SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

SPOTLIGHT ON COASTAL CORRUPTION, Plaintiff, v. STEVE KINSEY, et al., Defendants.	Case No. 37-2016-028494 **STATEMENT OF DECISION FOLLOWING BENCH TRIAL** (CCP §632; CRC 3.1590) Dept.: 72 Judge: Taylor Trial: Feb. 27 – March 7, 2018, Dept. 72

1. Overview and Procedural Posture.

This action is principally one for recovery of civil fines under the Public Resources Code. Plaintiff alleges that the defendants – all of whom are or were appointed members of the California Coastal Commission – violated several statutory proscriptions on "*ex parte* communications." The application of these statutory provisions has never before been litigated.

The complaint was filed August 17, 2016. It sought civil fines against the defendant commissioners based on a "per violation" imposition, as follows:

Former Commissioner Kinsey: $5,250,000.00
Commissioner Howell: $3,600,000.00
Former Commissioner McClure: $3,150,000.00
Former Commissioner Mitchell: $4,500,000.00
Commissioner Vargas: $5,625,000.00

Defendants demurred to the complaint, urging lack of standing, failure to allege specific facts suggesting a knowing violation of the "*ex parte*" rules, and uncertainty. ROA 15-16. Defendants also scheduled a motion to strike, but did not file one. ROA 13, 14.

Plaintiff filed, on November 28, 2016, a document entitled "Notice of Plaintiff's Intent to File First Amended Complaint." ROA 17. While this might have been satisfactory prior to January 1, 2016, the Legislature amended Code of Civil Procedure section 472 such that it now requires the amended complaint to be "filed and served no later than the date for filing an opposition to the demurrer." So on December 9, 2016, the court sustained the demurrer with 10 days leave to amend. ROA 22, 27. The first amended complaint (FAC) followed within days. ROA 23. By now it was entitled, in addition to an amended complaint, a petition for a writ of mandate. The relief sought was consistent with the new nomenclature: several species of declaratory relief; an order that the fines be paid to the Coastal Commission; injunctive relief; mandamus relief; and fees and expenses under Code of Civil Procedure section 1021.5.

Defendants demurred again. ROA 28. They again asserted lack of standing. They also asserted that the plaintiff failed to exhaust administrative remedies, and that the FAC "fails to allege specific facts supporting a knowing violation of the *Ex Parte* Rules." On February 17, 2017, after full briefing and hearing, the court sustained the demurrer with leave to amend. ROA 49. The court found plaintiff had adequately alleged standing, but that there were shortcomings in the allegations regarding knowing violations of the "*ex parte*" rules. *Id.* The second amended complaint (SAC) was filed a few weeks later. ROA 52.

Defendants demurred again, and filed a motion to strike. The demurrer urged two grounds: failure to exhaust and failure to allege specific facts supporting knowing violations of the *ex parte* rules. ROA 57. The motion to strike attacked standing and sought the striking of references to "statutory penalties other than Public Resources Code section 30820(b)." ROA 56. Following full briefing and a hearing on May 19, 2017, the court overruled the demurrer in part and sustained it in part. ROA 65. Although not initially inclined to do so, the court granted leave to amend. *Ibid.* The third amended complaint (TAC) was filed on June 6, 2017. ROA 66. It pled a multi-count single cause of action for violation of laws governing *ex parte* disclosures. It alleged defendants committed well over 100 violations of the Public Resources Code *ex parte* disclosure rules. TAC, paragraphs 17-19. The relief sought in the TAC was similar to that sought in the SAC. Defendants answered. ROA 67. Less than a month later, defendants filed their motion for summary judgment/adjudication on the TAC. ROA 68-73, 102.

The case had been set for trial in early December, 2017. ROA 48-51. However, the plaintiff approached the court in September 2017 via *ex parte* application seeking more time to oppose the motion for summary judgment/adjudication. ROA 78. The court granted the *ex parte* application, and continued the trial to February, 2018, to facilitate opposition briefing and a hearing on the motion for summary judgment/adjudication. ROA 86-90.

Discovery disputes thereafter arose, but were resolved without court intervention. ROA 91-100; 104-113.

Following full briefing (ROA 102, 114-125) and a hearing on January 19, 2018, the court denied the motion for summary judgment in a detailed ruling. ROA 130. The court found triable issues of fact. In addition, with regard to defendants' argument regarding "substantial compliance" with the *ex parte* disclosure rules, the court opted for full factual development at trial (so that the reviewing court may have the benefit of a more complete record in determining the several novel issues presented by this case). *Ibid.* The court also noted the signal purpose of the Coastal Commission *ex parte* rules: to banish forever the days of the smoke-filled room, where deals are cut and policies determined without meaningful input or participation or even notice to the public. [*See Dept. of ABC v. Appeals Board*, 40 Cal. 4th 1, 5 (2006)]. The court held this obvious legislative purpose would be undercut if Commissioners could be summarily exonerated from violations of the rules based simply on their written declarations, without the opportunity for cross-examination or a determination regarding demeanor and credibility. ROA 130.

Plaintiff thereafter filed, by stipulation, the 4th Amended Complaint. ROA 132, 136. It added two counts alleging that defendants McClure and Mitchell violated Public Resources Code section 30327.5(b) "by accepting illegal gifts." The parties answered ready at the TRC. ROA 133-135. They also answered ready at the trial call on February 23, and the trial was confirmed to start the following Tuesday (as the court was then finishing another trial).

Each side filed a single motion *in limine*, and both were opposed. ROA 139-147. The court reviewed same over the ensuing weekend, and faxed tentative rulings to the parties on February 26. These were argued and ruled upon on February 27, following which the court heard opening statements and evidence began.

Ultimately, the court heard from 13 witnesses over 6 days (some more than once), and received around 800 exhibits into evidence (the majority by stipulation). Following phase 1 argument on March 7, 2018, the court took that part of the case under submission.

After the parties jointly requested post-evidence briefing in lieu of closing argument, the court outlined for the parties a phased approach to the court's rendering of a decision, to include an initial tentative decision on four gateway issues, followed by further briefing, followed by a further tentative decision. The parties agreed to this approach. On March 9, the court published its tentative decision on the phase 1 issues in accordance with CCP section 632 and CRC 3.1590. The defendants filed, on March 23, an "objection" to the initial tentative decision, ROA 175, which the court interpreted as a request for SOD (RFSOD) under CRC 3.1590(d). The court assumes this is what the defendants were trying to accomplish with their March 23 filing (as the Rules of Court do not contemplate an "objection" to a tentative decision).

In conformance with the parties' stipulation and the court's April 26 order (ROA 201), phase 2 briefing was filed on April 6, April 20, and May 4, 2018. ROA 191-192, 198, 204. The briefing was extensive: plaintiff's briefing totals 19 pages of narrative plus two detailed spreadsheets/tables plus several inches of backup. Defendants' "brief" was 70 pages. In

addition, defendants filed a series of objections regarding the Kaufman/Kaufmann issue (ROA 193-197). The court reviewed the briefs and the accompanying spreadsheets/tables, and on May 7 filed and served its tentative decision on phase 2 issues in accordance with CRC 3.1590. ROA 205. It stated it would become the Statement of Decision (SOD) unless the steps required under CRC 3.1590(d) were taken within the timeframe set forth therein.

Despite having been told explicitly in ROA 175 that CRC 3.1590 does not contemplate "objections" to tentative decisions, defendants filed another such "objection" on May 18. ROA 213-219. Although the court once again treats it as a RFSOD, there are several problems with doing so. First, the document (ROA 213) is bereft of an essential element called for by CRC 3.1590(d): a specification of the "principal controverted issues" to be addressed by the court. Second, the May 18 filing is both an effort to adduce new evidence not presented at the trial, and to re-argue points already addressed by the court. Neither is contemplated by CRC 3.1590. The court denies the request for judicial notice (ROA 214-215) and ignores the declaration of Louise Warren and the exhibits thereto (ROA 216-218). Defendants fail to associate these items with a trial exhibit number, and the time for the offering of evidence has passed.

The court filed and served its PSOD [CRC 3.1590(f)] for both phases of the trial on the morning of May 21, 2018. [Because the trial courts are not final, it is important that they be prompt, and the court has at every turn tried to carry out this obligation.] Later the same day, plaintiff filed its RFSOD. ROA 222. The court did not receive a copy of the RFSOD until late in the day on May 23. Plaintiff's RFSOD essentially consists of 15 special interrogatories directed to the court; the vast majority of these cannot be classified as a specification of the "principal controverted issues" to be addressed by the court [as contemplated by CRC 3.1590(d)].

CCP section 632 provides:

> "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. . . ."

"[I]t is settled that the trial court need not, in a statement [of] decision, 'address all the legal and factual issues raised by the parties.' [Citation.] It 'is required only to set out ultimate findings rather than evidentiary ones.' [Citation.] '"[U]ltimate fact[]"' is a slippery term, but in general it refers to a core fact, such as an element of a claim or defense, without which the claim or defense must fail. [Citation.] It is distinguished conceptually from 'evidentiary facts' and 'conclusions of law.' [Citation.]" (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 559.) "The trial court is not required to make an express finding of fact on every factual matter controverted at trial, where the statement of decision sufficiently disposes of all the basic issues in the case." (*Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118.) A specific finding on a disputed factual issue is not required when that finding may necessarily be implied from a general finding. (*St. Julian v. Financial Indemnity Co.* (1969) 273 Cal.App.2d 185, 194.)

The court is not required to respond to the interrogatories posed by plaintiff. As the court held in *Pannu v. Land Rover N. Am., Inc.,* 191 Cal. App. 4th 1298, 1314 n. 12 (2011), "the trial court is not required to respond point by point to issues posed in a request for a statement of decision."

The law is well settled that a court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case. *Ermoian v. Desert Hospital*, 152 Cal. App. 4th 475, 500 (2007); *Hirshfield v. Schwartz*, 91 Cal. App. 4th 749, 763 (2001); *Marriage of Burkle*, 139 Cal. App. 4th 712 at footnote 15 (2006).

The court filed and served its Amended Proposed SOD on May 24, 2018. ROA 223. Plaintiff filed a notice of non-objection the following day. ROA 226. Plaintiff also lodged two alternative proposed versions of the judgment. ROA 230. Defendants filed no further objections to the proposed SOD within the timeframe contemplated by CRC 3.1590(g). The court has used neither version of the judgment prepared by plaintiff, and has instead filed its own version. It is filed contemporaneously with this SOD.

2. Applicable Standards.

A. Unlike the general ban on *ex parte* communications between litigants and judges, the law allows such communications between interested parties and members of the Commission under certain specified conditions. The California Coastal Act defines "*ex parte* communication" as an oral or written communication between a commissioner and an interested person about a matter within the Commission's jurisdiction that does not occur in a public hearing or other official proceeding or on the official record of the matter. Public Resources Code § 30322. The Act states that no commissioner "shall conduct an *ex parte* communication unless the commission member fully discloses and makes public the *ex parte* communication by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the commission on the record of the proceeding at that hearing." Public Resources Code § 30324(a).

Disclosure includes the "date, time and location of the communication," the "identity of the person or persons initiating and the person or persons receiving the communication," and a "complete description of the content of the communication." Public Resources Code § 30324(b)(1). "The executive director shall place in the public record any report of an *ex parte* communication." Public Resources Code § 30324(b)(2).

B. There are specified penalties for violations of the statutory *ex parte* communication requirements. Public Resources Code §§ 30327, 30824 (up to $7500 in civil fines for knowing violation of *ex parte* disclosure requirement.) In addition, "if a violation of this article occurs and a commission decision may have been affected by the violation, an aggrieved person, as described in Section 30801, may seek a writ of mandate from a court requiring the commission to revoke its action and rehear the matter." Public Resources Code § 30328.

C. Where the question "is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (*Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100–101. ... This "'public right/public duty' exception to the requirement of beneficial interest for a writ of mandate" "promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation

establishing a public right." (*Green v. Obledo, supra,* 29 Cal.3d at pp. 145, 144 ... We refer to this variety of standing as "public interest standing." *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166 (internal citations reduced).

Courts consider the following factors in determining whether to allow public interest standing: whether the entity in question "has shown a continuing interest in or commitment to the public right being asserted; whether it represents individuals who would be beneficially interested in the action; whether individuals who are beneficially interested would find it difficult or impossible to seek vindication of their own rights; and whether prosecution of the action as a citizen suit by a corporation would conflict with other competing legislative policies. *Save the Plastic Bag, supra,* at 167.

D. The exhaustion of administrative remedies is often a jurisdictional prerequisite to seeking judicial relief against governmental entities. *Abelleira v. Dist. of Ct. of Appeal* (1941) 17 Cal.2d 280, 292. The failure to exhaust is a jurisdictional defect. *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197. It is based upon the notion that a public agency must be given an opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review. *Id.* at 1198.

Even claims of constitutional infirmities (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 276) and challenges to the validity of any governing regulation (*Woods v. Super. Court* (1981) 28 Cal.3d 668, 680) must be presented in the first instance to the administrative agency. This requirement permits the agency to apply its expertise, resolve factual issues, apply statutorily delegated remedies, and mitigate damages. *Rojo v. Kliger* (1990) 52 Cal.3d 65, 86.

However, the doctrine does not apply where no specific administrative remedies are available to the plaintiff. *City of Coachella v. Riverside County Airport Land Use Comm.* (1989) 210 Cal.App.3d 1277, 1287; *see also Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 320.) "There must be 'clearly defined machinery' for the submission, evaluation and resolution of complaints by aggrieved parties." *Jacobs v. State Bd. of Optometry* (1978) 81 Cal.App.3d 1022, 1029.

E. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305. "The doctrine of equitable estoppel may be applied against the government where justice and right require it." *Id.* at 306.

F. The parties reached, shortly before trial, a stipulation on certain "Findings of Fact and Conclusions of Law." ROA 150. They reached a second such stipulation during trial, on March 1. ROA 154. They reached a third such stipulation on March 6. ROA 166. As juries are often instructed (CACI 106), stipulations of fact are binding and must be taken as true by the finder of fact. A stipulation is an agreement between opposing counsel that serves to obviate the need for proof or to narrow the range of litigable issues. (*County of Sacramento v. Workers' Comp.*

Appeals Bd. (2000) 77 Cal.App.4th 1114, 1118.) As an agreement, a stipulation is subject to the ordinary rules employed to interpret contracts. (*Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1341.) Accordingly, in construing a stipulation, the court's paramount consideration is the parties' objective intent at the time they entered into the stipulation. (*Ibid.*) Parties may agree by stipulation to limit the issues presented to the trial court and the court will respect such stipulation. (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 733.) Matters that, by stipulation, are not before the court cannot be the basis for the court's ruling. (*Assad v. Southern Pacific Transportation Co.* (1996) 42 Cal.App.4th 1609, 1616.) Stipulations are binding upon the parties. *Palmer v. City of Long Beach*, 33 Cal. 2d 134, 141-142 (1948). The court has already made the parties' stipulations the orders of the court, and to the extent not specifically addressed herein, incorporates same in this decision.

G. The 4th AC seeks declaratory relief. A threshold requirement for declaratory relief is the existence of a justiciable dispute. The declaratory judgment statute expressly provides that declaratory relief is available to parties to contracts or written instruments "*in cases of actual controversy* relating to the legal rights and duties of the respective parties." (Code Civ. Proc., § 1060, italics added.) Because Code of Civil Procedure section 1060 "makes the presence of an 'actual controversy' a jurisdictional requirement to the grant of declaratory relief ' " (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885 (*Environmental Defense Project*)), a "court is only empowered to declare and determine the rights and duties of the parties 'in cases of actual controversy' " (*Pittenger v. Home Savings & Loan Assn.* (1958) 166 Cal.App.2d 32, 36). For this reason, the existence of an " '*actual, present controversy*' " is " 'fundamental' " to an action for declaratory relief. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; *In re Claudia E.* (2008) 163 Cal.App.4th 627, 639.)

One requirement for a justiciable controversy is ripeness: there must be a dispute between adverse parties on a specific set of facts that has reached the point that an invasion of one party's rights is likely unless the court orders relief and enters a conclusive judgment declaring the parties' rights and obligations. (See, e.g., *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-171; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 8.

There is no basis for declaratory relief where only past wrongs are involved. *Baldwin v. Marina City Properties, Inc.* (1978) 79 Cal.App.3d 393, 407.

H. Request for Judicial Notice. Accompanying plaintiff's phase 2 trial brief was a request for judicial notice (ROA 192). Courts of appeal review a trial court's ruling granting a request for judicial notice pursuant to the abuse of discretion standard of review. (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1271.) Evidence Code section 453 provides that a trial court must take judicial notice of any matter specified in Evidence Code section 452, upon a party's proper request.

3. <u>The Evidence</u>.

The first witness was defendant Wendy Mitchell, called under Evid. Code section 776. Former Commissioner. Master's in Public Policy in 2003. Applied on line to Gov. Schwarzenegger to

Coastal Commission. Impeached mildly with deposition. Agendas electronically, hard copies via mail, on line. Thought it was easier to read hard copy; asked to have them mailed toward the end of her six years. Understands the record include everything in staff files. Piles of papers delivered day of hearing. Not everything handed to her was on the website. Then temporized. Assumed staff was complying with the law. Never asked about this. Oversaw Exec. Director. Douglas, Ainsworth, Lester. Evaluated their performance. Never focused performance review on procedures regarding ex parte disclosures. Voted to terminate Lester in 2016. In 2015 she asked a question about *ex partes*. Did not focus on *ex parte* procedures in reviewing Lester.

Official record. Has read *ex parte* rules. Never seen an official file; never been to a district office. She assumed staff put disclosures in the official record but does not know where the disclosures went. Wanted to confirm the disclosures were being handled correctly and that is why she raised it in 2015. Had concerns and counsel assured her. Did not ask where the official record is kept. Does not know what staff did with ex parte disclosure forms. Some she mailed, some electronic, some physically handed to staff. Did not keep copies of anything she submitted. Has not destroyed any records relating to *ex parte* disclosures.

Not sure when first heard "exhaustion of remedies." Impeached with depo on this. Not sure what it means. Had to do with suing the Commission. Does not understand the concept. Several questions on exhaustion. Agenda to public creates even playing field. Primary notification to public was via agenda website. Reasonable for members of the public to go to website. Agenda and backup. Did not use Commission website. Never trained on how public got information got agenda information. Relied on staff. Impeached with depo on public's reliance on website. So public and Commissioners on the same informational footing.

Her understanding of *ex parte* communication. Never changed. Read and understood *ex parte* rules. Impeached with deposition regarding her understanding of disqualification. Didn't investigate possibility of fines because always disclosed. Thought it was a $7500 max. Learned this in closed session. DNR trainings on *ex parte* rules. Understood timing requirements so everyone knew; "seven days prior to Commission meeting." Doesn't know how many days in advance agendas were posted.

Substance of disclosures required: anything substantive regarding the action item. Written materials had to be disclosed if there were any. Doesn't know what happened to disclosures once turned over to staff. She understood that making the written disclosure to staff was her responsibility; not responsible for making sure public had it. But in 2015, wanted to confirm she was following the law. Understood purpose of ex parte rules was so everyone had the same info. Did not follow up her submission.

Ms. Mitchell's testimony resumed after the noon recess. Two email accounts she used. Sara Wan is a lobbyist, former Commissioner. Susan McCabe also a lobbyist. Disclosed all ex parte communications with Wan. Believes all were disclosed. Frank Angel: does not recall any communications with him. Friends with McCabe. Has had ex parte communications with Ann Blemker from her company. Donald Schmitdz – had ex parte communications with him. Jared Ficker at CalStrat – no ex partes with him that she recalls. Had *ex partes* with Stanley Lamport. Andy Culbertson – she is also a lobbyist. Does not recall how many.

Ex. 293 page 1046. Comports with her understanding of *ex parte* disclosure rules. DNR where she got the disclosure form. She filled them out sometimes. Depended on circumstances. Ex. 293 page 1077. DNR this PowerPoint. Ex. 777. Minutes came out sporadically. Hard to recall because months would pass. Questioned accuracy. She voted to approve. DNR raising concerns about adequacy of minutes. Ex. 301 – saw at her deposition. Bears her email address. Looks like an ex parte communication for the Ridge Project. No idea if in the agenda materials. DNR if did an oral disclosure. Thinks it was sent to the staff. Ex. 302: her signature; not fabricated. DNR if did an oral disclosure. No idea if in the agenda materials. Transmitted to staff based on stamp. Ex. 303: no received stamp. Inconsistent staff practice regarding received stamps. Learned of this inconsistency via this case. Her signature. DNR if did an oral disclosure. Does not know if it was ever in the agenda materials. DNR if she stated her disclosure was "on file."

Ex. 304: her signature. Does not know if in agenda materials; DNR if did an oral disclosure. Ex. 305. Her signature. Recalls this one. Does not know if it was in the agenda materials. DNR if did an oral disclosure. Often did belt and suspenders: did both in writing and "on the mic." No independent recollection of turning in the disclosures.

Ex. 306. Don't recall it but has her name on it. Probably prepared by the people who were doing the presentation. Don't know if it is complete. Ex. 307. Does not recognize. Did not sign; does not know who prepared it. Does not have an email. Ex. 308. Does not recognize it. Does not know if it made it to the Commission's files before the matter was considered. Does not have proof of when disclosures were sent in. Ex. 309. Not signed; sent via email. Does not know when it was submitted or who prepared it. Does not know what staff did with it. Recalls the visit but not the specifics. Reference to briefing booklet: did not takes steps to insure it was submitted to staff. This lobbyist's practice was to submit these sorts of materials.

Commission meetings are videotaped. Believes them to be accurate. Ex. 310. Does not recognize it. Guesses the applicants prepared it. Another reference to briefing booklet. Did not make sure the booklet was in the record. Ex. 311. Does not know who prepared it. DNR if did an oral disclosure on this one. Ex. 312. Her signature. Did not verify briefing booklet had been submitted to staff – relied on the advocate's practice. Ex. 313. Her signature. Undated. Her practice was to submit papers timely but does not have independent verification. Ex. 314. Undated. Same testimony regarding briefing book. Ex. 315, 316, 317. In no case can she verify submission to Commission. Same with Ex. 318. Ex. 319: no reason to doubt that this ex parte occurred. Briefing book not attached. She did not verify that it was submitted to the Commission. Ex. 321. Same regarding the briefing book. Ex. 322. Does recall this one. Believes she turned this one in but never visited South Coast office. Can't explain date.

Ex. 323. Cannot verify. Assumes the communication occurred. Ex. 324. Her signature, handwriting. Does not know when delivered to Commission. Back to Ex. 302. Communication occurred Jan. 7. Tried to turn in disclosures within a day or two of the communication. Back to Ex. 303. Practice of Commission was to say on the mic my "disclosure is on file" but did not verify that they were.

Ex. 325. Her signature, handwriting. Did not attach the subject letter. Did not personally verify that the letter was in the Commission files. Never lied on the dais. Ex. 326. Sept. 29/Oct. 9 but did it on the mic. DNR how long the presentation lasted. Did not verify that the referenced presentation was in the official record. Ex. 327. Oct. 1/Oct. 10 – no written disclosure; did it on the mic. Witness not credible on this one. Ex. 328: on the mic again. Ex. 329. No written ex parte disclosure. Ex. 330. Oct. 1/Oct. 11 but no written disclosure. Did not take steps to include PowerPoint in the official record. Our job was to be as available as possible.

Ex. 331. Does not recognize. Ex. 332. Does not recognize. Relies on practice which was to submit PowerPoint to staff. Same with 333. Should have done a written disclosure. She was under the impression then that putting it on the mic was more transparent. Exs. 335/336. Did not disclose names of "Army Corps folks." Ex. 337. Did not disclose when or subject matter. Believes she has acted with fidelity.

Ex. 338. DNR length of meeting; did not independently verify that PowerPoint was in the record. Ex. 339: no written disclosure. Ex. 340: did not independently verify that PowerPoint was in the record. This one was one day "out of line." Ex. 341-342. Did not do a written disclosure on this one. Ex. 343. No written disclosure. Thought on the mic was better. "At some point my understanding was corrected." Staff corrected her sometime in 2014-15. Witness not credible on this point. Ex. 344: Robin Black knew the homeowners. Questions related to process not substance. Her understanding was that process questions don't have to be disclosed.

Ex. 363, pages 1221-1222. Does not recall. Voted on a Carollo project. Self-reported to FPPC. Impeached with deposition on this (pp. 170-171). Read in the paper and then self-reported. Didn't see it before her depo. It was at the end of a packet. Only time this happened. Only client on whose project she voted.

Ex. 346. DNR. Ex. 347. June 3 but disclosed on mic 10 days later; went over written disclosure earlier today. Did not ensure PowerPoint was in the record. Ex. 348/349: refers to Ex. 304. Recalls no training on how to do *ex parte* disclosures. Did not see 304 in the staff report or the agenda materials. Trying to make sure everyone had the same information. Did not ask staff. "This case has enlightened us on the lack of process on the staff side." Impeached with depo on this point. Ex. 350. Communication was July 1/not disclosed until July 10. Ex. 352. In writing and on the mic. Ex. 353. One Commissioner would summarize and then others would say "me too." Ex. 354: DNR if there was a written disclosure. Ex. 355/356. March 3/March 11. Doesn't know if written disclosure was on file. Ex. 357. DNR when the communication occurred. Ex. 358. 12 days after disclosure. Ex. 359. DNR. Did not attach the text message. Ex. 360/361. Didn't see her *ex parte* disclosure in the file and so did it on the mic. Impeached with her depo on this. Changed "website" to "everything the staff gives the Commissioners." Ex. 362. Assistant was setting up an *ex parte* with Sara Wan. Ex. 362 received.

Friendly cross at 4:13 p.m.: 11 years running a government consultancy. Worked in the State Legislature. Commissioner not a full time job. Tuesday travel day, in session 3 days per week. 8-10 hours in prep work. Commission meets all over the state. No salary. $100 per day per meeting plus meals. No office space provided. Never been to Coastal Commission offices. She did not maintain Commission files or have access to its files. Had no access to Commission

website. Wanted to get disclosures off her desk in a timely fashion. Relied on staff completely. They were responsible for everything except reading, listening to testimony and making a decision. Assumed there was a process relating to *ex partes*. Quite shocking – lack of a process. Not aware of lack of process.

Carollo did groundwater clean-up. She provided services to that company for a couple of years. She was on retainer. She had other clients who also paid her, for comparable work. Derived no benefit from any ex parte communication. Agendas listed dates but items were postponed or trailed. Many communications were very rote; some people just read from the disclosure form. Same PowerPoint often shown again at meeting. Denies any secret meetings. Tried to make sure everyone had the same information. Never sought to conceal an *ex parte*. No one ever asked her to keep the ex parte communications secret. Ended for day not finished with this witness.

Friendly cross of Ms. Mitchell resumed at 9:07 a.m. of February 28. Recalls no instance in which material presented at ex parte was different than what was presented than what was presented in a Commission meeting.

Back and forth on what staff told her about the method of her disclosures. Very confused and imprecise on this. Did it only on the mic between from 2011 to 2014 or 2015. Not sure of when staff approached her. Denies other communications regarding "problems with ex parte disclosures." Later volunteered she could research this.

Staff postponed items. Ex. 302 likely prepared by "the advocate." Identical to disclosure form done by Brennan within Ex. 1248. Ex. 307 is another disclosure form. Ex. 530 contains another copy of Ex. 307. Distributed by staff as an addendum to staff report. Ex. 321/Ex. 551. Cox turned in an identical ex parte disclosure form to hers; Uranga's is different because he took a tour and she did not. Ex. 324 reflects a contact by opponents of a project. Ex. 508 is the staff report for the same project. Ex. 326. Ex. 358 – Ex. 503. Both relate to Kellog Avenue project.

Redirect at 10:00. DNR what work she did for Carollo in the month she voted. Different offices. Not Coastal Commission work. Beyond that DNR. Timing of PowerPoints. DNR regulations on *ex parte* communications. Often relied on lobbyist to prep the forms; handed to her after the meeting had concluded. Substantively identical forms not surprising to her. Ex. 324. Advocates did a good job summarizing because it was in their interest to do so. Worked for Carollo every month she was on retainer. Compensation was in line with other clients and consultants.

Second witness at 10:17 was former Commissioner Martha McClure called under Evid. Code section 776. Retired teacher. Was also a Del Norte County Supervisor for 20 years. Received materials electronically via website, same way as public does so. Official Record is "all information the Commission contains within the file." Enhanced by what occurs or is presented at the hearing. Exhaustion of remedies means cure and correct avenues. Impeached with deposition on this. Does not expect public to bring things to her attention if they are not known to the public. Her understanding of *ex parte*. One on one meeting without other side present.

Received training on ex parte disclosure at public meetings – twice. DNR when. Impeached with depo on whether she looked at whether Legislature changed the rules.

Knew seven day rule. Knew "on mic" rule. Needed to give date, the place, the people present, and the subject matter discussed. Also written materials had to be disclosed. Not required to duplicate written materials.

Gave all at the mic, personally delivered written ones to Vanessa. Occasionally by email; one by mail. May have faxed. Impeached with depo on this. Did not get receipts for submission until Oct. 2016, after lawsuit was filed. Had heard expressions of concern about written disclosures not making it into official record. Did not evaluate Exec. Director on this.

Ms. McClure's testimony was interrupted for that of Frank P. Angel. Attorney since 1985. Environmental and public interest litigation. Described his work. Has done ex parte communications for clients. Malibu CDP matter for Keane. Had an *ex parte* on the phone with Sara Wan with Commissioner Howell. At least 15 minutes, maybe up to 35. Ex. 36. Lists the topics listed on Ex. 36 with Howell. Also discussed a couple of other items not reflected on Ex. 36. Broad Beach road heavily visited. Also discussed LCP systematic issue. Submitted PowerPoint at the subsequent hearing. Denies reading from a script. Had bullet points. Ex. 237. Ex parte disclosure form for McClure. By phone. Several of the *ex partes* – he brought up two other matters. Approximately half an hour. No PowerPoint by him; but Wan had one during ex parte. McClure asked questions buy DNR what questions. Also had *ex parte* with Mitchell – 20-25 minutes. Ex. 134 Kinsey/by phone/25-30 minutes. Keane/Malibu. Were other things discussed beyond what is shown on this disclosure form. DNR if he asked questions. Also had a communication with Vargas. Had to be rescheduled. From his car. Discussed view protection.

Cross at 11:18: Can't recall with which commissioners he raised the two other issues that are not shown on any disclosures. Ex. 293. Aware of *ex parte* rules. He presented no written materials, although Wan did. Two non-defendant commissioners asked for a photo, which he later sent them. He put it in his PowerPoint. It is in the administrative record. This case was unusual for him. Nothing he wanted was confidential. Had 3 minutes at the hearing. Reason we had the *ex parte* was time limits at hearing. No limits on writings. Wan prepared Ex. 36 and 237.

The direct of Ms. McClure resumed at 11:40. Denies deleting any emails regarding ex parte communications. Ex. 202. Was Ex. E at her deposition. Impeached from her depo on this. Did not change her practice after this ruling in Sept. 2016. Staff did not file her paperwork. She left Commission in Dec. 2016. She did not follow up; this was staff's job. Found out staff was not doing their job in late 2016. Did not know this before July 2016. Knew she could not participate in any decision until ex parte communications are disclosed. Ex. 215, page 758-61. 8/4/16 memo. Pages 786-87. Pages 792-807 for notice. Minutes are Ex. 777.

Overnight at Schmidtz' house. Went to a football game after the Commission meeting. Commission would have paid for a hotel. He is a paid advocate with business before the Commission. Denies appearance of impropriety. Ex. 224 – her signature. Does not know if it was included in the website materials. Ex. 225. Her signature. May 7 was date of

communication, and should have been disclosed earlier. Impeached with depo on this. Does not know if the exhibit booklet was supplied to staff. Did not verify. No received stamp obtained. Compare 224 and 225. Ex. 226: DNR if included in agenda materials. Only reason she thinks it was submitted is that Briggs got it in FOIA request. Also disclosed on mic. Impeached with depo. Ex. 227 - careless not to sign it. Written for her. Read from the paper on the mic and turned it in. Ex. 228 – submitted on Oct. 11. No received stamp. Not posted in advance of the meetings to which they relate. Ex. 229 – read at mic. Ex. 232 – submitted after she read at mic. Ex. 233 – again, reported at mic. Ex. 234. Same day as meeting. "reported it out on the mic." Ex 236. File stamp is after the meeting. Ex. 240. Hearing was Oct. 6; signed Oct. 9. Ex. 245. Communication April 5, signed and delivered on April 13. Not within the 7 day rule. Ex. 247 not "reported out" at dais. Did not mention the 12 reasons. Ex. 248. Ex. 250. Sept. 12 disclosure for a May *ex parte*. No writing. Ex. 252. Oct. 1 vs. Oct. 10. Ex. 253. April of 2013 vs. October disclosure. One day late with Ex. 254. Ex. 255 was also late – impeached with depo on this. Ex. 257. No written disclosure. Ex. 258. Failed to provide date of ex parte communication. Ex. 259. Impeached with depo on this. Ex. 260. Communication occurred May 7; is there a written disclosure on or before May 14? Ex. 225 is the disclosure; it was not sent prior to June 12; a draft was in her out box.

Ex. 261 involved a sales pitch. Ex. 262: does not know dates – seriatim messages on answering machine not forwarded to commission; emails may have been but not until 2016. Ex. 264 says "on file" which is Ex. 226. Not date stamped. Ex. 268/269. No written evidence of when the writing referenced therein was submitted.

Ex. 270, 271: no written ex parte disclosure. Ex. 272 and Ex. 812 and Ex. 813.

Ex. 275/276: 10/28/15 ex parte: no written disclosure. Ex. 277. April 5 communication; the written disclosure is Ex. 245. Submitted April 13 (same day as on mic). Back to Ex. 244 – 12/10/15 communication – submitted electronically "6 days before it was due." Emailed it within 6 days of the ex parte but two communications are referenced.

Ex. 256. DNR if did a written disclosure. Maybe so after read from the dais. Impeached with depo on this.

Friendly cross at 3:15 p.m. Her practice was to defer *ex parte* communications to within 7 days of a Commission meeting. No secret meetings. No confidentiality requests. Never tried to conceal. Ex parte communications were similar to presentations in hearings.

Ex. 226. Based on her practice would have reported at mic then submitted. Ex. 229: went back and watched the video archive. Knows she put them on the mic. Only two she has not looked at because they are not available. 230: confirmed it was on the mic. 234: same. 237: disclosed on mic and added additional information on unity of interest. 238: disclosed on the mic. Reviewed pre-prepared written forms for completeness and added as necessary. Did not necessarily read the whole form. Ex. 240, 241: disclosed on mic. Ex. 242: disclosed on mic. Ex. 243: same. Ex. 246: same. Ex. 247: same.

Redirect at 3:34: Ex. 215 page 786. New procedure/new email address. Cannot recite verbatim what she said on mic. Described application process. Knew it would be a lot of work.

Ex. 269 relates to Ex. 237. Example of her adding to a prior disclosure by another Commissioner. Never withheld information from a disclosure.

Fourth witness, called at 4:07, was Commissioner Mark Vargas. Since May of 2013. Several other appointed offices. Agenda package: usually obtain from Commission website. Website has changed. Not super clear on what constitutes the official record. Vague understanding of exhaustion of remedies. Don't understand it perfectly. Not aware of specific rules for expressing concerns regarding adequacy of ex parte communications. His understanding of definition of ex parte communication. If more than 7 days before Commission hearing, should be disclosed in writing within 7 days of the communication taking place. Form generally signed and send it in to staff. Staff has changed. First sent to Vanessa or Jeff. Now a general email address. Otherwise must be disclosed orally on the mic. If no disclosure, may not deliberate or participate. DNR training. Orientation book. 16 hour meetings. Disclosure must be full and complete and must include any written materials. Anybody can review what's on file. Agenda material often include ex parte disclosures.

He prepares and transmits disclosures usually via email. Almost always did it himself. DNR using mail. Maybe once FedEx. No fax. No personal delivery except at a Commission meeting. Provision of reply back (receipt) has changed about the time the email address change to "executive staff." Ex. 215, pp. 786-87. Prior to this DNR if got confirmation of receipt for disclosures that he emailed.

March 1, 2018: 9:15 a.m. Commissioner Vargas' testimony was interrupted to take up the testimony of Jeff Staben. Has worked for the Commission for 30 years. Presently an administrative assistant. "I process disclosure forms." Vanessa Miller also does so. Reports to Executive director. Talks to Miller about processing the forms. Final repository is the appropriate district office. Procedures and check list of August of 2016. Prior to then: either Miller or others would submit to Staben. He "pdf's" them. Ex. 827. Ex. 831. Ex. 832. Ex. 833. These are common types of emails being forwarded by Miller to Staben. Ex. 835. Ex. 838. Ex. 839. Ex. 840.

Friendly cross: 9:37. His typical tasks supporting the executive staff. HQ in SF. Six district offices. Lead staff person is typically an analyst in a district office. District offices maintain project-related files. HQ office maintains disclosure forms.

Since August of 2016: Memorandum that spelled out procedures; can be found on the Commission website. Include ex parte checklist. When a Commissioner submits a form at a meeting, it goes to Vanessa Miller. No more snail mail. No more fax. Just email now. Emails are monitored by Miller and witness. Described process: stamp then pdf and send to district office and maintain and sent receipt confirmation. Stamped on date they arrive. Emails not deleted. New procedure started August 4. [The complaint was filed August 17]

District staff decides what gets on the internet, including disclosure forms.

Prior to August of 2016: no procedures; no training for Commissioners; no training for him or Ms. Miller on processing forms. Commissioners used snail mail and fax, as well as email, as well as manually. No single email account; sent to Miller, witness, the executive director, possibly others. He got most of them. Described what he did. He would send a thank you email and then process it: send to district office and keep a copy (electronic and hard copy) in Executive Office. Typically deleted email after making hard copy. No practice of date stamping. No rhyme or reason. If handed in at a meeting, Ms. Miller would stamp them. She is the record clerk and that's why she has a stamp (witness does not). If mailed in, he usually opened the mail. No consistent practice of stamping these. Scanned then sent to district office and kept in Executive Office. Not always on the same day they arrived. Could be several days up to a month. Did not retain the envelope. If received via fax: described process. In all events, district staff decides what goes on website.

Never told a Commissioner ex parte disclosure forms were not being submitted properly. Exs. 1003-1008. Exs. 1137-1176. Ex. 1205-1206.

Redirect. Now has a stamp. Basis for impression. Miller was point of contact for Commissioners (but he processed them).

Sixth witness: Vanessa Miller, per Evid. Code section 776. Has worked at the Commission for 24 years. Associate program analyst since 2006. Described duties. Commission pays for hotels for Commissioners. Disclosure forms: she receives at meetings, via email, sometimes via US Mail. She attends the meetings. She is caretaker of records. Puts received stamp or writes it date and initials it. Not aware of deviating from this practice. Denies falsifying a date. Vast majority of forms by email. Works directly under the Executive Director.

Process today: Open email; send a receipt, print, stamp, scan it, send to district office. Process has changed. Used to just send to district office. No received stamp if email. None received via courier. Stamped mailed ones when opened. Generally same day it comes in. DNR any defendant following up regarding receipt of disclosure form; Lisa Crosse (worked for Kinsey) did so. Impeached with deposition on hearing that forms were not making it into file (changed No to Yes). Denies deleting disclosure forms. Ex. 834. Ex. 836.

Friendly cross at 11:13: materials sometimes submitted on date of hearing. Meetings typically end on Fridays. "That night is on them." Commissioners say "on file."

Ex. 844: diagram of executive office.

Commissioner Vargas then re-took the stand. Ex. 811. Meeting request. Switched email accounts in late 2014. No access to old account. Agenda website would be public's source for disclosure forms if filed in time to do so. Ex. 202/368. Friends of the Canyon ruling. Not familiar with the decision. Decision refers to witness. Concerned him. DNR a public report of an appeal of the ruling. He voted on the project. Aware the judge made that ruling.

Knows Susan McCabe as a paid advocate/lobbyist. Sara Wan is, too. Has had *ex parte* communications with both. Not sure of number. Ex. 388. General practice was to email. Probably the old email address. Not finished at noon.

Testimony of Mr. Vargas resumed at 1:35 p.m. Ex. 389. He probably prepared and signed. Ex. 390. His signature. All true and correct. Does not know when submitted to Commission. Does not know if 389 or 390 were posted on the Commission website. Ex. 391. Practice was to send Miller or Staben. DNR if made an oral disclosure on subject of Ex. 391. Has looked at website since his deposition. Including last night – couple of dozen hearings. Ex. 392: more than 7 days after the meeting. Ex. 393: received stamp 13 days after signature date. His practice was to send in same day he signed. Questions from court. Ex. 394. Started in 2013 and did redundant disclosures. Did not attach written materials; practice was to ask if the written materials had been shared with the staff. Links to Ex. 445. Ex. 395 also links to Ex. 445. Can't prove he mailed it but practice was to do so. Ex. 396. Don't know if he has proof he submitted. Does not know if it was on the Commission's website before the hearing. DNR if did oral disclosure. Ex. 397: safe time, but different conference calls. Calls reliability of the disclosure form into question. Ex. 398. Probably self-prepared. No proof of submission prior to hearing. Doesn't know if on website. Ex. 399. Same. Ex. 400: ten days after ex parte communication. Ex. 401: signature is undated, so no way of knowing if it was timely. Ex. 402: more than 7 days after the ex parte contact. Ex. 403: practice is to send this shortly after signing. May have submitted at hearing (but no received stamp, in contrast to Ex. 404, which does have one. Ex. 407. No received at hearing stamp. Ex. 408. Did oral disclosure on this and watched last night. Submitted at meeting (but no received stamp). Ex. 409. Probably prepared by Neely or someone in her office. Ex. 410. Did oral disclosure. DNR how long it lasted. Ex. 411. Did oral disclosure; saw last night. Probably gave to Williams at hearing. Same with Ex. 412. Ex. 413. Ex. 414. Ex. 415. Ex. 416. Not accurate as to date. Ex. 417. At Commission meeting. Ex. 419: more than 7 days after contact. Same with Ex. 420. Thru 424: all dated the same day.

Edge (David Evans) *ex parte*: went to Dublin. Business/pleasure trip of 7-10 days. Has seen U-2 before, though not abroad. Meeting lasted no longer than 15 minutes. Private room before the concert. Bought a ticket. Scheduled before his trip. DNR how long in advance it was scheduled. Nov. 23, 2015 was the meeting. Witness not credible when he testified he DNR how long in advance the meeting was scheduled, based on body language and demeanor. Still traveling when he filled out the form. Hearing was Dec. 10. Does not know if form was on website in advance of hearing (later established it was not but was in the addendum). DNR if did an oral disclosure. Denies (credibly) backdating this document.

Ex. 428 was very late. Thought he had emailed it and found out he had not.

Ex. 429 also more than 7 days.

Ex. 433 – error on date. Cannot say when the communication occurred. Ex. 434 received a day late. Ex. 435 – five days late.

Ex. 436, 437: does not know if there was a written disclosure. Both were more than 7 days before the hearing. Same with 438. Same with 440.

Exs. 396 and 443 are linked.

Ex. 444: very late disclosure if no writing. Ex. 446: if no writing, very late disclosure. Same with 447. Same with 449. Ex. 451 very late if no writing and he recalls seeing none today. Ex. 452 also late if no writing. Ex. 430 and 453 are linked.

Friendly cross at 4:00. Denies any secret meetings or promises of or requests for secrecy. Never withheld significant information from an oral disclosure. He would add to prior Commissioner oral disclosures as appropriate. He modified pre-written disclosures, including rewriting pdf documents and converting them to word. Videos of oral disclosures watched last night. Ex. 430 and 453 is an example of how he did it. Ex. 390: did an oral disclosure. Same with 392. Ex. 396: looked at his notes on his phone during a break and now recalls he did do an oral disclosure on this one. Ex. 397 same. Ex. 398: did oral disclosure. Made a spreadsheet which the court directed him to produce. Listed all the ones where his memory was refreshed. Ex. 427 and 1255: 1255 is the addendum. In it is another copy of Ex. 427. Discounts backdating theory.

Ex. 428: The Banning Ranch vote was after August 2015. Not finished at 4:30. In recess.

Monday, March 5, 2018. Friendly cross resumed at 9:06 a.m. Exs. 428, 512, Banning Ranch. Late 2016 was the hearing. Since August 2016, we almost always get a confirmation email. Not so before that. Exs. 432/1146. Redirect. He is not a sender or recipient of 1146. Honest commissioner. Public perception of him as a commissioner. Paraphrase v. quoting verbatim. Paraphrasing can give rise to full disclosure. His notes in spreadsheet form.

The seventh witness was James Erik Howell. Currently a Commissioner, since 2014. Member of State Bar since 1993; court-based practice. Pismo Beach City Council for 5 years. Official record is all information related to a project or application. Oceano Dunes example: boxes and boxes of correspondence, not on the website. "Relevant information, information staff believes I need, is on the website." Has received presentations – training on *ex parte* communications in open session. Impeached with deposition testimony. *Friends of Canyon* decision. Read portions of it. Exhaustion of remedies. He understands public gets the record the same way he does. Sara Wan is an advocate, former chair of Commission. Has had *ex parte* communications with her. Frank Angel is her colleague. Susan McCabe is a consultant before the Commission. Ann Blenker is an associate. Schmidtz is also a paid advocate. Neishes – same. Jared Ficker at Cal Strat. Stanley Lamport also an advocate before the Commission. Andrea Culbertson. No undisclosed *ex parte* communications.

Typically fills out own forms. Some consultants provide pre-prepared to be reviewed. He would snail mail his disclosures. Also email – started gradually using email when Commission came up with a form. Never checked receipt. Not very good with technology. Could not figure out how to get his signature on emailed documents. Believes public should perceive him as honest. Never withheld information. No reason for public to be dubious. Written materials "need to be provided to staff." Written materials-did not verify.

Exs. 26-45. His written disclosures. 26, 31, 33, 35, 36, 38-43 undated and/or unsigned. Exs. 46-78: his verbal disclosures. Ex. 27 and 33 correspond to 51/52. Understands the disclosure obligation is his. Disclosure forms are placed on line for the hearings. Impeached with depo on this. Friendly cross, 10:35. Disclaims secret meetings, efforts to conceal. Has made a handful of additions to pre-prepared forms. Never deliberately omitted disclosures. Most projects, everything is attached, but sometimes not. Examples: biological/archaeology reports. Staff may not consider some information relevant. Longer reports may not be attached. Stuff not attached may still be part of the Commission's record.

Ex. 26. Undated. Probably mailed same day. Mail from Pismo Beach to SF used to think it got there promptly. Stopped mailing. Some emails may have been deleted. Ex. 28, 29: has not come before Commission. Ex. 30: Ex. 496 shows the disclosure was part of agenda materials.

If staff present, not an ex parte. Ex. 31 omits that Exec. Director was present. Ex. 33. A passing comment he made. Undated, but typically submitted same day. Ex. 38: Ex. 58 shows it was in the Staff Report. Same with Ex. 40 and 41/Ex. 515 (day before hearing addendum).

Ex. 42: Signed 1/27, not file stamped until May 11 but the contact was May 5. So 1/27 is an error. Ex. 512 shows it was attached to commission report. Ex. 43: same--also within Ex. 512.

Ex. 48: same day as Commission meeting. Some go 14 hours a day. Typically 3 days. Unlike Mr. Vargas, this witness has independent recollection of *ex parte* communications. 11:15: re-direct. Impeached with depo on email deletion. Did not include questions he asked in disclosure forms. Unsigned disclosures because he is not good with technology. Ex. 31: not an ex parte but he thought it wouldn't do any harm. Ex. 33-35, 38, 39-41, 44, 45: does not know when received by Commission. Ex. 42: lasted 5 min. at the most. Impeached with depo. Ex. 40: did not attach letter. Ex. 814: does not recall. Ex. 63. DNR how long spent on staff report. Ex. 502 says ex. 33 was rec'd April 30.

The 8th witness was Kathryn Burton (who had been present for every day of trial). Plaintiff is a 501(c)(3) nonprofit corporation. Formed June 17, 2016. She is the president. Plaintiff exists to make sure the Coastal Act is followed, to make sure Commissioners follow the Act and the public get open transparent due process. She and others formed it. Gave reasons she got interested. Firing of Lester in Feb. 2016. History with Aguirre. She is an attorney. Bar in 1994. Aguirre lawsuit involving *ex partes* in CPUC context. No level playing field if disclosures not filed correctly.

Ex. 764: Franchise Tax Board status letter document and articles of incorporation for plaintiff. She authorized the filing. Incorporated June 20, 2016. Resumed after lunch. Tax exempt organization. Ex. 817. Ex. 818: Letter from state regarding non-profit registration. Ex. 819 is the statement of information showing the witness' signature. Ex. 820: Minutes and bylaws and articles of incorporation. She went to the meeting. 2004: she filed an appeal regarding a waterway in Carmel Valley in San Diego. No information prior to 2016 newspaper articles regarding ex parte disclosure issues. Commission website.

Cross at 1:14 p.m.: She was corporate designee of plaintiff at deposition earlier this year. Three designated areas of testimony. Conversations giving rise to creation of plaintiff followed firing of Lester. Impeached with deposition on number of members. Other minutes (other than Ex. 820) exist in the form of emails that involved Mr. Briggs and this litigation. Never had a meeting involving all 54 members. Ex. 1260 was created by her recently in response to notice of trial, after he deposition in January of 2018. Membership list. Created from bits and pieces such as checks, PayPal account info, emails regarding donations. Majority know they are members. She sent out thank you notes and an email with a status report – the latter after her deposition. No membership cards. Website has a button to donate but not one to become a member. Impeached with deposition on this – unnecessarily combative witness. No decisions by full membership. No employees. No publications other than website. Uses Briggs' address. She believes ex parte communications should be banned entirely. She knows of no one checking to see if there were late disclosure forms on file. No one from Spotlight has ever testified before the Commission about *ex parte* communications. No one for Spotlight has ever written to the commission objecting to any disclosure or non-disclosure. Can't complain about an ex parte violation you don't know about. Assumed Commissioners were doing their jobs properly. Realized after she read the newspaper articles there was a lot of sloppiness and the public was being shut out. Legislature hasn't addressed it. Have not investigated since the lawsuit was filed. Not aware of any *ex parte* violations since August 2016. Board gives direction to Briggs. Concluded for day at 2:00 p.m.

Steve Kinsey was the first witness on Tuesday, March 6, 2018 (ninth overall), at 9:30 a.m. He was a Commissioner 2011-2017. Called under Evid. Code section 776. He has an architecture degree and a contractor's license. He was also a Marin County Supervisor. Does transportation planning now. Described his understanding of ex parte disclosure rules. Training – PowerPoint presentation at public hearing was the only training he received. Ex. 215.792-807. August 15, 2014, Ex. 777. "No coaching, no counseling, no calling me out" on *ex parte* disclosure. Public should have confidence except twice when he was inaccurate. Denies false disclosures. Never verified presence of written materials except in pre-hearing review, when he happened to see them. Failed twice to disclose twice – Banning Ranch.

Heard of *Friends on the Canyon* case. Commission lost. He does not dispute the judge's finding but believed his disclosure form was on file. Submitted generally speaking he would sign and date the forms, give it to his administrative asst., who would transmit it. Ms. Cross worked for Marin County. Sometimes hand delivered. New methodology in August of 2016. He is not certain if he emailed, but doubts it. No scanning equipment. Cross did the scanning. Sometimes faxed; sometimes emailed. Unaware of any receipts. Delivered in person at or shortly before Commission meetings. No receipt. No file stamped copies. No emails deleted. Ex. 154. DNR. Sara Wan – knows her. Has had *ex parte* communications with her – perhaps 5. Susan McCabe. Other advocates/ lobbyists, *ex parte* communications with them.

Official record. Information is posted on the agenda page of the Commission's website. He accessed materials in the fashion. Crates were delivered in early years. Later accessed electronically, but supplemental materials were also delivered at or shortly before hearings. He read materials online. Access to same record as public up until the day of hearing addenda.

Exs. 104-153. Recalls from his deposition. Recalls some context. Nothing substantive beyond what was reported. Admits Ex. 129 was late.

Exs. 155-197 are his oral disclosures.

Friendly cross at 10:27. Denies concealing/secret *ex parte* communications. Did his best to be complete. Appointed by Steinberg, who told him about a predecessor's unwillingness to do ex parte communications. Admits two tardy disclosures on Banning Ranch. He recused from that hearing when he learned of tardiness. There was one hearing he did participate in. Did not intend to fail to disclose. Timeframe of tardy disclosures was in 2016 for communications in 2015. Circumstances in his life: His 90+ year old parents needed care. Took up a lot of his time. Ex. 105: late. Ex. Was attached to staff report for Oct. 2015 hearing. Ex. 106 also for banning Ranch. Also late. Was attached to staff report for Oct. 2015 hearing. Participated in Oct. 2015 hearing. Ex. 112 was in Ex. 528. Ex. 127. Also on microphone. Same with 129. Exs. 113, 525 – identical. Ex.129/541 p. 27. Ex. 151/152 reflect date of recusal from Banning Ranch.

Court viewed a video of a Commission meeting (Ex. 1259) as an exemplar of Commissioners making *seriatim* "on the mic" disclosures.

Redirect at 11:41: Banning Ranch was very controversial. Ex. 105. Singed on 13th. Believes it to be procedural. Not his handwriting. Admits tardy disclosures. Not finished by noon.

Resumed at 1:34 p.m. Ex. 151 reflects a typo. Same with 152. Turned in at June, 2016 hearing. This was the date he recused. He decided in the spring he needed to recuse.

Stipulations reached, addressed to court.

Ex. 878, a video of a Commission Meeting, was shown to the court. It was an exemplar of seriatim "on the mic" disclosures.

Plaintiff's final witness was Al Wanger, 10th overall, a Commission staffer since 2000, called per Evid. Code section 776. PMK on agenda materials. Oversees webmaster. Webmaster uploads to agenda. No other involvement with *ex parte* disclosures. Worked with IT staff to set up new email box, and email account for each Commissioner. Email deletion policy – nothing in writing. Entire project file is not uploaded. Just staff reports and attachments. Ex. 811.

Friendly cross by Packard: Official record definition. A public records request response would be more inclusive than the staff report. Described process for uploading staff report. Deadline 10 days before hearing. Addenda: up to day of hearing. "On file" means Commissioner has submitted the form. May not be on line or in the addendum. "Prudent" to do it also "on mic." New procedures since spring 2016 have been working.

Plaintiff rested at 2:10 p.m.

First defense witness was Scott Collier. Commission since late 2007. IT manager. Definition of metadata. Each .pdf has create date and modify date. Generated automatically by computer. Ex. 1258. Spreadsheet showing create/modify dates.

Cross: tried to undercut accuracy of Ex. 1258.

Defendant Mitchell was then recalled to the stand. Exs. 322/510. Exs. 323/510. Uses Gmail.

Defendant McClure was then recalled to the stand. Sought and received Friday night lodging. Described travel difficulties. Another portion of Ex. 878 shown. Same as what she referenced in her disclosures. Cross: Friday night at same hotel. Not Saturday night. Schmidtz' house – high school football game.

The proceedings on March 6 ended with defendants seeking judicial notice of another trial court ruling (on the subject of "substantial compliance"). And the court hearing argument and ultimately denying the request for reasons stated in the court reporter's transcript.

On Wednesday, March 7, the penultimate witness called by defendants was Susan Hansch. She is chief deputy director of the Commission. Reimbursement for travel/hotel is overseen by her. If Friday meetings go long, or if the Commissioner has a long trip, state will cover Friday night. Told McClure that Commission would pay. Cross: Only decision points are end time of meeting and length of commute (*i.e.* to Crescent City). Southern California. Would depend on how the Commissioner wanted to travel home. Would pay for a hotel *en route* if they wanted to leave at noon. The Hansch testimony, which was consistent with defendant McClure's testimony on this point, was more credible than the Miller testimony on the subject of Friday night reimbursement.

Defendants' final witness was Rick Zbur. He is executive director of Equality California, since 2014. Former Latham & Watkins, LA office. Used to practice before Commission. Had *ex parte* communications – ten to 30 per year. Sometimes with consultants. Never secret. Almost always sharing info already in the public realm. Pointing out information already in record but perhaps not reviewed by Commissioner. Always wanted Commissioner to disclose fully so as to avoid a future action to set aside a project approval. Disclosure is beneficial. Applicant has an interest in full disclosure. Always provided written materials to staff. Interacted with Commission staff "pretty often." "My sense from the outside" was staff was undersized and hardworking. There were often delays in processing due to staff workload. Could not possibly include everything in the Commission files in the staff reports.

Interacted with all defendants except Howell. Thought Mitchell was diligent about disclosure. McClure also diligent. All commissioners were thorough. Same with Vargas and Kinsey.

Cross: why *ex parte*? Emphasize points already in record. Public hearings: very short opportunity to address Commission. Believed needed additional time. Looked at staff reports to see what opponents had said to Commissioners. One defendant (Vargas) is a member of his Board. Mr. Zbur's testimony was very credible and not seriously undermined on cross.

The court thereafter heard argument on the four threshold issues referenced at the end of section 1 above: standing, exhaustion, substantial compliance, and the statute of limitations. As already noted, the parties agreed on a phase 2 briefing schedule with plaintiff's brief due April 6, 2018 [ROA 191-192], and defendants' brief due April 20 (ROA 198).

4. Discussion and Rulings.

A. Some aspects of the case came down, as many cases do, to witness credibility. In making the credibility determinations set forth herein, the court considered, among others, the factors underlying CACI 107.

B. Standing. The testimony of Ms. Burton (which the court found credible), along with the court's review of the law summarized in part 2C above, convinces the court that plaintiff has standing to prosecute this action. First, defendants did not seriously challenge the plaintiff's capacity to sue or its adherence to the corporate formalities, all of which were established by the Burton testimony and the exhibits that came in while she was on the stand. Second, with respect to statutory standing, defendants conceded plaintiff is a "person" within the meaning of Public Resources Code section 30111 [which includes "corporation" and "organization" (which plaintiff clearly is) within the definition of "person."] Statutory standing is conferred as to count 3 by sections 30111, 30805, and 30820(a)(2) taken together. Section* 30805 provides that "any person may maintain an action for the recovery of civil penalties provided in section 30820."

The issue of whether section 30820 applies at all in this case is one which affects several aspects of the matters presented for decision. Defendants contend, in essence, that because the Legislature created two special statutes relating to penalties for violation of the *ex parte* disclosure requirements (sections 30327 and 30824), the more general provision relating to penalties (section 30820) should not apply at all. Def. Tr. Br. at 13-14. If the defendants are correct, there is no statutory standing, and count three of the 4th AC must be dismissed in its entirety. But the court finds that the Legislature did not make sections 30327 and 30824 the exclusive means by which violations of the *ex parte* rules could be redressed.

Deciding whether section 30820 applies to this case involves an exercise in statutory interpretation. The general rules of statutory construction are (1) to ascertain the intent of the Legislature to effectuate the purpose of the law, (2) to give a provision a reasonable and commonsense interpretation consistent with its apparent purpose, which will result in wise policy rather than mischief or absurdity, (3) to give significance, if possible, to every word or part, and harmonize the parts by considering a particular section in the context of the whole, (4) to take matters such as content, object, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction into account, and (5) to give great weight to consistent administrative construction. (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 17-18 [194 Cal.Rptr. 722].)

As the court noted in *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal. App. 4th 1385, 1396-98 (2013), courts interpreting statutory schemes "begin with the fundamental rule that our primary task is to determine the lawmakers' intent." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) "In construing statutes, we aim 'to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.' " (*Klein v. United States*

of America (2010) 50 Cal.4th 68, 77, quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.)

California courts "have established a process of statutory interpretation to determine legislative intent that may involve up to three steps." (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 786–787.) The "key to statutory interpretation is applying the rules of statutory construction in their proper sequence ... as follows: 'we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.' " (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082, quoting *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1126, 28 Cal.Rptr.2d 601.)

"The first step in the interpretive process looks to the words of the statute themselves." (*Alejo, supra,* 212 Cal.App.4th at p. 787; see *Klein, supra,* 50 Cal.4th at p. 77, 112 ["[w]e look first to the words of the statute, 'because the statutory language is generally the most reliable indicator of legislative intent' "].) "If the interpretive question is not resolved in the first step, we proceed to the second step of the inquiry. [Citation.] In this step, courts may 'turn to secondary rules of interpretation, such as maxims of construction, "which serve as aids in the sense that they express familiar insights about conventional language usage." ' We may also look to the legislative history. [Citation.] 'Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.' [Citation.] [¶] 'If ambiguity remains after resort to secondary rules of construction and to the statute's legislative history, then we must cautiously take the third and final step in the interpretive process. [Citation.] In this phase of the process, we apply "reason, practicality, and common sense to the language at hand." [Citation.] Where an uncertainty exists, we must consider the consequences that will flow from a particular interpretation. [Citation.] Thus, "[i]n determining what the Legislature intended we are bound to consider not only the words used, but also other matters, 'such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction.' [Citations.]" These "other matters" can serve as important guides, because our search for the statute's meaning is not merely an abstract exercise in semantics. To the contrary, courts seek to ascertain the intent of the Legislature for a reason—"to *effectuate the purpose* of the law." ' " (*Alejo,* at pp. 787–788; see *MacIsaac, supra,* 134 Cal.App.4th at p. 1084.)

Courts do not necessarily engage in all three steps of the analysis. "It is only when the meaning of the words is not clear that courts are required to take a second step and refer to the legislative history." (*Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 875; accord, *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1411; see *MacIsaac, supra,* 134 Cal.App.4th at 1084 ["[i]f ambiguity remains after resort to secondary rules of construction and to the statute's legislative history, then we must cautiously take the third and final step in the interpretative process"].)

Applying these precepts, the court first notes that while it is true that the Commission's prior construction of section 30820 as applying only to violations in the nature of development or un-permitted construction or elimination of protected wetlands is entitled to some deference, this assumption is entitled to less weight where, as here, the confluence of sections 30820, 30327 and

30824 is being considered for the first time. Nor is the court persuaded by the "parade of horribles" argued by defendants as reflecting absurdity if plaintiff's construction is adopted. Def. Tr. Br. at 17. The other hypothetical "violations" of the Coastal Act are not before this court. What is before this court is a simple question: does "any violation of this division" include violation of the *ex parte* rules. The court answers this question in the affirmative based on a plain reading of the unambiguous word "any." Further informing this view are two observations about the statutory scheme: first, if the Legislature had intended section 30820 to cover only "development" related violations, subpart (2) of section 30820(a) would have been largely unnecessary. Second, the language contained in both section 30327 and 30824 "in addition to any other applicable penalty" would be rendered a nullity if defendants' construction is correct. Courts must harmonize statutory schemes, not eliminate legislative language. Accordingly, the court holds that section 30820 reaches the conduct at issue in this case, and therefore statutory standing is conferred as to count 3.

Defendants' attention turned, in the March 23 filing (ROA 175), to the legislative history of section 30820. See ROA 176-186. Defendants had really not developed this argument previously. But consistent with the case law summarized above, the court finds the words of the statute clear and finds that it need not resort to a review of the legislative history.

Turning to public interest standing, defendants erroneously argue that the 4th AC in this case "does not please (*sic* – should read "plead") mandamus." Def. Tr. Br. at 19:21. This, of course, is incorrect. Paragraph 6 of the prayer in the 4th AC does seek a writ of mandate. So the initial central premise of defendants' public interest standing argument collapses.

Moreover, defendants acknowledge that public interest standing can be conferred by exercise of discretion. Def. Tr. Br. at 20:6-8. The court finds that circumstances for the exercise of this discretion exist, inasmuch as failing to allow standing as to counts one and two would result in the lack of an effective remedy for violation of an important public interest statute. Defendants concede there has never been a prior case alleging violation of the Commission's *ex parte* rules, and the court believes the evidence shows this is in part because of the inattention of the Commission staff to this issue prior to August of 2016. [See, e. g. McClure testimony late in the morning of Feb. 28 about the staff "not doing its job."] If the Commission was inattentive to the process of making sure disclosures were made part of the public record in advance of hearings, and the AG's office is defending the conduct, the only way to facilitate the effective pursuit of a remedy is to confer public interest standing. The court further finds that conferring standing would be entirely consistent with *Plastic Bag, supra,* 52 Cal. 4th at 166.

The court finds the federal authority cited in ROA 172 by defendants for the absence of public interest standing and associational standing [*Hunt v. Washington State Apple Advertising Comm'n*, 432 US 333 (1977), and *Washington Legal Foundation v. Leavitt*, 477 F. Supp.2d 202 (DDC 2007)], to be not binding on this court (as to the latter case), and less persuasive on pure issues of state law than *Plastic Bag, supra,* and *Taxpayers for Accountable School Bond Spending v. SDUSD*, 215 Cal. App. 4th 1013, 1031 (2013).

For these reasons, the court agrees with plaintiff that it has standing to pursue this case: public interest standing exists as to counts one and two, and statutory standing exists as to count three.

C. Exhaustion. As an initial matter, the court agrees with plaintiff that exhaustion does not apply where, as here, the plaintiff/petitioner is not seeking to overturn an action of the Commission. The Legislature knows how to differentiate between the term "person" and "aggrieved person," and so did several of the witnesses in this trial. Section 30328 allows an aggrieved person, as described in Section 30801, to seek a writ of mandate from a court requiring the commission to revoke its action and rehear the matter "if a violation of this article occurs and a commission decision may have been affected by the violation." But as developed above, section 30820 provides an additional vehicle for redress that does not involve setting aside prior Commission orders or development approvals. While exhaustion would clearly apply to actions under 30328, exhaustion does not apply to actions under 30820.

Further, the court finds defendants' exhaustion argument fundamentally inconsistent with their argument concerning when a disclosure of an *ex parte* communication is made part of the record. Def. Tr. Br. at 12. Defendants contend that if a Commissioner has written a disclosure which is then buried somewhere in the bureaucracy the Coastal Commission, members of the public must find it and object at the hearing so the matter under consideration can be delayed.** (Def. Tr. Br. at 11:25) Charitably put, this argument is inconsistent with the principles underlying the Coastal Act generally, and the *ex parte* rules specifically. How can a concerned party, desiring to participate in the transparent public process that is supposed to accompany the Commission's stewardship of the Coastal Zone, be expected to raise non-compliance with the *ex parte* rules if it is impossible as a practical matter for the concerned party to know of such violations? Defendants, in the March 1 stipulation, acknowledged that some of the five Commissioners' written *ex parte* disclosures were not in the agenda materials provided to the public via the Commission's website in advance of the applicable hearing. All five defendants acknowledged they would not expect members of the public to object to *ex parte* disclosures they could not have been aware of. According to the testimony of Mr. Staben, the delay in including written disclosures in agenda materials was due to the Commission's staff being backlogged up to a month in processing the disclosures. This was an institutional failure which, in the court's view, defeats the exhaustion defense. The failure to exhaust defense was not made out by defendant such that it is entitled to a judgment of dismissal. The PAGA case and the prisoner case relied upon by defendants in ROA 172 [*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330; *Wright v. State of Calif.* (2004) 122 Cal.App.4th 659] are easily distinguishable on chasmally different facts.

Moreover, even if the doctrine does apply, it is not a bar where no specific administrative remedies are available to the plaintiff. *City of Coachella v. Riverside County Airport Land Use Comm.* (1989) 210 Cal.App.3d 1277, 1287; *see also Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 320.) "There must be 'clearly defined machinery' for the submission, evaluation and resolution of complaints by aggrieved parties." *Jacobs v. State Bd. of Optometry* (1978) 81 Cal.App.3d 1022, 1029. Here, even after the Commission revamped its procedures for handling *ex parte* disclosure forms in August of 2016 (Ex. 215:786), it did not create a rule or process giving an interested party an absolute right or other clearly defined machinery to seek or receive a hearing continuance if he or she or it heard an "on the mic" disclosure that was tardily made or otherwise infirm.

D. Substantial Compliance. In determining whether a state body has substantially complied with statutory requirements "[t]he paramount consideration is the objective of the statute." (*Downtown Palo Alto Com. For Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 395, 225 Cal.Rptr. 559.) "Unless the intent of a statute can only be served by demanding strict compliance with its terms, substantial compliance is the governing test." (*County of Tulare v. Campbell* (1996) 50 Cal.App.4th 847, 853, 57 Cal.Rptr.2d 902.) " 'Substantial compliance ... means actual compliance in respect to the substance essential to every reasonable objective of the statute.' (*Stasher v. Harger–Haldeman* (1962) 58 Cal.2d 23, 29 [22 Cal.Rptr. 657, 372 P.2d 649], italics omitted.)" *(National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1522, 50 Cal.Rptr.2d 339.)

In *N. Pacifica LLC v. California Coastal Comm'n*, 166 Cal. App. 4th 1416, 1431–32 (2008), the court held: "The stated objectives of the Bagley–Keene Act are to assure that "actions of state agencies be taken openly and that their deliberation be conducted openly." (Gov.Code, § 11120.) Because Government Code section 11130.3, subdivision (b)(3) allows substantial compliance with the Bagley–Keene Act's notice requirements, the objectives of that Act can be served without demanding strict compliance with those requirements. Thus, state actions in violation of those requirements should not be nullified, so long as the state agency's reasonably effective efforts to notify interested persons of a public meeting serve the statutory objectives of ensuring that state actions taken and deliberations made at such meetings are open to the public."

In *Sims v. Dep't of Corrections*, 216 Cal. App. 4th 1059, 1073 (2013), the court noted that "substantial compliance, an affirmative proposition, is the counterpart, or obverse, of the substantial failure to comply, which negatively expresses the same idea. ... it is therefore proper to say that noncompliance is insubstantial, or "harmless," only where it does not compromise any "reasonable objective" of" statute being examined.

The court holds that defendants are not entitled to an across-the-board finding of substantial compliance thereby mandating a judgment of dismissal. As plaintiff pointed out, the Legislature knows how to employ the words "substantial compliance," doing so several times in various provisions of the Public Resources Code (*e.g.* sections 41813, 48662, 49501.3, 21092). It did not include these words in the statutes relating to *ex parte* disclosure requirements. More fundamentally, the court agrees with plaintiff that the desire for openness and transparency, expressed throughout the Coastal Act and in particular in the *ex parte* rules, has intrinsic value in and of itself and indeed is a reasonable objective, standing alone, of the Coastal Act. The evidence in this case does not lead to a wholesale conclusion that the *ex parte* rules have been substantially complied with; such a general finding would compromise a reasonable objective of the statutory scheme. This does not mean, of course, that the court might find individual derelictions so minor or inconsequential that the maxim "*de minimis non curat lex*" might apply. This, however, requires a further examination of individual disclosures, which is beyond the scope of this phase of the court's decision. For now, all that can be said is that plaintiff has carried its burden to show that defendants are not entitled to judgment via application of the doctrine of substantial compliance.

E. Limitations. Several witnesses testified they could not recall the substance of *ex parte* communications from 2013-2015, and several testified they could not recall the substance of *ex parte* disclosures they made "on the mic" from that timeframe. The statutes of limitation exist in

part because of the foibles of memory. "There are several policies underlying such statutes. One purpose is to give defendants reasonable repose, thereby protecting parties from 'defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation may present unfair handicaps.' A statute of limitations also stimulates plaintiffs to pursue their claims diligently." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797 (2005)(internal citations omitted).

The court finds that the one-year statute of CCP section 340(a) for actions seeking civil penalties applies to counts one and two. Although section 340(a) contains an exception "if the statute imposing it (the penalty) prescribes a different limitation," neither section 30327 nor 30824 does so. Although mandamus and declaratory relief is sought in the 4th AC, the gist or gravamen of the action is one for civil penalties. Accordingly, the statute of limitations for counts one and two is CCP section 340(a) (one year).

In what is apparently another issue of first impression, the court holds that the so-called "discovery rule" does not apply to section 340(a). The only case cited by plaintiff holding that the discovery rule delays accrual of a claim arose under section 340(c) in a defamation context. *Shively v. Bozanich*, 31 Cal. 4th 1230, 1253 (2003). Actions for penalties or forfeitures are a different animal than actions for libel or slander, particularly when leveled against public officials such as commissioners. Further, when the Legislature intends for the discovery rule or other delayed accrual concept to apply, it explicitly says so. *See, e.g.* CCP sections 337.1(b); 337.15(g); 337.2; 338(b)(C); 338(d); 338(h); 338(i); 338.1; 340.1; 340.15(a)(2); 340.2(a)(2); 340.35; 340.5; 340.6; 340.7; 340.8. Even if the discovery rule did apply, the one year statute would bar any claims contained in counts 1 and 2 arising from "on the mic" disclosures, because all information necessary to challenge the disclosure was available at the hearing. Finally, plaintiff did not carry its burden to establish that defendants are estopped to raise the statute of limitations.

With regard to the claims asserted in count 3, the applicable statute is the three-year statute of Public Resources Code section 30805.5. This is another logical result of the court's holding, in part 4B above, that section 30820 reaches the conduct challenged in this action. That said, the court, in the phase 1 decision, announced its expectation that plaintiff would adhere to the representation made in footnote 5 of its pre-trial brief (ROA 143). Defendants were entitled to rely on that concession in preparing to try the case. A review of plaintiff's phase 2 brief makes clear plaintiff complied; no penalties are urged for conduct prior to August of 2013.

In light of the foregoing, and in light of the filing date of the complaint (August 17, 2016), count three reaches conduct after August 17, 2013, and counts 1 and 2 reach back only to August 17, 2015.

Having addressed the threshold issues, the court now turns to the five counts alleged in the 4th amended complaint.

F. Count 1: violation of Section 30324 – failure to fully disclose *ex parte* communications by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the Commission on the record of the proceeding at that hearing.

Section 30824 provides:

"In addition to any other applicable penalty, any commission member who knowingly violates Section 30324 is subject to a civil fine, not to exceed seven thousand five hundred dollars ($7,500). Notwithstanding any law to the contrary, the court may award attorneys' fees and costs to the prevailing party."

No published decision has considered these provisions as of this writing.

Before addressing the claims against each of the five defendants, the court makes some overall observations about what the evidence has shown in this case.

It is abundantly clear to the court that the Legislature needs to consider the current and future viability of the Commission as it is presently constituted. Specifically, the court sincerely questions whether the mandates of the Coastal Act – the protection of natural resources with due respect for property rights – can be efficiently carried out with transparency and participatory openness using a part-time, unpaid*** volunteer board that meets only 3 days a month at scattered locations. The testimony was overwhelming that Commissioners try to jam the important work of the Commission into their already full schedules as teachers (McClure), local government officials (McClure, Kinsey and Howell), consultants (Mitchell), single mothers (Mitchell), investors (Vargas), attorneys (Howell), etc. They receive only nominal per diem and travel expenses, receive minimal if any dedicated staff support, and are provided with no office or dedicated computer or other "back office" or tech support. They only recently got Commission email addresses. They are presented a few days before hearings with literally thousands of pages of dense documents which they must access on the Commission's website, read and consider. These staff reports and addenda are often supplemented at or shortly before the hearings with hundreds of pages of additional material jammed under their hotel room doors the night before a hearing or stacked on the dais at the hearing. Some defendants were candid in acknowledging they cannot read every page; others claimed they did, but given the volume described, the court observes that this must have been, at most, a cursory review. The court, having read numerous administrative records in its career, suggests that anyone who thinks that all Commissioners are actually studying all of the voluminous materials presented is simply fooling herself/himself. This problem is exacerbated by the clear testimony that Commission meetings often last 12-16 hours per day. There are 5.5 hours per day of testimony/evidence in an average Superior Court trial, and jurors (and even judges) sometimes have a hard time attending for even this period of time. Woe is the lot of applicants or opponents in Coastal Commission hearings when they fall in the second half of a 12 to16 hour agenda. This is not justice.

The courts cannot hope to function as the guardians of parties' substantive and due process rights and efficiently serve as the forum for dispute resolution in a free and open society unless they are adequately funded by the other branches of government. Similarly, the Coastal Commission cannot pretend to be the quasi-judicial forum for resolution of disputes over coastal protection and coastal development unless the other branches both properly fund the Commission's mission and provide a pre-hearing and hearing structure that is equal to the increasingly daunting task.**** The evidence in this case is strongly suggestive of a need for legislative attention to the latter (which could very well result in a need for enhancements to the former). Mr. Zbur's testimony, in particular, supported the court's conclusions in this regard. And legislative reform

would also make the Commission more democratic and eliminate the risk outlined in defendants' closing brief at 17:3 ("only...the independently wealth, retired, and elite ... will be willing to serve").

With regard to plaintiff's interrogatory no. 4 to the court (ROA 222), the court finds the evidence was insufficient to determine the propriety of the Commission's budget in the relevant years. Nor, it strikes the court, is this an issue legitimately raised by the pleadings; and it is very likely a non-justiciable political question best left to the other branches of government. The evidence did preponderate in favor of a finding that the Commission did not, at least prior to August of 2016, devote sufficient staff to the processing of *ex parte* disclosure forms submitted by individual commissioners.

Beyond the impositions on the individual Commissioners,## as well as on the applicants for Commission approval and the opponents in those matters, the current practice also places undue power and control in the hands of Commission staff – who are neither elected by the People nor appointed by anyone elected by the People. Because Commissioners cannot reasonably be expected to read and consider all of the detailed materials they are presented with every month, the "staff recommendation" no doubt takes on an outsized role. This in turn exacerbates the problems critics of *ex parte* communications have identified, and undoubtedly affects the Commissioner independence which the drafters of the Coastal Act were seeking to achieve.

It is equally clear to the court that prior to August of 2016, the Commission had essentially no process for tracking the processing of written disclosure forms, and either no process or at best an inadequate process for insuring that Commissioners were trained in, understood, and complied with their disclosure obligations. Neither the August 2014 training (Ex. 215.792) nor the earlier training memos (Exs. 845, 846, 849, 852, 853) appear to the court to have been sufficient. From all that appears, this minimal indoctrination was not the subject of adequate follow-up or refresher (despite Commissioner turnover). The prescribed form for making disclosures requires written material to be attached, yet this requirement was not enforced by staff. Staff support was inadequate, leading to delays of up to a month in processing written disclosures (which in many cases completely defeated the purpose of disclosure). Staff vigilance was almost wholly lacking, as it seems to the court it was the role of the full time, well-paid staff leadership (not the unpaid part-time Commissioners) to inculcate the entire Commission – from clerical staff to Commissioner - with an *ethos* of strict adherence to the disclosure rules. Much of what the evidence established were the institutional failures of a non-party (the Commission), not personal failures of individual Commissioners. Much, but not all.

Since August of 2016, the process has gotten much better. See Exhibit 215:786-87. Commissioners now have a single preferred method of submission of written disclosures (email to a single email address), and a single "clearing house" for written disclosures. The Commission staff now has procedures and time deadlines for receipt, time stamping, file maintenance, and the provision of written disclosure to district offices (so the disclosure may be made part of the agenda materials for individual items under consideration by the Commission and thereby become available for public scrutiny). Responsive to interrogatories 3a and 3b from plaintiff's counsel, the evidence did not establish a Commission policy or practice of erroneous date recording prior to 2016; that is not to say that discrete dating errors may have occurred.

The court finds, however, that the post-August 2016 process still has room for improvement. For example, the written disclosure form should include a requirement that the Commissioner state the duration of the *ex parte* phone call or meeting (as doing so will help the public understand if the essence of the communication has been fairly rendered in the text). And the Commission should clarify and enforce the requirement that written materials shown or handed to a Commissioner during an *ex parte* communication be attached to written disclosure forms. It is not enough, in the court's view, to rely on what has apparently been a longstanding assumption: that consultants or proponents or opponents will supply identical sets of briefing materials to some unidentified staff person, and that is enough. It is not enough. The public has a right to know exactly what PowerPoint or other briefing material was shown to a particular Commissioner on a particular day at a particular *ex parte* communication. PowerPoints can be changed with a few mouse clicks. "Evolution" of presentation materials is not hard to imagine. Again, these are institutional failures of the Commission, not the individual Commissioners. And this is not just the court's view. It is also the Legislature's mandate. Section 30324(b) requires disclosure of "the complete text of any written material that was part of the communication." It says nothing about these materials being "submitted to staff." And it is crystal clear the defendants knew this: they were trained on this specific provision. See Ex. 215, pages 786 and 803. But they were also told, as was the public, that submission to the staff was enough. Ex. 215, page 761. This was an another institutional failure in the court's view: staff let the commissioners down, and in so doing let the people of California down. Plaintiff made an issue of this in the first four of its May 21, 2018 interrogatories to the court. The court believes it has made its findings on this issue quite clear, but if there is any doubt, the court finds that the non-compliance with section 30324(b) with respect to the attachment of materials to be an area of shared responsibility. Certainly the commissioners could read and understand the statutory requirement, but the Commission staff bears the lion's share of the fault for not enforcing the rule as written and allowing the commissioners to skate by accepting an applicant's assurance that written materials had been "submitted to staff." Were the court to have found otherwise, the violations found by the court would have increased exponentially. This is also an example of what the court meant when it observed above that the way the Commission is set up now results in a concentration of power in the hands of the staff and less independence of the individual commissioners.

The court finds, with regard to written disclosures that were complete and timely submitted by defendants to Commission staff but not processed in a timely fashion, that plaintiff failed to carry its burden of proof as to willful non-disclosure. The statutory scheme contemplates how an individual Commissioner "discloses and makes public" the *ex parte* communication: "by providing a full report of the communication to the executive director within seven days after the communication." There is no additional requirement that individual Commissioners ensure that Commission staff processes the disclosure seasonably. Rather, the "executive director shall place in the public record any report of an *ex parte* communication." Public Resources Code § 30324(b)(2). Plainly, before August of 2016, the executive director had failed to arrange the staff that reported to him in such a manner so as to carry out this requirement. While it is true, as argued in plaintiff's phase 2 brief at 6:25-26, that the commissioners did not "reform the way the executive director" was handling *ex parte* disclosures, this is further simply evidence of the correctness of the court's observation above (and in a footnote, *ante*) that Commission staff has

come to dominate the affairs of the Commission at the expense of the authority and independence of the Commissioners.

Further, the court generally credits the testimony of the defendants who testified their normal practice was to submit written disclosures within a day of the date they were signed. There was no evidence that the standard of care prior to August, 2016 was to obtain and receive some documentary evidence of the time and date of submission (such as a "conformed copy" or receipt of some sort). In this regard, too, plaintiff failed to carry its burden of proof. This eliminated a significant number of the alleged derelictions under sections 30327 and 30824.

Having made these observations, the court now turns to analyzing, in addition to the institutional failures past and present, the individual commissioner failings proven by plaintiff (on or after August 17, 2015).

1. Former Commissioner Kinsey. Before trial, plaintiff contended Kinsey violated section 30324 on at least 70 occasions, giving rise to $525,000.00 in civil penalties ($7500 per violation per section 30824). In footnote 9 of its phase 2 brief, plaintiff withdrew 10 of these alleged violations, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. Kinsey violations on or after August 17, 2015 are: Ex. 140, Ex. 143, Ex. 144, Ex. 151, Ex. 152, Ex. 191, Ex. 192, Ex. 193, Ex. 196 and Ex. 197. In addition, Mr. Kinsey failed to report his December 2015 communication/tour of the Banning Ranch project site, and then not only failed to recuse, but actually participated in a substantive Commission decision to waive a reapplication fee in a high profile project. He later recused from further consideration of the Banning Ranch project. As defendants' post-trial brief concedes, "this is the most serious violation in the record."

2. Commissioner Howell. Before trial, plaintiff contended Howell violated section 30324 on at least 48 occasions, giving rise to $360,000.00 in civil penalties ($7500 per violation per section 30824). In footnote 9 of its phase 2 brief, plaintiff withdrew 8 of these alleged violations, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. Howell violations on or after August 17, 2015 are: Ex. 69, Ex. 72, Ex. 76.

3. Former Commissioner McClure. Before trial, plaintiff contended McClure violated section 30324 on at least 42 occasions, giving rise to $315,000.00 in civil penalties ($7500 per violation per section 30824). In footnote 9 of its phase 2 brief, plaintiff withdrew 6 of these alleged violations, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. McClure violations on or after August 17, 2015 are: Ex. 275, Ex. 277.

4. Former Commissioner Mitchell. Before trial, plaintiff contended Mitchell violated section 30324 on at least 60 occasions, giving rise to $450,000.00 in civil penalties ($7500 per violation per section 30824). In footnote 9 of its phase 2 brief, plaintiff withdrew 7 of these alleged

violations, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. Mitchell violations on or after August 17, 2015 are: Ex. 322, Ex. 325, Ex. 360-361.

5. Commissioner Vargas. Before trial, plaintiff contended Vargas violated section 30324 on at least 75 occasions, giving rise to $562,500.00 in civil penalties ($7500 per violation per section 30824). In footnote 9 of its phase 2 brief, plaintiff withdrew 11 of these alleged violations, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. Vargas violations on or after August 17, 2015 are: Ex. 419, Ex. 420, Ex. 428, Ex. 429, Ex. 450, Ex. 451.

G. Count 2: violation of section 30327 - knowingly making, participating in making, or in some other way attempting to use his or her official position as a member of the Commission to influence a Commission decision having failed to disclose an *ex parte* communication as required by Section 30324.

Section 30327 provides:

"a) No commission member or alternate shall make, participate in making, or any other way attempt to use his or her official position to influence a commission decision about which the member or alternate has knowingly had an *ex parte* communication that has not been reported pursuant to Section 30324.

(b) In addition to any other applicable penalty, including a civil fine imposed pursuant to Section 30824, a commission member who knowingly violates this section shall be subject to a civil fine, not to exceed seven thousand five hundred dollars ($7,500). Notwithstanding any law to the contrary, the court may award attorneys' fees and costs to the prevailing party."

Again, as of this writing, no published decision has shed light on these provisions.

1. Former Commissioner Kinsey. Before trial, plaintiff contended Kinsey is liable for an additional 70 violations. Some of these were withdrawn in footnote 9 of the plaintiff's phase 2 brief, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. Kinsey violations on or after August 17, 2015 are: Ex. 140, Ex. 143, Ex. 144, Ex. 151, Ex. 152, Ex. 191, Ex. 192, Ex. 193, Ex. 196 and Ex. 197. In addition, Mr. Kinsey failed to report his December 2015 communication/tour of the Banning Ranch project site, and then not only failed to recuse, but actually participated in a substantive Commission decision to waive a reapplication fee in a high profile project. He later recused from further consideration of the Banning Ranch project. As defendants' post-trial brief concedes, "this is the most serious violation in the record."

2. Commissioner Howell. Before trial, plaintiff contended Howell is liable for an additional 48 violations. Some of these were withdrawn in footnote 9 of the plaintiff's phase 2 brief, and the

brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. Howell violations on or after August 17, 2015 are: Ex. 69, Ex. 72, Ex. 76.

3. Former Commissioner McClure. Before trial, plaintiff contended McClure is liable for an additional 42 violations. Some of these were withdrawn in footnote 9 of the plaintiff's phase 2 brief, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. McClure violations on or after August 17, 2015 are: Ex. 277.

4. Former Commissioner Mitchell. Before trial, plaintiff contended Mitchell is liable for an additional 60 violations. Some of these were withdrawn in footnote 9 of the plaintiff's phase 2 brief, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. Mitchell violations on or after August 17, 2015 are: Ex. 322, Ex. 325, Ex. 360-361.

5. Commissioner Vargas. Before trial, plaintiff contended Vargas is liable for an additional 75 violations. Some of these were withdrawn in footnote 9 of the plaintiff's phase 2 brief, and the brief reduced the proposed imposition for each. A great many other alleged violations were eliminated as the result of the court's ruling above on the statute of limitations, or by other evidence in the record, or by the court's determination that plaintiff failed to carry its burden of proof. Vargas violations on or after August 17, 2015 are: Ex. 419, Ex. 420, Ex. 428, Ex. 429, Ex. 450, Ex. 451.

H. Count 3: Alleges violations of sections 30324 and 30327 are "separately punishable" under section 30820, subject to a cap of $30,000 per violation. Defendants are not entitled to wholesale dismissal of count 3; this is another logical result of the court's holding in part 4B above, that section 30820 reaches the conduct challenged in this action.

Section 30820(c) sets forth a list of factors the court must consider in determining the amount of the penalty:

(1) The nature, circumstance, extent, and gravity of the violation.
(2) Whether the violation is susceptible to restoration or other remedial measures.
(3) The sensitivity of the resource affected by the violation (not applicable here)
(4) The cost to the state of bringing the action (not applicable here).
(5) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits, if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.

1. Former Commissioner Kinsey. Before trial, plaintiff contended Kinsey is liable for $4.2 million (140 violations x $30,000.00). On the last page of plaintiff's post-trial brief (ROA 191), the overall penalty sought was reduced to $1,893,500.00. Kinsey violations on or after August

17, 2013 are: Ex. 105, Ex. 106, Ex. 112, Ex. 113, Ex. 115, Ex. 126, Ex. 129, Ex. 130, Ex. 131, Ex. 136, Ex. 138, Ex. 140, Ex. 143, Ex. 144, Ex. 151, Ex. 152, Ex. 155, Ex. 156, Ex. 157, Ex. 157, Ex. 159, Ex. 160, Ex. 161, Ex. 163, Ex. 165, Ex. 167, Ex. 168, Ex. 169, Ex. 179, Ex. 171, Ex. 172, Ex. 177, Ex. 178, Ex. 179, Ex. 180, Ex. 181, Ex. 182, Ex. 183, Ex. 184, Ex. 186, Ex. 189, Ex. 191, Ex. 192, Ex. 193, Ex. 196, and Ex. 197. In addition, Mr. Kinsey failed to report his December 2015 communication/tour of the Banning Ranch project site, and then not only failed to recuse, but actually participated in a substantive Commission decision to waive a reapplication fee in a high profile project. He later recused from further consideration of the Banning Ranch project. As defendants' post-trial brief concedes, "this is the most serious violation in the record."

2. Commissioner Howell. Before trial, plaintiff contended Howell is liable for $2.88 million. On the last page of plaintiff's post-trial brief, the overall penalty sought was reduced to $863,500.00. Howell violations on or after August 17, 2013 are: Ex. 59, Ex. 60, Ex. 63, Ex. 64, Ex. 65, Ex. 69, Ex. 72, and Ex. 76.

3. Former Commissioner McClure. Before trial, plaintiff contended McClure is liable for $2.52 million. On the last page of plaintiff's post-trial brief, the overall penalty sought was reduced to $1,193,500.00. McClure violations on or after August 17, 2013 are: Ex. 225, Ex. 226, Ex. 250, Ex. 255, Ex. 256, Ex. 257, Ex. 258, Ex. 262, Ex. 264, Ex. 267, Ex. 270, Ex. 271, Ex. 272, and Ex. 277.

4. Former Commissioner Mitchell. Before trial, plaintiff contended Mitchell is liable for $3.6 million. On the last page of plaintiff's post-trial brief, the overall penalty sought was reduced to $1,098,500.00. Mitchell violations on or after August 17, 2013 are: Ex. 307, Ex. 308, Ex. 309, Ex. 312, Ex. 314, Ex. 322, Ex. 325, Ex. 326, Ex. 327, Ex. 328, Ex. 329, Ex. 330, Ex. 333, Ex. 335, Ex. 339, Ex. 340, Ex. 343, Ex. 347, Ex. 350, Ex. 358, and Ex. 360-361.

5. Commissioner Vargas. Before trial, plaintiff contended Vargas is liable for $4.5 million. On the last page of plaintiff's post-trial brief, the overall penalty sought was reduced to $1,323,500.00. Vargas violations on or after August 17, 2013 are: Ex. 402, Ex. 419, Ex. 420, Ex. 428, Ex. 429, Ex. 442, Ex. 444, Ex. 445, Ex. 446, Ex. 447, Ex. 449, Ex. 450, Ex. 451.

29 additional communications were withdrawn in the plaintiff's closing reply brief (ROA 204). It should be noted that some of the plaintiff's reductions from the amounts initially sought are the result of its creative argument regarding "progressive" impositions of fines; some are the result of the plaintiff's temporary acceptance of the court's phase 1 rulings (see footnote 5 of ROA 191); and some are the result of defendants' arguments (see footnote 1 of ROA 204).

The court addresses the amount of the fines relative to parts 4F, 4G and 4H of this decision *infra* in part 5.

I. Count 4: violation of section 30327.5 - Prohibition of gifts - McClure/Schmitz. The court finds plaintiff did not carry its burden of proof to establish count 4 by a preponderance of the evidence, and it is dismissed. Former Commissioner McClure is the prevailing party on count 4. Plaintiff is entitled to no relief on count 4.

Cal. Pub. Res. Code § 30327.5 provides:

a) An interested person shall not give, convey, or make available gifts aggregating more than ten dollars ($10) in a calendar month to a commissioner or a member of the commission's staff.
(b) A commissioner or member of the commission's staff shall not accept gifts aggregating more than ten dollars ($10) in a calendar month from an interested person.
(c) For purposes of this section, "interested person" shall have the same meaning as the term is defined in Section 30323.
(d) For purposes of this section, "gift" means, except as provided in subdivision (e), a payment, as defined in Section 82044 of the Government Code, that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. A person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value.
(e) For purposes of this section, "gift" does not include any of the following:
(1) A gift that is not used and that, within 30 days after receipt, is either returned to the donor or delivered to a nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, without being claimed as a charitable contribution for tax purposes.
(2) A gift from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of one of those individuals. However, a gift from one of those people shall be considered a gift if the donor is acting as an agent or intermediary for a person not covered in this paragraph.
(3) A cost associated with the provision of evidentiary material provided to the commission and its staff.
(4) An educational or training activity that has received prior approval from the commission.
(5) A field trip or site inspection that is made available on equal terms and conditions to all commissioners and appropriate staff.
(6) A reception or purely social event that is not offered in connection with or is not intended to influence a decision or action of the commission and that is open to all commissioners, members of the staff, and members of the public and press.

Under section 30327.6, a person who violates this prohibition is subject to a $500.00 fine.

Added in 2007 and amended in 2008, these provisions have apparently never before been addressed by a court.

As already noted in part 3 above, The Hansch testimony, which was consistent with defendant McClure's testimony on this point, was more credible than the Miller testimony on the subject of Friday night reimbursement. Ms. McClure was entitled to stay in Southern California at public expense after a late-ending Commission meeting far from her home. It was not feasible for her to attempt same-night travel to Crescent City (which might as well be in Oregon and has only a part-time airport at best). Her lodging would have cost her nothing, and would have cost the taxpayers something. Her stay at Mr. Schmidtz' house cost her nothing. The end result: she received nothing of value, and the State saved whatever the government rate was at the hotel for the one night in question.

It is important to note that sections 30327.5 and 30327.6 are not bans on conduct involving an appearance of impropriety. If they were, the outcome might be different. The court can certainly understand that eyebrows were raised by Ms. McClure's decision to stay at the home of a paid advocate who had appeared before the Commission. On the other hand, while Schmidtz was an "interested person," plaintiff did not establish that Mr. Schmidtz had appeared before the

Commission at the meeting which had just ended, or that he was representing a client with then-pending business before the Commission. Nor did plaintiff prove that Schmidtz paid for McClure's admittance to the high school football game, or that the cost of admission exceeded $10.00.

J. Count 5: violation of section 30327.5 - Prohibition of gifts - Mitchell/Carollo. The court finds plaintiff did not carry its burden of proof to establish count 5 by a preponderance of the evidence, and it is dismissed. Former Commissioner Mitchell is the prevailing party on count 5. Plaintiff is entitled to no relief on count 5.

The evidence preponderated in favor of a finding that Mitchell did work for another office of Carollo than the one that did business before the Commission. The evidence preponderated in favor of a finding that Carollo was a subcontractor to another entity that had worked on a matter that came before Mitchell and the other Commissioners, making it hard for her to discern its involvement. Finally, the evidence preponderated in favor of a finding that the $5000 monthly retainer paid by Carollo to Mitchell for consulting work before bodies other than the Commission was a normal retainer, paid in exchange for services she rendered to that company. Thus, consideration of equal or greater value was received, and the retainer was not a gift within the meaning of section 30327.5(d).

A final note as the court wraps up the discussion of count 5 against former Commissioner Mitchell: the objections to the inclusion of the "Steve Kaufman" column on the spreadsheet (and accompanying discussion elsewhere in plaintiff's briefing) are sustained. Frankly, this added nothing to plaintiff's presentation, and plaintiff had a serious case of mistaken identity. It appears to the court that plaintiff's counsel owes both Messrs. Kaufman(n) an apology.

5. <u>Remedies</u>.

The court agrees with defendants that the crippling amounts bandied about by plaintiff in its pleadings and elsewhere were intended for *in terrorem* effect and perhaps for headlines. They are just as turgid and unhelpful as the notion that the evidence at trial exposed "crimes against democracy." Teapot Dome was a crime against democracy. So were the Alien and Sedition Acts. So was rounding up Americans of Japanese descent in 1942 and sending them to Manzanar. So were the Watergate burglary and cover-up, and the decision to break in to Daniel Ellsberg's doctor's office. So was the Iran-Contra imbroglio. There are other, more recent examples probably best left unstated. But what happened at the Coastal Commission between 2013 and 2016, while imperfect, was not one of them. "Infractions against administrative law," maybe, but not "crimes against democracy."

Fines are meant to serve both as punishment and to make an example of the offender, so as to deter future conduct by the offender and by others. They are not meant to cripple the violator financially, nor force a bankruptcy, nor (unless provided expressly by the Legislature, *e.g.* the VCGCB), as a source of revenue. The challenge for the court is to impose a fine that is appropriate to the dereliction, that serves the legitimate purposes of the legislative authorization, but does not give rise to other unintended consequences.

The court finds that the fines suggested by plaintiff -- which range between $1000 and $30,000 per violation -- are out of proportion to the derelictions established. One way of examining this is to look at fines established for other common misconduct. For example, for a DUI with no prior similar offense, the fine is between $390 and $1000, plus a restitution fine of between $150 and $1000. Vehicle Code section 23536; Penal Code section 1202.4. The fine for a "wet reckless" is between $145 and $1000, plus the restitution fine. Vehicle Code section 23103. For violation of Vehicle Code section 14601 (driving on a suspended/revoked license), the fine is $300 - $1000 for a first offense, and $500 - $2000 for a second offense (plus the restitution fine). For violation of Vehicle Code section 20002 (hit and run), the fine may not exceed $1000 (plus the restitution fine). [These numbers do not include various additional fees and penalty assessments.]

For simple battery, the fine may not exceed $2000 (plus the restitution fine). Penal Code section 243. For petty theft, the fine may not exceed $1000 (plus the restitution fine). Penal Code section 490. For vandalism, the fine structure is between $1000 and $50,000, depending on the value of the property vandalized. Penal Code section 594. For unlawfully carrying a concealed weapon, the fine may not exceed $1000 (plus the restitution fine). Penal Code section 25400. For furnishing alcohol to a minor, the fine is $1000. B&P Code section 25658.

Many of these exemplar misdemeanors involve arguable threats to good order and public safety. Whatever else may be said about the derelictions of the five defendant commissioners, it is hard to argue that their conduct put any person or property in jeopardy. Abetted by lax Commission procedures, they violated the ideal of openness and transparency, but no coastline view corridor was lost; no seabird or fish habitat was sullied; no property owner's development rights were impinged. Plaintiff's argument in ROA 204 that defendants' actions "shattered the public's confidence" is frankly a request that the court draw a questionable inference from the evidence received. With these thoughts in mind, the court proceeds to determine the fines appropriate in this case. In doing so, the court draws a distinction between conduct which occurred before the training in August of 2014, and later conduct. While the training and instruction on the *ex parte* rules the defendants received (Exs. 845, 846, 849, 852, 853) was enough to render the defendants' violations "knowing," the August 2014 training (Ex. 215.792), even though it was not sufficiently followed up on or monitored by staff, should have served as a reminder to the defendants that their disclosures needed to be timely, robust, thorough, and technically compliant. Exs. 53, 58, 59, 65, 75, and the argument at page 5 of plaintiff's closing brief, cement the impression of "knowing" violations. This yields a modest enhancement as the court determined was appropriate. The court has also taken into account the aforementioned factors of section 30820(c) where appropriate. Where the statutory scheme confers discretion, the court has exercised the same.

A. Former Commissioner Kinsey.

Mr. Kinsey failed to report his December 2015 communication/tour of the Banning Ranch project site, and then not only failed to recuse, but actually participated in a substantive Commission decision to waive a reapplication fee in a high profile project. Exs. 143, 144. He later recused from further consideration of the Banning Ranch project. As defendants' post-trial brief concedes at 53:20, "this is the most serious violation in the record." The court agrees. For

this willful violation, the court imposes a fine of $7500, inclusive of all three counts. Additional willful violations by Mr. Kinsey are resolved as follows:

Ex. 105: $100 fine, count 3 only.
Ex. 106: $400 fine, count 3 only.
Ex. 112: $900 fine, count 3 only.
Ex. 113: $600 fine, count 3 only.
Ex. 115: $1000 fine, count 3 only. Mr. Kinsey failed to make sure his disclosure was processed seasonably.
Ex. 126: $500 fine, count 3 only. $100 per each day late, plus $100 enhancement in light of 8/14 training.
Ex. 129: $1000 fine, count 3 only, inclusive of enhancement.
Ex. 130: $1000 fine, count 3 only, inclusive of enhancement.
Ex. 131: $1000 fine, count 3 only, inclusive of enhancement.
Ex. 136: $200 fine, count 3 only, inclusive of enhancement.
Ex. 138: $200 fine, count 3 only, inclusive of enhancement.
Ex. 140: $400 fine on count 1; $400 fine on count 2; $500 fine on count 3, inclusive of enhancement in light of 8/14 training.
Ex. 151: No fine in light of recusal.
Ex. 152: No fine in light of recusal.
Ex. 155: $700 fine, count 3 only.
Ex. 156: $500 fine, count 3 only.
Ex. 157: $300 fine, count 3 only.
Ex. 159: $400 fine, count 3 only.
Ex. 160: $900 fine, count 3 only.
Ex. 161: $600 fine, count 3 only.
Ex. 163: $300 fine, count 3 only.
Ex. 165: $500 fine, count 3 only.
Ex. 167 and Ex. 110: $1000 fine, count 3 only.
Ex. 168: $200 fine, count 3 only.
Ex. 169: $200 fine, count 3 only.
Ex. 170: $600 fine, count 3 only.
Ex. 171: $400 fine, count 3 only.
Ex. 172: $1200 fine, count 3 only.
Ex. 175: No fine. Withdrawn in footnote 1 of ROA 204.
Ex. 176: $100 fine, count 3 only.
Ex. 177: $100 fine, count 3 only.
Ex. 178: No fine, substantial compliance.
Ex. 179: $200 fine, count 3 only.
Ex. 180: $200 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 181: $800 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 182: $300 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 183: $200 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 184: $800 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 186: $400 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 187: No fine; see Ex. 130.

Ex. 189: $200 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 191: $100 fine on count 1; $100 fine on count 2; $200 fine on count 3, inclusive of enhancement in light of 8/14 training.
Ex. 192: $300 fine on count 1; $300 fine on count 2; $400 fine on count 3, inclusive of enhancement in light of 8/14 training.
Ex. 193: $200 fine on count 1; $200 fine on count 2; $300 fine on count 3, inclusive of enhancement in light of 8/14 training.
Ex. 196: $200 fine on count 1; $200 fine on count 2; $300 fine on count 3, inclusive of enhancement in light of 8/14 training.
Ex. 197: $200 fine on count 1; $200 fine on count 2; $300 fine on count 3, inclusive of enhancement in light of 8/14 training.

Total fines for Kinsey: $30,300.00

B. Commissioner Howell. The court imposes the following fines for willful violations as follows:

Ex. 53: No fine; see Ex. 54.
Ex. 59: $100 fine, count 3 only. One day late.
Ex. 60: $300 fine, count 3 only. $100 for each of the three days late.
Ex. 63: $500 fine, count 3 only. $100 for each of the four days late, plus $100 in light of 8/14 training.
Ex. 64: $500 fine, count 3 only. $100 for each of the four days late, plus $100 in light of 8/14 training.

Ex. 69: $200 fine on count 1; $200 fine on count 2; $300 fine on count 3 in light of 8/14 training.
Ex. 72: $200 fine on count 1; $200 fine on count 2; $300 fine on count 3 in light of 8/14 training.
Ex. 76: $200 fine on count 1; $200 fine on count 2; $300 fine on count 3 in light of 8/14 training.

Total fines for Howell: $3500.00

C. Former Commissioner McClure. The court imposes the following fines for willful violations as follows:

Ex. 225: $300 fine, count 3 only; $100 for each of the three days late.
Ex. 226: $300 fine, count 3 only; $100 for each of the three incompletely reported contacts.
Ex. 228: No fine; see Ex. 1258.
Ex. 250: No fine; arguably time-barred.
Ex. 255: $200 fine, count 3 only.
Ex. 256: $300 fine, count 3 only.
Ex. 257: $100 fine, count 3 only.
Ex. 258: $100 fine, count 3 only.
Ex. 262: $100 fine, count 3 only.

Ex. 264: $200 fine, including $100 in light of 8/14 training. Count 3 only.
Ex. 267: $200 fine, including $100 in light of 8/14 training. Count 3 only.
Ex. 270: $200 fine, including $100 in light of 8/14 training. Count 3 only.
Ex. 271: $200 fine, including $100 in light of 8/14 training. Count 3 only.
Ex. 272: No fine, time barred.
Ex. 275: No fine; see Ex. 276.
Ex. 277: $100 fine on count 1; $100 fine on count 2; $200 fine on count 3 including $100 in light of 8/14 training.

Total fines for McClure: $2600.00

D. Former Commissioner Mitchell. The court imposes the following fines for willful violations as follows:

Ex. 307: $100 fine, count 3 only. Substantial compliance.
Ex. 308: $100 fine, count 3 only. Substantial compliance.
Ex. 309: $100 fine, count 3 only. Substantial compliance.
Ex. 312: $100 fine, count 3 only. Substantial compliance.
Ex. 314: $100 fine, count 3 only. Substantial compliance.
Ex. 322: $100 fine, count 3 only. Substantial compliance.
Ex. 325: $200 fine, including $100 enhancement in light of 8/14 training.
Ex. 326: $300 fine, count 3 only. $100 per day late.
Ex. 327: $200 fine, count 3 only.
Ex. 328: $200 fine, count 3 only.
Ex. 329: $300 fine, count 3 only.
Ex. 330: $300 fine, count 3 only.
Ex. 333: $100 fine, count 3 only.
Ex. 335: $100 fine, count 3 only.
Ex. 339: $100 fine, count 3 only.
Ex. 340: $100 fine, count 3 only.
Ex. 343: $100 fine, count 3 only.
Ex. 347: $300 fine, count 3 only.
Ex. 350: $200 fine, count 3 only.
Ex. 358: $600 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 360-361: $1100 fine on count 1; $1100 fine on count 2; $1200 fine on count 3, inclusive of enhancement in light of 8/14 training.

Total fines for Mitchell: $7100.00

E. Commissioner Vargas. The court imposes the following fines for willful violations as follows:

Ex. 402: $500 fine, count 3 only.
Ex. 419: $100 fine on count 1; $100 fine on count 2; $200 fine on count 3, including $100 in light of 8/14 training.

Ex. 420: $100 fine on count 1; $100 fine on count 2; $200 fine on count 3, including $100 in light of 8/14 training.
Ex. 428: $5000 fine, inclusive of all counts and enhancement.
Ex. 429: $500 fine on count 1; $500 fine on count 2; $600 fine on count 3, including $100 in light of 8/14 training.
Ex. 442: $200 fine, count 3 only.
Ex. 443: No fine. Withdrawn in footnote 1 of ROA 204.
Ex. 444: $200 fine, count 3 only. The fact that the tardy disclosure involved a matter on the consent calendar was considered, but is not a complete defense.
Ex. 445: $900 fine, count 3 only.
Ex. 446: $800 fine, count 3 only.
Ex. 447: $1000 fine, count 3 only.
Ex. 449: $200 fine, count 3 only, inclusive of enhancement in light of 8/14 training.
Ex. 450: $100 fine on count 1; $100 fine on count 2; $200 fine on count 3.
Ex. 451: $2000 fine, inclusive of all counts and enhancement.

Total fines for Vargas: $13,600.00

The requests for relief other than fines, initially stated in the amended pleadings, are not really further developed in the closing briefs. To the extent they are, plaintiff appears now to concede that non-monetary justice is not possible at this time. ROA 204 at pp. 6-7. Therefore, in light of the fact that three of the defendants are no longer commissioners, and because only past wrongs are involved, all forms of injunctive, mandamus and declaratory relief are denied (other than as aforesaid). The court agrees with defendants (Cl. Br. at 20) that the pendency of this case, and the unwanted attention it has yielded, and the imposition of the fines ordered above, and the reforms undertaken in 2016 by Commission staff in the processing of *ex parte* disclosures, taken together, give every reason to believe that future commissioners will be more attentive to the requirements of the law when it comes to *ex parte* disclosure. If not, a future court would have the option of imposing fines much closer to the maximums allowed under the Coastal Act.

6. <u>Prevailing Parties</u>.

Without citing a single case or statute, defendants asked in ROA 213 that the court "delete" its discussion in the TD of prevailing party status and allow further briefing.

For purposes of an award of costs, the court is of the view that the law could not be clearer. The right to recover costs is based entirely on statute. In the absence of an authorizing statute, neither party is entitled to costs. *Garcia v. Hyster Co.*, 28 Cal. App. 4th 724, 732 (1994). One such statute is CCP section 1032(b), which provides that a *prevailing party* is entitled to recover costs *as a matter of right* in any action or proceeding. *See Bank of San Pedro v. Superior Court*, 3 Cal. 4th 797, 800 (1992). Section 1032(b)(4) defines "prevailing party" as "the party with the net monetary recovery." Under any measure, this is plaintiff. Although former Commissioner McClure is the prevailing party on count 4 and former Commissioner Mitchell is the prevailing party on count 5, plaintiff is the prevailing party on counts 1, 2 and 3 as to all five defendants, and has the "net monetary recovery" as to all 5 defendants. Plaintiff is entitled to file a memorandum of costs.

A party claiming costs must submit a verified memorandum of costs to the court. (Cal. Rules of Court, rule 3.1700(a).) "There is no requirement that copies of bills, invoices, statements, or any other such documents be attached to the memorandum. Only if the costs have been put in issue via a motion to tax costs must supporting documentation be submitted." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267.) Merely objecting to a cost that appears proper on its face does not mean that the party claiming the cost must prove that it was reasonable and necessary. The court makes no ruling today on any motion to tax or strike### costs which defendants may elect to file.

Plaintiff is also entitled to file a motion for an award of reasonable attorneys' fees in accordance with sections 30824 and 30327(b) of the Public Resources Code. This hearing should be scheduled by counsel seasonably, so that the facts and law and procedural steps of the case remain relatively fresh in the judicial mind. Defendants stated they "will likely file their own fee motion." The vehicle for such a motion is nowhere disclosed in defendants' submissions. California follows the "American rule," under which each party to a lawsuit ordinarily must pay his, her or its own attorney fees. *Trope v. Katz* (1995) 11 Cal.4th 274, 278; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504. Code of Civil Procedure section 1021 codifies the rule, providing that the measure and mode of attorney compensation is left to the agreement of the parties "[e]xcept as attorney's fees are specifically provided for by statute." Public Resources Code sections 30824 and 30327(b) are two such statutes; CCP section 1021.5 is another. The latter speaks in terms of a "successful party;" the former say "prevailing party." The two are synonymous. *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 570 (2004). Evidently defendants wish to further litigate the issue of "prevailing party" for purposes of an award of attorneys' fees. The determination of "prevailing party" for an award of costs does not determine who is the "prevailing party" for purposes of a statutory award of attorneys' fees. *MacQuiddy v. Mercedes Benz USA*, 233 Cal. App. 4th 1036, 1047 (2015); *Salehi v. Surfside III HOA*, 200 Cal. App. 4th 1146, 1153 (2011). Accordingly, defendants may also file a motion for attorneys' fees if they wish to. The competing motions are set for the same day, August 17, 2018. They will also form the vehicle for the court to consider whether plaintiff's then-nascent lawsuit was a catalyst for the 2016 changes in Commission procedures which have been discussed above. See *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th at 560-61.

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The clerk is ordered forthwith to provide copies of this decision to counsel for both sides.

IT IS SO ORDERED.

June 12, 2018

Timothy B. Taylor
Judge of the Superior Court

* Undesignated references herein to "section" are to the Public Resources Code unless the context clearly requires otherwise.

**This apparent preference for delaying the public's business so that untimely disclosures can somehow be rendered harmless by the passage of additional time is probably not surprising in an entity already frequently criticized for the glacial pace of its proceedings. See *McAllister v. Cty. of Monterey*, 147 Cal. App. 4th 253, 274 (2007)(interpreting statutory "short time limit" as 'designed to avoid unnecessary bureaucratic delay'); *LT-WR, L.L.C. v. California Coastal Comm'n*, 151 Cal. App. 4th 427, 789 (2007)(holding petitioner "was not without a remedy in the face of the Commission's delay in hearing the matter"); *Healing v. California Coastal Com.*, 22 Cal. App. 4th 1158, 1171 (1994)("We summarily reject the Coastal Commission's contention that the delay Healing has suffered (and is continuing to suffer) is "normal.") The Fourth District Court of Appeal, Div. 1, arguably allowed the Commission to impose such bureaucratic delay in *Coronado Yacht Club v. California Coastal Com.*, 13 Cal. App. 4th 860, 871 (1993).

***Plaintiff's phase 2 brief takes the court to task for treating defendants as "babes in the woods" and "victims," and accepting their "feigned innocence." Hardly. The court understands that service on the Commission without pay (beyond whatever full time job the individual commissioner may have) can yield other benefits (whether remunerative or political or just added prestige). The court's point is different: maybe it is time for a Commission with full-time commissioners, fairly paid and not needing the distraction of other employment; meeting regularly in one or two established locations; with meetings of reasonable duration with added time for complete presentations by applicants and opponents alike; with adequate staff support; and, as a result of all this, with the repose to make thoughtful decisions independent of the overweening, unelected, unaccountable Commission staff. The court did not set out to offer these observations, or to make the findings above regarding the bureaucratic failings of the Commission itself. The court simply went where the evidence took it.

****The court says "increasingly daunting" for several reasons. California's population continues to grow, albeit perhaps at a slower rate than in years past. There is less and less undeveloped land in the Coastal Zone. Scientists tell us that ocean levels are rising. It is hard to imagine that there will be fewer conflicts between development and preservation coming before the Commission in future years, and it is not a stretch to imagine that those conflicts will be increasingly complex.

##One wonders why anyone not independently wealthy would apply for appointment to the Commission as currently constituted, knowing in advance what is expected and how little support is offered. Plaintiff's phase 2 trial brief suggests the explanation is twofold: use of the office as a springboard for statewide elective office, and feathering one's nest for future lucrative consulting work. Perhaps.

"Technically, a motion to strike challenges the entire cost bill (e.g., on the ground the claimant is not the 'prevailing party'), whereas a motion to tax challenges particular items or amounts. But the terms are often used interchangeably and there is no difference in the procedural rules." *See* Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trial & Evidence* (The Rutter Group 2016), § 17:137.