



Case No.: D080658

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION ONE

Robin Marien, et al.,	)	
	)	
Respondents, Plaintiffs, Cross-	)	
Defendants,	)	San Diego County
	)	Superior Court Case No.:
vs.	)	No. 37-2015-0001568-CU-DF-
	)	CTL
	)	
Robert Michael Kuczewski,	)	
	)	
Appellant, Defendant, Cross-	)	
Complainant.	)	
	)	

Appeal from Judgment of the Superior Court of California,  
in and for the County of San Diego  
Honorable Kenneth J. Medel, Judge

RESPONDENTS’ BRIEF

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**CERTIFICATE OF INTERESTED PARTIES**

Pursuant to Rule 8.208(d)(1) and (2) of the California Rules of Court, the Respondents/Plaintiffs/Cross-Defendants disclose that Co-Respondent/Plaintiff/Cross-Defendant Robin Marien owns more than 10% of Respondent/Plaintiff/Cross-Defendant Air California Adventure, Inc.

Dated: September 29, 2023

SHEWRY & SALDAÑA, LLP



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Christopher C. Saldaña

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## SUMMARY OF ARGUMENT

Robert Kuczewski (“Appellant” or “Kuczewski”) appeals a unanimous jury verdict and judgment thereon finding in favor of Respondents Robin Marien, Gabriel Jebb, and Air California Adventure, Inc. (“plaintiffs” or “Respondents”) on their claims for defamation and against Kuczewski on the entirety of his First Amended Cross-Complaint, having resolved against him the very first question of his special verdict form as to each and every of his causes of action.

This is the third time this case has been before this Court<sup>1</sup>, and the second time it has been brought here by Kuczewski. In *Marien, et al. v. Kuczewski*, Fourth District, Division One Case No. D069836 (“*Marien I*”), this Court reviewed the denial of cross-anti-SLAPP motions. In doing so, the Court made findings of law in relation to the roles under defamation law of the adverse parties in this case. Those findings were applied by the superior court and, later this Court again, in *Marien, et al. v. Holland*, Fourth District, Division One Case No. D077586 (“*Marien II*”).

After remittitur, this case came to trial in late June and early July of 2022. The superior court determined that no new evidence was provided which bore upon this Court’s prior rulings in relation to whether: plaintiffs were public figures, the case dealt with matters of public interest, or public issues and the like. Just as this Court did twice before, the superior court ruled that this case dealt with essentially “garden-variety” defamation; the plaintiffs’ case proceeded

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<sup>1</sup> For this reason, plaintiffs will not re-hash the background facts already reviewed – at length – by this Court.



to jury on a general verdict and instructions on the theory the matter was a private one of private concern.

Kuczewski's demanded a special verdict form for his claims, but refused to produce it, so the Court provided it to him subject to his acceptance. Following his acceptance of the form, the jury reviewed the evidence and returned a verdict on Mr. Kuczewski's 8 causes of action. The jury's July 7, 2022, verdict found for plaintiffs on their defamation claims and awarded \$1,800,003.00 in total, which includes an award of punitive damages in the amount of \$50,000.00 following a finding of malice or oppression. The jury's verdict was also for plaintiffs on Kuczewski's eight cross-claims, finding essentially that plaintiffs did not act at any time with the intent to cause harm or injury to Kuczewski. Kuczewski filed his notice of appeal the day after the verdict and later filed his motions for new trial and JNOV. Both motions were denied.

Kuczewski's opening brief is a largely incomprehensible manifesto comprised of non-sequiturs and inflammatory statements about the plaintiffs and, to a lesser extent, the trial judge. Kuczewski entirely fails to frame his appeal by reference to claims of error, record evidence, and authority bearing on his claimed error. In fact, Kuczewski acknowledges this wholesale failure by asking this Court to do what he didn't, to "use [the Court's] own extensive background in the law for any such references." Appellant's Opening Brief ("AOB"), p. 4. This despite his previous forays into litigation in this case and beyond.

Kuczewski received the benefit of a free record and reporter's transcript in this matter. Yet, in 50 pages of AOB material, he cites

those materials approximately 10 times and without producing a balanced record of all evidentiary facts before the jury, essentially limiting the record to items he felt (often wrongly) assisted his cause. In short, Kuczewski failed to live up to his obligation as an appellant to produce a fair and full record and citations to it in support of his appeal. That failure requires that his brief be stricken or that the judgment be summarily affirmed.

Kuczewski's status *in pro per* also does not save him; the authorities of this state demand that he is held to the same standard as counsel in prosecuting his appeal, which he has failed to do. Moreover, treating his appeal any other way would work substantial prejudice upon the plaintiffs because they have insufficient information to comprehend what Kuczewski claims as the basis for reversal here, let alone the evidence or argument that, had it been made, he claims would advance that request. Without such basic information, the plaintiffs are unable to formulate a reasoned response to the AOB.

To the extent plaintiffs understand any of Kuczewski's claims, they appear to be that this is a matter of free speech and press and matters of public concern and interest despite the fact he was defaming the plaintiffs for the purpose of taking over their business<sup>2</sup>. Therefore, this Court and the superior court got it wrong in this

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<sup>2</sup> In addition to other evidence, the trial testimony was that, in addition to his defamation campaign, Kuczewski solicited financing from others to take over the business and owned and operated a website named: "takebacktorrey.com". (2 RT 550-551). Obviously, he sought to "take" the Torrey Pines Gliderport "back" from the plaintiffs though Kuczewski never "had" it to begin with.

case...several times. But Kuczewski does not acknowledge the law of the case or any reason the superior court or this Court would have to revisit issues already decided against him. The short answer is that Kuczewski doesn't provide such a reason because there is none cognizable under law.<sup>3</sup>

Furthermore, even had this Court and the superior court previously erred in their determinations the defamation claims in this case were private matters of private concern, Kuczewski fails to address how he was prejudiced. And for good reason: there was ample evidence at trial that Kuczewski either knew his utterances were false, had no evidence to support them, or did no investigation of them; plaintiffs testified as to their falsity; and the jury eventually found that Kuczewski was motivated by malice or oppression, and issued an award of punitive damages against him. These facts alone would suffice to support a public figure/public concern claim and contravene a claim of prejudice had Kuczewski made one. There was no error, but if there had been it would have been harmless. Plaintiffs are constrained to respond to Kuczewski's "press" claims in the AOB because there is no record evidence this matter involves the press and Kuczewski has provided none in his brief.

Next, it appears Kuczewski takes issue with Air California Adventure, Inc.'s involvement in the case.<sup>4</sup> He claims that Air

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<sup>3</sup> Kuczewski's brief admits as much (and that he is simply re-litigating what he has already lost on appeal) because pages 45-46 of the AOB are verbatim taken from pages 29-31 of the AOB in *Marien I* and no record evidence, such as trial testimony or offers of proof, are provided in support of this recycled argument.

<sup>4</sup> This, despite the fact he cross-complained against this entity seeking relief as against it in *respondeat superior*.

California Adventure, LLC is the true leaseholder and concessionaire of the Torrey Pines Gliderport. Kuczewski does not adequately explain the basis for his argument. To the extent plaintiffs understand it, they note that the testimony in the case was that Air California Adventure, LLC was transitioned to Air California Adventure, Inc. and that the City of San Diego (the owner of the Gliderport land) recognizes Air California Adventure, Inc. as the leaseholder and concessionaire since September 1998. Robin Marien is the owner of Air California Adventure, Inc. The company had standing as a plaintiff.

Kuczewski then claims that because Air California Adventure, Inc. is not the leaseholder, none of the plaintiffs had standing to trespass him from the Torrey Pines Gliderport Property. But, Kuczewski has no evidence to support his bizarre ownership fantasy and the only record evidence is to the contrary. Secondly, even if Kuczewski's ownership conspiracy were correct, he cites no authority to support his claim that would divest plaintiffs of the right to seek his ejectment. Thirdly, Kuczewski ignores the fact that the jury answered **no** in response to the first special interrogatory for each of his causes of action, which were all some variation of: "Did [the plaintiff] act with the intent to" do what Kuczewski has claimed in his case. Because the jury did not find that any predicate act was undertaken, or that it was undertaken with the requisite *mens rea*, Kuczewski cannot demonstrate that his "ownership" swamp dream – even had it been true – had any prejudice on his claims. That is, because the jury found either that plaintiffs did not engage in the conduct alleged, or that they did not do so with the guilty mind required, whether they could or

could not utilize trespass as an affirmative defense is immaterial because the jury never had to answer that question. Thus, even if Kuczewski's ownership conspiracy were correct, the error would have been harmless because it did not impact the jury's decision.

Kuczewski then moves on to criticize the trial judge's evidentiary rulings without specifically referencing those rulings, the claim or error, any record support, or any authority supporting the claim of error. Kuczewski also, once again, fails to even attempt to show prejudice from his claims of error. Without this information, plaintiffs are themselves prejudiced by having to guess what, if anything, Kuczewski claims the error actually is. Kuczewski has waived these claims.

Should the Court determine no waiver exists, Kuczewski's claims should be resolved against him because, to the extent they can be distilled at all from his AOB, they sought to introduce decades-old information about the business that occurred prior to Mr. Marien taking over the leasehold and concession. The trial court gave Mr. Kuczewski an extraordinarily wide berth and provided guidance to him as to how to introduce evidence and what kind of evidence was appropriate. Kuczewski simply refused to take heed and repeatedly sought to introduce evidence he knew the court had already found inadmissible, which he now apparently seeks to relitigate without explaining why the trial court was wrong or how it prejudiced his case.

Kuczewski next claims that no award on plaintiffs' claims should have issued from the jury because his statements were "true" and because of the first amendment. Kuczewski fails to cite any

portion of the record demonstrating how the evidence was not substantial enough to support the verdict. He also fails to cite any portion of the record supporting the contention his claims were true. Kuczewski fails to appreciate this Court does not make credibility determinations following a jury verdict. Kuczewski fails to show how the first amendment applies to this claim or how the evidence demands a contrary outcome or how he may overcome the law of the case.

Finally, Kuczewski once again floats a stray thought into the fray: that the Johnny Depp/Amber Heard trial in Virginia had some bearing on this case. He provides no evidence it was ever raised in the trial. He cites no part of the transcript supporting his proposition. He provides no authority-supported argument. He has shown no prejudice. Kuczewski has waived this argument.

The judgment should be summarily affirmed.

### **Statement of Appellate Jurisdiction**

Kuczewski purported to file a notice of appeal pursuant to California Code of Civil Procedure §904.1(a); however the notice was premature in that it was filed on July 8, 2022, prior to the actual entry of judgment in the case and prior to the trial court's resolution of the Appellant's motions for new trial and judgment notwithstanding the verdict.

Kuczewski's appeal of the judgment and denial of the motion for new trial may in the Court's discretion be timely under Rule 8.104(d), California Rules of Court. Kuczewski's premature notice of appeal, however, divested the trial court with jurisdiction to hear

Kuczewski's motion for judgment notwithstanding the verdict.

*Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 485-486.

### **Standard of Review**

Kuczewski appears to seek review of several different portions of the proceedings below. As an initial matter, the AOB suggests that Kuczewski's appeal is subject to *de-novo* review because, he states, the case involves "Questions of Law with regard to the classification of Limited purpose Public Figures, Freedom of Speech, Freedom of the Press and other related matters." (capitalization in original). AOB, p. 23. Plaintiffs disagree with Kuczewski's statement on the standard of review.

#### **A. REHASH OF "PUBLIC" & "FIRST AMENDMENT" CLAIMS/ QUEST TO SEEK RECONSIDERATION OF *MARIEN I* & *MARIEN II*, WITHOUT NEW EVIDENCE**

Generally, "the trial court's resolution of disputed factual questions bearing on the public figure determination is reviewed for substantial evidence, while the trial court's resolution of the ultimate question of public figure status is subject to independent review for legal error." *Khawar v. Globe Int'l, Inc.* (1998) 19 Cal.4th 254, 264. However, these decisions were previously made by this court on appeal in *Marien I* and no new facts have been offered or referenced by Kuczewski which would even suggest the Court should reconsider those holdings.

Thus, these matters have already been litigated before this Court in *Marien I*, pgs. 15-19 (under heading "B. No Public Issue or Issue of Public Interest in This Case."). The issues raised by Kuczewski here are, therefore, law of the case: "The doctrine of law

of the case may be applicable where the prior appeal is from a decision short of a full trial, such as a judgment on demurrer or an order of nonsuit, or in this case, an order denying an anti-SLAPP motion to strike a complaint. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 909, p. 944.)” *Bergman v. Drum* (2005) 129 Cal.App.4th 11, 15, fn. 3. Having failed to provide additional record-information or substantive, authority-supported argument, these claims are not subject to *de-novo* review.

## **B. THE JUDGMENT & SUFFICIENCY OF THE EVIDENCE**

It is fundamental that a trial court judgment is ordinarily presumed to be correct and the burden is on Kuczewski to demonstrate, on the basis of the record presented on appeal, that the trial court committed an error that justifies reversal of the judgment. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409 [citing cases]. “This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” (*Id.*; see *Cal. Const.*, art. VI, § 13.)

“In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. ‘[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented.’” *Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.” “All intendments and presumptions are indulged to support it on matters as to which the



record is silent, an error must be affirmatively shown.” *Denham v. Sup.Ct.* (1970) 2 Cal.3d 557, 564. Any ambiguity in the record is resolved in favor of the appealed judgment or order. *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631.

On appeals challenging sufficiency of the evidence, appellate courts are guided and restricted by the “substantial evidence” rule: The trial court's resolution of disputed factual issues must be affirmed so long as supported by “substantial” evidence. *Id.* at 632. *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678 (“Defendants raising a claim of insufficiency of the evidence assumes (sic) a daunting burden” (internal quotes omitted); *In re Michael G.* (2012) 203 Cal.App.4th 580, 589 (“The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts.”))

“[A]rticle VI, section 13 generally ‘prohibits a reviewing court from setting aside a judgment due to trial court error unless it finds the error prejudicial.’ The section applies to both constitutional and nonconstitutional errors. It ‘empower[s]’ appellate courts ‘to examine ‘the entire cause, including the evidence,’ and ‘require[s]’ them ‘to affirm the judgment, notwithstanding error, if error has not resulted ‘in a miscarriage of justice.’” (internal citations omitted). *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.

### **C. CLAIMS RELATING TO JURY INSTRUCTIONS & VERDICT FORMS**

Kuczewski’s claims regarding jury instructions and verdict forms relate only to his refusal to accept that he has no first

amendment/public issue/ public official claim in this matter. These items are also law of the case and not subject to *de-novo* review. These claims are also subject to review for waiver/invited error. Under the doctrine of invited error Kuczewski may not complain of error in instructions that he requested. *Stevens v. Owens–Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653–1655. “The invited error doctrine is based on estoppel. “Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal” ‘on appeal.’” *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 706. The harmless error standard also applies to these claims. *F.P. v. Monier, supra*.

#### **D. EVIDENTIARY CHALLENGES**

A “trial court's ruling on the admissibility of evidence generally is reviewed for abuse of discretion.” *People v. Griffin* (2004) 33 Cal.4th 536, 587, disapproved on other, unrelated grounds by *People v. Riccardi* (2012) 54 Cal.4th 758, fn. 32. “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” *People v. Carmony* (2004) 33 Cal.4th 367, 377. ‘Even under [the abuse of discretion] standard, there is still a substantial evidence component. We defer to the trial court's factual findings so long as they are supported by substantial evidence, and determine whether, under those facts, the court abused its discretion.’” *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1121. The harmless error standard also applies to these claims. *F.P. v. Monier, supra*. Plaintiffs maintain that Kuczewski’s claims are also subject to forfeiture/waiver analysis.

### **General Objection to Kuczewski's Brief**

The Plaintiffs object to Kuczewski's filing on several bases. First, Kuczewski has failed to identify the appropriate standard of review and, instead, appears to have simply picked the one he thought would help him the most. In *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187, the court extensively catalogued the frequency with which appellate courts have declined to reach the merits of a claim raised on appeal because of the absence of a record or citations to it.

The court in *Foust* stated: “In numerous situations, appellate courts have refused to reach the merits of an appellant's claims because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided.” Here, we have a corollary error, which is appellant's failure to sufficiently cite to the transcript in order to support his claims and provide respondents an opportunity to retort. An appellant's opening brief must provide a summary of the significant facts limited to matters in the record. Cal. Rules of Court, Rule 8.204(a)(2)(C). Every brief must support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. Cal. Rules of Court, Rule 8.204(a)(1)(C).

The appellate court is not required to search the record on its own seeking error. If a party fails to support an argument with the necessary citations to the record, the argument will be deemed waived. *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *see Estate of Palmer's* (1956) 145 Cal.App.2d 428, 431 [attack on evidence without fair statement of evidence entitled to no consideration when

apparent substantial amount of evidence was received on respondent's behalf].

In an appeal challenging the sufficiency of the evidence, an appellant's opening brief must set forth all the material evidence on point and *not simply state the facts believed to be favorable to the appellant*. *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881. An appellant's burden to provide a fair summary of the evidence "grows with the complexity of the record." *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739. When an appellant's opening brief states only the favorable facts, ignoring evidence favorable to respondent, the appellate court may treat the substantial evidence issues as waived and presume the record contains evidence to sustain every finding of fact. *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218; *see also Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1072; *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409-410.

Here, Kuczewski has provided essentially zero record facts and few citations to the record at all. Instead, Kuczewski writes what amounts to a citation free – free of evidence and free of authorities – editorial on what terrible people and entities the plaintiffs are, what a swell and "brave" man he is. He takes issue with the trial judge, again without citation to evidence or authority, he takes issue with the jury's decisions in the case and blames the Johnny Depp case somehow, again without citation to anything. Although not factual, Kuczewski's "statements" are anything but a fair summary of the evidence and ignore all of the significant and substantial evidence supporting the plaintiffs' favorable verdict and judgment. Kuczewski has filed and

served an egregious example of a brief which through its failure to sufficiently cite the transcript waives and forfeits his sufficiency of the evidence challenge. Worse still, this applies both to his appeal of plaintiffs’ verdict and judgment against him on their claims as well his own failed claims against the plaintiffs. Indeed, Kuczewski provides virtually no discussion at all – whether objectively deficient discussion or otherwise – of his own cross-claims.

The same principle applies when an appellant, like Kuczewski here, asserts a point but fails to support it with reasoned argument and citations to authority. In such cases, the court may treat the argument as waived and pass on it without any consideration. *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Salas v. California Dept. of Transp.* (2011) 198 Cal.App.4th 1058, 1074; *EnPalm, LLC v. Teitler Family Trust* (2008) 162 Cal.App.4th 770, 775; *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1075. Kuczewski’s AOB does not cite a single case or statute for any proposition supporting his many, many, many pages of argument. In other words, he offers a fact-less, law-less diatribe against the plaintiffs replete with extra-record suggestion and commentary. Kuczewski admits he failed to cite any authorities when he asked this Court to do his work for him and “find” for him on its own and on his behalf authorities supporting his case. In other words, he asks this Court to act as his new lawyer.

Kuczewski’s failure to provide sufficient citations to the record, his failure to provide a full or balanced recitations of record facts, his failure to provide even one case or statute, and his failure to support his claims with reasoned argument, require that this Court treat the entirety of his argument as waived or forfeited and summarily dismiss

the appeal or affirm the jury's verdict and the court's judgment thereon. Alternatively, the Court should dismiss the appeal or deem it abandoned:

“A ‘reviewing court has inherent power, on motion or its own motion, to dismiss an appeal which it cannot or should not hear and determine.’ [Citation.] An appealed-from judgment or order is presumed correct. [Citations.] Hence, the appellant must make a challenge. In so doing, he must raise claims of reversible error or other defect [citation] and ‘present argument and authority on each point made’ [citations]. If he does not, he may, in the court's discretion, be deemed to have abandoned his appeal. [Citation.] In that event, it may order dismissal. [Citation.]” (*In re Sade C.* (1996) 13 Cal.4th 952, 994.

*County of Kern v. Diller* (1999) 69 Cal.App.4th 1412, 1425. The Court should exercise its discretion and deem this appeal abandoned.

Plaintiffs anticipate that Mr. Kuczewski will again request – as he does throughout his AOB – special treatment because he is representing himself. However, “[e]xcept when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation”. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 citing *Lawrence v. Superior Court* (1988) 206 Cal.App.3d 611, 619, fn. 4. “A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation.” *Id.* “Thus, as is the case with attorneys, [self-represented] litigants must follow correct rules of procedure. [Citations.]” *Id.*, citing *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247; *Stebly v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522,

524 [“Although plaintiffs appear in this court without counsel, that does not entitle them to special treatment”]. The Court should reject Mr. Kuczewski’s entreaties for special treatment because he represents himself. His appeal should be deemed forfeited or waived or abandoned or summarily dismissed.

## **STATEMENT OF THE CASE & STATEMENT OF FACTS**

### **A. Procedural Posture**

This Court has twice before reviewed this matter on interlocutory appeal from the denial of various anti-SLAPP motions. See *Marien I* and *Marien II*. Following remittitur, this matter came on regularly for jury trial beginning in earnest on June 27, 2022, 7 CT 1676-1677, with opening statements and testimony beginning on June 30, 2022 (0<sup>5</sup> CT 3). After four days of testimony and closing arguments, on July 7, 2022 the duly empaneled jury returned a verdict in favor of all plaintiffs on all claims submitted (which were for defamation) (7 CT 1742-1744) and against Mr. Kuczewski on all cross-claims submitted (7 CT 1745-1757).

The jury awarded a total of \$1,750,003.00 on plaintiffs’ non-punitive claims against Mr. Kuczewski. (7 CT 1742-1744). Having found through clear and convincing evidence that Mr. Kuczewski acted with malice or oppression in the commission of defamation against Mr. Marien and Mr. Jebb (7 CT 1744), a short trial was held on the amount of punitive damages. 3 RT 748-755. The jury then returned a total amount of punitive damages of \$50,000. (7 CT 1758).

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<sup>5</sup> All references to the settled statement in this brief will be to volume 0 of the Clerk’s Transcript, following by the page number: 0 CT pg.

The day after the jury announced its verdict, on July 8, 2022, Mr. Kuczewski filed his notice of appeal. (7 CT 1762). On July 15, 2022 Mr. Kuczewski filed his motions for new trial and JNOV (7 CT 1765, 1788), which were both opposed and denied on July 22, 2022. (8 CT 1977, 1978). Judgment was entered on July 20, 2022. (8 CT 1958).

## **B. Background Facts**

Plaintiffs do not belabor the background facts of this case because this Court has twice been provided them. At its core, this case involves Mr. Kuczewski's continuing defamation against these Plaintiffs via Internet postings of speeches and statements he has made either knowing they are false, or without conducting even a scintilla of investigation to make that determination. Suffice it to say, Plaintiffs take the position that Mr. Kuczewski defamed them *per se*; the jury agreed and even made a finding and award of punitive damages.

Mr. Kuczewski's cross-claims are all tort claims. The jury duly considered those claims and made findings against Mr. Kuczewski on the most basic portions of his claims. Judgment was entered consistent with the jury's findings. This appeal, such as it is, follows.

## **C. Trial Testimony & Evidence**

### **1. Testimony Covered by the Settled Statement**

The Court issued a settled statement regarding unreported items occurring in the case, which includes discussions and rulings on jury instructions and verdict forms, and the unreported testimony of witnesses Marjorie Holland and David Metzger and plaintiff, Gabriel Jebb. (0 CT 1-13).



Kuczewski's co-defendant, Marjorie Holland, admittedly edited and published Kuczewski's defamatory videos on Mr. Kuczewski's website, ushawks.org. (0 CT 2). She understood the purpose of the publication was to expose the material to a wider audience and direct Kuczewski's statements to people involved in the hang gliding and paragliding communities. (0 CT 2). Ms. Holland understood the statements at issue in the case cast the plaintiffs in a negative light and are likely to harm the plaintiff's reputations. (0 CT 3). Ms. Holland stated she maintains a negative view of the plaintiffs, despite having limited to no personal interaction with them, published Kuczewski's statements accusing Plaintiffs of corruption and other items causing them ill repute, and was unaware of the existence of any evidence to support these claims. (0 CT 2, 4).

Holland stated that she understood that by claiming Plaintiffs are in need of "oversight", Kuczewski is claiming that Plaintiffs are doing something "wrong". (0 CT 5). She does not know how operations at the site could be better conducted, but is convinced that they could be. She also testified she had no idea whether current safety practices are sufficient, or even whether "better" practices could be conceived or implemented. (*Id.*) Holland does not know if the Torrey Pines Gliderport is actually dangerous and has made no attempt to learn that information. (*Id.*) She does not know of any specific evidence Mr. Kuczewski has to support that claim either. (*Id.*) Ms. Holland was aware prior to at least one of his three arrests that Mr. Kuczewski was going to refuse the police's requests that he leave the Gliderport and that she and Mr. Kuczewski were both aware that would likely lead to his arrest. (0 CT 6).

Plaintiffs' witness, David Metzgar, testified to being a long-time member of the paragliding and hang-gliding community and close friend of Lyne Perry, the person Mr. Kuczewski has claimed committed suicide because of bullying by the plaintiffs. (0 CT 5, 7). Metzgar has been approached by others in the industry about Kuczewski's accusations set forth on his website, ushawks.org, and testified that for those who did not interact with the plaintiffs on a regular basis, Kuczewski's accusations have negatively impacted plaintiffs' reputation, which results in a loss of income to the plaintiffs because those individuals will not frequent the site or use the plaintiffs' services. (0 CT 7). In addition to testifying as to his first-hand accounts of Mr. Kuczewski's routine harassment, and to his knowledge and belief that Kuczewski's statements are categorically false, Metzgar notes that in Exhibit 158 Kuczewski states his purpose is to "get you guys out of this place", meaning to dispossess the Plaintiffs of their role as proprietors and management of the site. (0 CT 8).

Metzgar has seen each of Kuczewski's and Holland's videos, website posts, and other material at issue in this case. (0 CT 6). Metzgar states the substance of each of the accusations in those statements is categorically untrue. (0 CT 6). Plaintiffs are not unsafe, are not corrupt, did not cause the suicide of Lyne Perry, do not cause air sports accidents due to malfeasance or incompetence, do not run drugs, are not thugs, and are not in the mafia. (0 CT 6). Metzgar testified that Plaintiffs had nothing to do with his close friend, Lyne Perry's, death. (0 CT 7).

Plaintiff, Gabriel Jebb, testified at the first day of trial testimony that his family had transitioned the company from a limited liability company to a C-Chapter corporation (“Air California Adventure, Inc.”). (0 CT 9). Mr. Jebb testified that his family sold that company to Robin Marien and provided notice to the City of the sale. (0 CT 9). Mr. Jebb also testified that while he was employed by Mr. Marien’s iteration of the company, he was aware of the City’s calls, e-mails, and letters to Mr. Marien as the leaseholder and concessionaire. (0 CT 9). Through his Exhibit 300, see e.g., Exhibit 300, at 3:20-3:30), Mr. Kuczewski repeatedly states some type of variation of “This is the Torrey Pines lessee. This is what we see. This is Robin Marien...” while pointing to a picture of Mr. Marien at the Torrey Pines Gliderport. In response to Mr. Kuczewski’s fantastical claims that Mr. Marien and Air California Adventure, Inc. did not hold the leasehold and concession, Mr. Marien was examined about Exhibit 27, the new lease, which was read out loud and which the Court allowed Mr. Kuczewski to study prior to exhibition to the jury. (0 CT 8).

Mr. Kuczewski’s AOB indicates that he **now** objects to an unknown quantum (and for unknown reasons) of the jury instructions, the verdict forms, and the exclusion of several items of evidence. There is simply insufficient information provided by the AOB to allow Plaintiffs to determine what testimony or evidence bears on Kuczewski’s undefined claims. Moreover, Kuczewski makes these claims despite the great pains taken by the superior court to mollify his concerns and ensure fairness.

The parties collectively prepared and presented to the superior court competing jury instructions and special verdict forms. (0 CT 12-13). Following extensive discussions, the parties withdrew all objections to the jury instructions presented to the jury in this case with the exception of Mr. Kuczewski's objections to plaintiffs' two special jury instructions renumbered as requested by the superior court to instructions 1314 and 1331. (0 CT 12).

The court overruled these two objections of Kuczewski to these two instructions and did not adopt his suggested revisions on the basis that the revisions were both argumentative and contradicted the law in light of the evidence presented to that point in the trial. *Id.* The court explained to Mr. Kuczewski the differences between general verdict forms and special verdict forms. *Id.* Mr. Kuczewski declined to create the special verdict form, offered no objections to Plaintiffs' use of a general verdict form but requested the jury's determination of his cross-claims be recorded by way of special verdict form. (0 CT 12; 1 RT 111-112). Plaintiffs drafted their general verdict form and submitted it to the superior court and the Defendant. The superior court drafted Mr. Kuczewski's special verdict form and presented it to the parties. No objections were tendered by either party to either form. (0 CT 12).

## **2. The Plaintiffs' Testimony**

Gabriel Jebb's testimony continued the second day of trial. Mr. Jebb testified that the statements of Kuczewski posted on the Internet website ushawks.org by Holland at Kuczewski's request, Kuczewski's Exhibit 300, were false. (1 RT 116). Mr. Jebb stated Kuczewski's false, online statements accusing Plaintiffs of unsafe operations,

bullying, organized crime, and drug use resulted in the loss of three business contracts valued at \$2,000,000.00 each, totaling a loss of \$6,000,000.00. (1 RT 116, 117, 130-132). Additionally, Jebb testified to the emotional damage caused by Mr. Kuczewski's conduct. (1 RT 122-127, 135, 136).

Regarding, Kuczewski's cross-claims, Mr. Jebb testified he did not intend to injure Kuczewski, there were no injuries, and the contact between them was mutual. (1 RT 127, 132-133). Jebb used his authority and discretion as flight director to remove safety hazards from the property because Kuczewski's provocative behavior was a safety risk. (1 RT 134, 135). On his cross-examination, Kuczewski questioned Jebb regarding whether the area in which the incident occurred was open to the public at that time. (1 RT 228). Jebb stated that it was, but it was not open to Kuczewski because he had been asked to vacate due to safety concerns that were captured by Kuczewski's own filming. *Id.*

Plaintiff, Robin Marien testified to being the leasehold owner, concessionaire, and representative of co-plaintiff, Air California Adventure, Inc. ("ACA"). (1 RT 249, 251, 256-257). Mr. Marien testified that ACA does business as the "Torrey Pines Gliderport." (1 RT 308). Mr. Marien testified Kuczewski's statements are false and baseless and that he has suffered several emotional, personal, and business losses and damages as a result of his conduct. (1 RT 291-295; 313-318).

On cross-examination, Kuczewski presented Mr. Marien Exhibit 1, ACA's prior lease agreement with the City of San Diego, that represented a lease between the City and Air California

Adventure, LLC rather than the current Air California Adventure Inc. Marien testified that the name has since been amended and a copy of the current lease is between Air California Adventure, Inc. and the City was presented as Exhibit 27. (2 RT 496-499). After authenticating the Exhibit, Mr. Marien was questioned concerning the recitals of Exhibit 27, which in relevant part stated:

This GROUND LEASE AND OPERATING AGREEMENT (this “Lease”) is entered into as of the Commencement Date (defined in EXHIBIT A attached to this Lease), **between THE CITY OF SAN DIEGO, a California municipal corporation (“Landlord”), and AIR CALIFORNIA ADVENTURE, INC., a California corporation (“Tenant”).**

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1. PURPOSES. At the Commencement Date, Landlord owns the Premises, which is a hang-gliding, paragliding, non-powered aircraft flying, radio-controlled model aircraft flying, and sailplane flying facility and associated retail facilities that are part of Landlord’s Torrey Pines City Park. **Tenant has occupied and operated the Premises for these uses since September of 1998 pursuant to that certain Flat Rate Lease between Tenant and Landlord effective September 17, 1998.**

(Emphasis added). Ex. 27.

Marien stated he purchased the business (Air California Adventure, Inc., which was prior to the purchase transitioned from Air California Adventure, LLC (0 CT 9)), from David Jebb, the former leasehold owner and concessionaire several years before the incidents in this claim, and that David Jebb relinquished possession of the property to Marien, was not involved in the business from that point forward, and is not a part of this claim. (2 RT 469).

Likewise, Marien testified that he never intentionally caused Kuczewski any harm or physical injury (1 RT 259). Kuczewski was admittedly trespassing on the business property and Marien exercised his right to eject Kuczewski for trespassing. (1 RT 291-295).

### **3. Kuczewski's Witnesses**

Kuczewski poffered testimony from his witness, Bryan Yute, recounting incidents that occurred not only outside the scope of this claim, but prior to Robin Marien's ownership. (1 RT 234-247). Mr. Yute then says, "Remember?" to Mr. Jebb in an effort to intimidate him. (1 RT 245). On cross-examination, Mr. Yute stated he never had a problematic interaction with Mr. Marien. (1 RT 247).

Kuczewski's following witness, David Beardslee, also believed the current owner of ACA to be David Jebb. (2 RT 452). Mr. Beardslee testified that he, Mr. Kuczewski, and witness Ernie Casco have a problem with the plaintiffs and dislike their management. (2 RT 451-452). Mr. Beardslee was excluded from the property by prior ownership because they contended he had fondled minors while engaged in tandem flights. (2 RT 453-454).

The testimony of Kuczewski's witness, John Heiny was similarly unhelpful to Kuczewski. Kuczewski attempted to characterize Mr. Heiny as an expert witness without designating him as such. (1 RT 275-280). Kuczewski's final witness, Ernesto ("Ernie") Casco, testified to having a personal interest in Mr. Kuczewski's claim to the leasehold. (2 RT 431). Mr. Casco testified that Plaintiffs Marien and Jebb "inherited the conflict" surrounding the property. (2 RT 399). Most notably, Casco had an outburst in front of the jury while the parties engaged in a sidebar outside the courtroom. (2 RT

409). The witness spoke to Mr. Marien directly in order to intimidate or threaten him. (2 RT 409-413). The trial court *voir dired* jurors who witnessed the outburst to ensure their ability to remain neutral and judge the evidence fairly. (*Id.*)

#### **4. Kuczewski's Testimony & Trial Conduct**

Kuczewski testified that he acknowledged that the statements made about Plaintiffs are negative. (2 RT 504). He directed Holland to republish his speeches for increased viewership; to publicize and bring attention to the statements he made about plaintiffs. (2 RT 505).

Mr. Kuczewski acknowledged he is not qualified to talk about site safety. (2 RT 506). That he never testified at trial as an expert despite statements indicating otherwise. (*Id.*) He testified that he has "...no way of knowing which accidents are Plaintiffs fault or not." (2 RT 517). Kuczewski admits one can reasonably believe that the posts are meant to say "maybe some [accidents] are their [plaintiffs'] fault." (2 RT 517). He also admitted that it is reasonable for someone to see his posts and take away the impression that plaintiffs needs some kind of oversight of their operations for a particular purpose. (2 RT 521). Kuczewski also concedes that he does not publish his videos on the Internet until after the City is aware of whatever gripe he has presented, so that when Ms. Holland republishes his statements at his direction it is necessarily done to inform some other audience, namely glider pilots. (2 RT 518-519).

Although Kuczewski *now* takes issue with the jury instructions and verdict forms used during trial, his statements reflect that Kuczewski had the opportunity to provide his own jury instructions and verdict forms, refused to do so, requested the court complete both



for him, and received, reviewed, accepted, and used the jury instructions and verdict forms requested. (1 RT 110; 0 CT 12-13).

Kuczewski received direction, guidance, and/or an education on particular mechanisms of evidence and civil trials. (1 RT 138, 146, 149, 153, 155, 174, 178, 179, 182, 186, 190-194, and 211-215). Mr. Kuczewski refused to take seriously several of the advantages and opportunities to be heard before the court that were offered to him.

Mr. Kuczewski's conduct of the trial, his testimony, and his AOB display a continued, unreasonable, and willful disrespect for the legal process. The lower court went to great lengths to ensure Kuczewski was not disadvantaged and that he could participate in his own defense. The lower court presented an opportunity for Kuczewski to review any and all evidence submitted to the court, which includes copies of his own ushawks.org posts, and he did, without objection. (2 RT 527). The lower court attempted to give Kuczewski guidance and latitude in the execution of his own defense, however Mr. Kuczewski routinely took advantage of the circumstances and attempted to introduce evidence that had already been excluded in limine (*See e.g.*, 2 RT 572), among various other issues. This colloquy was indicative of Kuczewski's approach to the trial and this case, which occurred during his examination of Mr. Jebb regarding one of the videos Mr. Kuczewski shot and introduced into evidence:

THE COURT: [...]Mr. Kuczewski has expressed a lot of misunderstanding about the proceedings in situations where the Court has felt that it's clearly understood what the proceedings were supposed to be[...] (1 RT 112).

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DEFENDANT KUCZEWSKI: Well, the one I wanted to show is the short one, Your Honor.

THE COURT: Mr. Kuczewski, let's move forward.

(Video played.)

BY DEFENDANT KUCZEWSKI:

Q. Do you recall what you just did there, Mr. Jebb?

A. No.

Q. Is it possible that you shoved me over the guardrail?

A. I don't know. I don't believe I did.

DEFENDANT KUCZEWSKI: Can I play it back just to see if I can refresh his memory, Your Honor?

THE COURT: We all saw the video. Ask questions. Mr. Kuczewski, it's apparent to me that you're passively resisting my instructions. Follow my instructions and let's get through this for the jury, okay?

We're running a courtroom here. This is the last bastion where we provide information to a jury in a neat, organized and efficient way and I'm not going to have the same patience level as others might.

So let's get it done efficiently because these people have a life to live and they need to get on with their lives. So let's get through this efficiently.

And when I order something, I don't want to have to argue with what I've ordered three or four times afterwards.

Play the video and then you can ask some questions, any questions you like.

So let's move through it.

(Video played.)

THE COURT: Play the video. Play the video, all the parts that you want to play.

(Video played.)

DEFENDANT KUCZEWSKI: I do want to show his hand on my jacket, Your Honor.

THE COURT: Keep playing the video.

DEFENDANT KUCZEWSKI: All right.

(Video played.)

THE COURT: Just keep playing it until you've played --

DEFENDANT KUCZEWSKI: I have want to --

THE COURT: Play the whole video, Mr. Kuczewski.  
Play the whole video and then you can come back and  
ask him any questions you want.

(Video played.)

DEFENDANT KUCZEWSKI: I think this might be a  
point to move ahead, Your Honor.

THE COURT: Okay. Go ahead and move it ahead,  
please.

Thank you.

DEFENDANT KUCZEWSKI: I do want to note that Mr.  
Jebb has that document and he's hiding it.

THE COURT: No. No. No. You'll get a chance to do  
your closing argument and you can make your points you  
want with the jury, but not now. This is not the time.  
Keep it moving.

(Video played.)

DEFENDANT KUCZEWSKI: Go forward a little  
further.

(Video played.)

DEFENDANT KUCZEWSKI: Okay. This part is pretty  
important.

(Video played.)

DEFENDANT KUCZEWSKI: I'll move forward again,  
Your Honor.

THE COURT: Thank you.

DEFENDANT KUCZEWSKI: Okay. This is another  
incident of grabbing and touching --

THE COURT: Just show the video. No commentary.

(Video played.)

DEFENDANT KUCZEWSKI: He actually grabs my  
shirt, my jacket, Your Honor.

THE COURT: Sir -- Mr. Kuczewski -- Mr. Kuczewski,  
stop the video. I'm going to tell you again. You will get a  
chance to testify and you will get a chance to give a  
closing argument, but you're not going to comment  
during this video, okay?

Don't try to oppose me right now. I'm giving you the  
ground rules. Don't comment during the video. Let the  
jury look at the video the way they want to see it and then

you'll get a chance, during your direct testimony and your closing argument, to comment. But don't comment on the video. So let's move forward. Thank you.

(Video played.)

DEFENDANT KUCZEWSKI: Your Honor, I can stop it here. I'll skim through it real quick and save the jury 13 minutes, if you would like.

THE COURT: Let's do it. Let's go ahead and skip right through it.

DEFENDANT KUCZEWSKI: Okay. This is mostly just a standoff, facing each other, waiting for the police to arrive.

THE COURT: There we go.

DEFENDANT KUCZEWSKI: There is a point here where Mr. Marien contacts me.

(Video played.)

DEFENDANT KUCZEWSKI: Now I do want to show Mr. Jebb --

THE COURT: Let's just play the video, sir.

(Video played.) (1 RT 211-214).

Mr. Kuczewski's suggestions in his brief that he was somehow mistreated or unfairly maligned by the trial court is simply incorrect based upon the record evidence.

## **ARGUMENT**

### **I. Kuczewski's General "Public" & "First Amendment" Claims of Error Fail Because the Law of the Case Resolves the Issues Against Him & He Fails to Provide Additional, Substantial Evidence or Argument to Base Any Claim That Law of the Case Should Not Apply; Thus He Demonstrates No Error In Jury Instructions or Verdict Forms**

Kuczewski's brief is difficult to substantively distill but, in essence, he appears to claim (as he previously did in *Marien I*) that the trial court erred in finding exactly what this Court found in *Marien I*:

that this case is a private matter of private concern. Plaintiffs are not public figures, this is not a public issue, and Kuczewski's defamatory statements did not involve a matter of public concern. And that the issuance of jury instructions and verdict forms consistent with those findings was error.

Generally, "the trial court's resolution of disputed factual questions bearing on the public figure determination is reviewed for substantial evidence, while the trial court's resolution of the ultimate question of public figure status is subject to independent review for legal error." *Khawar v. Globe Int'l, Inc.* (1998) 19 Cal.4th 254, 264. However, this decision was previously made by this court on appeal in *Marien I* and no new facts have been referenced by Kuczewski's record.

Thus, these matters have already been litigated before this Court in *Marien I*, pgs. 15-19 (under heading "B. No Public Issue or Issue of Public Interest in This Case."). The issues raised by Kuczewski here are, therefore, law of the case: "The doctrine of law of the case may be applicable where the prior appeal is from a decision short of a full trial, such as a judgment on demurrer or an order of nonsuit, or in this case, an order denying an anti-SLAPP motion to strike a complaint. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 909, p. 944.)" *Bergman v. Drum* (2005) 129 Cal.App.4th 11, 15, fn. 3.

An anti-SLAPP decision is law of the case except where an "...amended complaint differs materially from the original complaint and includes allegations and claims that were not addressed in [the original anti-SLAPP appeal][.]" *Newport Harbor Offices & Marina*,

*LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 41. Each of Mr. Kuczewski's claims made in his opening brief: that he is a "brave" citizen subject to first amendment protections of speech and press for his republications of statements defamatory per se have already been reviewed, analyzed, and resolved against him in *Marien I*, \*5-\*8. "On remand [from *Marien I*], Plaintiffs filed a second amended complaint (SAC), which added Holland as a named defendant in place of a Doe defendant, but did not allege any new false statements [regarding Kuczewski]." *Marien II*, \*1.

Having failed to provide additional record-information or substantive, authority-supported argument, these claims are simply not subject to *de-novo* review because it is the law of the case that Kuczewski's general "public" and "first amendment" fail. That is particularly true because Kuczewski offered no evidence at trial to alter this Court or the trial court's analysis of the issues settled by the law of the case. For that reason, he cites no such evidence either. That is, the evidence at trial tracked the operative complaint because the offending statements offered at trial were quoted verbatim in the operative complaint.

Furthermore, as indicated in the settled statement, the parties – to include Mr. Kuczewski – withdrew all objections to verdict forms and jury instructions except Kuczewski's objections to two instructions: Nos. 1314 (Right to Eject Trespasser) and 1331 (No Liability Where No Arrest By a Private Citizen). 0 CT 12-13. Under the doctrine of invited error Kuczewski may not complain of error in instructions that he requested. *Stevens v. Owens–Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645 1653–1655. Consequently, as to

the balance of the instructions, Mr. Kuczewski has waived or forfeited any claim of error.

Regarding these two particular objected-to instructions, Kuczewski does not in his brief explain what the problem is or how it negatively impacted his case. In fact, it appears he focuses his argument on issues that could not possibly embrace these two instructions. That is, it seems that Kuczewski focuses his jury instruction appeal on the balance of the instructions for which he withdrew all objections. But, assuming *arguendo* that is not the case, and that these two instructions are his focus, it deserves reminder that these instructions dealt with aspects of Kuczewski's cross-claims involving an affirmative defense or elements beyond the first question of his special interrogatories – which necessarily means the jury never relied upon them:

First Cause of Action Assault: Gabriel Jebb

1. Did Mr. Jebb act with intent to cause harmful or offensive contact to Mr. Kuczewski?

Yes \_\_\_\_\_ No   X  

If you answered Question 1 “Yes”, please proceed to Question 2. If you answered Question 1 “No”, please proceed to Question 9.

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Second Cause of Action: Battery Gabriel Jebb

9. Did Gabriel Jebb touch Robert Kuczewski with the intent to harm or offend him?

Yes \_\_\_\_\_ No   X  

If you answered Question 9 “Yes”, please proceed to Question 10. If you answered Question 9 “No”, please proceed to Question 19.

Third Cause of Action: False Arrest, Gabriel Jebb

19. Did Gabriel Jebb intentionally cause Mr. Kuczewski to be arrested without a warrant?

Yes \_\_\_\_\_ No   X  

If you answered Question 19 “Yes”, please proceed to Question 20. If you answered Question 19 “No”, please proceed to Question 24.

Fourth Cause of Action: Wrongful Restraint Gabriel Jebb

24. Did Gabriel Jebb intentionally deprive Mr. Kuczewski of his freedom of movement by use of physical force and duress?

Yes \_\_\_\_\_ No   X  

If you answered Question 24 “Yes”, please proceed to Question 25. If you answered Question 24 “No” please proceed to Question 34.

As to Mr. Marien

First Cause of Action Assault: Robin Marien

34. Did Mr. Marien act with intent to cause harmful or offensive contact to Mr. Kuczewski?

Yes \_\_\_\_\_ No   X  

If you answered Question 34 “Yes”, please proceed to Question 35. If you answered Question 34 “No”, please proceed to Question 42.

Second Cause of Action: Battery Robin Marien

42. Did Robin Marien touch Robert Kuczewski with the intent to harm or offend him?



Yes \_\_\_\_\_ No   X  

If you answered Question 42 “Yes”, please proceed to Question 43. If you answered Question 42 “No”, please proceed to Question 51.

Third Cause of Action: False Arrest, Robin Marien

51. Did Robin Marien intentionally cause Mr. Kuczewski to be arrested without a warrant?

Yes \_\_\_\_\_ No   X  

If you answered Question 51 “Yes”, please proceed to Question 52. If you answered Question 51 “No”, please proceed to Question 56.

Fourth Cause of Action: Wrongful Restraint, Robin Marien

56. Did Robin Marien intentionally deprive Mr. Kuczewski of his freedom of movement by use of physical force and duress?

Yes \_\_\_\_\_ No   X  

If you answered Question 56 “Yes”, please proceed to Question 57. If you answered Question 56 “No” please stop, sign and return your verdict.

(7 CT 1745, 1753, 1763, 1768, 1778, 1784, 1793, 1798). The jury answered not a single question in favor of Kuczewski on Plaintiffs’ claims or on any of his own. Thus, the jury never reached the plaintiffs’ affirmative defense of trespass or questions dealing with the manner of the claimed false arrest because the jury instead found that

Kuczewski failed even to demonstrate that any of the Plaintiffs acted with the intent to cause harm or injure him.

So, while the plaintiffs maintain there is no error in the instructions to begin with, and Kuczewski has not identified any either, even if there was some error it simply cannot be prejudicial under such circumstances.

The judgment should be affirmed.

## **II. Kuczewski's Challenges to the Judgment & Sufficiency of the Evidence Fail Because He Provides No *Bona-Fide* Challenge to Either**

It is fundamental that a trial court judgment is ordinarily presumed to be correct and the burden is on Kuczewski to demonstrate, on the basis of the record presented on appeal, that the trial court committed an error that justifies reversal of the judgment. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 355, p. 409 [citing cases]. “This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.” (*Id.*; see *Cal. Const.*, art. VI, § 13.)

“In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court. ‘[I]f any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented.’” *Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.” “All intendments and presumptions are indulged to support it on matters as to which the

record is silent, an error must be affirmatively shown.” *Denham v. Sup.Ct.* (1970) 2 Cal.3d 557, 564. Any ambiguity in the record is resolved in favor of the appealed judgment or order. *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631.

On appeals challenging sufficiency of the evidence, appellate courts are guided and restricted by the “substantial evidence” rule: The trial court's resolution of disputed factual issues must be affirmed so long as supported by “substantial” evidence. *Id.* at 632. *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 678 (“Defendants raising a claim of insufficiency of the evidence assumes (sic) a daunting burden” (internal quotes omitted); *In re Michael G.* (2012) 203 Cal.App.4th 580, 589 (“The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts.”). On appeal challenging sufficiency of the evidence, an appellate court will affirm the judgment so long as the judgment is supported by substantial evidence on any one sufficient cause of action. *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673; *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 596.

Mr. Kuczewski has failed in his opening brief to explain by citation to authority or record evidence the basis for his claim that the jury’s verdict and the trial court’s judgment were against the substantial evidence. He states throughout his AOB some variation of the contention that he should have won because his statements were “truthful and accurate.” AOB, pg. 40. But he points to no testimony to support this contention. In fact, Mr. Kuczewski makes no mention of

the substantial evidence standard and, obviously, failed to demonstrate at all prejudice from such a showing. In fact, the role of this reviewing tribunal is not to resolve conflicts in the evidence or reweigh credibility determinations clearly made by the jury. *People v. Snow* (2003) 30 Cal.4th 43, 66. It is also not for the respondent on appeal or the court of appeal in the first instance to scour the record for any and all plausible arguments an appellant might make, and argue against a self-constructed straw man.

Consequently, the respondents and the court are left only with the fact that disputed factual issues were raised to the jury and the jury found in favor of the plaintiffs/respondents on all those issues in relation to plaintiffs' general verdict as well as defendant's special verdict. Having failed to point to any evidence demonstrating – or even intimating – an insufficiency of the trial evidence, Mr. Kuczewski's appeal necessarily fails under this standard inasmuch as Kuczewski refuses even to identify a prejudicial error supported by the evidence at trial. *Denham*, 2 Cal.3d at 564.

The judgment should be affirmed.

### **III. Trial Testimony & Exhibits Demonstrate that Air California Adventure, Inc. Was a Proper Plaintiff & Kuczewski's Failed Cross-Claims Are Not Saved Even If It Were Not**

The jury was allowed to hear all of Kuczewski's claims that Air California Adventure, Inc. was not the leaseholder of the Torrey Pines Gliderport. However, the jury clearly disagreed with Kuczewski's contentions, which were irrelevant in any event. Here's how we know.

Mr. Gabriel Jebb testified at the first day of trial that his family had transitioned the company from a limited liability company to a C-Chapter corporation (“Air California Adventure, Inc.”). (0 CT 9). Mr. Jebb testified that his family sold that company to Robin Marien and provided notice to the City of the sale. (0 CT 9). Mr. Jebb also testified that while he was employed by Mr. Marien’s iteration of the company, he was aware of the City’s calls, e-mails, and letters to Mr. Marien as the leasehold and concessionaire. (0 CT 9).

Mr. Kuczewski has railed against Mr. Marien, who had no interest in Air California Adventure, LLC, and sued Mr. Marien and Air California Adventure, Inc. through his cross-complaint, but nevertheless now apparently seeks to argue he sued the wrong entities. Finally, in response to Mr. Kuczewski’s claims that Mr. Marien did not hold the leasehold and concession, Mr. Marien was examined about Exhibit 27, the new lease, which was read aloud and exhibited to the jury. The relevant portion of Exhibit 27 read:

This GROUND LEASE AND OPERATING AGREEMENT (this “Lease”) is entered into as of the Commencement Date (defined in EXHIBIT A attached to this Lease), **between THE CITY OF SAN DIEGO, a California municipal corporation (“Landlord”), and AIR CALIFORNIA ADVENTURE, INC., a California corporation (“Tenant”).**

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1. PURPOSES. At the Commencement Date, Landlord owns the Premises, which is a hang-gliding, paragliding, non-powered aircraft flying, radio-controlled model aircraft flying, and sailplane flying facility and associated retail facilities that are part of Landlord’s Torrey Pines City Park. **Tenant has occupied and operated the Premises for these uses since September of 1998**

**pursuant to that certain Flat Rate Lease between  
Tenant and Landlord effective September 17, 1998.**

(Emphasis added).

Mr. Marien testified that he recognized the document, signed it, and that it was countersigned by the City. Kuczewski had a chance to examine Marien on the document. (2 RT 499-500). California Evidence Code section 622 states: “The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.”

The highlighted portion of the lease above is a recital, and not a recital of consideration. The parties to the lease are Mr. Marien, Mr. Marien’s company, Air California Adventure, Inc., and the City of San Diego. They agree that Air California Adventure, Inc. has been the tenant of the Gliderport since the September 1998 lease. Mr. Kuczewski – despite his very best attempts – is not a party to the lease. Thus, he has no standing to dispute that which is conclusively established as between those entities who are: The City of San Diego and Air California Adventure, Inc. and Robin Marien. That evidence was more than sufficient for the jury to determine that Mr. Kuczewski’s “Inc. versus LLC” red herring was inapplicable.

Surely, with the additional testimony on the issue of Mr. Jebb and Mr. Marien as to the City and Marien’s agreements prior, there was no doubt Mr. Kuczewski was once again simply wrong in his factual suggestions and analysis. And, had he wished to challenge that information despite the existence of Evidence Code section 622, he

could have simply had someone from the City's Real Estate Assets & Airports Management Department testify. Kuczewski didn't do that either.

The jury's findings of fact in relation to Kuczewski's serial defamation are simply not affected by who is, or is not, the leaseholder and concessionaire and Kuczewski has provided no supportable argument or authority to the contrary. Moreover, Kuczewski's own causes of action are also unaffected by his contentions here because the jury's verdict did not rely on any findings regarding who is or is not the leaseholder and concessionaire (again, it is clear that Mr. Marien and Air California Adventure, Inc. are).

The jury reviewed Mr. Kuczewski's cross-claims and in its special verdict found:

First Cause of Action Assault: Gabriel Jebb

1. Did Mr. Jebb act with intent to cause harmful or offensive contact to Mr. Kuczewski?

Yes \_\_\_\_\_ No   X  

If you answered Question 1 "Yes", please proceed to Question 2. If you answered Question 1 "No", please proceed to Question 9.

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Second Cause of Action: Battery Gabriel Jebb

9. Did Gabriel Jebb touch Robert Kuczewski with the intent to harm or offend him?

Yes \_\_\_\_\_ No   X  

If you answered Question 9 "Yes", please proceed to Question 10. If you answered Question 9 "No", please proceed to Question 19.

Third Cause of Action: False Arrest, Gabriel Jebb

19. Did Gabriel Jebb intentionally cause Mr. Kuczewski to be arrested without a warrant?

Yes \_\_\_\_\_ No X\_\_\_\_\_

If you answered Question 19 “Yes”, please proceed to Question 20. If you answered Question 19 “No”, please proceed to Question 24.

Fourth Cause of Action: Wrongful Restraint Gabriel Jebb

24. Did Gabriel Jebb intentionally deprive Mr. Kuczewski of his freedom of movement by use of physical force and duress?

Yes \_\_\_\_\_ No X\_\_\_\_\_

If you answered Question 24 “Yes”, please proceed to Question 25. If you answered Question 24 “No” please proceed to Question 34.

As to Mr. Marien

First Cause of Action Assault: Robin Marien

34. Did Mr. Marien act with intent to cause harmful or offensive contact to Mr. Kuczewski?

Yes \_\_\_\_\_ No X\_\_\_\_\_

If you answered Question 34 “Yes”, please proceed to Question 35. If you answered Question 34 “No”, please proceed to Question 42.

Second Cause of Action: Battery Robin Marien

42. Did Robin Marien touch Robert Kuczewski with the intent to harm or offend him?



Yes \_\_\_\_\_ No   X  

If you answered Question 42 “Yes”, please proceed to Question 43. If you answered Question 42 “No”, please proceed to Question 51.

Third Cause of Action: False Arrest, Robin Marien

51. Did Robin Marien intentionally cause Mr. Kuczewski to be arrested without a warrant?

Yes \_\_\_\_\_ No   X  

If you answered Question 51 “Yes”, please proceed to Question 52. If you answered Question 51 “No”, please proceed to Question 56.

Fourth Cause of Action: Wrongful Restraint, Robin Marien

56. Did Robin Marien intentionally deprive Mr. Kuczewski of his freedom of movement by use of physical force and duress?

Yes \_\_\_\_\_ No   X  

If you answered Question 56 “Yes”, please proceed to Question 57. If you answered Question 56 “No” please stop, sign and return your verdict.

(7 CT 1745, 1753, 1763, 1768, 1778, 1784, 1793, 1798). The jury answered not a single question in favor of Kuczewski on Plaintiffs’ claims or on any of his own. Thus, the jury never reached the plaintiffs’ affirmative defense of trespass; the jury instead found that Kuczewski failed even to demonstrate that any of the Plaintiffs acted with the intent to cause harm or injure him.

So, whether or not Air California Adventure, Inc. is the leaseholder and tenant (it is), does not matter because the jury never had to consider whether it or its managers or employees had the right to exclude Kuczewski. Likewise, this suggestion of error is irrelevant to the jury's decision on Plaintiff's defamation claims. Kuczewski's defamation of Air California Adventure, Inc., Robin Marien, and Gabriel Jebb was undertaken by name. Kuczewski specifically identified these individuals and entity in his statements posted online and which were restated verbatim in the operative second amended complaint.<sup>6</sup>

In several of those statements (which were introduced into evidence by Mr. Kuczewski through his Exhibit 300, see e.g., Exhibit 300, at 3:20-3:30), Mr. Kuczewski states some type of variation of "This is the Torrey Pines lessee. This is what we see. This is Robin Marien..." while pointing to a picture of Mr. Marien at the Torrey Pines Gliderport. Mr. Kuczewski admitted through his own evidence, through his pleadings, and through his testimony that Air California Adventure, Inc. was lessee and concessionaire of the Torrey Pines Gliderport and it defies logic why he now seeks to abandon those admissions. It is particularly mystifying in light of the fact that Mr. Kuczewski and the Plaintiffs all requested that the jury receive CACI 212 (7 CT 1689). As that instruction makes clear, California Evidence

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<sup>6</sup> Kuczewski failed to designate the second amended complaint instead focusing his designation on the briefing in the superior court on anti-SLAPP issues, which have long been decided by this Court in *Marien I* and *Marien II*. This is yet another example of Mr. Kuczewski failing to requite his obligations as an appellant, and the prejudice it worked upon the Court and the Plaintiffs.

Code sections 403 and 1220 would allow the jury to disregard Kuczewski's new argument based upon his prior admissions alone.

Accordingly, none of Kuczewski's business formation and organization arguments affect the Plaintiffs' claims or his own. The jury got it right and the jury had more than ample evidence upon which to rest its decisions; so Kuczewski cannot, therefore, carry his burden – though he cites no standard of review actually applicable to such a claim – on this issue.

The judgment should be affirmed.

#### **IV. Kuczewski's Evidentiary "Objections" Fail On the Merits & For Lack of Specificity**

A "trial court's ruling on the admissibility of evidence generally is reviewed for abuse of discretion." *People v. Griffin* (2004) 33 Cal.4th 536, 587, disapproved on other, unrelated grounds by *People v. Riccardi* (2012) 54 Cal.4th 758, fn. 32. "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." *People v. Carmony* (2004) 33 Cal.4th 367, 377. 'Even under [the abuse of discretion] standard, there is still a substantial evidence component. We defer to the trial court's factual findings so long as they are supported by substantial evidence, and determine whether, under those facts, the court abused its discretion.'" *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1121. The harmless error standard also applies to these claims. *F.P. v. Monier, supra*. Plaintiffs maintain that Kuczewski's claims are also subject to forfeiture/waiver analysis.

Kuczewski seems to take issue primarily with the Court's denial of his request to show a video from 2011 which he contends shows an accident which the trial court allowed Mr. Kuczewski to *repeatedly* reference and elicit testimony about. (*See e.g.*, 1 RT 341, 342; 2 RT 506, 513, 515). It appears then that Mr. Kuczewski is not upset with exclusion of the topic – because that didn't happen – but is instead angry that he wasn't able to show a video of it. A disputed matter, settled without admission of liability, and without testimony by any of the participants or the videographer.

In order to prove an abuse of discretion based upon the exclusion of evidence, a litigant must provide the trial court with an offer of proof as to the “substance, purpose, and relevance” of the excluded material prior to exclusion of the evidence. (Evid. Code, § 354, subd. (a)). Mr. Kuczewski does not point to record evidence to demonstrate that he made an offer of proof regarding this video. Mr. Kuczewski does not show how the video was helpful in a non-prejudicial way that went beyond the admission of his testimony about the facts of the accident itself.

Mr. Kuczewski does not adequately explain how the outcome of the case would have been different, based upon citations to authority or record evidence, had this video been admitted in addition to his testimony. This is likely because there is no such evidence. As Mr. Jebb testified:

When you do the math, Torrey Pines has an accident 1 out of 378,000 flights, which is better than any airport in the country or the world, which is 10 times, 100 times, 1000 times fewer than any of the nearest other paragliding sites or paragliding operations in the US. There is no place in

the world that has a safety record, I mean, anywhere near ours, especially, considering the volume of traffic that we have there.

(1 RT 131). Mr. Kuczewski has failed to carry his burden as to this video and, having allowed testimony about the incident, the trial court was well within its discretion to deny admission of the video as cumulative and prejudicial, among other considerations.

Next Mr. Kuczewski claims in his AOB that he was limited in “questioning Expert Witness Jack Gary Smith (1 RT 156) who was presented as an expert on airports to establish that the Torrey Pines Gliderport should be treated as an ‘airport.’” But Mr. Smith was actually presented as an expert in police procedures:

Q. What is your current job?

A. Currently, I am retired from law enforcement and I currently own a company entitled Jack Smith Consulting and Investigative Services. We provide expert testimony on police practices and procedures and do other investigative work.

Q. Fair enough. What is your training and experience and education that qualifies you for that job?

A. Well, I spent about -- almost 38 years in law enforcement. I rose from -- I spent 28 years with the Los Angeles Police Department, where I rose from police officer to the rank of Captain III, which is over -- an area commander, and I was an acting commander in personnel and Training Bureau for the LAPD before I retired.

Q. Okay. And then subsequent to that, what did you do next in law enforcement?

A. I took a job as Chief of Police for the City of El Cajon. And I was police chief in the City of El Cajon for approximately six years.

During that time, I was also president of the San Diego County Police Officer and Sheriff's Committee, and we oversaw all law enforcement activities for the County of

San Diego. I was president of that committee for about three years.

(1 RT 157-158). Mr. Smith testified that he believed that law enforcement could trespass Mr. Kuczewski under Penal Code section 602. (1 RT 161). Mr. Smith also testified that he reviewed the municipal code of San Diego as it relates to airports, and that the Torrey Pines Gliderport can exclude individuals based upon its inclusion in the broad definition of the section in effect at that time: San Diego Municipal Code section 68.1020. (1 RT 161-162).

Mr. Smith did testify that he became very familiar with airport operations when he was in charge of the Venice Division of the Los Angeles Police Department and Los Angeles International Airport was part of his responsibility for approximately five years. (1 RT 167). In light of this testimony, it is unclear to the respondents how Mr. Kuczewski claims he was unfairly denied the opportunity to examine an expert witness on matters not designated and how this prejudiced his case so severely that the outcome would have been different had the court allowed him to discuss airports and dogs with Mr. Smith. (1 RT 173).

Once again, Mr. Kuczewski claims an error that does not exist and which cannot be – and was not in the AOB – supported by citation to authority or record evidence. In other words, as is done throughout the AOB, Mr. Kuczewski simply “wings it” by claiming errors that do not exist and prejudices the respondents by forcing them to attempt to divine his intentions and assignments of error, as well as to answer his insupportable allegations concerning the trial.

Mr. Kuczewski has not carried his burden and the judgment should be affirmed.

**V. Mr. Kuczewski is Himself to Blame for His Adverse Verdict, Not Johnny Depp or Amber Heard As He Claims**

Based upon a juxtaposition of the evidence and the defendant's testimony in this case against the jury's verdict, it is readily apparent that the jury ruled against Mr. Kuczewski because it found his evidence and testimony to lack credibility, logic, and sense. Indeed, the jury even found by clear and convincing evidence that Kuczewski acted with malice or oppression in his defamation campaign, and assessed punitive damages against him.

Kuczewski does absolutely nothing on appeal to justify a different conclusion. Provided a free copy of the clerk's and reporter's transcripts, he refuses to use them as necessary because they don't support his position. Instead, he claims abuse in the form of an adverse verdict and that it is the fault of the plaintiffs, the trial judge, and the Johnny Depp and Amber Heard trial. The throughline is that he fails to provide authority or evidence for any of those assertions. And, as more fully demonstrated above, to the extent evidence bearing thereon exists, it is squarely contrary to Kuczewski's assertions.

Kuczewski *appears* to claim the amount awarded to the three plaintiffs is excessive, but he fails to address why or what authority supports his position. As the Court is aware, appellate courts can overturn an award as "excessive" only if "the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice

or corruption on the part of the jury.” *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1213. Here, the sheer volume of defamatory statements and the plaintiffs’ testimony concerning their economic and non-economic loss and injuries more than supports the amount of the verdict. So too does the fact the jury found Kuczewski acted with malice or oppression and awarded punitive damages. Moreover, Kuczewski provides no authority or evidence even suggesting a contrary result was warranted.

Kuczewski was roundly defeated in this trial and it was fair and square. He demonstrates no error because there is none. He demonstrates no prejudice, because there is none. The judgment should be affirmed.

## **VI. Kuczewski’s Post-Trial Motions Were Correctly Denied**

Mr. Kuczewski moved for a judgment notwithstanding the verdict (“JNOV”) and new trial after the verdict. Both motions were denied. This Court reviews the denial of a motion for judgment notwithstanding the verdict for substantial evidence (*Brown v. City of Sacramento* (2019) 37 Cal.App.5th 587, 598 ““As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion.””)) and the denial of a motion for new trial for abuse of discretion. *Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1018.<sup>7</sup>

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<sup>7</sup> The respondents maintain the trial court was divested of jurisdiction to hear the JNOV motion due to Kuczewski’s premature notice of appeal. *Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 485-486. However, in an abundance of caution, they brief the matter anyway.



As more fully set forth throughout this brief above, the substantial evidence supports this verdict. Kuczewski admitted his Internet postings for the jury's review. Exhibit 300. The Plaintiffs testified at length about their conduct, their damages, the falsity of Kuczewski's claims, and more. Kuczewski showed video of his claims of assault, battery, false arrest, and wrongful restraint. The Plaintiffs testified as to their recollections. The jury heard it all and rejected each and every of Kuczewski's claims and defenses, while finding in favor of the Plaintiffs on each of theirs. The motion for JNOV was correctly denied because the verdict is supported by the substantial evidence and there is no substantial evidence contradicting the jury's findings. Furthermore, Mr. Kuczewski has wholly failed to even argue the substantial evidence standard or sufficiently cite to the record or authorities, so he has effectively waived his appeal of the JNOV denial.

The same result attains for the denial of his motion for new trial. Kuczewski has not argued – let alone shown – how the trial court abused its discretion in denying his motion for new trial. The simple answer for his failure is that his motion was correctly denied. As more fully set forth throughout this brief above, there is no demonstrable abuse of discretion here.

The judgment should be affirmed.

## **CONCLUSION**

Based upon the foregoing, the record in this matter, and any additional argument or evidence advanced in this case, plaintiffs respectfully submit that the jury's verdict was correctly decided and it,

and the judgment thereon, should be affirmed with costs awarded to Respondents.

Dated: September 29, 2023      SHEWRY & SALDAÑA, LLP



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Christopher C. Saldaña

## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to California Rules of Court, Rule 8.204(c)(1), (4) that the forgoing brief contains 13,879 words as measured by the word count function of Microsoft Word, which was used to prepare this brief.

Dated: September 29, 2023      SHEWRY & SALDAÑA, LLP



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Christopher C. Saldaña

## PROOF OF SERVICE

I, Christopher C. Saldaña, am a member of the bar of this Court. I declare under penalty of perjury under the laws of the State of California, that the following is true and correct:

My business address is 402 W. Broadway, Suite 1550, San Diego, San Diego County, California 92101.

On September 29, 2023, I served the foregoing Respondents' Brief on Self-Represented Litigant Robert Michael Kuczewski in this matter by utilizing the TrueFiling electronic service as required by this Court's local rules. Based upon my review of the TrueFiling electronic service utilities, Mr. Kuczewski will be served by TrueFiling at bob@ushawks.org.

The Honorable Kenneth J. Medel was served by mail service with this brief, at the address below:

Hon. Kenneth J. Medel  
Hall of Justice, Department 66  
330 West Broadway  
San Diego, CA 92101

Executed this 29th day of September, 2023 at San Diego, San Diego County, California.

Dated: September 29, 2023      SHEWRY & SALDAÑA, LLP



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Christopher C. Saldaña