B266621

Court of Appeal
State of California

Second Appellate District
Division Four

Y. R.
Appellant,

vs.

A. F.
Respondent.

Appeal from an Order of the Superior Court of Los Angeles
Hon. B. Scott Silverman
Case No. BF051758

REPLY BRIEF

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I. THE MISSING FINDINGS CANNOT BE INFERRED

Respondent starts his brief with the claim: "Affirmance of the trial court order is required *because the court made the required findings* to deviate from the guideline child support figure based on substantial evidence in the record." (Resp. Brief, ¶ IV.A, p. 20, emphasis added.) Respondent thereafter acknowledges the court failed to make the findings mandated by the child support statutes, and asks this Court to infer the missing findings from the record. (*Id.*, ¶ IV.A, pp. 24-25 and ¶ IV.A.2, pp. 37-38.) He argues "the mandated statutory findings are *discernable* from the record." (*Id.*, ¶ IV.A, heading at p. 21, emphasis added; see also, pp. 21-43.) The court did not make all the required findings, and the missing ones cannot be discerned from the record.

A. Six findings are required sua sponte before deviating from the guideline

The child support guideline "may be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053, because one or more of the … factors [listed in subparts (1) to (5) of Section 4057, subdivision (b)] is found to be applicable by a preponderance of the evidence, and the court states in writing or on the record the information required in subdivision (a) of Section 4056…." (Fam. Code, § 4057, subd. (b).) When unpacked, the statue requires six findings before a deviation is permitted based on the extraordinarily high income exception to the guideline:

1. "[A]pplication of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053…." (Fam. Code, § 4057, subd. (b).)

2. "The parent being ordered to pay child support has an extraordinarily high income…." (*Id.*, § 4057, subd. (b)(5).)

3. "[T]he amount determined under the formula would exceed the needs of the child[]."(*Ibid*.)

4. "The amount of support that would have been ordered under the guideline formula." (*Id.*, § 4056, subd. (a)(1).)

5. "The reasons the amount of support ordered differs from the guideline formula amount." (*Id.*, § 4056, subd. (a)(2).)

6. "The reasons the amount of support ordered is consistent with the best interests of the children." (*Id.*, § 4056, subd. (a)(3).)

"The statutory findings are mandatory. The failure to make them precludes effective appellate review and may constitute reversible error if the missing information is not otherwise discernible from the record. [Citations.]" (*In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 183; see also, *Rojas v. Mitchell* (1996) 50 Cal.App.4th 1445, 1450-51 [same].) The findings are necessary because the state has a compelling interest in ensuring children receive proper support. (*In re Marriage of Hall* (2000) 81 Cal.App.4th 313, 320-21; Fam. Code, § 4053, subd. (e) .) Federal law also requires a statement of reasons for ordering below-guideline support. (Fam. Code, § 4056, subd. (a).)

A deviation from guideline cannot be affirmed by simply looking for any evidence that might have justified the order. As Division 5 of this Court recently explained in *S.P. v. F.G*. (Cal. Ct. App., Oct. 27, 2016, No. B268249) 2016 WL 6395039:

> The trial court must "render the specified information sua sponte when deviating from the guideline formula." [Citation.] The statement of reasons contemplated by

> section 4056, subdivision (a)(3) is not just a conclusory finding that the variance from presumptively-correct formula support is in a child's best interest. The trial court must articulate why the deviation is in the child's best interest. [Citation.] A "child support order [ ] that deviate[s] from the presumptively-correct formula amount without an accompanying [section 4056, subdivision (a)] statement of information and reasons will be reversed on appeal ... unless the requisite findings can be implied from the record...." [Citations.]

(*S.P. v. F.G., supra,* at p. 8.) In *Marriage of Hall, supra,* 81 Cal.App.4th 313, a below-guideline child support order was reversed on a "judgment roll" because the trial court failed to make the required findings. (*Id.,* at p. 314) As the court explained:

> [T]he need for an explanation of the child support order is grounded in an important part of public policy from the point of view of the best interests of children. Section 4053, subdivision (e) declares that the formula guideline 'seeks to place the interests of children as the *state's* top priority.' (Italics added.) A logical corollary of this statute is that appellate courts must have enough information in the record to evaluate whether a court correctly followed the formula guideline (in most situations, unlike the present case, a deviation will not be apparent on the face of the order) or whether it abused its discretion in differing from it. While most appeals in this area are brought by payor parents who complain that they are being forced to pay too much, one need only reflect on the case where an error in the calculation of the guideline formula resulted in an order that was *too low* to appreciate the importance of appellate review to the implementation of the public policy. An adequate record on appeal is vital to the implementation of that policy

(*In re Marriage of Hall, supra,* 81 Cal.App.4th at pp. 320-21, italics in original.)

B. The court had to award guideline support absent these findings

It is presumed that the guideline produces the correct support in all cases. (Fam. Code, §§ 4053, subd. (k) & 4057, subd. (a).) "When the extraordinarily high earning supporting parent seeks a downward departure from a presumptively correct guideline amount, it is that parent's 'burden to establish application of the formula would be unjust or inappropriate,' and the lower award would be consistent with the child's best interests." (*Hubner, supra,* 94 Cal.App.4th at p. 183.) If the findings are not made and are not discernable from the record, the presumption was never rebutted and guideline support should have been ordered.

C. The court missed two findings

The trial court made some of the required findings. It found Respondent "is an extraordinarily high earner" (3 CT 691, lines 7-8), that "guideline support is $25,325 per month" (*Id.*, line 22), that such amount "would exceed the child's reasonable needs and therefore deviates from guideline" (*Id.*, lines 23-24), and that the amount ordered "will meet the child's reasonable needs" (*Id.*, lines 24-27). There is no finding that "application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053…." (Fam. Code, § 4057, subd. (b).) Nor did the court state "[t]he reasons the amount of support ordered is consistent with the best interests of the children" (*Id.,* § 4056, subd. (a)(3).) The two missing findings cannot be discerned from the record, as discussed separately below.

D. The missing finding that guideline support is "unjust or inappropriate" cannot be inferred because there is no indication the court considered the Family Code section 4053 principles

Before deviating from the guideline, the court had to find that "application of the formula would be unjust or inappropriate in the particular case, consistent with the principles set forth in Section 4053…." (Fam. Code, § 4057, subd. (b).) The policy statements in Section 4053 are the principles upon which the guideline was developed, and courts must adhere to them in setting child support. (*Id.*, § 4053.) The court had to analyze these principles before it could determine if "application of the formula would be unjust or inappropriate" (See, Fam. Code, § 4057, subd. (b).) It cannot be inferred the court adhered to the twelve principles in Section 4053 when the record fails to show the court considered any. Each principle is discussed below.

1. "A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life."

(Fam. Code, § 4053, subd. (a), emphasis added.)

The court found Respondent's "monthly gross cash flow is $336,470, which is comprised of $239,333 in wages, $2,714 of other taxable income, and $94,422 of non-taxable income." (3 CT 691, lines 11-12.) Guideline child support on such income is $25,325 per month (*Id.*, line 22), which is 7.5% of Respondent's income. There is nothing unjust or inappropriate about ordering Respondent to pay 7.5% of his income as support for his child, since child support is a parent's "first and principal obligation" (See, Fam. Code, § 4053, subd. (a).)

Respondent's average monthly living expenses are $77,159 per month, including $20,900 per month in rent. (2 CT 396, item 13.) Respondent must support his daughter according to his "circumstances and station in life." (See, *Id.*) The amount ordered by the court ($8,500 plus add-ons) would not permit the child to live in a comparable home to her father or share in the other privileges he enjoys based on his income. Although the details of his home are not in the record, Respondent invited the court to "make assumptions regarding [his] income and lifestyle that are the least favorable to him." (1 CT 201:17-21.) At $20,900 per month in rent, Respondent's home must be opulent. Petitioner's rent is $2,840 per month. (1 CT 59:15.) This child cannot live at the same station in life as her father when his rent is nearly 10 times greater than the home she lives in with her mother, who has sole custody (1 CT 175-80).

Respondent encouraged the court to focus on the $9,013 per month in expenses Petitioner paid from of the voluntary support payments she received from Respondent before the hearing, and to set support based on those expenses, after deducting the $1,833 per month Petitioner earned in in wages. Respondent argued:

> Petitioner is able to pay all of her expenses, including those for her two children from other relationships with a child support award of $7,180. [She] lists her monthly expenses on her I&E at $9,013, which even includes [their child's] tuition at private school, summer camp, eyeglasses, incidentals', all auto expenses (including [her] Mercedes Benz lease payment), and all household expenses for [herself], the minor child and [her] two other children from different relationships. [She] earns income in the amount of $1,833 per month. Accordingly, [she] needs $7,180 per month to pay her monthly expenses. The guideline amount of $11,840 gives [her] $4,660 more per month than she needs to pay the monthly expenses for

> [herself], the minor child and [her] two other children from prior relationships. [¶]

(1 CT 198:7-15, emphasis removed.) The court apparently accepted that argument because it analyzed the child's need for support based on Petitioner's historical expenses. The court stated:

> The Petitioner's Income and Expense Declarations consistently show expenses that … never exceed $9,000 per month…. (RT 3/23/15, 10:7-9.)
>
> Her claimed expenses are $9,013. She includes the $400 tuition that the Respondent pays. It wasn't clear to me whether she added that in or whether she just listed it and excluded it, so I don't know whether it overlaps. (*Id.*, 10:28 - 11:4.)
>
> My assessment … of the reasonable needs of the child are … complicated by virtue of the Petitioner having two other children for which the respondent isn't responsible. (*Id.*, 11:6-10.)
>
> If I take her expenses -- which she doesn't claim are solely for this child. She says those are her personal expenses and she's included the full amount of her rent -- I have to infer that some amount of those expenses are attributable to the other two children for which the respondent isn't responsible. But it's impossible for me to … sort them out. (*Id.*, 11:11-17.)

The court then deviated from the guideline and awarded $8,500 per month in support plus add-ons for tuition and other expenses. The child's historical expenses in her mother's home do not define the child's current needs for support. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 293.) "A trial court's assumption that a child's historical expenses define the child's need can be 'erroneous in the case of wealthy parents, because it ignores the well-established principle the 'child's need is measured by the parents' current station in life.' [Citations.]" (*S.P. v. F.G., supra,* 2016 WL

6395039, at p. 5.) Although the support awarded by the court was enough for the child to live at her mother's station in life, it is not enough to live according to her father's lifestyle.

Respondent, for the first time on appeal, claims that the child's needs can be calculated based on his living expenses. He says the children in his household cost $11,193 per month to support, and argues this is a measure of what this child needs. (Resp. Brief, ¶ Iv.A.1.i, p. 28.) He arrives at that amount by taking a weighted average of his total living expenses according to the number people who live in his household. (*Id.*, pp. 27-29.) He divides his rent by how many people live in his house. The approach is irrelevant because the cost of maintaining his family in one household is less than what it would cost to support those children in separate households. This child needs a whole house to live in, not a fraction of a house.

Guideline support of $25,325 per month would allow the child to live at her father's station in life. She could live in a comparable home to her father and have money for food, clothing and vacations. Respondent can pay guideline support, per his admission. (2 CT 319-20; 323-24.) He has total income of $336,470 per month, including non-taxable income of $94,422 per month. (3 CT 691, lines 11-12). After paying his $77,159 per month in living expenses, he will have $17,263 left over in non-taxable income, plus $239,333 in wages and $2,714 of other taxable income each month. (See, 3 CT 691, lines 11-12.) He can afford to pay guideline support.

2. "Both parents are mutually responsible for the support of their children."

(Fam. Code, § 4053, subd. (b), emphasis added.)

Petitioner has monthly income of $1,833 (3 CT 691, line 13), limiting her ability to support their child.

3. "The guideline takes into account each parent's actual income and level of responsibility for the children."

(Fam. Code, § 4053, subd. (c), emphasis added.)

Respondent's high income produces a high level of support under the guideline. This is appropriate so the child can live according to her father's station in life. The guideline also produces a high level of support due to Petition having sole custody (1 CT 175-80), which is the highest level of responsibility a parent can have for a child.

4. "Each parent should pay for the support of the children according to his or her ability."

(Fam. Code, § 4053, subd. (d), emphasis added.)

Respondent presented no evidence that payment of guideline support would impose any hardship on him, change his standard of living, or prevent him from supporting his other children. He admitted to his ability to pay any reasonable amount of support (2 CT 319-20; 323-24), and the court found he is an extraordinarily high earner (3 CT 691, lines 7-8).

5. "The guideline seeks to place the interests of children as the state's top priority."

(Fam. Code, § 4053, subd. (e), emphasis added.)

Child support should be maximized, not minimized, to reflect that children are the top priority of the state. Adequate findings are necessary

before deviating from the guideline to ensure this policy is implemented. (*In re Marriage of Hall, supra*, 81 Cal.App.4th at pp. 320-21.) It is in the child's best interest is to enjoy the same station in life as her father. The court's below-guideline order does not advance that interest because she cannot live in a comparable home or have the other privileges her father can afford based on his income. Guideline support will allow the child to do so.

> **6. "Children should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children."**

(Fam. Code, § 4053, subd. (f), emphasis added.)

Respondent claims the court ordered below-guideline support so Petitioner and her other children would not benefit. (Resp. Brief, ¶ I, p. 2 ("the way in which the court fashioned the award ensured that the funds contributed by Father were expended on the minor child at issue rather than equally spent on the minor child and her two half-siblings who had different Fathers and for whom Mother did not receive any child support"; see also, *id.*, ¶ IV, pp. 19-20 and ¶ IV.A.1.iii, pp. 32-33 [same].)

The argument this child should receive less support to keep Petitioner or her other child from benefitting lacks merit. Child support may appropriately improve the standard of living of the custodial household. (Fam. Code, § 4053, subd. (f).) The fact guideline support will improve the lifestyle of Petitioner and the child's siblings is not a reason to deviate from the guideline. Although Respondent has no duty to support Petitioner and her other children, there is no practical way for this child to live at Respondent's station in life without benefitting Petitioner, since she has sole custody of their child. Reducing support to keep the household

from benefiting punishes this child for having siblings and a single mother who supports the household. It is the state's top priority to protect the interests of this child (*Id.*, § 4053, subd. (e).) The state has no interest in helping Respondent pay less support for his child.

Respondent made a point of telling the trial court, and this Court, about Petitioner having two other children from different fathers, who do not pay support for those children. (Resp. Brief, ¶ I, p. 2; ¶ IV, pp. 19-20; ¶ IV.A.1.iii, pp. 32-33.) He failed to mention those children existed when the parties had their child together. (1 CT 28, item 12, showing the age of this child [8], Petitioner's other daughter [13] and Petitioner's son [14].) He presumably understood and accepted those circumstances when he conceived this child with Petitioner. Respondent has a second child out of wedlock with another woman, for whom he is paying at least $13,457 per month in support. (1 CT 183, item 10.d.) He has three other children with his wife. (1 CT 181, item 3.d.) All of Respondent's children are treated as equal under the law, and should live at his station in life, regardless of the circumstances in which they were brought into this world.

7. "Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the increased costs of raising the children in two homes and should minimize significant disparities in the children's living standards in the two homes."

(Fam. Code, § 4053, subd. (g), emphasis added.)

Respondent exercises no parenting time with his daughter. There is a large disparity in the living standards in each parent's homes. Respondent pays $20,900 per month in rent (2 CT 396, item 13), while Petitioner's rent is $2,840 per month (1 CT 59:15).

8. "The financial needs of the children should be met through private financial resources as much as possible."

(Fam. Code,, § 4053, subd. (h), emphasis added.)

Not applicable.

9. "It is presumed that a parent having primary physical responsibility for the children contributes a significant portion of available resources for the support of the children."

(Fam. Code, § 4053, subd. (i), emphasis added.)

Petitioner has sole custody. It is presumed that a significant portion of her current resources, and the support she receives from Respondent, is contributed for the support of their child. (See, *id*.)

10. "The guideline seeks to encourage fair and efficient settlements of conflicts between parents and seeks to minimize the need for litigation."

(Fam. Code, § 4053, subd. (j), emphasis added.)

The guideline is an objective measure of child support, which reduces litigation over how much a child "needs" in support. The guideline achieves uniform results and ensures children receive adequate support. Requiring courts to adhere to the guideline when setting support encourages settlement, rather than protracted legal battles like this one.

11. "The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula."

(Fam. Code, § 4053, subd. (k), emphasis added.)

There are no special circumstances warranting below-guideline support. The guideline is just and appropriate based on Respondent's income. It will permit this child to live at her father's station in life, and Respondent can pay according to the guideline. He failed to rebut the presumption that the guideline produces the correct support.

12. "Child support orders must ensure that children actually receive fair, timely, and sufficient support reflecting the state's high standard of living and high costs of raising children compared to other states."

(Fam. Code, § 4053, subd. (l), emphasis added.)

Petitioner lives in Santa Monica (2 CT 396, item 13), an expensive area of the state, creating a higher need for support. The guideline ensures a fair and sufficient amount of support because it considers each party's income and parenting responsibilities.

The principles in Section 4053 show that application of the guideline would neither be unjust or inappropriate. This Court should not assume the trial court analyzed these factors in fashioning its award. The state's interest in ensuring child receive proper support is too important to fill in gaps this wide.

E. The missing finding that below-guideline support is in the child's "best interests" cannot be inferred because there is no indication the court considered how its award would serve the child's interests

The court had to state "[t]he reasons the amount of support ordered is consistent with the best interests of the children." (Fam. Code, § 4056, subd. (a)(3).) Respondent claims the trial court "found that this total 'child support package' was in the best interests of the child…." (Resp. Brief, ¶ IV, p. 19.) No best interests finding was made.

Respondent then argues "the best interest finding is implicit in the court's other findings and based upon substantial evidence contained on the record." (*Id.*, ¶ IV.A.2, p. 37.) Respondent invokes the doctrine of implied findings, arguing that the absence of a statement of decision requires this Court to affirm the order. (Resp. Brief, ¶ IVA.2, pp. 37-40.) A statement of decision was not available because this order was made on a Request for Order for child support, which is the same as a motion. (3 CT 690, item 1.) A statement of decision may be requested for a decision "at trial" (Code Civ. Proc., § 632) and is "neither required nor available upon decision of a motion." (*Lavine v. Hospital of the Good Samaritan* (1985) 169 Cal.App.3d 1019, 1026; see also, *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 353-354 [same]).

Had the rules regarding statements of decision applied here, it would not have helped Respondent because Petitioner requested a best interests finding from the court, which it failed to make. When a statement of decision fails to resolve a controverted issues, and the error was brought to the attention of the trial court, the appellate court will not infer that the issue was resolved for the prevailing party. (Code Civ. Proc., § 634; see, *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1137 [discussing

procedure to bring defects in proposed statement of decision to the court's attention].) At the hearing, Petitioner argued "there is no showing that [the tentative below-guideline ruling] would be in [the child's] best interest…." (RT 3/23/15, 14:4-9.) Petitioner also objected to the proposed order after hearing, pointing out that Respondent "produced no evidence to show the lower amount would be in the child's best interest." (3 CT 511:14-16). The court issued the order as proposed by Respondent, without a best interests finding. (See, 3 CT 690-693).

Respondent claims that "the best interests finding may be implied from the record" and cites two cases for that proposition: *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 96, and *In re Marriage of Laudeman* (2001) 92 Cal.App.4th 1009. (Resp. Brief, ¶ IV.A.2, pp. 37-38.) Both cases involved above-guideline support. In *Laudeman*, Division 1 of this Court explained:

> Although the statements required by subdivision (a) of section 4056 were not made when Scott's and Lisa's stipulated judgment was signed, the record is sufficient to show that, had the omission been called to the court's attention, the statements would have been made. The amount the guideline support would have been was not then and is not now disputed, and it is clear that the higher amount is in the best interests of the children. (§ 4056, subds.(a)(1), (a)(3).) Where the order is for more rather than less, the reasons for the deviation are plainly irrelevant. [Citations.]

(*Marriage of Laudeman, supra,* 92 Cal.App.4th at p. 1014.) Since the court made a downward departure from the guideline , the best interests finding was required. (See, *ibid.* and *In re Marriage of Hall, supra,* 81 Cal.App.4th at pp. 320-21 [need for findings to ensure support is not set too low].)

II. THE AMOUNT AWARDED IS UNREASONABLY LOW

A "common sense" test for determining the reasonableness of a request to deviate under the extraordinarily high earner exception is whether the support awarded is less than a non-extraordinarily high earner would have paid under the guideline. (*McGinley v. Herman* (1996) 50 Cal.App.4th 936, 945.) A parent who does not have extraordinarily high income must pay support according to the guideline, unless one of the other guideline exceptions apply. (See, Fam. Code, § 4057.) It would be illogical if a parent with extraordinarily high income could pay less child support by rebutting the guideline than a parent making much lower income would have paid under the guideline. As the Court explained in *McGinley v. Herman*:

> We think it no more than common sense that a parent who rebuts the guidelines [sic] support presumption because of an extraordinarily high income not be permitted to pay less support than a parent whose income is not extraordinarily high. Because of the lack of meaningful findings in this case, we have no way of ascertaining the level of income which must have been imputed to Herman in order to yield a figure of $2,150 monthly child support under the guidelines [sic] formula. What we can say with certainty is that, if this imputed amount of income were less than the level of income that could properly be considered extraordinarily high, the support award of $2,150 would be prima facie inadequate.

(*McGinley v. Herman, supra,* 50 Cal.App.4th at p. 945.)

The *McGinley* test reveals whether the below-guideline award is inadequate to meet the child's needs. Respondent submitted a guideline calculation based on his claimed income of $2,282,512 in income, which resulted in guideline support of $11,840 per month. (Resp. Brief, IV.B, p.

44; 1 CT 218.) The court found that income over $2 million or $3 million per year is extraordinarily high. (3 CT 691:7-8.)

The $8,500 award is far lower than what a parent making $2 million per year would have paid under the guideline, as a non-extraordinarily high earner. It defies common sense that Respondent, who makes $4,037,640 per year (3 CT 691, lines 11-12), would pay less child support than someone making half his income must pay per the guideline.

Respondent argues the court ordered a "child support package" of $8,500 per month plus tuition, health insurance, 90% of uninsured healthcare, and 75% of extracurricular activities. (Resp. Brief, ¶ IV.A.1.1, pp. 29-30.) All totaled, Respondent says the "package" is worth $12,104 per month. (*Ibid.*) There is no finding these additional items will bring the total support obligation to $12,104 per month. The expenses the court ordered Respondent to pay are in addition to the guideline, and are referred to as "add-ons" for that reason. (See, *In re Marriage of Fini* (1994) 26 Cal.App.4th 1033, 1039; see also, Fam. Code, § 4062.) These items are not deductions from guideline support. Had guideline support been ordered, the child would have received $25,325 per month in child support, plus a mandatory add-on for uninsured healthcare (Fam. Code, § 4062, subd. (a)(2)) and whatever amount the court determined as a discretionary add-on for educational expenses (*Id.*, subd. (b)(3).

III. THE ERROR IS NOT HARMLESS

Failing to make required findings when deviating from the guideline is not harmless when the missing finding cannot be discerned from the record. (*Rojas v. Mitchell, supra,* 50 Cal.App.4th at pp. 1450-51.) The *Rojas* court explained:

> In general, the failure to make a material finding on an issue supported by the pleadings and substantial evidence is harmless when the missing finding may reasonably be found to be implicit in other findings. [Citation.] The court's failure to make findings is also harmless when, under the facts of the case, the finding would necessarily have been adverse to the appellant. (Ibid.) [¶] Here, after considering documentary evidence and arguments submitted on behalf of the parties, the court expressly found that a $5,500 monthly child support award met the reasonable needs of the child. However, it did not give the *reasons* for this finding. Unfortunately, the error cannot be considered harmless since the missing reasons cannot be implied in the court's express findings and we cannot conclude that the missing information would necessarily have been adverse to appellant….

(*Rojas v. Mitchell, supra,* 50 Cal.App.4th at pp. 1450-51, italics in original.)

DATED: November 17, 2016

Respectfully submitted,

WALZER MELCHER LLP

/s/

Christopher C. Melcher
Steven K. Yoda
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CERTIFICATE OF COMPLIANCE

Counsel of record certifies that under Rule 8.204(c)(1) of the California Rules of Court, the attached brief contains less than 14,000 words according to the program used to create this document.

DATED: November 17, 2016 WALZER MELCHER LLP

/s/
Christopher C. Melcher

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