

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

_____	)	
ROBERT KAHN,	)	Case No. H042539
	)	
Plaintiff and Appellant,	)	Santa Cruz Co. Super. Ct.
	)	No. 169364
vs.	)	
	)	
FRANK D. SCHONIG,	)	
	)	
Defendant and Respondent.	)	
_____	)	

**RESPONDENT'S BRIEF**

In the Appeal from the Judgment of the  
Santa Cruz County Superior Court  
Hon. Rebecca Connolly, Judge

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SIXTH APPELLATE DISTRICT

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Case No. H042539  
Santa Cruz Co. Super. Ct.  
No. 169364

Appellant: Robert Kahn

Respondent: Frank D. Schonig

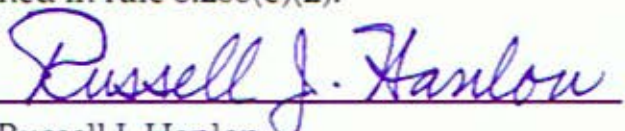
**Respondent's Certificate of Interested Entities or Persons  
Initial Certificate**

1. This form is being submitted on behalf of the following part: Respondent Frank D. Schonig
2. Interested entities or persons required to be listed under rule 8.208 are as follows:

<u>Full name of interested party</u>	<u>Nature of interest</u>
None.	None.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June 5, 2017.

  
Russell J. Hanlon

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Appellant Robert Kahn pursues a bizarre appeal. He expressly waives his right to argue that the trial court erroneously decided any of his claims that the court rejected. Kahn seeks only to strike two sentences from the court's amended judgment. In those two sentences, the trial court concluded that the 1993 Well Agreement between Kahn and Respondent Frank Schonig was unenforceable and that Kahn shall take nothing under that agreement. Kahn argues that the trial court lacked the authority to decide that the 1993 Well Agreement was unenforceable for two reasons: (1) the pleadings purportedly did not present that issue, and (2) the court's consideration of that issue was barred by a statute of limitations.

Schonig will establish that Kahn has forfeited and waived both of his arguments because he presents them for the first time on appeal. Kahn had many opportunities to present his two arguments regarding the trial court's lack of authority. He could have presented those two arguments at a colloquy regarding the need for expert testimony, in which the trial judge raised the issue of the enforceability of the 1993 Well Agreement. He also could have presented those two arguments in his trial brief regarding his claim for specific performance of the 1993 Well Agreement. He could have presented those two arguments at the hearing on Schonig's motion



for nonsuit on Kahn's breach of contract claim and at the hearing on the resolution of his specific performance claim.

But, Kahn never presented either argument in the trial court. Instead, he argued that the trial judge could decide the issue of the voidability of the 1993 Well Agreement. He also argued that the 1993 Well Agreement was certain and unambiguous and should be specifically enforced. Under the doctrines of theory of trial, equitable estoppel, invited error, and waiver, this Court should decide that Kahn has forfeited his arguments that the trial court lacked the authority to decide the enforceability of the 1993 Well Agreement based upon pleading deficiencies and a statute of limitations.

Schonig also will demonstrate, on the merits, that both Kahn's third amended complaint and Schonig's answer did present the issue of the enforceability of the 1993 Well Agreement. Kahn alleged a claim for specific performance, in which he requested performance of the 1993 Well Agreement. One of the essential elements of any claim for specific performance is a contract with sufficiently definite terms to enable the trial judge to know what to enforce. Kahn's specific performance claim unquestionably presented the issue of the enforceability of the 1993 Well Agreement and, particularly, whether the agreement was sufficiently definite and certain. Under the case upon which Kahn chiefly relies, Schonig's denial of the

existence of the 1993 Well Agreement also tendered the issue of the enforceability of that agreement. This Court should conclude that the record does not support Kahn's pleading deficiency argument.

Schonig further will show, on the merits, that no statute of limitations can apply to the issue of the enforceability of the 1993 Well Agreement. Again, Kahn needed to plead and prove that this agreement was enforceable as an essential element of his specific performance claim. It is self-defeating for Kahn to argue that a statute of limitations precluded the trial court from considering and deciding the enforceability of the agreement. Also, Schonig's answer effectively raised the issue of the enforceability of the agreement as a defense. Our Supreme Court has held that a statute of limitations does not apply to a defense, especially in a contract action, like the instant case. This Court should hold that no statute of limitations can apply to the issue of the enforceability of the 1993 Well Agreement.

Contrary to established rules of appellate practice, Kahn presents only his version of the facts regarding his specific performance and breach of contract claims that he lost in his summary of facts and his discussion of facts within legal arguments. In an obvious effort to disparage Schonig, Kahn also presents facts which are relevant to claims for damages that he won, but which are

irrelevant to his arguments on appeal. This Court should disregard those improprieties in Kahn's discussion of the facts.

## **II. SUMMARY OF SIGNIFICANT FACTS.**

### **A. Identity of Parties.**

Kahn owns a home located at 25263 Terrace Grove Road in Los Gatos. 3 Clerk's Transcript ("CT") 580 (¶1), 10 CT 2665 (¶1 admission). Schonig owns a nearby home located at 25256 Terrace Grove Road in Los Gatos. 3 CT 580 (¶2), 10 CT 2665 (¶2 admission). Kahn admits that Schonig essentially provided him with free water for 20 years (1988-2008). 9 Reporter's Transcript ("RT") 2178:18-24.

In a statement of decision issued after the phase one bench trial, the trial court found that Kahn has the right to take water from the watershed on Schonig's property, transport the water over Schonig's property via water pipes, maintain and repair the horizontal bores, aquifers, and wellsprings, access Schonig's property upon 24 hours notice (except in an emergency, when no notice is required), and transport the water to a common holding tank upon the nearby Burchby/Avoy property for distribution to Kahn's property. 16 CT 4198-4199.

### **B. Kahn and Schonig Sign the 1993 Well Agreement.**

On December 16, 1989, Kahn and Schonig signed a contingency fee agreement whereby Kahn, as attorney, would

represent Schonig in an insurance claim matter regarding a loss that Schonig sustained to buildings and personal property at his home. 14 CT 3700-3702. The agreement provided that Kahn would receive 10 percent of the proceeds of the insurance payment if the claim were resolved without an arbitration proceeding or court action. 14 CT 3700. The insurance company paid Schonig between \$450,000 and \$525,000 on his loss claim. 7 RT 1550:17-23. Schonig told Kahn that he would like to delay payment of the \$45,000 contingency fee due so that he could use all of the insurance proceeds to rebuild his home. 7 RT 1551:8-21. Kahn agreed. *Ibid.* On May 15, 1991, Schonig gave Kahn an unsecured \$45,000 promissory note, due on December 15, 1992, with 10 percent annual interest. 14 CT 3705.

Toward the end of 1992, Schonig requested that Kahn extend the due date for this note. 7 RT 1564:5-22. Kahn agreed based upon the condition that Schonig would give Kahn a deed of trust on Schonig's home as security for the payment of the new note. *Ibid.* In a December 12, 1992 letter to Schonig, Kahn recited the terms that \$7,125 in interest had accrued on the \$45,000 note and that the parties had agreed that Schonig would give Kahn a new note for \$52,125, due on December 15, 1994, with a 10 percent interest rate, and secured by a deed of trust on Schonig's home. 14 CT 3745. On

December 15, 1992, Schonig signed the \$52,125 promissory note and the deed of trust in favor of Kahn. See 13 CT 3500-3503.

In late 1991 or 1992, Kahn decided that he wanted to drill a vertical well so that he could have more water than he currently had. 7 RT 1552:12-21. Kahn recognized that he already received a sufficient amount of water from Schonig's property, but his supply of water was affected by the weather and natural disasters. *Ibid.* Kahn wanted a vertical well as an alternative source of water. *Ibid.* By agreement, Kahn obtained a right to drill a new vertical well on Schonig's property in exchange for forgiving the debt that Schonig owed him, including interest. 10 RT 2297:5-2299:18.

Kahn originally picked a site for the new vertical well that was in the corner of Schonig's property or on the adjacent Beddingfield property. 13 RT 3068:21-3070:17. Schonig told Kahn that Kahn could not use that location for the new well due to the proximity to the property boundary and Kahn agreed. *Ibid.* Kahn chose a different site for the new well and his second choice became the designated location for the new well in the parties' agreement. *Ibid.*

Kahn already knew the exact location of the property boundary near the designated site for the new well. 12 RT 2881:2-21, 2888:18-2889:1. In 1990, Kahn learned the location of that property boundary when he gave Schonig advice regarding the placement of

a building corner that crossed a neighbor's property line when Schonig was rebuilding his home after an earthquake and fire had destroyed his home. 12 RT 2877:19-2881:7. In 1990, Schonig informed Kahn that a retaining wall in the back of Schonig's property was not the southern boundary of the property when they discussed Schonig's encroachment on his neighbor's property. 12 RT 2902:3-8.

Kahn and Schonig signed the Agreement for Conveyance of Well and Water Rights, Electrical Rights and Water Easement dated October 31, 1993 ("1993 Well Agreement"). 14 CT 3706-3717. Kahn drafted that agreement. 12 RT 2881:23-2882:4. The 1993 Well Agreement has the following material provisions:

- Kahn desires and Schonig is willing to grant an easement on the Schonig property for the construction, placement, and maintenance of a water well, pump, electric connections, electric meter, pipelines, and related fixtures. 14 CT 3706 (recital).
- The parties intend to connect the pipelines from the location of the new vertical well with the pipelines that already exist on Schonig's property for the benefit and supply of water to Kahn's property. The parties confirm the easement for the existing water pipes that carry water over Schonig's property to Kahn's property. 14 CT 3706-3707 (recitals).

- After the construction of the new vertical well, the parties intend to connect the existing pipelines to the water supply from the new well to direct water to the holding tank on the Burchby property and Schonig grants Kahn an easement for that purpose. 14 CT 3707 (recital).
- Schonig grants Kahn an exclusive easement for the new well, pump, electric connections, electric meter, and equipment, subject to a reservation of Schonig's rights to 25 percent of the water from the new vertical well. Schonig also grants Kahn the exclusive right to withdraw from the new well such water as may be necessary for Kahn's domestic use, but in no event more than 75 percent of the daily output from the well. 14 CT 3709 (¶¶1-3).
- The agreement grants Kahn no rights to the existing vertical well on Schonig's property. 14 CT 3710 (¶6).
- "SCHONIG cannot and does not make any guaranty concerning the quality or quantity of water agreed to be furnished under this agreement or concerning the continuing availability of water." 14 CT 3710 (¶7).
- "This agreement is subject at all times to any and all valid laws, ordinances, and governmental regulations whether federal, state, county, or city. Any modification made to this agreement by any such law and or ordinance and or regulation to the conduct of

the parties under this agreement shall not impose liability on either party hereto for breach of their duties under this agreement.” 14 CT 3711-3712 (¶16).

An exhibit “C” was a diagram that showed the location of the proposed new well and existing water pipelines and wells. 14 CT 3716. Kahn drew that diagram. 12 RT 2885:22-2886:18. Schonig believed that this diagram was not drawn even close to scale and could not represent anything. *Ibid.*

Kahn admitted that paragraph 7 -- disclaiming any guaranty by Schonig about the availability of water from the new well -- “protects Mr. Schonig so that in the event that if I either get a dry well or alternatively, if the quality or quantity is not what is anticipated or was a bad spot to drill, that’s on me, not on Mr. Schonig.” 8 RT 1757:2-6.

On September 23, 1996, Kahn signed a notarized memorandum that stated that the December 15, 1992 note and deed of trust from Schonig to him had been fully satisfied and that Schonig owes no debt to Kahn. 14 CT 3753-3754. On the same date, Kahn also signed a request for full reconveyance of that deed of trust. *Ibid.*

**C. The 1993 Well Agreement Was Unenforceable.**

The location of the new vertical well was not specified in the version of the 1993 Well Agreement that was signed by both



parties. The notary acknowledgments -- completed by two different notaries -- for Kahn's and Schonig's signatures on the 1993 Well Agreement specify that the number of pages in the signed agreement was seven. 14 CT 3712-3713; 12 RT 2981:7-18. The agreement, without the exhibits (including the exhibit "C" diagram), is seven pages. 14 CT 3706-3713. The seventh page is the signature page with the notary's acknowledgment on it. 14 CT 3712-3713; 12 RT 2981:7-18.

Schonig never saw the exhibit "C" diagram until after Kahn recorded the 1993 Well Agreement. 12 RT 2981:7-18, 2986:3-16. After Schonig signed the 1993 Well Agreement in front of the notary, Kahn added three pages to the agreement. 12 RT 2981:23-2982:6. Schonig received a copy of the fully executed 1993 Well Agreement back after Kahn had recorded it. *Ibid.* The recorded version of the agreement had the three extra pages. *Ibid.*, 12 RT 2986:3-16. The three added pages to that 1993 Well Agreement were exhibit "A" (legal description of a property), exhibit "B" (legal description of another property), and exhibit "C" (Kahn's diagram with the proposed new vertical well location). 14 CT 3714-3716. Those three pages were not attached to the version of the agreement that Schonig took to his notary. 12 RT 2985:5-2986:16. Those three pages were attached to the

version of the agreement that was recorded and mailed to Schonig.  
*Ibid.*

Kahn admitted that both notaries for Schonig and him stated that the number of pages in the signed agreement was seven. 8 RT 1762:3-14. Then, Kahn added that “we really have three exhibits that are attached to this.” *Ibid.* Kahn did not say that the three exhibits were attached to the agreement at the time that it was signed by either party before a notary. Nor did he ever deny that the three exhibits were added after the agreement was signed and before it was recorded.

Schonig never took any action to prevent Kahn from drilling the new vertical well on Schonig’s property. 12 RT 2906:7-9. Nor did Schonig ever refuse to allow Kahn to drill the new well. 12 RT 2905:10-21. Schonig told Kahn many times that Schonig does not mind if Kahn starts drilling. *Ibid.* Even so, it is undisputed that Kahn never took any action to develop the new vertical well on Schonig’s property. At a meeting on Schonig’s porch in 2008, Schonig told Kahn that Schonig did not think that Kahn could install the new vertical well at the location designated on the diagram because that location was too close to a property boundary and would violate a setback requirement. 12 RT 2902:19-2903:8.

Kahn acknowledged that Schonig told him, in 2008, that Kahn may have a problem with developing the new well at the location designated on the diagram due to the property boundary. 8 RT 1797:4-16, 9 RT 2044:15-2046:7. Kahn admitted that, during this discussion in 2008, “we both decided there was going to be a problem.” 8 RT 1806:15. As a result of this discussion in 2008, Kahn realized that “I couldn’t use the original site if what he was telling me was accurate.” 8 RT 1812:2-3.

In 2008, Schonig also told Kahn that there was a leach field within 100 feet of the designated location for the new vertical well. 8 RT 1802:2-1803:11. Schonig had installed the leach field to service his house and industrial workshop. *Ibid.* A leach field is where the water from a septic tank leaches into the ground so as to disperse the effluent in the tank. 8 RT 1804:24-1805:5. Schonig informed Kahn that it may be problematic to get a county permit to install the new well at the location designated on the diagram. 8 RT 1805:6-9

On May 7, 2008, Kahn and his wife signed an acknowledgment and agreement, drafted by Kahn, that Schonig can terminate, at any time with or without cause, Kahn’s taking of water from the existing vertical well on Schonig’s property to supplement the water that Kahn takes from the horizontal wells on Schonig’s property. 14 CT 3749; 8 RT 1775:21-1776:4. This document further

stated that Schonig has no continuing obligation to supply water from the existing vertical well to Kahn. 14 CT 3749.

### **III. NATURE OF THE ACTION AND RELIEF SOUGHT.**

The operative complaint was Kahn's third amended complaint, in which he sought damages and equitable relief. 3 CT 579-600. According to Kahn, two claims in that pleading are relevant to his appeal -- a specific performance claim and a breach of contract claim. Appellant's Opening Brief ("AOB") 25.

The salient claim is Kahn's request for specific performance of the 1993 Well Agreement. 3 CT 583-584, 593-594 (¶¶28-30, 96-98). Kahn alleged that he is entitled, under that agreement, to drill a new vertical well on Schonig's property to obtain potable water. *Ibid.* Kahn alleged that Schonig installed a leach field near the location of the new well site and thereby poisoned the land and water. *Ibid.* Kahn pleaded that, as a result of Schonig's installation of the leach field, Schonig deprived him of his right to obtain potable water from the proposed new well. *Ibid.* Kahn claimed that he is entitled to specific performance of the 1993 Well Agreement. *Ibid.* But, he suggested that he may be able to enforce his rights, under that agreement, only by acquiring a one-fourth interest in the existing vertical well on Schonig's property. *Ibid.*

In his breach of contract claim, Kahn alleged that Schonig damaged Kahn's water system during the grading of Schonig's property when he rebuilt his home in 1990. 3 CT 582-583, 596 (¶¶25, 114-115). Kahn alleged that Schonig agreed and affirmed, orally and in writing, that Kahn would have a one-fourth interest in obtaining water from the existing vertical well on Schonig's property indefinitely or until Kahn drilled and operated a new well that provided sufficient water to Kahn. *Ibid.* Kahn claimed that Schonig breached that agreement by preventing Kahn from asserting his rights under the 1993 Well Agreement, by poisoning the groundwater near the new well site, and by denying Kahn access to water from the existing vertical well on Schonig's property. *Ibid.*

In his answer, Schonig denied the allegations in paragraphs 25, 28-30, 96-98, and 114-115. 10 CT 2667, 2670. Schonig thereby denied the existence of the 1993 Well Agreement that Kahn had pleaded in paragraphs 28-30.

Following the phase one bench trial not pertinent to this appeal, the trial court decided that Kahn had certain rights to the water system on Schonig's property and a prescriptive easement over the former Dabbert property (which now was owned by Schonig). 16 CT 4198-4199. The case proceeded to a jury trial on the remaining claims at issue.

In the middle of the phase two jury trial, the trial judge raised the scheduling issue whether there would be a need for expert testimony regarding the fairness and reasonableness of the 1993 Well Agreement (which was an agreement between an attorney and his client), if the judge denied Kahn's request for specific performance of that agreement. 11 RT 2746:1-2748:6. The judge specifically asked if the expert attorney opinions were necessary if the 1993 Well Agreement was not enforceable. *Ibid.* The judge commented that the 1993 Well Agreement may not be enforceable because the designated location of the new vertical well was too close to a property boundary and leach fields. *Ibid.* The judge again expressed the concern about the need for expert testimony regarding the value of the 1993 Well Agreement if the well cannot be installed at the designated location due to its proximity to the boundary line. *Ibid.*

In response, Kahn did not say that the trial judge lacked the authority to decide the issue of the enforceability of the 1993 Well Agreement based upon the failure of the pleadings to raise that issue or a statute of limitations. Instead, Kahn claimed that an environmental health department employee purportedly had determined that the new well could be installed at the designated location. 11 RT 2748:7-14. But, Kahn informed the judge that he would not present any such evidence at trial. *Ibid.*

The trial judge next asked whether Kahn's compliance with Rule 3-300 of the California Rules of Professional Conduct, in connection with the formation of the 1993 Well Agreement, was a jury question. 11 RT 2752:13-2753:6. Schonig's attorney stated that the first issue is whether there is an enforceable contract or a contract that violates a Rule of Professional Conduct. *Ibid.* The judge asked whether this issue is a jury question. *Ibid.* Kahn did not answer by stating that both the trial judge and the jury lacked the authority to decide the issue of the enforceability of the 1993 Well Agreement because the pleadings failed to present that issue or a statute of limitations barred that issue.

Rather, Kahn's response was that if an attorney-client agreement violates Rule 3-300, then the agreement is voidable if it is deemed to be unfair. 11 RT 2754:7-15. Kahn observed that "it could become a decision for the Court to decide whether the violation was such that it wasn't fair and just." *Ibid.* The trial judge replied that the enforceability of the 1993 Well Agreement seems to be a question of fact for the jury, but Kahn wants to label the issue "voidability" and say that the issue is a question of law for the court. 11 RT 2754:16-20. The trial judge concluded this colloquy by noting that there are legal issues regarding the enforceability of the 1993 Well Agreement and that the trial could consume a lot of time regarding the value of that

agreement, when the agreement cannot be enforced. 11 RT 2755:3-2756:2.

A few days after this colloquy, Kahn filed a supplemental brief on his specific performance claim. 15 CT 4024-4026. In that brief, Kahn did not argue that the trial judge lacked the power to decide the enforceability of the 1993 Well Agreement for want of that issue being submitted by the pleadings or based upon the application of a statute of limitations. Instead, Kahn quoted Civil Code section 3390, as follows: “The following obligations cannot be specifically enforced: ... (5) An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.” 15 CT 4025. Kahn proceeded to argue that the 1993 Well Agreement “is sufficiently certain and unambiguous and specific performance should be ordered.” *Ibid.*

Around the same time, Schonig also filed a trial brief on the specific performance claim. See Augmentation of Record (“AR”) 1-22. Schonig argued, among other things, that the 1993 Well Agreement is not enforceable because the designated location of the new vertical well is too close to a leach field and a property boundary, in violation of the applicable county ordinance. AR 3-5. Schonig attached a copy of the county ordinance, which requires



that a well be located at least 100 feet from a leach field and 50 feet from a property boundary line. AR 14.

Schonig noted that the evidence showed that, before the parties signed the 1993 Well Agreement, the leach field was in place and Kahn knew the property boundary line. AR 4. Schonig explained that the 1993 Well Agreement, which Kahn drafted, provided that it is subject to all government regulations and that no party shall have any liability if a government regulation prevents the performance of any obligation required by the agreement. *Ibid.*

#### **IV. JUDGMENT APPEALED FROM.**

After Kahn concluded his presentation of evidence, Schonig brought a motion for nonsuit on, among other claims, Kahn's breach of contract claim. 13 RT 3219:1-3220:9. Schonig pointed out that Kahn's contract claim was that Schonig agreed and confirmed, orally and in writing, that Kahn had the right to a one-fourth interest in the water from the existing vertical well on Schonig's property indefinitely or until Kahn drilled a new well. *Ibid.* Schonig argued that the written agreement that was the source of this contractual obligation -- the 1993 Well Agreement -- was legally unenforceable. *Ibid.* Schonig also argued that the two-year statute of limitations bars any claim based upon an oral agreement because Kahn testified that

Schonig intended to breach the oral agreement as early as June 2008. *Ibid.*

The trial judge commented that both grounds were good grounds to grant nonsuit. *Ibid.* Kahn did not argue that the court lacked the authority to decide that the 1993 Well Agreement was unenforceable due to the pleadings or a statute of limitations. *Ibid.* The judge granted nonsuit regarding Kahn's 19th cause of action for breach of contract. *Ibid.* The judge also refused to allow Kahn, at that late date, to amend his complaint to add a claim for quantum meruit. 14 RT 3222:7-3223:15, 3226:2-3227:6.

As the jury deliberated Kahn's claims for damages, the trial judge conducted a lengthy hearing with counsel to decide Kahn's equitable claim for specific performance. 15 RT 3617:13-3673:13. The judge commented that Schonig has argued that Kahn requests equitable relief -- the award of a one-fourth interest in the existing vertical well -- that is not provided in the 1993 Well Agreement and that paragraph 16 in that agreement provides that no party shall have liability if the new vertical well cannot be installed at the designated location. 15 RT 3617:18-3618:12.

Kahn acknowledged that he signed an agreement that provided that Schonig is not required to give him a one-fourth interest in the existing vertical well. 15 RT 3620:24-3621:3. Kahn

suggested that his claim was not for specific performance of the 1993 Well Agreement, but to allow him to connect to the existing vertical well, based upon his assumption that water from the new vertical well would not be safe. 15 RT 3625:1-13.

The trial judge recognized that paragraph 16 in the 1993 Well Agreement can apply if a new vertical well cannot be installed at the designated location due to a nearby leach field. 15 RT 3635:13-3637:17. The judge suggested that Kahn failed to perform an adequate investigation before he signed the agreement. *Ibid.* The judge found that there was no evidence that Schonig or anyone else installed the septic tank and leach field on any particular date. 15 RT 3634:2-3638:7, 3641:14-20. The judge pointed out that the building with the encroaching corner, which the leach field serviced, was built in 1990. 15 RT 3638:1-21. The judge observed that if the leach field was installed then, the leach field was in place before the signing of the 1993 Well Agreement. *Ibid.*

The judge reasoned that Kahn took the risk, under paragraph 16, that he would not be able to enforce the 1993 Well Agreement due to a boundary line or a leach field. 15 RT 3638:17-21, 3649:25-3650:24. The judge concluded that, under that agreement, Kahn cannot force Schonig to take any remedial action, like moving

his leach field, in the event that the well cannot be installed. 15 RT 3650:6-11.

The trial judge noted again that Kahn should have conducted a reasonable investigation because he was forgiving a \$60,000 debt in exchange for the 1993 Well Agreement. 15 RT 3639:14-3640:16, 3645:7-19, 3648:17-19. The judge stated that, under paragraph 16, Kahn took the risk of any problem with the enforcement of the agreement regarding the location of the new vertical well. 15 RT 3640:3-16. The judge determined that Schonig was exempt from any duty of disclosure to ensure that the location of the new vertical well would comply with government regulations based upon paragraph 16 and the fact that this was an attorney-client agreement. 15 RT 3640:20-3641:5, 3648:7-25.

The trial judge admonished Kahn that he could have protected himself by contracting around the possibility of his inability to install the new well at the designated location. 15 RT 3643:24-3644:6. The judge also noted that Kahn has conceded that he waived Schonig's promise to give him access to the existing vertical well when Kahn drafted and signed the 2008 agreement. 15 RT 3651:6-20.

Throughout the lengthy hearing on the specific performance claim, Kahn never argued that the trial court lacked the authority to

decide the issue of the enforceability of the 1993 Well Agreement because the parties' pleadings did not present that issue or a statute of limitations barred any consideration of the issue.

The trial judge concluded that Kahn failed to meet his burden of proof that the 1993 Well Agreement was sufficiently definite for the court to know what to enforce. 15 RT 3670:7-18. Thus, the judge decided that Kahn's evidence failed to meet his burden of proof regarding the enforceability of the 1993 Well Agreement. *Ibid.* The judge specifically found that Kahn did not present evidence regarding the location of the new well that would enable her to enforce the 1993 Well Agreement. 15 RT 3671:6-3672:4. The judge denied Kahn's claim for specific performance of the 1993 Well Agreement because Kahn's evidence failed to establish that there was a specific, definite, and enforceable contract. 15 RT 3671:6-3673:14.

In announcing her ruling, the trial judge set forth her findings, which summarized her comments during the hearing (15 RT 3664:9-3667:17):

- There was no evidence of the date on which the septic tank and leach field were installed on Schonig's property and thus, there was no evidence of any change of circumstances after the parties signed the 1993 Well Agreement.

- Kahn had the opportunity to investigate before he signed the agreement, but he failed to do so.
- In the 1993 Well Agreement, Kahn assumed all risks regarding the location of the new vertical well.
- Paragraph 16 in that agreement provides that if the new vertical well cannot be installed at the designated location, no party shall be liable for breach of duty -- and this was incredibly broad language.
- Kahn took the risk that he could not install the new well at the designated location.
- Kahn has not shown that he has any entitlement to a one-fourth interest in the existing vertical well based upon the proximity of the septic system or the property boundary to the designated location for the new well.
- Kahn has not shown that the 1993 Well Agreement is sufficiently definite so that the court knows what to enforce. The court declines to specifically enforce that agreement because Kahn has not presented evidence of what the court should enforce.

The trial court issued a separate order granting nonsuit and other relief to Schonig and against Kahn. 15 CT 4142-4144. The order set forth the court's ruling that nonsuit had been granted regarding the breach of contract claim. 15 CT 4143. The order also specified

that Kahn was not entitled to specific performance of the 1993 Well Agreement because, among other grounds, “[t]he evidence advanced by Plaintiff Robert Kahn at trial did not establish the enforceability of the 1993 Well Agreement and therefore, the Court holds that the 1993 Well Agreement is not enforceable.” 15 CT 4144. In its amended judgment, the trial court reiterated its ruling that Kahn was not entitled to specific performance of the 1993 Well Agreement based upon the finding that “Robert Kahn failed to establish by a preponderance of the evidence that the 1993 Well Agreement was enforceable. Therefore, Robert Kahn will take nothing under the 1993 Well Agreement.” 17 CT 4585.

## **V. QUESTIONS PRESENTED.**

A. Did the trial court properly consider and determine the enforceability of the 1993 Well Agreement in deciding Kahn’s specific performance claim?

B. Was the trial court’s determination that the 1993 Well Agreement was unenforceable barred by any statute of limitations?

## **VI. STANDARDS AND SCOPE OF APPELLATE REVIEW.**

It is difficult to determine the applicable standards of review when the record does not actually present the issues identified by Appellant. Schonig agrees that any question of law is subject to de novo review. AOB 27-28.

To the extent that this Court must review the trial court's factual findings, the applicable standard of review is the substantial evidence rule. *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660, 190 Cal.Rptr. 355, 660 P.2d 813. This Court would view the evidence and draw reasonable inferences from the evidence most favorably to the prevailing party. *Ibid.* The trial court's findings, if supported by substantial evidence, are binding on appeal. *Id.* at 661.

Kahn's failure to request a statement of decision regarding the trial court's consideration of his specific performance claim results in the application of the implied findings doctrine. *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 269, 88 Cal.Rptr.3d 186. Thus, this Court can determine whether substantial evidence supports any implied finding that would support the trial court's decision on Kahn's specific performance claim. *Ibid.*

## **VII. ARGUMENT.**

### **A. The Trial Court Properly Considered and Decided the Issue of the Enforceability of the 1993 Well Agreement.**

#### **1. Kahn Has Forfeited the Issue of the Enforceability of the 1993 Well Agreement Under the Doctrines of Theory of Trial, Equitable Estoppel, Invited Error, and Waiver.**

As a preliminary matter, this Court does not even need to consider Kahn's arguments that the trial court lacked the



authority to decide the issue of the enforceability of the 1993 Well Agreement based upon pleading deficiencies and a statute of limitations. Kahn has forfeited the issue of the enforceability of that agreement under many rules of law.

A plaintiff's failure to challenge the sufficiency of the allegations in the defendant's answer constitutes a waiver of the plaintiff's right to rely upon any defects in the answer on appeal. *Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 876, 67 Cal.Rptr.2d 411. In *Jones*, the plaintiff responded to the defendant's summary judgment motion on the merits and never claimed that the defendant's answer was defective. After the trial court granted summary judgment based upon the bar of a federal statute, the plaintiff argued, on appeal, that the ruling was improper because the defendant had not pleaded the bar of that statute in its answer. The Court of Appeal affirmed, holding that the plaintiff had notice of the statutory defense and, by litigating the merits of the summary judgment motion, "waived any right to claim on appeal that the answer was defective." *Id.* at 877. The court explained that the plaintiff's waiver resulted from the theory of trial doctrine -- where the parties try a case based upon the assumption that certain issues are raised by the pleadings, neither party can change this theory for the purposes of review on appeal. *Id.* at 876-877.

In other cases, the courts likewise have ruled that the plaintiff waives any defect in the answer by failing to object to the answer by demurrer or at trial or by presenting evidence relevant to the unpled defense. *Holmes v. California National Guard* (2001) 90 Cal.App.4th 297, 313, 109 Cal.Rptr.2d 154; *Ridgway v. Salrin* (1940) 41 Cal.App.2d 50, 53, 105 P.2d 1024; *Prentice v. Zumwalt* (1932) 124 Cal.App. 646, 653-654, 13 P.2d 379.

In *Viglione v. City and County of San Francisco* (1952) 109 Cal.App.2d 158, 159-160, 240 P.2d 68, the appellate court also affirmed a judgment based upon the application of the rule that where an action has been tried and evidence presented under the theory that a certain issue was raised by the pleadings, and the trial court issued a judgment that decided that issue, a party cannot argue, for the first time on appeal, that the issue was not raised by the pleadings. Accord, *Coffman v. Singh* (1920) 49 Cal.App. 342, 344, 193 P. 259. In *Viglione*, the court reasoned that this rule is based upon the equitable estoppel doctrine -- it is unfair for a party to withhold an objection to a defective pleading that could have been remedied by amendment in the trial court and, upon losing the case in the trial court, raise the fatal defect in the pleading for the first time on appeal. *Viglione, supra*, 109 Cal.App.2d. at 160.

Under the doctrine of invited error, where a party's conduct induces or invites the trial court to commit an error, that party cannot claim, on appeal, that the judgment should be reversed based upon the error. *Transport Insurance Co. v. TIG Insurance Co.* (2012) 202 Cal.App.4th 984, 1000, 136 Cal.Rptr.3d 315; *Ludgate Insurance Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 613, 98 Cal.Rptr.2d 277 (decided by this Court).

In *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 948-950, 90 Cal.Rptr.3d 247, this Court decided that the plaintiff forfeited its claim that the trial court erred in dismissing some of the plaintiff's claims at a hearing on motions in limine before trial by failing to object to the procedure. In *In re Marriage of Falcone and Fyke* (2008) 164 Cal.App. 4th 814, 826, 79 Cal.Rptr.3d 588, this Court applied the familiar rule that an appellant waives any procedural defects or erroneous rulings where the appellant failed to present an objection in the trial court. This Court invoked the rationale of fairness -- an appellate court will not reverse a judgment on the ground that the opposing party did not have a chance to argue and that the trial court did not have an opportunity to consider. *Ibid.*

Here, Kahn had many opportunities in the trial court to present his arguments that the trial judge purportedly lacked the

authority to decide whether the 1993 Well Agreement was enforceable because the pleadings did not present that issue and a statute of limitations barred any consideration of the issue. However, Kahn never presented either argument in the trial court.

Kahn could have presented those two arguments when the trial judge commented that there would be no need for expert testimony regarding the 1993 Well Agreement if she decided that the agreement was unenforceable. 11 RT 2746:1-2748:6, 2752:13-2753:6. In that colloquy, the trial judge disclosed her inclination to rule that the 1993 Well Agreement was unenforceable due to the proximity of the designated new well location to the property boundary and a leach field on the Schonig property. *Ibid.* Kahn failed to argue that the trial judge lacked the authority to determine the enforceability of the 1993 Well Agreement based upon pleading deficiencies or a statute of limitations. Instead, Kahn advised the trial judge that she could decide that the agreement was voidable, as an unfair agreement for the client, if there was a violation of Rule 3-300. 11 RT 2754:7-15. Thus, Kahn invited the trial judge to decide the enforceability of the 1993 Well Agreement.

Kahn could have presented his two arguments on the trial judge's authority to determine the enforceability of the agreement in his supplemental brief regarding his specific performance claim. 15

CT 4024-4026. Instead, he cited Civil Code section 3390(e), which provides that an agreement with uncertain terms cannot be specifically enforced. 15 CT 4025. Kahn even argued that the 1993 Well Agreement “is sufficiently certain and unambiguous and specific performance should be ordered.” *Ibid.* Therefore, Kahn again invited the trial judge to order specific performance of the 1993 Well Agreement because the agreement was certain and unambiguous.

Kahn could have presented his two arguments that the trial court lacked the authority to decide the enforceability of the agreement when he argued against Schonig’s motion for nonsuit on the breach of contract claim. 13 RT 3219:1-3220:9. Schonig argued that Kahn had alleged that the agreement, which was the subject of the breach of contract claim, was confirmed in the written 1993 Well Agreement, but the 1993 Well Agreement was legally unenforceable. *Ibid.* Kahn did not respond to that argument. *Ibid.* The trial judge granted the nonsuit motion. *Ibid.*

Kahn could have presented his two arguments on the trial judge’s authority to resolve the enforceability of the agreement at the lengthy hearing on his specific performance claim. 15 RT 3617:13-3673:13. But, Kahn never argued that, contrary to his prior invitations, the trial judge lacked the power to decide the issue of the enforceability of the 1993 Well Agreement based upon the failure of

the pleadings to raise that issue or the application of a statute of limitations. *Ibid.* The trial judge determined that Kahn failed to present evidence concerning the location of the new well that would allow her to enforce the agreement. 15 RT 3671:6-3672:4. At the conclusion of the hearing, the trial judge ruled that the 1993 Well Agreement was unenforceable because it was indefinite. 15 RT 3664:9-3667:17, 3670:7-3673:14.

On appeal, Kahn's two arguments are that the trial judge lacked the authority to decide that the 1993 Well Agreement was unenforceable for two reasons: (1) the operative complaint and answer did not present that issue, and (2) a statute of limitations precludes any consideration of the issue. AOB 5, 6-7, 27-32. Like the plaintiffs in *Jones*, *Ridgway*, and *Prentice*, Kahn waived any defects in the pleadings by failing to object and litigating the issue of the enforceability of the agreement. The theory of trial and equitable estoppel doctrines preclude Kahn from trying the case based upon the theory that the issue of the enforceability of the agreement was raised by the pleadings, and later arguing, for the first time on appeal, that this issue was not presented by the pleadings. *Jones*, *supra*, 57 Cal.App.4th at 876-877; *Viglione*, *supra*, 109 Cal.App.2d at 159-160. Under *Transport Insurance* and *Ludgate Insurance*, Kahn invited any error because he specifically requested that the trial

judge decide that the 1993 Well Agreement was enforceable. Under *K.C. Multimedia* and *Falcone and Fyke*, Kahn forfeited and waived the issue of the trial judge's authority to decide the enforceability of the agreement based upon pleading deficiencies or a statute of limitations because he failed to make a timely and appropriate objection.

This Court can and should affirm because Kahn has forfeited and waived his two arguments on appeal -- that the trial judge lacked the authority to decide the enforceability of the 1993 Well Agreement based upon pleading deficiencies and a statute of limitations.

**2. The Operative Complaint and Answer Did Present the Issue of the Enforceability of the 1993 Well Agreement.**

If this Court is inclined to consider, on the merits, Kahn's argument that the pleadings did not present the issue of the enforceability of the 1993 Well Agreement, it should determine that the basic premise for his argument is wrong. The operative complaint and answer did raise the issue of the enforceability of that agreement.

The essential elements of a claim for specific performance are: (1) the inadequacy of a legal remedy; (2) a reasonable contract supported by adequate consideration; (3) the existence of mutuality

of remedies; (4) contract terms that are sufficiently definite to enable the trial judge to know what to enforce; and (5) a substantial similarity between the requested performance and the promised performance in the contract. *Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 472, 72 Cal.Rptr.3d 835; *Henderson v. Fisher* (1965) 236 Cal.App.2d 468, 473, 46 Cal.Rptr. 173. "It is a general rule of pleading in a specific performance action that the complaint show the existence of a valid and binding contract with the defendant and one which is specifically enforceable." *Spector v. Pete* (1958) 157 Cal.App.2d 432, 437, 321 P.2d 59.

As Kahn argued in a trial brief below (15 CT 4025), Civil Code section 3390(e) prohibits a trial court from granting specific performance of "[a]n agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." Cases in which an appellate court has denied a specific performance claim on the ground that the contract is indefinite or uncertain are legion. See *Klein v. Markarian* (1917) 175 Cal. 37, 40, 165 P. 3; *Bonk v. Boyajian* (1954) 128 Cal.App.2d 153, 156, 274 P.2d 948; *Roberts v. Lebrain* (1952) 113 Cal.App.2d 712, 715-716, 248 P.2d 810; *Dickey v. Pattison* (1949) 92 Cal.App.2d 659, 661-662, 207 P.2d 1081; *Laugharn v. Bryant* (1935) 5 Cal.App.2d 721, 725, 43 P.2d



312. “Definiteness of an agreement is the sine qua non of its enforceability.” *Dickey, supra*, 92 Cal.App.2d at 662.

Here, the 14th cause of action in Kahn’s third amended complaint is for specific performance of the 1993 Well Agreement (which he calls the 1993 Easement Agreement). 3 CT 593-594 (¶¶96-98). Kahn referred to his right, under that agreement, to drill a new vertical well on Schonig’s property to obtain potable water. 3 CT 593 (¶97). Then, Kahn alleged: “Plaintiff is entitled to specific and/or equitable performance of the 1993 Easement Agreement in order to obtain the possessory and real property interests in the Schonig property to which he clearly has rights.” 3 CT 594 (¶98).

Contrary to Kahn’s characterization of his complaint (AOB 1, 22, 25, 30), Kahn definitely pleaded a cause of action for specific performance of the 1993 Well Agreement. Under *Real Estate Analytics* and *Henderson*, an essential element of Kahn’s specific performance claim necessarily was a contract with sufficiently definite terms that enabled the trial court to know what to enforce. Under *Klein, Bonk, Roberts, Dickey*, and *Laugharn*, a contract with definite and certain terms was a sine qua non of Kahn’s specific performance claim. Under the case law, there can be no doubt that Kahn’s specific performance claim presented the issue of the enforceability of the 1993 Well Agreement.

This Court should hold that the trial court properly considered and decided that issue because Kahn's operative complaint did, in fact, tender that issue. The trial court could and did deny Kahn's claim for specific performance on the ground that he failed to establish that the 1993 Well Agreement specified a definite or certain location for the new vertical well. 15 RT 3671:6-3672:4. Kahn is wrong when he argues that the trial court could not consider the enforceability of the 1993 Well Agreement in deciding his specific performance claim. AOB 6-7, 30-31.

Kahn cites *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384, 282 Cal.Rptr. 508, for the proposition that the conclusory allegations set forth in the affirmative defenses in Schonig's answer could not raise any issue of material fact, such as the enforceability of the 1993 Well Agreement. AOB 6, 29-30. Kahn misplaces his reliance upon *FPI*. *FPI* destroys, rather than helps, Kahn's case on appeal.

*FPI* focused upon the role of pleadings in a summary judgment proceeding in an action on a note. The court ruled that the defendants' general denial served to put at issue the material allegations in the complaint. *FPI, supra*, 231 Cal.App.3d at 383. The court determined that the defendants' denial encompassed the defense that "the purported contract is wholly void." *Ibid.* Here,

Kahn pleaded the existence of the 1993 Well Agreement in paragraphs 28-30 and his entitlement to specific performance of that agreement in paragraphs 96-98 in his third amended complaint. 3 CT 583-584, 593-594. In his answer, Schonig denied all allegations in paragraphs 28-30 and 96-98. 10 CT 2667, 2670. Under *FPI*, Schonig's answer, by denying the existence of the 1993 Well Agreement, presented the issue of the enforceability of that agreement.

*FPI* is fatal to Kahn's case for an additional reason. The appellate court observed that the legal conclusions alleged by the defendants as affirmative defenses in their answer did not adequately plead those defenses. *FPI, supra*, 231 Cal.App.3d at 384. However, the plaintiffs, like Kahn herein, failed to demur to the answer or object to the presentation of evidence in support of those defenses. *Id.* at 384-385. Consequently, the Court of Appeal ruled that the plaintiffs' failure to challenge the defects in the answer resulted in the plaintiffs' waiver of the right to rely upon those pleading defects on appeal. *Id.* at 385. The court specifically relied upon the theory of trial doctrine in support of its ruling. *Ibid.*

Accordingly, this Court should conclude that *FPI Development* supports Schonig's position on appeal because the case establishes that Schonig's answer tendered the issue of the enforceability of the

1993 Well Agreement and that Kahn waived any pleading defects anyway.

Kahn states that he does not controvert the trial court's rulings on his specific performance and breach of contract claims. AOB 5, 30. Thus, Kahn expressly waives the right to argue that the trial court erred in denying his specific performance and breach of contract claims. Kahn cannot undo his waiver in his reply brief. The propriety of the trial court's rulings on Kahn's specific performance and breach of contract claims is not at issue on appeal.

**B. No Statute of Limitations Applies to the Issue of the Enforceability of the 1993 Well Agreement.**

Kahn's argument that a statute of limitations barred the trial court's consideration of the enforceability of the 1993 Well Agreement is devoid of merit. AOB 31-33. If this Court is inclined to consider the merits of Kahn's argument, it should decide that the statute of limitations cannot possibly apply to the issue of the enforceability of the 1993 Well Agreement.

Kahn has pleaded causes of action for specific performance and breach of contract. 3 CT 593-594, 596. One of the essential elements of a specific performance claim is contract terms sufficiently definite to enable the trial judge to know what to enforce. *Real Estate Analytics, supra*, 160 Cal.App.4th at 472; *Henderson, supra*, 236 Cal.App.2d at 473. Indeed, Kahn conceded

below that Civil Code section 3390(e) prohibits the trial court from granting specific performance if the agreement lacks sufficiently certain terms that make the precise act, which is to be performed, clearly ascertainable. 15 CT 4025. Consequently, the purported fact that the 1993 Well Agreement was enforceable was an essential element of Kahn's specific performance claim. It is a non-sequitur for Kahn to argue that a statute of limitations precluded the trial court from considering the enforceability of the 1993 Well Agreement, when he needed to plead and prove that the agreement was enforceable to establish his specific performance claim.

Moreover, in his answer, Schonig denied the existence of the 1993 Well Agreement and thereby raised the issue, under *FPI*, that the agreement was unenforceable. 10 CT 2667, 2770. Our Supreme Court has emphasized that "statutes of limitations do not apply to defenses." *Styne v. Stevens* (2001) 26 Cal.4th 42, 51, 109 Cal.Rptr.2d 14, 26 P.3d 343. The Court explained:

Under well-established authority, a defense may be raised at any time, even if the matter alleged would be barred by a statute of limitations if asserted as the basis for affirmative relief. The rule applies in particular to contract actions. One sued on a contract may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after rescission, would be untimely.

*Id.* at 51-52. Accord, *Pringle v. Water Quality Insurance Syndicate* (C.D. Cal. 2009) 646 F.Supp.2d 1161, 1171-1172 (applying California law). Under *Styne*, no statute of limitations can apply to Schonig's defense that the 1993 Well Agreement was unenforceable.

In cross-complaints, Schonig did request a declaration that the 1993 Well Agreement was unenforceable and rescission of that agreement. 3 CT 678, 10 CT 2663. But, *Styne* held that where, as here, a defendant requests, in a cross-complaint, affirmative relief by asking for a declaration that the agreement is unenforceable, but simply seeks the result that he or she owes no obligations under the agreement alleged by the plaintiff, "the matter must be deemed a defense to which the statute of limitations does not apply." *Styne*, *supra*, 26 Cal.4th at 53. Here, although Schonig requested declaratory relief and rescission regarding the 1993 Well Agreement in his cross-complaints, he simply sought the result that he owed no obligations under that agreement. Under *Styne*, the statute of limitations cannot apply. Therefore, this Court should decide that no statute of limitations can apply to Schonig's defense that the 1993 Well Agreement is unenforceable.

## **VIII. CONCLUSION.**

For the foregoing reasons, this Court should affirm the entire amended judgment of the trial court.


IX. WORD COUNT CERTIFICATE.

I hereby certify that the number of words in the text of the foregoing Respondent's Brief, exclusive of the title sheet, the CIEP, the tables, and this certificate, is 8,955, according to the word count in the Pages 5.6.2 word processing program that I used to prepare this brief.

Dated: June 5, 2017.

Respectfully submitted,

LAW OFFICES OF RUSSELL J. HANLON

By 

RUSSELL J. HANLON

Attorney for Defendant and Respondent  
FRANK D. SCHONIG

**PROOF OF E-SERVICE**

STATE OF CALIFORNIA

COUNTY OF SANTA CRUZ

I am a citizen of the United States and a resident of the County of Santa Cruz, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is: 95 South Market Street, Suite 300, San Jose, CA 95113. On June 5, 2017, I electronically filed:

**RESPONDENT'S BRIEF**

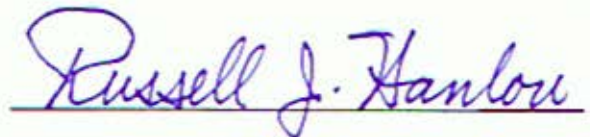
with the Clerk for the Court of Appeal - Sixth Appellate District by using the True Filing e-filing system and, in doing so, I selected the "file and serve" option of e-service on Appellant, with the following counsel being served:

Robert Kahn -- Counsel for Appellant, In Pro Per  
25263 Terrace Grove Road  
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Joseph Balestrieri -- Counsel for Appellant  
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San Jose, CA 95113

Supreme Court of California -- Electronic copy

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this proof of service was executed on June 5, 2017, at Santa Cruz, California.



Russell J. Hanlon



**PROOF OF SERVICE BY MAIL**

STATE OF CALIFORNIA

COUNTY OF SANTA CRUZ

I am a citizen of the United States and a resident of the County of Santa Cruz, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is: 95 South Market Street, Suite 300, San Jose, CA 95113. On June 5, 2017, I served the within:

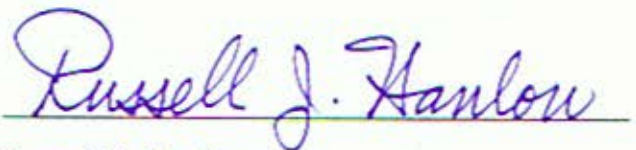
**RESPONDENT'S BRIEF**

on the following court, by placing a true copy thereof in a sealed envelope, with postage for first class delivery fully pre-paid, and placing the sealed envelope in the United States mail at Santa Cruz, California, addressed to the court, as follows:

Hon. Rebecca Connolly  
Office of the Clerk  
Santa Cruz County Superior Court  
701 Ocean Street  
Santa Cruz, CA 95060-4086

-- Trial Judge

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this proof of service was executed on June 5, 2017, at Santa Cruz, California.



Russell J. Hanlon