



Litigation Update

Litigation Section News

March 2013

Newer And More Specific Probate Statute § 366.3 Takes Precedence Over Older And More General § 9353.

Plaintiff filed suit for breach of contract to make a will 91 days after rejection by the estate of his claim *but* within a year of the decedent's death. The administrator of the estate is the defendant, and her demurrer was sustained without leave to amend after the trial court found plaintiff's suit was time barred. The appellate court reversed, stating: "*Probate Code* [section] 9353 gives claimants 90 days from rejection of the claim by the estate to file suit; section 366.3 gives them a year from decedent's death to file suit. Under the longstanding rule of construction that newer and more specific statutes take precedence over older and more general statutes, we conclude it is section 366.3's time limit that controls." *Allen v. Stoddard* (Cal. App. Fourth Dist., Div. 3; January 9, 2013) (As Mod., February 1, 2013) 212 Cal.App.4th 807.

No Contemporaneous Perception That Defective Product Caused Injury, So No Bystander Claim For Emotional Distress.

Plaintiff brought an action after she suffered emotional distress upon witnessing the death of her brother while they were scuba diving off the coast of Catalina Island. At the time of the accident, plaintiff thought her brother had a heart attack, but later learned that a plastic flow-restriction insert had become lodged in decedent's second stage regulator preventing him from getting enough air to breathe underwater. The trial court granted summary judgment. The appellate court affirmed, noting that plaintiff did witness the injury, but did not meaningfully comprehend that the company's defective product caused the injury. *Fortman v. Forvaltningsbolaget Insulan AB* (Cal. App. Second Dist., Div. 3; January 10, 2013) (As Mod. February 7, 2013) 212 Cal.App.4th 830.

Superior Court Told To Bow Out.

The parties had a disagreement about a lease. The superior court retained jurisdiction after trial "to make further orders, including injunctions, if necessary in the future to effectuate and or enforce the Court's judgment." The appellate court reversed that portion of the judgment, stating: "We are concerned with the court retaining jurisdiction for the life of the lease, which may continue for another 17 years, and interjecting itself into a contractual relationship between two business entities to resolve future, hypothetical disputes. In addition, we note the trial court resolved all the issues between the parties and there appears to be little need for the court to be involved with the administration of the lease until its end." *Stump's Market, Inc. v. Plaza de Santa Fe Limited, LLC* (Cal. App. Fourth Dist., Div. 1; January 11, 2013) 212 Cal. App.4th 882.

Insufficient Evidence To Defeat An Anti-SLAPP Motion.

Plaintiff brought an action for sexual assault against her employer and two co-employees. One of the co-employees cross-complained against plaintiff for defamation and intentional infliction of emotional distress. The trial court granted plaintiff's motion to strike under the anti-SLAPP statute [*Code of Civil Procedure* section 425.16] and dismissed the cross-complaint, and the co-employee appealed. After concluding the allegations of the cross-complaint were within the SLAPP law, the appellate court considered whether the co-employee had nonetheless demonstrated a likelihood of prevailing on the merits. The appellate court found that the co-employee did not specifically deny the truth of the allegation he had sexually assaulted plaintiff, noting that, while the cross-complaint alleged plaintiff's statements were false, he "cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the

merits," and that "Such a denial—which would have been easy to make under penalty of perjury, if true—cannot be reasonably inferred." The judgment of dismissal was affirmed. *Aber v. Comstock* (Cal. App. First Dist., Div. 1; January 11, 2013) 212 Cal.App.4th 931.

Plaintiff Can't Sue For Being Dismissed Due To Disability Because She Was Never Dismissed.

Plaintiff, a County employee, who suffered a back injury during her employment and claimed to be disabled, brought an action against the County under *Government Code* sections 31725 and 31721. The last sentence of section 31725 states in part: "... the employer shall reinstate the member to his employment effective as of the day following the effective date of the dismissal." The trial court granted summary adjudication and the appellate court affirmed, stating plaintiff's "claims fail as a matter of law because the undisputed facts show that [plaintiff] was neither 'dismissed' by the County because of a disability, within the meaning of section 31725, nor 'separated' from employment by the County, within the meaning of section 31721." *Mooney v. County of Orange* (Cal. App. Fourth Dist., Div. 3; January 11, 2013) 212 Cal.App.4th 865.

Black Letter California Law Rewritten.

The parole evidence rule protects the integrity of written contracts by making their terms the exclusive evidence of the parties' agreement, except if there is fraud. In *Bank of America v. Pendergrass* (1935) 4 Cal.2d 258, 263, [48 P.2d 659, 661], the California Supreme Court adopted a limitation on the fraud exception: evidence offered to prove fraud must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not

a promise directly at variance with the promise of the writing. Now, the California Supreme Court says “*Pendergrass* failed to account for the fundamental principle that fraud undermines the essential validity of the parties’ agreement. When fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds.” The court stressed “that the intent element of promissory fraud entails more than proof of an unkept promise or mere failure of performance,” and concluded: “... *Pendergrass* was ill-considered, and should be overruled.” *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association* (Cal. Sup. Ct.; January 14, 2013) 55 Cal.4th 1169.

Treble Damages And Attorney Fees Upheld Under A Penal Code Provision. Defendant induced plaintiff to loan him \$202,500 based on a false pretense. Plaintiff brought an action seeking attorney fees and treble damages. *Penal Code* section 496, subdivision (a), makes receiving, buying, or withholding property “that has been obtained in any manner constituting theft” an act punishable by imprisonment. Subdivision (c) reads: “Any person who has been injured by a violation of subdivision (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney’s fees.” The trial court awarded treble damages and attorney fees. The appellate court affirmed, finding that section 496 does not require a criminal conviction. *Bell v. Feibush* (Cal. App. Fourth Dist., Div. 3; January 15, 2013) 212 Cal.App.4th 1041.

“All Other Persons” In A Release Means All Other Persons. Rodriguez was injured in a car accident and settled with the other driver, Oto, and the rental car company, Hertz, who rented a car to the other man. The release released: “Takeshi Oto and The Hertz Corporation, its employees, agents, servants, successors, heirs, executors, administrators and *all other* persons, firms, corporations, associations or partnerships (hereafter Releasees).” Rodriguez later brought an action against Oto and Oto’s employer, Toshiba. Defendants answered the complaint, asserting the release as an affirmative defense, and moved for summary judgment, which

the trial court granted. The appellate court affirmed, stating: “Neither the failure to name Toshiba in the release, nor plaintiff’s deposition testimony about his subjective understanding of its effect, was sufficient to raise a triable issue of fact concerning the mutual intention of the parties. So far as this record shows, that intention was fully and accurately expressed by the language of the release. *Rodriguez v. Oto* (Cal. App. Sixth Dist.; January 15, 2013) 212 Cal. App.4th 1020.

Ignoring An Offer Under § 998 May Be Costly. After two trials and a remitter, a medical malpractice case appeared to be over when judgment was entered for \$1,437,276. But the parties soon became embroiled in an issue over costs. Two months after the complaint was served, plaintiff had served on defendant a document entitled “Acceptance of Plaintiffs’ Offer to Compromise Pursuant to [Section] 998 and *Civil Code* [Section] 3291.” The document read in relevant part: “The Clerk of the Court is hereby authorized and directed to enter Judgment against [Dr. Cooper] on the Complaint of Plaintiffs ... in the amount of NINE HUNDRED FIFTY THOUSAND DOLLARS (\$950,000.00) pursuant to Plaintiffs’ Offer to Compromise which is attached hereto. Costs to be submitted pursuant to cost bill filed by plaintiff[s] within ten (10) days after entry of said Judgment.” Plaintiffs’ lawyer filed a memorandum of costs totaling \$530,315.99, of which \$411,100.31 was for prejudgment interest. The trial court found the offer to compromise was made in good faith and was valid. Also finding the offer to compromise was valid, the appellate court affirmed. *Whatley-Miller v. Cooper* (Cal. App. Second Dist., Div. 8; January 15, 2013) (As Mod., Feb. 6, 2013) 212 Cal.App.4th 1103.

Homeowner Prevails Against Homeowners Association. Several general provisions in CC&R’s interpreted differently by HOA and homeowner, resulting in a \$10/day fine until a cabana and fireplace were removed. The trial court sided with the homeowner, vacated the fine and ordered some modifications to the cabana and fireplace. The appellate court affirmed, concluding the trial court properly interpreted the governing documents,

and that there was no abuse of discretion in awarding attorney fees and pre-litigation mediation fees to be paid to the homeowner. *Grossman v. Park Fort Washington Association* (Cal. App. Fifth Dist.; January 15, 2013) 212 Cal.App.4th 1128.

Litigation Privilege Does Not Protect Attorneys. Plaintiffs sued their neighbors for dumping contaminated debris on their property. The court ordered the neighbors’ lawyers to disburse certain funds if their clients did not clean up as ordered. When the neighbors did not remove the debris, their lawyers “disbursed the funds in a manner contrary to plaintiffs’ interest in remediating the debris on their property.” The trial court permitted plaintiffs to add causes of action for civil conspiracy against the neighbors’ attorneys on the ground the attorneys had conspired with their clients to interfere with the court-approved remediation plan. The appellate court affirmed the court’s order, concluding the claims are not barred by the litigation privilege “because, as alleged, the attorneys’ communications and affirmative misconduct interfered with the abatement of a nuisance, involved communications with nonparticipants to the action, and did not attempt to achieve the objects of any litigation.” *Rickley v. Goodfriend* (Cal. App. Second Dist., Div. 1; January 16, 2013) 212 Cal.App.4th 1136.

Police Officer Was Not Mandated To Report His Own Sexual Assault Of A Minor. Minor plaintiff was sexually assaulted by a police officer when she was on an explorer program and doing ride alongs with him. She brought an action against the City, alleging the City was vicariously liable for the police officer’s negligence based on his breach of the mandatory duty to report the sexual abuse to a child protective agency under *Penal Code* section 11166, subdivision (a). The trial court sustained the City’s demurrer to the third amended complaint without leave to amend. The appellate court affirmed, agreeing with the trial court that the Child Abuse and Neglect Reporting Act did not impose a mandatory duty for the police officer to report his own acts of sexual abuse of a minor since such a requirement would render the statute unconstitutional as a forfeiture of the police

officer's Fifth Amendment privilege against self-incrimination. *Kassey S. v. City of Turlock* (Cal. App. Fifth Dist.; January 17, 2013) 212 Cal.App.4th 1276.

County Not Liable For Wrongful Release Of Funds Subject To Execution. Plaintiff brought an action against a City and Sheriff's Department, contending the Sheriff's Department caused the release of funds subject to a writ of execution contrary to instructions of plaintiff. The trial court sustained a demurrer without leave to amend. The appellate court affirmed, holding the claim is barred by the litigation privilege in *Civil Code* section 47, subdivision (b). *Tom Jones Enterprises, Ltd. v. County of Los Angeles* (Cal. App. Second Dist., Div. 5; January 17, 2013) 212 Cal.App.4th 1283.

Placeholders Cannot Be Used For Emergency Legislation. The appellate court's first paragraph speaks for itself: "The narrow, but potentially recurring and important, question we address in these writ proceedings is whether the California Constitution, as amended by the voters in 2010, allows the Legislature to identify blank bills with an assigned number but no substance (so-called "spot bills") in the budget bill, pass the budget, and thereafter add content to the placeholder and approve it by a majority vote as urgency legislation. (*Cal. Const.*, Art. IV, §12, subs. (d) and (e).) We conclude that spot bills which remain empty of content at the time the budget is passed are not bills that can be identified within the meaning of article IV, section 12, subdivision (e)(2) of the California Constitution and enacted as urgency legislation by a mere majority vote." *Howard Jarvis Taxpayers Association v. Debra Bowen, as Secretary of State; Legislature of the State of California* (Cal. App. Third Dist.; January 18, 2013) 212 Cal.App.4th 1298.

Arbitration Ethics Violated. By the time a medical malpractice case was arbitrated, the lawyer for the defendant doctor was "... doing [alternative dispute resolution] with ADR Services, Inc." Neither the lawyer nor the arbitrator revealed to plaintiff that the defense lawyer had joined the arbitrator's arbitration/mediation firm. The arbitrator found in favor

of the defendant doctor. The appellate court ruled the arbitration award had to be vacated, stating: "Here we conclude that the California Arbitration Act (the Act) (*Code of Civil Procedure* section 1280, et seq.), and the California Ethics Standards for Neutral Arbitrators in Contractual Arbitrations (Ethics Standards) require that the arbitrator disclose the relationship." *Gray v. Chiu* (Cal. App. Second Dist., Div. 6; January 22, 2013) 212 Cal.App.4th 1355.

Employer Mandated Tip-Pooling Not Illegal. Class action plaintiffs alleged their casino employer violated *Labor Code* sections 351 and 1197, by compelling its card dealers to participate in a tip-pooling arrangement. The trial court entered judgment for the casino under *Code of Civil Procedure* section 631.8. The appellate court affirmed, stating that "given the absence of legislative intent to prohibit employer-mandated tip pooling," it could not conclude the practice is illegal. *Avidor v. Sutter's Place, Inc.* (Cal. App. Sixth Dist.; January 23, 2013) 212 Cal.App.4th 1439.

Coverage Excluded. Plaintiffs' homeowners policy reads: "We do not insure under any coverage for any loss which is caused by one or more of the items below, regardless of whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: a. Ordinance or Law, meaning enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure." In a home remodel project, before construction was finished, city building inspectors discovered the project did not conform to the city's floodplain regulations, and ordered the property demolished. Plaintiffs made a claim on their homeowners' insurance policy. Their insurance company denied the claim, asserting the demolition was not an accidental loss, and in any event the loss was excluded. The insurer successfully moved for summary judgment. The appellate court affirmed, noting: "This seems, unfortunately for the [plaintiffs], a rather clear example of the 'law or ordinance exclusion.'" *Reichert v. State Farm General Insurance Company* (Cal. App. Fourth Dist., Div. 3; January 24, 2013) 212 Cal.App.4th 1543.

California Supreme Court Resolves Split Over Accrual Rules for Unfair Competition Claims. The California Supreme Court has offered hope to plaintiffs facing statute of limitations problems under California's Unfair Competition Law, ("UCL") [*Business & Professions Code* section 17200, et seq.] holding that special rules for calculating accrual dates for so-called "continuing wrongs" can, in some cases, apply to UCL claims. In *Aryeh v. Canon Business Solutions, Inc.* (Cal. Sup. Ct.; January 24, 2013) 55 Cal.4th 1185, a business owner leased copy machines for a term of 60 months. The lease required a monthly payment for each copier, subject to a maximum copy allowance. Copies in excess of the monthly allowance cost more. The business owner noticed a discrepancy between the number of copies his business actually made and the meter readings taken by the owner of the copy machines. The business owner concluded the copy machine owner's employees were running test copies, a total of at least 5,028 copies over the course of 17 service visits. These test copies resulted in the business owner's exceeding his monthly copy allowance and extra charges. The business owner brought an action under the unfair competition law. The trial court sustained a demurrer without leave to amend on the basis of the statute of limitations, stating the clock on a UCL claim starts running when the first violation occurs. A divided Court of Appeal affirmed. The California Supreme Court reversed, stating: "The common law theory of continuous accrual posits that a cause of action challenging a recurring wrong may accrue not once but each time a new wrong is committed. We consider whether the theory can apply to actions under the unfair competition law

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(*Business & Professions Code* section 17200, *et seq.*) and, if so, whether it applies here to save plaintiff Jamshid Aryeh's suit from a limitations bar. We conclude: (1) the text and legislative history of the UCL leave UCL claims as subject to the common law rules of accrual as any other cause of action, and (2) continuous accrual principles prevent [the] complaint from being dismissed at the demurrer stage on statute of limitations grounds. Accordingly, we reverse the Court of Appeal's judgment."

Public Policy Requires Arbitrator's Award To Be Judicially Reviewed. A dispute over a construction project went to arbitration. One party argued the general contractor was not licensed and was thus required to disgorge all compensation for services pursuant to *Business and Professions Code* section 7031, but the arbitrator rejected the argument and found for the general contractor. The trial court denied a motion to vacate the award and entered judgment. The appellate court reversed, holding "7031 constitutes a clear-cut and explicit legislative expression of public policy mandating disgorgement of compensation received by an unlicensed contractor," and remanded the matter to the trial court for a *de novo* review. *Abdout v. Hekmatjah* (Cal. App. Second Dist., Div. 4; January 25, 2013) 213 Cal.App.4th 21.

Primary Assumption Of The Risk In Caring For Alzheimer's Patient. A man contracted with a home care agency to provide care for his wife who suffers from Alzheimer's disease. The wife injured the caregiver, and the caregiver brought an action against the husband and wife for negligence and premises liability. The trial court granted summary judgment to the husband and wife, and the appellate court affirmed, stating: "The primary assumption of risk doctrine is a defense as to [the husband], as well as to [the wife]." *Gregory v. Cott* (Cal. App. Second Dist., Div. 5; January 28, 2013) 213 Cal. App.4th 41.

Retirees May Pursue Action For Lifetime Medical Benefits From University Of California. When Lawrence Livermore National Laboratory was operated by the University of California, all retirees received

University-sponsored group health insurance benefits. In 2007, management and operation of Livermore was transferred to a private consortium, and in 2008 retirees' University-sponsored group health benefit was terminated. Retirees brought an action for mandamus against the Regents, claiming *inter alia* that the elimination of their University-sponsored group health insurance benefits constituted an unconstitutional impairment of either express or implied contract the Regents formed with the retirees. The trial judge sustained the Regents' demurrer without leave to amend. The Court of Appeal reversed, finding the pleading stated causes of action for breach of implied contract, promissory estoppels and equitable estoppels, but not breach of express contract. *Requa v. The Regents of the University of California* (Cal. App. First Dist., Div. 5; January 29, 2013) 213 Cal. App.4th 213.

No Prescriptive Easement Created When There Was An Existing Permissive Easement. Plaintiff sought to establish a permissive easement over two access roads on undeveloped land against two defendants, one of whom had authorized use of the roads. The trial court granted judgment in favor of both defendants, holding plaintiff's use of the land was expressly authorized by a prior permissive easement, so no prescriptive easement was created. On appeal, plaintiff contended the permission was granted by only one of the defendants, and that defendant did not have authority to grant an easement for the remaining defendant. The appellate court affirmed the judgment, stating plaintiff was equitably estopped from questioning the grantor's authority to grant an easement over the other defendant's property. *Windsor Pacific LLC v. Samwood Co.* (Cal. App. Second Dist., Div. 3; January 30, 2013) 213 Cal.App.4th 263.

Business Judgment Rule Does Not Shield Cooperative. A dairy cooperative instituted production quotas for its members and reduced payments for milk deliveries in excess of the quotas. One co-op member brought an action for breach of contract claiming his quota was too low. The contract required the co-op to accept all of the milk from its

members "subject to the right of the Board, in its discretion ... to allocate equitably among its members on a uniform basis . . . the quantity ... of milk to be received by the Association." The dairy claimed it was shielded by the business judgment rule. The trial judge found the quota system was not equitable or uniform and therefore breached the contract. On appeal, the co-op contended the trial court failed to apply the business judgment rule and give deference to its board of directors. The appellate court affirmed, stating: "We conclude that the quota system adopted by the board was not equitable and uniform and, therefore, was outside the scope of discretionary authority granted by the contract." *Scheenstra v. California Dairies, Inc.* (Cal. App. Fifth Dist.; January 30, 2013) 213 Cal.App.4th 370.

Whistleblower Claim Is Alleged When Reporting Illegal Conduct Of Fellow Employee; No Whistleblower Claim If No Economic Harm To State Alleged. Plaintiff brought a whistleblower action under the California False Claims Act [CFCA; *Government Code* section 12650], contending he was fired in retaliation for reporting possible fraud in connection with California Redemption Value payments to his employer who is in the recycling business. The trial court granted summary judgment to the employer, and the appellate court reversed, stating: "We reverse the summary judgment on three of [plaintiff's] causes of action, and affirm the judgment for [employer defendant] on two others. Because [plaintiff] did not demonstrate that the fraud alleged in one of his causes of action under the CFCA involved possible financial harm to the state, summary judgment was proper on that claim. We conclude as to his other CFCA cause of action that [plaintiff] alleged possible fraud on the government that caused it economic harm and that his reporting of fraud was protected conduct. We also conclude that the *Labor Code* protects an employee from discrimination for reporting claims of illegal conduct by fellow employees as well as by an employer." *McVeigh v. Recology San Francisco* (Cal. App. First Dist., Div. 3; January 31, 2012) 213 Cal.App.4th 443.

Attorney Fee Provision In Escrow Instructions Unconscionable. Plaintiffs lost at summary judgment after bringing an action against a title company for overcharging for notary services performed through the title company's escrow services company. The escrow instructions contained an attorney fee provision, and, under it, the trial court awarded the title company \$266,801 for its attorney fees. The appellate court reversed the attorney fee order, noting: "A customer presented with standardized escrow instructions would not reasonably expect an attorney fees provision that was *both* completely one-sided (i.e., only allowing defendant to recover its fees) and all-encompassing (i.e., including claims independent of the contractual escrow instructions, such as for alleged violations of statute or fraudulent conduct)." *Hutton v. Fidelity National Title Co.* (Cal. App. Fifth Dist.; January 31, 2012) (As Mod. February 22, 2013) 213 Cal.App.4th 486.

Feds Serious About Real Estate Development Vis-À-Vis The Clean Air Act. The CEO of a real estate development company was convicted of violating the *Clean Air Act* [42 U.S.C. §85.]. In his appeal, he complained about a jury instruction: "You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant: 1. was aware of a high probability that there was asbestos in the ceilings at [] condominiums, and 2. deliberately avoided learning the truth." The judgment of conviction was affirmed. *United States of*

America v. Charles Yi (Ninth Cir.; January 2, 2013) 704 F.3d 800.

The Sum Of The Allegations Is Greater Than The Parts. A securities fraud complaint alleged false financial adjustments were made to a company's accounts, and the district court dismissed it for failure to sufficiently allege scienter as to each of the defendants. The Ninth Circuit reversed, noting that viewed in isolation any one allegation may not compel an inference of scienter, but "when we consider the allegations holistically . . . the inference [is] that [the company and its chief executive officer and chief financial officer] were deliberately reckless as to the truth of their financial reports and related public statements." *In Re: Verifone Holdings, Inc. Securities Litigation* (Ninth Cir., December 21, 2012.) 704 F.3d 694, [Fed. Sec.L.Rep. (CCH) P97, 238].

Sanctions Order Reversed After Grant Of Summary Judgment Affirmed. Plaintiff, a corporation, propounded special interrogatories to defendant. Defendant did not provide answers because it contended plaintiff, as a suspended corporation, lacked the capacity to prosecute the action. The trial court agreed and awarded monetary sanctions to defendant. Subsequently, the trial court granted summary judgment in favor of defendant. The appellate court affirmed the grant of summary judgment, and stated "the only question that remains is the propriety of the discovery sanctions." The award of sanctions was reversed because the

defendant did not raise the issue of plaintiff's capacity to sue at its earliest opportunity. *Ve&P Trading Co. v. United Charter, LLC* (Cal. App. Third Dist.; December 19, 2012) 212 Cal.App.4th 126, [151 Cal. Rptr.3d 146].

No Medical Evidence Supports Denial Of Benefits By Railroad Retirement Board. The United States Railroad Retirement Board denied an application for benefits under the Railroad Retirement Act [45 U.S.C. §231a] which provides an annuity for disabled children of railroad workers. To qualify for benefits, the child must have been disabled prior to the age of 22 and remained continuously disabled through the time of the application for benefits. During three of the 30 years preceding his application, the applicant worked at three menial jobs, and was fired from each. The Ninth Circuit reversed and remanded because the medical evidence provided no support for the denial. *Stephens v. U.S. Railroad Retirement Board* (Ninth Cir.; November 21, 2012) 704 F.3d 587.

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California Court of Appeal, Fourth District

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mitch.wood@calbar.ca.gov

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ana.castillo@calbar.ca.gov

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