandes. Moreover, clear and convincing evidence establishes that defendant Kiran Rawat, who is in default for non-appearance at trial and the Sitaram Trust ratified and approved the malicious, fraudulent and oppressive conduct of defendant Singh.”

The statement of decision then provides “this court must consider the net worth of the defendants in assessing an appropriate punitive damage award. Accordingly, Raj Singh, Kiran Rawat and the Sitaram Trust are ordered to appear and present evidence of (1) profits gained from the rental of the premises to Fernandes; 2) their financial condition, to include evidence of income, assets, liabilities and net worth. Failure to comply with this order will be deemed a waiver of the right to contest the amount of punitive damages thereafter awarded.” (Italics added.) All parties were ordered to appear at a hearing on April 3, 2015.

2. Although these pleadings are captioned as by Oliver, and purportedly signed by him, the contents do not appear to have been written by an attorney, suggesting that, as in the Singh case, he may have acted as a “puppet” for Singh. (See Singh, supra, 227 Cal. App.4th at pp. 823-824 (“Similar allegations [of puppetry] were made in two unrelated appeals, County of Sacramento v. Rawat (Feb. 24, 2014, C075383) and County of Sacramento v. Rawat (Feb. 24, 2014, C075384) (both subsequently dismissed), in which Oliver was also purportedly representing Singh. In response . . . this court sent a letter to the State Bar referring the matter for investigation.”).) The trial court first charitably described the cross-complaint as “an unstructured pleading,” but later found it to be “unintelligible and self-contradictory and as such . . . frivolous.”

3. The record on appeal does not contain all case documents. “To the extent the record is incomplete, we construe it against [the appellants].” (Stutter Health Uninsured Pricing Cases (2009) 171 Cal. App.4th 495, 498.) Nor is there a transcript of the liability trial.

4. Contrary to an alternative assumption by Fernandes, the trial court’s usage of “default” in this particular passage did not mean a default judgment was entered, it merely meant that Rawat did not appear at the trial.
Punitive Damages Hearing

At the April 3, 2015 hearing on punitive damages, Rawat did not appear. Singh had filed a “reply” to the statement of decision, but it did not explain his financial condition or list his properties; instead it objected that it was a plaintiff’s burden to prove financial condition. Singh also claimed he had suffered financial harm and was entitled to damages of over $200,000, as well as sanctions of $1,000,000.

Counsel for Fernandes filed a declaration in support of punitive damages, detailing his search of property records, showing the Trust held property in the Sacramento area of a total sale value of over $341,000, and Rawat held property of a total sale value of over $1,383,000, but that it was impossible to ascertain Singh’s own holdings, due to his common name. This declaration was not rebutted.

At the hearing, the trial court asked Singh if he would produce his financial information, and Singh declined, claiming there were “lawsuits pending with IRS” and claiming not to own any property. He claimed to be unemployed. He never explained what happened to the money he received.

In a “final” statement of decision, the trial court ruled that the failure of each defendant to comply with the order regarding financial condition barred any objection to an award of punitive damages. The court found:

“Clear and convincing evidence therefore establishes that Singh, Rawat and the Sitaram Trust owned, managed and controlled the subject property . . . and in so doing, engaged in conduct that was intentional, malicious, fraudulent and oppressive. The evidence likewise establishes their actions were part of a continuing course of misconduct and a method of doing business rather than an isolated incident, because the persons who succeeded Fernandes as tenants were subjected to the same or similar oppressive tactics.

“In consideration of the evidence of financial condition of the defendants, the extreme reprehensibility of their conduct and the extent of the harm inflicted on plaintiff, punitive damages are awarded in the amount of $350,000.”

Post-Punitive Damages Trial Motions

Singh moved to modify the ruling, in part alleging that Rawat was never served. In reply, Fernandes in part relied on a proof of service on Rawat, the answer filed by Oliver on behalf of “Defendants,” and Rawat’s verified response to standard interrogatories.

The trial court denied Singh’s motion on May 22, 2015, and filed a formal judgment on that same day, awarding Fernandes $87,894 in compensatory damages and $350,000 in punitive damages, plus costs, prejudgment interest, and attorney fees.5

Singh filed another motion, confusingly captioned and structured, but in essence seeking to change the judgment. This was later denied.

Rawat and the Trust moved to set aside the “ruling” alleging Rawat was “surprised to know that there is a judgment against me and against Sitaram Trust in this case.” Rawat claimed Oliver abandoned her, “never even informed Kiran Rawat and Sitaram Trust about this case,” and she had not been served with any documents in the case. Rawat declared Singh “never even informed me all the facts in this case” and “never asked my approval to do anything in this case.” Rawat did not, however, declare that she did not know about the case.

Later, and represented by counsel, Rawat, individually and in her capacity as a trustee of the Trust, filed a formal motion to vacate the judgment as “void” due to lack of service. In support, Rawat filed a new declaration alleging she was the only trustee of the Trust; the facts stated in the proof of service (at the Sacramento County courthouse) were not correct because she was never served at any point; she was never “mailed any information about this case”; she first learned of this case from Singh on June 10, 2015, after the adverse judgment; and she had been “legally separated” from Singh since 2005 (thereby conceding she was still married to him). Rawat also alleged that Singh had no authority to accept service for the trust, she had never hired Oliver to represent the Trust (but she did not explicitly declare that she had not hired Oliver to represent her), she had not executed any documents in the case, and she “never had any conversations about the litigation” with Oliver. No documents corroborating her alleged legal separation from Singh were provided.

In opposition, Fernandes again relied on the proof of service, the answer, and Rawat’s discovery responses, to show she had been served and had appeared. As for the claim of abandonment, Fernandes contended that may cause liability for Oliver, but did not deprive the court of jurisdiction over Rawat.

In reply, Rawat filed another declaration alleging in part that she never signed the discovery verification and had had no knowledge of it, and she had never hired Oliver to represent her or the Trust. She later filed another declaration, avowing that she had been at work at Mercy General Hospital at the time she was allegedly served.

At the hearing on the motion to vacate filed by Rawat and the Trust, counsel argued the presumption arising from the filed proof of service was rebutted by Rawat’s denial that she was served, that she never hired attorney Oliver, that she did not sign any discovery documents filed by Oliver, and that she was unaware of any such documents.

5. Although not explicitly stated in the judgment, it appears the $8,000 in statutory penalties was deemed to be subsumed within the total punitive damage award.
The trial court denied the motion to vacate the judgment and granted a motion for attorney fees of $21,595, and costs of $1,310, that had been opposed by Singh. The court found Rawat had not rebutted the presumption of proper service, finding that her declarations denying service were “unpersuasive.” The court separately found Rawat appeared in the action by filing an answer and responding to discovery, and again stated it did not credit her contrary declarations.

On July 30, 2015, the trial court amended the formal judgment by adding the costs and attorney fees, over Singh’s repeated objections.

New counsel then filed a timely notice of appeal on behalf of “Defendants,” but Singh is now self-represented in this court.

DISCUSSION

I

Appeal of Rawat

Rawat attacks the denial of her motion to vacate the judgment, contending the judgment was void for lack of service and extrinsic fraud. She also attacks the punitive damage award, both for lack of evidence of reprehensible conduct and lack of evidence of financial condition. We shall reject each of these claims.

A. The Motion to Vacate

Rawat’s statement of facts regarding her motion to vacate recites the evidence from her declarations as if the trial court had credited those declarations. By doing so, she has forfeited any contention of error regarding the motion to vacate, as we shall explain.

“A judgment or order of a court of general jurisdiction . . . is presumed to be valid, i.e., the court is presumed to have jurisdiction of the subject matter and the person, and to have acted within its jurisdiction. The judgment need not recite the jurisdictional facts, and a party relying on it need not plead or prove the jurisdictional facts. The burden of proof is on the party who attacks the judgment to show lack of jurisdiction.” (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment on Trial Court, § 5, p. 589.)

The return of a registered process server “establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return.” (Evid. Code, § 647, italics added.) Rawat claims she produced evidence sufficient to rebut the presumption, so it should have disappeared. (Id., § 604; see Farr v. County of Nevada (2010) 187 Cal.App.4th 669, 680-682; In re Heather B. (1992) 9 Cal.App.4th 535, 560-561.) But the trial court found Rawat appeared in the action, disbelieving her contrary declarations, thereby trumping any issue about the service presumption.

The denial of a motion to vacate is reviewed for an abuse of discretion, and we defer to the trial court’s resolution of any factual conflicts in the declarations. (See In re Marriage of Connolly (1979) 23 Cal.3d 590, 597-598; Anastos v. Lee (2004) 118 Cal.App.4th 1314, 1318-1319; Baratti v. Baratti (1952) 109 Cal.App.2d 917, 921-922.)

Rawat’s failure to state the facts fairly forfeits her evidentiary points. (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881 (Foreman).) “[I]n addressing [a party’s] issues we will not be drawn onto inaccurate factual ground.” (Western Aggregates, Inc. v. County of Yuba (2002) 101 Cal. App.4th 278, 291.)

B. Punitive Damages

Rawat claims that no substantial evidence supports her liability for ratifying her husband’s reprehensible conduct. But because there is no reporter’s transcript of the trial, Rawat cannot attack the factual finding that she and Singh were co-actors in matters regarding Trust property. (See, e.g., Foust v. San Jose Construction Co., Inc. (2011) 198 Cal.App.4th 181, 186-187.)

We also reject Rawat’s claim that her conduct was insufficiently reprehensible to merit an award of punitive damages. First, she does not state any facts about reprehensibility, far less state them in favor of the judgment, and therefore forfeits the claim. (Foreman, supra, 3 Cal.3d at p. 881.) Second, the trial court detailed a vicious and premeditated course of conduct that meets the standard for punitive damages. “Of the three guideposts that the [United States Supreme Court] court outlined [to establish the propriety of an award of punitive damages], the most important is the degree of reprehensibility of the defendant’s conduct. On this question, the high court instructed courts to consider whether ‘[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.’ ” (Roby v. McKesson Corp. (2009) 47 Cal.4th 686, 713.)

In this case, all five factors are present, even without considering all prior actions by the defendants. After Fernandes returned home from working a graveyard shift as a Denny’s waitress—and without any prior notice due to the fraudulent proof of service—she found herself without a home or her necessary property, such as food and clothing. This caused her emotional distress, not merely economic harm. She struggled to keep her job after the fraudulent eviction and had to

6. Rawat separately contends extrinsic fraud has occurred because a sworn declaration is sufficient to rebut the presumption of service. We agree a declaration of non-service if credited by the trial court can rebut the presumption of proper service, as explained in a case cited by Rawat. (See City of Los Angeles v. Morgan (1951) 105 Cal.App.2d 726, 729-731.) But the trial court herein expressly declined to credit Rawat’s declarations, finding them “unpersuasive.”
stay with friends, showing she could not financially absorb the blow defendants inflicted. The conduct was repeated, in that this was the third baseless attempt to evict Fernandes; it was no accident, but was part of a vicious campaign to stop her from seeking habitable housing. Defendants showed no remorse, inasmuch as they took no steps to remedy the substandard conditions, as reported by the subsequent tenants. (See Lopez v. Watchtower Bible & Tract Society of New York, Inc. (2016) 246 Cal.App.4th 566, 592-593 [proof of a pattern of misconduct would be relevant to show a defendant acted with willful and conscious disregard].)

In short, the trial court found sufficient facts meriting punitive damages.7

Pointing to a general rule regarding punitive damages, that it is a plaintiff’s burden to prove a defendant’s financial condition (see Adams v. Murakami (1991) 54 Cal.3d 105, 108-109), Rawat faults the evidence of her financial condition because Fernandes’s declaration about the “sale value” of the real property—which was unrebutted—was insufficient. This argument overlooks the trial court’s discovery order compelling Rawat, the Trust, and Singh, to produce evidence of their financial condition—an order disregarded by each defendant. A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders.


II

Appeal of Singh

Singh’s briefing flagrantly disregards appellate norms. As we have told him before, a brief must contain “meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error” and contain adequate rendered citations, or else we will deem all points “to be forfeited as unsupported by adequate factual or legal analysis.” (Singh, supra, 227 Cal.App.4th at p. 817.) Singh once again has filed briefs that either state the facts in the light favorable to himself, rely on facts unsupported by the record, or make incoherent legal arguments. However, we discern four issues presented with sufficient clarity to merit discussion. Any other points “are simply overtaken or outflanked by resolution of the matters which we do discuss or do not warrant discussion because they are too fragmentary or obscure.” (Claypool v. Wilson (1992) 4 Cal.App.4th 646, 659; see Tilbury Constructors, Inc. v. State Comp. Ins. Fund (2006) 137 Cal.App.4th 466, 482.)

First, Singh contends that Rawat and the Trust were not served. But he lacks standing to make this claim. (See In re J.T. (2011) 195 Cal.App.4th 707, 717.) Moreover, we have already rejected similar claims raised by Rawat.

Second, Singh claims that he should not be subject to punitive damages in the absence of evidence of his financial condition. This echoes the same claim raised by Rawat, and we give the same answer: By disobeying the court order to produce evidence of his financial condition, Singh has forfeited this claim.

Third, Singh claims that a punitive damage award cannot exceed three times the compensatory award. We disagree with this contention, insofar as it presents a purely facial challenge to the punitive damages award, not an as-applied challenge, because Singh does not state the facts fairly. (See Foreman, supra, 3 Cal.3d at p. 881.)

The punitive damages award was just under four times the compensatory damages award (350,000/87,894 = 3.982). Our Supreme Court has held punitive damages should rarely exceed a single-digit multiplier. (See Nickerson v. Stonebridge Life Ins. Co. (2016) 63 Cal.4th 363, 367 [“Absent special justification, ratios of punitive damages to compensatory damages that greatly exceed 9 or 10 to 1 are presumed to be excessive”]; Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal.4th 1159, 1181-1183.) The high court has stated “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” (State Farm Mut. Ins. v. Campbell (2003) 538 U.S. 408, 425 [155 L.Ed.2d 585, 606], italics added.) The ratio in this case was below that suggested line, and therefore is not facially infirm. (See Izell v. Union Carbide Corp. (2014) 231 Cal.App.4th 962, 984, 988 [upholding punitive damage award reflecting a 4.62 to one ratio compared to the compensatory award].)

Singh’s reliance on Hale v. Morgan (1978) 22 Cal.3d 388 (Hale), is not persuasive. Hale involved a statutory penalty of $100 per day for wrongfully cutting off a tenant’s utilities under a former version of Civil Code section 789.3. (See Stats. 1971, ch. 1274, § 1, pp. 2494-2495.) Because the utilities were off for 173 days, the trial court imposed a penalty of $17,300. (Hale, at pp. 392-393.) Hale held such a penalty—on the specific facts of that case—violated due process. (Id. at pp. 397-398; cf. Kinney v. Vaccari (1980) 27 Cal.3d 348, 352-356 [distinguishing Hale on the facts and upholding award of multiple days of penalties].) An important fact

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7. Rawat’s claim that no compensatory damages were awarded against her misreads the statement of decision. The statement of decision first states it will refer to all defendants as “Singh,” and then speaks of the conduct of particular defendants, awarding compensatory damages against Singh individually, and then finding Rawat and the Trust ratified his conduct, thus making them equally liable.
was that once service is cut off “the duration of the penalties is potentially unlimited, even though the landlord has done nothing” except fail to restore service. (Hale, at p. 399.) But here, the statutory penalty was for four specific acts (three acts of filing baseless eviction cases, and a fourth for repeatedly demanding rent in excess of the conditional judgment), at the statutory rate of $2,000 per act, for a total statutory penalty of $8,000. (But see fn. 5, ante.) Thus, Hale, a fact-driven case, does not advance Singh’s claims in this case.\(^8\)

Fourth, Singh contends the attorney fee award was excessive. The trial court was best positioned to determine a reasonable fee award. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) Because Singh does not fairly describe the evidence supporting the award, he has not demonstrated an abuse of discretion.

**DISPOSITION\(^9\)**

The judgment is affirmed. Defendants shall pay plaintiff’s costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(1) & (2).)

We concur: Blease, Acting P. J., Nicholson, J.

Duarte, J.

Cite as 17 C.D.O.S. 10593

**TROY FLOWERS,** Plaintiff and Appellant,

v.

**FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.**, Defendant and Respondent.

No. D071392

In The Court of Appeal of the State of California

Fourth Appellate District

Division One


APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

Filed October 20, 2017

Certified for Publication November 2, 2017

**COUNSEL**

McColloch Law Firm, Maria E. Saling and Michael T. McColloch for Plaintiff and Appellant.

Gibson, Dunn & Crutcher and Ethan D. Dettmer for Defendant and Respondent.

**ORDER CERTIFYING OPINION FOR PUBLICATION**

THE COURT:

The opinion in this case filed October 20, 2017, was not certified for publication. It appearing the opinion meets the standards specified in California Rules of Court, rule 8.1105(c), the respondent’s request pursuant to California Rules of Court, rule 8.1120(a) for publication is GRANTED.

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in California Rules of Court, rule 8.1105(c); and

ORDERED that the words “Not to Be Published in the Official Reports” appearing on page one of said opinion be deleted and the opinion herein to be published in the Official Reports.

McCONNELL, P. J.

Copies to: All parties

**OPINION**

In the period between 2000 and 2001, plaintiff and appellant Troy Flowers’s application for a securities sales license was rejected by Ohio state officials because they found that he was “not of ‘good business repute,’ “ In addition, Flowers was subjected to discipline by securities regulators with respect to his violation of securities laws and regulations and his failure to cooperate in a securities investigation. A pub-
licly accessible record of this disciplinary history is maintained by defendant and respondent, the Financial Industry Regulatory Authority, Inc. (FINRA).

Flowers filed a complaint against FINRA in which he sought an order requiring that FINRA expunge his disciplinary history from its records. The trial court sustained without leave to amend FINRA’s demurrer to Flowers’s complaint. Because federal securities laws and regulations provide FINRA with a process by which it may challenge FINRA’s publication of his disciplinary history, and Flowers has not pursued that process, he may not now, by way of a civil action, seek that relief from the trial court. Accordingly, we affirm the trial court’s order sustaining the demurrer and its judgment in favor of FINRA.

FACTUAL AND PROCEDURAL BACKGROUND

Although FINRA is a private, not-for-profit Delaware corporation, it is also a self-regulatory organization (SRO) authorized under title 15 United States Code section 78oo-3 et seq. (The Maloney Act, amending the Securities Exchange Act of 1934 (the Exchange Act)); as such, it is registered with the federal Securities and Exchange Commission (SEC) as a national securities association. Prior to 2007, FINRA was known as the National Association of Securities Dealers (the NASD); in 2007, the NASD consolidated its regulatory functions with the regulatory functions NYSE Regulation, Inc. provided for the New York Stock Exchange and changed its name to FINRA. (See In re Series 7 Broker Qualification Exam Scoring Litigation (D.D.C. 2007) 510 F.Supp.2d 35, 36, fn.1, aff’d (D.C. Cir. 2008) 548 F.3d 110.)

In its role as an SRO, FINRA is subject to extensive oversight by the SEC.

(See 15 U.S.C. § 78s; First Jersey Securities, Inc. v. Bergen (3d Cir. 1979) 605 F.2d 690, 693, cert. denied, 444 U.S. 1074.) FINRA disciplines its members when it has determined that they have violated securities laws and regulations or FINRA’s own rules. (15 U.S.C. § 78s.) The Exchange Act itself requires that, as an SRO, FINRA maintain information in a central registration depository (CRD) database about its member firms as well as their current and former registered representatives, including their broker representatives. (See 15 U.S.C. § 78oo-3(i)(1)(A); Santos-Buch v. Fin. Indus. Regulatory Auth. (S.D.N.Y. 2011) 32 F.Supp.3d 475, 479.) Of concern here, the Exchange Act further requires that FINRA publish information about its members’ “disciplinary actions, regulatory . . . proceedings, and other information required by . . . exchange or association rule, and the source and status of such information.” (15 U.S.C. § 78oo-3(i)(5).) FINRA does this through BrokerCheck (https://brokercheck.finra.org), which allows members of the public to search for and review the professional history of individual brokers.

BrokerCheck was established when in 2009, with the SEC’s approval, FINRA adopted Rule 8312 of its rules. In approving FINRA Rule 8312, the SEC stated: “BrokerCheck allows the public to obtain certain limited information regarding formerly associated persons, regardless of the time elapsed since they were associated with a member, if they were the subject of any final regulatory action.” (75 Fed.Reg. 41254 (July 15, 2010) (italics added.) The SEC noted that former brokers, “although no longer in the securities industry in a registered capacity, may work in other investment-related industries, such as financial planning, or may seek to attain other positions of trust with potential investors.” (Id. at p. 41257.) Thus, on one hand, the SEC found that “[d]isclosure of such person’s record while he was in the securities industry via BrokerCheck should help members of the public decide whether to rely on his advice or expertise or do business with him”; on the other hand, it also found that the absence of this information “could lead a person making an inquiry about a formerly associated person to conclude that the formerly associated person had a clean record.” (Ibid.) The SEC noted that, “if registered persons are aware . . . information will be available for a longer period of time, it should provide an additional incentive to act consistent with industry best practices.” (Ibid.) In describing and approving FINRA’S creation and operation of BrokerCheck, the SEC stated: “FINRA has a statutory obligation to make information available to the public and . . . the [SEC] believes that FINRA should continuously strive to improve BrokerCheck because it is a valuable tool for the public in deciding whether to work with an industry member.” (Securities and Exchange Com., Release No. 34-61002, (Nov. 13, 2009), 74 Fed.Reg. 61193, 61196 (Nov. 23, 2009).)

Flowers was a registered representative of two NASD member firms from 1995 until 2000, Pacific Cortez Securities Incorporated (also known as La Jolla Capital), and Equitade Securities Corporation. As such, his regulatory history as a participant in the securities industry is available to the public on BrokerCheck. There is no dispute Flowers’s BrokerCheck history states that: in August 2000, the Ohio Division of Securities rejected his application for a securities salesperson license because it found that he was “not of ‘good business repute’”; that in 2000, he was fined $10,000 by the NASD for engaging with La Jolla Capital in penny stock sales, which did not comply with the Exchange Act and SEC Penny Stock Rules; and that in 2001, the NASD barred Flowers from participating in the securities industry because he failed to timely cooperate with an NASD investigation as required by his firm’s membership in the NASD.

By way of the complaint he filed in the trial court against FINRA, Flowers sought an order requiring that FINRA expunge these matters from its database. Flowers alleged that the information about him as disclosed on BrokerCheck was false, inaccurate and misleading. In particular, he alleged that he had never in fact applied for an Ohio sales license, that in 2000, he had accepted the $10,000 fine only because he was leaving the securities business and did not wish to contest the matter, and that he initially had declined to cooperate with NASD’s investigation on the advice of counsel and
had later agreed to cooperate. Flowers further alleged that although he no longer wishes to act as a securities broker, his BrokerCheck record prevents him from opening a personal securities account and, because it is publicly available, the record inhibits his ability to obtain employment. Given these circumstances, Flowers’s complaint alleges that as a matter of equity the three items should be expunged from FINRA’s records.

Initially, FINRA removed Flowers’s complaint to the United States District Court. However, the district court remanded the case to the trial court, where FINRA filed a demurrer. In support of its demurrer, FINRA asked the trial court to take judicial notice of records with respect to Flowers’s Ohio application for a sales license and its own records of the regulatory actions it took against Flowers.5 FINRA argued Flowers’s complaint was barred by the requirement that he exhaust available administrative and judicial remedies and that in any event his claims were preempted by federal securities laws and regulations. The trial court agreed and sustained FINRA’s demurrer without leave to amend and entered a judgment in favor of FINRA. Flowers filed a timely notice of appeal.

I

The principles governing our review of orders sustaining a demurrer without leave to amend are well-established. “‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’” [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” (Champion v. County of San Diego (1996) 47 Cal.App.4th 972, 976, quoting Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

II

We agree with the trial court that Flowers’s complaint is barred by the doctrine of exhaustion of remedies. As we explain, our concern here is not so much with the fact that it appears from the record that Flowers could have challenged Ohio’s rejection of his sales license, as well as NASD’s earlier disciplinary actions administratively and obtained judicial review of any adverse administrative determination; rather we are more concerned here with Flowers’s ability to seek relief from publication of those matters first from FINRA itself, then the SEC and finally a United States Circuit Court of Appeals. With respect to disciplinary actions against participants in the securities industry, we believe the doctrine of exhaustion of remedies requires that such a determination be made in the first instance in the forums to which Congress has assigned the task of resolving those issues. Moreover, by requiring that the subject of a BrokerCheck report which includes disciplinary action seek expungement by way of exhausting the remedial scheme available under the Exchange Act, we not only assure that the expertise and interests of the institutions to which Congress has delegated the task of policing the securities industry is brought to bear, we also diminish the risk of intruding into areas where state law has been preempted by federal securities statutes and regulations.

“[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.” (Abelleira v. Dist. Ct. of App. (1941) 17 Cal.2d 280, 292.) Exhaustion of available administrative remedies “is a jurisdictional prerequisite, not a matter of judicial discretion.” (Yamaha Motor Corp. v. Super. Ct. (1986) 185 Cal.App.3d 1232, 1240, citing Wilkinson v. Norcal Mut. Ins. Co. (1979) 98 Cal.App.3d 307, 313.) “[E]ven though the administrative remedy is couched in permissive language[,] an aggrieved party is not required to file a grievance or protest if he does not wish to do so, but if he does wish to seek relief, he must first pursue an available administrative remedy before he may resort to the judicial process.” (Yamaha Motor Corp. v. Super. Ct., at p. 1240, citing Morton v. Super. Ct. (1970) 9 Cal.App.3d 977, 982.)

“There are several reasons for the exhaustion of remedies doctrine. ‘The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.’” [Citation.] Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor ‘because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.’ [Citation.] It can serve as a preliminary administrative siftng process [citation], unearthing the relevant evidence and providing a record which the court may review. [Citation.]

(Yamaha Motor Corp. v. Super. Ct., supra, 185 Cal.App.3d at p. 1240.)

1. Those documents conflict with Flowers’s allegations with respect to the accuracy of FINRA’s BrokerCheck disclosures.

2. The record includes documents which demonstrate that Flowers received notice of his right to challenge both the rejection of his


4. The exhaustion requirement has also been applied to review of disciplinary actions by self-regulatory organizations such as application for an Ohio sales license and the discipline imposed by NASD.

national securities exchanges. [Citations.] . . . [G]iven the ‘comprehensive review procedure’ established by the Exchange Act [citation] Congress intended that the doctrine of exhaustion of administrative remedies, in appropriate circumstances, apply to challenges to the disciplinary proceedings of the national securities exchanges.” (Id. at p. 57.)

Here, FINRA has emphasized that its publication of Flowers’s regulatory history was an important part of its enforcement responsibility. As the court in Barbara noted, Congress has provided for administrative review by the SEC of FINRA’s enforcement of its rules and resort to the circuit court of appeals. (Barbara, supra, 99 F.3d at pp. 56–57.) Thus, if Flowers was unable to obtain relief from the publication of his history from FINRA itself, he could have asked for relief from the SEC and in turn a federal circuit court. (Ibid.)

In requiring that Flowers exhaust his federal administrative and judicial remedies, we fully recognize the trial court has equitable power to order expungement of public records in appropriate circumstances. (Lickiss v. Financial Industry Regulatory Authority (2012) 208 Cal.App.4th 1125, 1133–1134 (Lickiss.).) The court in Lickiss expressly recognized that power. (Ibid.) “[I]n any given context in which the court is prevailed upon to exercise its equitable powers, it should weigh the competing equities bearing on the issue at hand and then grant or deny relief based on the overall balance of these equities . . . [thus,] expungement is proper where the benefits to the petitionor outweigh the disadvantages to the public and the burden on the court.” (Ibid.; italics added.) However, because a trial court, in exercising its equitable power to order expungement, must weigh the benefits to an individual against the public’s interest in full disclosure, disposition of Flowers’s claims by the agencies tasked with protecting the public interest will not only avoid the need for the trial court’s intervention but will plainly facilitate the “development of a complete record that draws on administrative expertise.” (Yamaha Motor Corp. v. Super. Ct., supra, 185 Cal.App.3d at p. 1240.)

As we noted, a closely related concern is preemption. We accept the holdings of federal cases which have found that FINRA’s publication of disciplinary histories is not protected by the “complete preemption,” which would prevent application of any state, statute, or rule of law. (See Godfrey v. Fin. Indus. Regulatory Auth. (C.D.Cal., Aug. 9, 2016, No. CV 16-2776 PSG) 2016 WL 4224956; Doe v. Fin. Indus. Regulatory Auth., (C.D.Cal., Nov. 19, 2013, No. CV 13-06436 DDP) 2013 WL 6092790.) Finding an absence of complete preemption, those cases permit state as well as federal jurisdiction over FINRA publication and expungement issues. However, here we are concerned with the narrower doctrine of “conflict preemption,” which arises by implication when “Congress’s intent to preempt state law is implied to the extent that federal law actually conflicts with any state law. [Citation.] Conflict preemption analysis examines the federal statute as a whole to determine whether a party’s compliance with both federal and state requirements is impossible or whether, in light of the federal statute’s purpose and intended effects, state law poses an obstacle to the accomplishment of Congress’s objectives.” (Whistler Invs. v. Depository Trust & Clearing Corp. (2008) 539 F.3d 1159, 1164.) Conflict preemption applies even where, as here, a case is heard in a state tribunal. (See, e.g., AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333, 352, [preventing state court from applying rule which is obstacle to purposes and objectives of Federal Arbitration Act].)

In light of the SEC’s determination the public has an interest in having access to the disciplinary records of individuals providing financial and investment advice, there is an obvious risk of conflict between the SEC’s conclusion a particular individual’s records should remain public and a state court’s decision that the individual’s interests outweigh the public benefit of disclosure. Such a result would plainly put FINRA in a situation where it was subject to the conflicting duties and in turn require application of conflict preemption.

Contrary to Flowers’s argument, the holding in Lickiss has no bearing on the exhaustion of remedies determination we make here. In Lickiss, the court held the provisions of FINRA’s distinct rule 2080 only govern the circumstances under which FINRA will waive its right to participate in third party judicial or arbitral proceedings involving customer disputes and in which expungement has been sought by a FINRA member; contrary to FINRA’s contention in Lickiss, the waiver of notice and service standards set forth in rule 2080 do not govern the substantive principles of equity, which a court must apply in determining whether such expungement is appropriate. (Lickiss, supra, 208 Cal.App.4th at pp. 1135–1136.)

We note that in adopting the predecessor to rule 2080 discussed in Lickiss, the NASD was responding to concerns that members, by way of settlements with customers in third party litigation would be able to “buy clean records” by obtaining an expungement order from a court or arbitrator hearing a customer complaint. (68 Fed.Reg. 74667-01.) Rule 2080 and its predecessor sought to prevent such evasion of its recording keeping and publication responsibilities by requiring notice to the NASD and now FINRA and providing them an opportunity to object to any expungement sought in such third-party proceedings. In the context of third party customer disputes which are the subject of rule 2080, the SEC has expressly found state and federal courts are fully capable of determining whether expungement is appropriate. (68 Fed.Reg. 74667-01; Lickiss, supra, 208 Cal.App.4th at p. 1135.) As FINRA emphasizes, Flowers is seeking expungement of disciplinary actions FINRA itself has taken against him and quasi-disciplinary action taken by the State of Ohio; by its terms rule 2080 does not speak to expungement of such disciplinary actions. Thus, the SEC’s expressed willingness to permit the state and federal courts where customer complaints are pending determine whether expungement is appropriate in those cases in no way suggests the SEC believes its own disciplinary actions should be treated similarly by
courts or any other forum which did not impose the discipline in the first instance.

In sum, we affirm the trial court’s judgment because although the trial court has equitable power to order expungement of public records, in this case Flowers has an adequate and more carefully tailored remedy under the process set forth in the Exchange Act.

**DISPOSITION**

The judgment is affirmed. FINRA to recover its costs of appeal.

BENKE, J.

WE CONCUR: McCONNELL, P. J., NARES, J.

Cite as 17 C.D.O.S. 10597

THE PEOPLE, Plaintiff and Respondent,

v.

JOSE LUIS PEREZ et al., Defendants and Appellants.

No. E060438

In The Court of Appeal of the State of California

Fourth Appellate District

Division Two

(Super.Ct.No. FV1901482)

Filed November 3, 2017

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed in this matter on October 25, 2017 is modified as follows:

1. On page 11, in the third full paragraph, delete the sentence:

   Defendant Chavez was driving Alvarado’s pickup, with Rodriguez as his passenger.

and substitute the sentence:

   Rodriguez was driving Alvarado’s pickup, with defendant Chavez as his passenger.

2. On page 34, in the second full paragraph, delete the sentence:

   He also drove one of the pickups to Victorville.

and substitute the sentence:

   He also rode along in one of the pickups to Victorville.

3. On page 82, delete all of section XVIII.B.1, entitled “Forfeiture.”

4. On page 83, delete the subheading:


5. On page 83, delete the sentence:

   Separately and alternatively, we also reject this contention on the merits.

and substitute the sentence:
We assume, without deciding, that counsel for Sandoval and Chavez did not forfeit their clients’ present contention.

Except for this modification, the opinion remains unchanged. This modification does not effect a change in the judgment. Appellant Chavez’s petition for rehearing is denied.

CERTIFIED FOR PARTIAL PUBLICATION

RAMIREZ P. J.