S232582

IN THE SUPREME COURT OF CALIFORNIA

STEVE RYAN,
Plaintiff and Petitioner,

v.

MITCHELL ROSENFELD, et al.
Defendants and Respondents.

AFTER AN ORDER OF INVOLUNTARY DISMISSAL BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NO. A145465

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICUS CURIAE BRIEF

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Pursuant to rule 8.520(f) of the California Rules of Court, the California Academy of Appellate Lawyers respectfully requests leave to file the attached amicus curiae brief regarding the issue as to which the Court granted review: "Is the denial of a motion to vacate the judgment under Code of Civil Procedure section 663 separately appealable?" (Order, Apr. 27, 2016.)

The California Academy of Appellate Lawyers is a non-profit elective organization of experienced appellate practitioners. Its goals include promoting and encouraging sound appellate procedures designed to insure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation. The Academy has participated as amicus curiae in many cases before this Court, including, most recently, *Jameson v. Desta*, Case No. S230899 (pending), *F.P. v. Monier*, Case No. S216566 (pending), *Conservatorship of McQueen* (2014) 59 Cal.4th 602, and *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097.

The Academy has no interest in or connection to either side in this case. No party or party's counsel authored the attached amicus curiae brief in whole or in part. Other than the Academy and its members, no person or entity, including any party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Robert Cooper, the attorney for plaintiff and petitioner Steve Ryan, is a member of the Academy, but Mr. Cooper is not on the

Academy's amicus curiae committee, and, in accordance with the Academy's rules, he did not participate in the Academy's decision to file this brief or in the brief's preparation.

Respectfully submitted,

Dated: January 26, 2017

By: /s/ Orly Degani

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AMICUS CURIAE BRIEF

INTRODUCTION

In at least seven different decisions dating from 1911 to 1949, this Court repeatedly held that the denial of a motion to vacate a judgment made pursuant to Code of Civil Procedure section 663 is an appealable post-judgment order.[1] (*Socol v. King* (1949) 34 Cal.2d 292, 296–297 *(Socol)*; *Rounds v. Dippolito* (1949) 34 Cal.2d 59, 61 *(Rounds)*; *Funk v. Campbell* (1940) 15 Cal.2d 250, 251 *(Funk)*; *California Delta Farms, Inc. v. Chinese Am. Farms, Inc.* (1927) 201 Cal. 201, 202–204 *(California Delta Farms)*; *Spotton v. Superior Court* (1918) 177 Cal. 719, 720 *(Spotton)*; *Condon v. Donohue* (1911) 160 Cal. 749, 750–751 *(Condon)*; *Bond v. United Railroads of San Francisco* (1911) 159 Cal. 270, 273 (*Bond*).)

Then, without explanation, in *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865 *(Clemmer)*, this Court dismissed an appeal from an order denying a section 663 motion to vacate a judgment, stating that the order was *not* appealable. (*Clemmer*, *supra*, at pp. 871, 890.) In so doing, the Court did not overrule or even acknowledge its long line of prior decisions holding the opposite, nor did the Court provide any reasoning or analysis.

We believe *Clemmer*'s unsupported statement was an inadvertent error. Although, as a general rule of practice, orders denying motions to vacate are non-appealable, this Court has always been clear that the general rule is subject to several exceptions. (See, e.g., *Winslow v. Harold G. Ferguson Corp.* (1944)

[1] All further statutory references in this brief are to the Code of Civil Procedure, unless otherwise indicated.

25 Cal.2d 274, 282 *(Winslow)*. One of those exceptions is that the rule does not apply to orders denying *statutory* motions to vacate a judgment such as those brought under section 663. (*Winslow*, *supra*, at p. 282.) *Clemmer* erroneously applied the general rule instead of the section 663 exception.

This Court's long line of decisions pre-*Clemmer* is grounded in sound reasoning, and no good basis exists for departing from those cases. The principal rationale for the general rule is that, without it, every unsuccessful litigant would have essentially two opportunities to appeal from the same judgment. This concern is not significant when statutory motions to vacate a judgment are involved, because the relevant authorizing statutes impose sufficient restrictions on such motions. Moreover, in both purpose and effect, a section 663 motion to vacate a judgment is similar to a motion for judgment notwithstanding the verdict ("JNOV"), the denial of which is appealable, and distinguishable from a motion for new trial, the denial of which is not appealable. To promote the goal of having bright-line, consistent rules about the critical issue of appealability, this Court should clarify that the denial of a section 663 motion to vacate a judgment is appealable just as the denial of a JNOV motion is appealable.

ARGUMENT

A. This Court Has Repeatedly Held That Denial Of A Section 663 Motion To Vacate A Judgment Is An Independently Appealable Post-Judgment Order Under Section 904.1, Subdivision (a)(2).

Section 663 was enacted in 1897. As currently amended, it provides: "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; . . . [¶] 2. A judgment or decree not consistent with or not supported by the special verdict."

This Court first considered section 663 and its companion section 663a (then section 663½) — prescribing the procedural rules for a motion to vacate under section 663 — in *Patch v. Miller* (1899) 125 Cal. 240 *(Patch)*. The respondent in *Patch* moved to dismiss an appeal on the ground that the appellant could have but failed to file a section 663 motion to vacate the judgment in the trial court. (*Patch*, *supra*, at p. 241.) This Court held that sections 663 and 663a "were not intended to affect the remedy by appeal [from a final judgment] already existing [under former section 963, now section 904.1, subdivision (a)(1)], but were intended to provide a remedy in addition thereto." (*Patch*, *supra*,

at p. 241) Therefore, "an appeal from a final judgment . . . has the same effect, and is to be heard and determined in the same way, as before the enactment of the added sections." (*Ibid.*)

A few years later, in *Bond*, *supra*, 159 Cal. 270, this Court considered whether a separate appeal also lies from the denial of a section 663 motion — the very issue under review here. This Court unequivocally held that an order denying a section 663 motion "is clearly an appealable order" under the provision in former section 963 (now section 904.1, subdivision (a)(2)), authorizing an appeal from "any special order made after final judgment."[2] (*Bond*, *supra*, 159 Cal. at p. 273.) In so doing, the *Bond* Court recognized that while section 663a expressly provides only for review of orders *granting* section 663 motions, this "should not be construed so as to affect the right given by section 963 to appeal from an order *denying* the motion, as from an order made after judgment."[3] (*Bond*, *supra*, at p. 273, original emphasis.)

In *Bond*, the appellants had timely appealed simultaneously from both the judgment and the order denying the section 663 motion to vacate the judgment and enter a new and different judgment. (*Bond*, *supra*, 159 Cal. at p. 273.) It was not critical in *Bond* whether the order denying the section 663 motion could be appealed, because the same questions were presented on appeal

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[2] Current section 904.1, subdivision (a)(2), authorizes an appeal from any "order made after a judgment made appealable by [subdivision (a)(1)]."

[3] Section 663a, subdivision (e) provides: "An order of the court granting a [section 663] motion may be reviewed on appeal in the same manner as a special order made after final judgment."

from the order and on appeal from the judgment. A similar situation arose in *Condon*, *supra*, 160 Cal. 749, where this Court nonetheless reiterated that "such an order [denying a section 663 motion to vacate] is appealable, as a special motion made after final judgment."[4] (*Condon*, *supra*, at pp. 750–751.)

Subsequently, in *Spotton*, *supra*, 177 Cal. 719, this Court addressed the question whether the denial of a section 663 motion to vacate a judgment and enter a new and different judgment is appealable when, as in the present case, an appeal from the judgment was "not taken within the time allowed by law." (*Spotton*, *supra*, at p. 720.) Once again, the Court held that "[o]ur law gives a separate appeal from an order made by the court on the motion referred to in sections 663 and 663a of the Code of Civil Procedure." (*Spotton*, *supra*, at p. 720)

In *California Delta Farms*, *supra*, 201 Cal. 201, this Court considered whether the denial of a section 663 motion to vacate a judgment is appealable when no appeal has been taken from the

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[4] This same situation also arose before *Bond* and *Condon*, in *Rahmel v. Lenhdorff* (1904) 142 Cal. 681 *(Rahmel)*. Although *Rahmel* does not explicitly reference section 663, it is clear that the motion to vacate filed there was a section 663 motion. The decision states that, after a bench trial, the "[d]efendant appeal[ed] from the judgment and from a subsequent order denying his motion for the entry of a different judgment on the findings," which is precisely the type of motion that section 663 authorizes. (*Rahmel*, *supra*, at p. 682.) In *Rahmel*, as in *Bond* and *Condon*, this Court held that "since it [the order denying the motion to vacate] is a special order made after final judgment, it is appealable." (*Ibid.*; see also *California Delta Farms*, *supra*, 201 Cal. at p. 202 [citing *Rahmel* as one of "the decisions . . . to the effect that such an order [denying a section 663 motion] is . . . appealable"].)

judgment. (*California Delta Farms*, *supra*, at p. 202.) The Court concluded that "[t]here should be no uncertainty on the question," based on the Court's prior decisions in *Bond* and *Spotton* "hold[ing] that an order denying a motion to vacate and to enter a different judgment is appealable as a special order made after final judgment." (*Id.* at p. 203.)

After *California Delta Farms*, this Court repeated on several more occasions that an order denying a section 663 motion to vacate a judgment and enter a new and different judgment is appealable, even if an appeal from the judgment is not filed or is filed too late. (*Socol*, *supra*, 34 Cal.2d at pp. 296–297; *Rounds*, *supra*, 34 Cal.2d at p. 61; *Funk*, *supra*, 15 Cal.2d at p. 251.)[5]

In *Socol*, this Court recognized, as it had almost forty years earlier in *Bond*, that "section 663a provides for an appeal from an order granting . . . a motion [to vacate a judgment under section 663], but is silent on the subject of an appeal from an order of

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[5] After *Funk,* but before *Socol* and *Rounds*, this Court decided *Estate of Corcofingas* (1944) 24 Cal.2d 517, which involved an appeal from a decree determining heirship and from the denial of a motion to vacate the decree and enter a different one, presumably made under section 663 (although the decision does not specify). (*Estate of Corcofingas*, *supra*, at pp. 519–520.) The Court found "well-taken" the argument that the order denying the motion to vacate was not appealable, and dismissed the appeal from that order. (*Id.* at pp. 520, 522.) However, "[a] proceeding to determine heirship is a matter in probate," and "[Probate Code section 1240] specifies the orders and judgment[s] in probate from which an appeal will lie." (*Estate of O'Dea* (1940) 15 Cal.2d 637, 638.) "That section has no application to appeals from judgments or orders in ordinary civil proceedings, which are controlled by Code of Civil Procedure, section 963 [now section 904.1]." (*Socol*, *supra*, 34 Cal.2d at p. 297 [distinguishing *Estate of Corcofingas* on this basis].)

denial," so "it might be contended that it was not intended to provide for an appeal in such case." (*Socol*, *supra*, 34 Cal.2d at p. 296.) However, the Court reiterated that its earlier decisions, including *Bond*, *California Delta Farms* and *Funk,* "have established the rule that an order of denial of a motion to vacate under section 663 is appealable," because "Section 963 [now section 904.1, subdivision (a)(2)] provides. . . that an independent appeal may be taken from '. . . any special order made after final judgment . . .'." (*Socol*, *supra*, 34 Cal.2d at p. 296; see also *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 663–664 [reiterating that "an order denying a motion to vacate made pursuant to Code of Civil Procedure section 663 has been held to be appealable"], citing 6 Witkin, Cal. Proc. (2d ed. 1971) § 94, pp. 4100–4102); *Hagge v. Drew* (1945) 27 Cal.2d 368, 384 [dismissing appeal from order denying new trial but considering merits of appeal from order denying section 663 motion to vacate judgment].)

B. The Cases Cited In The Answer Brief On The Merits To Suggest Inconsistency In This Court's Decisions Involved Other Types Of Motions To Vacate, Not Motions Made Under Section 663.

The Answer Brief on the Merits ("ABOM") contends that the Court's decisions on the appealability of orders denying section 663 motions to vacate "have not been entirely consistent" (ABOM at 3), but that is not true. In fact, until *Clemmer* (which the ABOM does not mention), every time this Court considered the issue, the Court held that the denial of a section 663 motion is

appealable. (See *Socol*, *supra*, 34 Cal.2d at pp. 296–297; *Rounds*, *supra*, 34 Cal.2d at p. 61; *Funk*, *supra*, 15 Cal.2d at p. 251; *California Delta Farms*, *supra*, 201 Cal. at pp. 202–204; *Spotton*, *supra*, 177 Cal. at p. 720; *Condon*, *supra*, 160 Cal. at p. 750–751; *Bond*, *supra*, 159 Cal. at p. 273.)

The cases that the ABOM cites (at ABOM 3–4) to demonstrate an alleged inconsistency in the Court's decisions — *Kent v. Williams* (1905) 146 Cal. 3 *(Kent)*, *Title Ins. & Trust Co. v. California Dev. Co.* (1911) 159 Cal. 484 *(Title Ins.)*, and *Southern Pac. R. Co. v. Willett* (1932) 216 Cal. 387 *(Willett)* — involved other types of motions to vacate, not section 663 motions.

Title Ins. involved the denial of "an order (made *before* judgment) refusing to vacate a prior order appointing a receiver." (*Title Ins.*, *supra*, 159 Cal. at pp. 486–487, emphasis added.) Because the order appointing the receiver was not "within the class of orders made directly appealable by the terms of section 963" (now section 904.1), it could not be "made reviewable by the device of moving to set it aside and appealing from the order denying the motion." (*Title Ins.*, *supra*, at pp. 487–488.)

The denial of a section 663 motion to vacate a judgment, by contrast, *is* within the class of orders made directly appealable by section 904.1, because it is an order made after a final, appealable judgment. (See Code Civ. Proc., § 904.1, subd. (a)(2); *Socol*, *supra*, 34 Cal.2d at pp. 296–297; *Bond*, *supra*, 159 Cal. at p. 273.)

The basis for the motions to vacate filed in *Kent* and *Willett* is not clear from the decisions, but the decisions cite *Tripp v. Santa Rosa St. R. Co.* (1886) 69 Cal. 631 *(Tripp)*, *Goyhinech v. Goyhinech* (1889) 80 Cal. 409 *(Goyhinech)*, *Harper v. Hildreth*

(1893) 99 Cal. 205 *(Harper)*, and *Alpers v. Bliss* (1904) 145 Cal. 565 *(Alpers)*, as support for their holdings that the orders denying the motions were not appealable. (See *Kent*, *supra*, 146 Cal. at p. 11; *Willett*, *supra*, 216 Cal. at p. 390.) None of those cited cases involved the denial of a section 663 motion. Three of the four (*Tripp*, *Goyhinech* and *Harper*) were decided before section 663's enactment in 1897. The fourth (*Alpers*) concerned the denial of a motion by the defendant to vacate a judgment of dismissal entered at the plaintiffs' request. (*Alpers*, *supra*, at pp. 567–569.) The purpose of the motion to vacate was to enable the defendant to file a cross-complaint. (*Ibid.*) The motion did not seek to vacate the judgment and have "another and different judgment entered" in accordance with the facts found by the court or a special verdict (Code Civ. Proc., § 663), which is the only type of motion authorized by section 663.

Section 663 "is designed to enable speedy rectification of a judgment rendered upon erroneous application of the law to facts which have been found by the court or jury or which are otherwise uncontroverted." (*Forman v. Knapp Press* (1985) 173 Cal.App.3d 200, 203 *(Forman)*; see *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 738 [a section 663 "motion may be made whenever the trial judge draws an incorrect legal conclusion or renders an erroneous judgment upon the facts found . . . to exist"].) "As the statutory language indicates, a motion to vacate lies [under section 663] only where a 'different judgment' is compelled by the facts found." (*Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1574 *(Payne)*, quoting Code Civ. Proc., § 663, emphasis omitted.) When ruling on a section 663 motion, a trial court is "limited to the substitution of the

judgment that should have been given as a matter of law upon the findings of fact, if the judgment already given was an incorrect conclusion from such findings." (*Jones v. Clover* (1937) 24 Cal.App.2d 210, 212; accord *Dahlberg v. Girsch* (1910) 157 Cal. 324, 326 ["the power of the court is expressly limited to the correction of the decree or judgment because the conclusion of law is inconsistent with and not supported by the findings"].) A trial court has no authority under section 663 to vacate a judgment and restore the action to the trial calendar for further proceedings, such as filing additional pleadings, submitting additional evidence, or making new findings of fact. (*Hassell v. Bird* (2016) 247 Cal.App.4th 1336, 1350–1351, review granted 381 P.3d 231, 208 Cal.Rptr.3d 284 (*Hassell*); *Payne*, *supra*, 167 Cal.App.4th at p. 1575; *Plaza Hollister Ltd. P'ship v. County of San Benito* (1999) 72 Cal.App.4th 1, 14 *(Plaza Hollister)*; *Forman*, *supra*, 173 Cal.App.3d at p. 203.)[6]

Thus, *Alpers* — like *Tripp*, *Goyhinech* and *Harper* — did not involve the denial of a motion to vacate a judgment pursuant to section 663. None of those cases, nor the cases relying on them cited in the ABOM (*Kent*, *Title Ins.,* and *Willett*) cast any doubt

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[6] This Court granted review in *Hassell* on the following issues, which do not appear to implicate section 663: "(1) Does an on-line publisher have a right to notice and an opportunity to be heard before a trial court orders removal of on-line content? (2) Does the statutory immunity provided by 47 U.S.C. 230(c)(1) and (e)(3) bar a trial court from enjoining a website publisher's actions and potentially enforcing the court's order by way of contempt or other sanctions?" (*Hassell v. Bird,* No. S235968, Sept. 21, 2016 order.)

on this Court's clear and repeated holding that "an order of denial of a motion to vacate under section 663 is appealable."[7] (*Socol*, *supra*, 34 Cal.2d at p. 296.)

C. According To A Long Line Of Decisions By This Court, The General Rule That Denial Of A Motion To Vacate A Judgment Is Not Appealable Is A Court-Made Limitation On Section 904.1, Subdivision (a)(2), Which Only Applies To Some *Non*-Statutory Motions, And Expressly Does *Not* Apply to Section 663 Motions.

Kent, *Title Ins., Willett, Tripp, Goyhinech, Harper,* and *Alpers* were all decided in accordance with the general rule that "an order refusing to vacate a prior order or judgment from which an appeal may be taken is not appealable unless there is a record which presents matters for consideration that could not be presented upon the appeal from the original order or judgment." (*Kent*, *supra*, 146 Cal. at p. 11, citing *Goyhinech*, *supra*, 80 Cal. 409, *Harper*, *supra*, 99 Cal. 205, and *Alpers*, *supra*, 145 Cal. 565; see also *Title Ins.*, *supra*, 159 Cal. at pp. 487–488; *Willett*, *supra*, 216 Cal. at p. 390.)

This general rule is not a new development, as the ABOM suggests, nor is it compelled by statute, as the ABOM also intimates. (ABOM 4–7.) To the contrary, it "is a mere rule of practice established by this court without the aid of any statute"

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[7] Neither does *Lamb v. Holy Cross Hosp.* (1978) 83 Cal.App.3d 1007, cited at ABOM 5, in which the appellate court expressly noted that the motion to vacate failed to "set forth any grounds cognizable under section 663." (*Lamb v. Holy Cross Hosp.*, *supra*, at p. 1010.)

(*Title Ins.*, *supra*, 159 Cal. at p. 488), as a limitation on section 904.1, subdivision (a)(2)'s broad pronouncement that any "order made after an appealable judgment is itself appealable" (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651). (See also *Spellens v. Spellens* (1957) 49 Cal.2d 210, 228–229 [recognizing that "an order refusing to vacate a final judgment is in its very nature a special order made after judgment" and, thus "technically within the class of orders made directly appealable by statute," while explaining the "*rule of practice* to the effect that [such] an order. . ., although described as appealable by the statute, c[an] not be made to take the place of an appeal from the [judgment]"], emphasis added.)

Moreover, the general rule is subject to several recognized exceptions. (See, e.g., *Winslow*, *supra*, 25 Cal.2d at p. 282.)

The principal justification for the rule is that "to allow the appeal from the order of denial would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment." (*Rooney v. Vermont Inv. Corp.* (1973) 10 Cal.3d 351, 358.) This justification does not apply and, thus, "an appeal from an order refusing to vacate a judgment *will* lie[,] when the record available to the appellate court on such appeal raises issues which are not disclosed or could not be disposed of on appeal from the judgment itself." (*Id.* at p. 359, emphasis added; see also, e.g., *In re Yoder* (1926) 199 Cal. 699, 702–703; *Cope v. Cope* (1964) 230 Cal.App.2d 218, 228–229.) The parties' briefs refer to this situation as the "silent record" exception to the

general rule that no appeal may be taken from the denial of a motion to vacate a judgment. (Opening Brief on the Merits ("OBOM") 14; ABOM 3.)

Similarly, an appeal can be taken from an order refusing to vacate a judgment where "the appellant was not a party to the proceeding resulting in the original judgment . . . , and for that reason could not appeal therefrom, or [where] such original judgment . . . was made *ex parte*, and the party complaining did not have notice in time to appeal, or had no opportunity to make a . . . record which would present his real grounds of objection." (*Title Ins.*, *supra*, 159 Cal. at p. 488; see also *Younger v. Superior Court* (1978) 21 Cal.3d 102, 110 fn. 6; *Luckenbach v. Laer* (1923) 190 Cal. 395, 398–399; *Estate of Baker* (1915) 170 Cal. 578, 581–583; *Pignaz v. Burnett* (1897) 119 Cal. 157, 162–164; *Mayor & Common Council of San Jose v. Fulton* (1873) 45 Cal. 316, 319.) In these circumstances, too, the concern about permitting a second appeal from the same ruling does not apply because, "for reasons involving no fault of the appealing party, he has never been given an opportunity to appeal directly from the judgment." (*Estate of Baker*, *supra*, at p. 582.)

An order denying a motion to vacate a void judgment is also appealable as an exception to the general rule of nonappealability, but for a different reason: "[A] judgment which is void upon its face is a dead limb upon the judicial tree," so "[s]uch a judgment may be set aside by the court at any time, and it is immaterial how the invalidity is called to its attention." (*Baird v. Smith* (1932) 216 Cal. 408, 410; see also, e.g., *311 South Spring St. Co. v. Dep't of Gen. Servs.* (2009) 178 Cal.App.4th 1009, 1014 ["[A]n exception to this general rule [that the denial of

a motion to vacate a judgment is not appealable] applies when the underlying judgment is void. In such a case, the order denying the motion to vacate is itself void and appealable because it gives effect to a void judgment"], internal quotations and citation omitted; *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691; *Residents for Adequate Water v. Redwood Valley Cnty. Water Dist.* (1995) 34 Cal.App.4th 1801, 1805 [same]; *Marriage of Brockman* (1987) 194 Cal.App.3d 1035, 1040–1041 [same]; *Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, 1030–1031 [same]; *County of Ventura v. Tillett* (1982) 133 Cal.App.3d 105, 110 *[same]*, disapproved on other grounds by *County of Los Angeles v. Soto* (1984) 35 Cal.3d 483 fn. 4.)

Most importantly for present purposes, this Court has explicitly held that "[i]n those cases *where the law makes express provision for a motion to vacate* [a judgment,] as under sections 473, 473a[,] . . . 663, [and] 663a of the Code of Civil Procedure[,] an order denying such motion is. . . appealable," even if the same grounds could be urged on appeal from the judgment.[8] (*Winslow*, *supra*, 25 Cal.2d at p. 282, original emphasis; see also *People v. Totari* (2002) 28 Cal.4th 876, 887 fn. 5 *(Totari)* [recognizing that "[i]n civil cases, 'it has become an established rule that an appeal lies from the denial of a statutory motion to vacate an appealable judgment. . .'"], quoting 9 Witkin, Cal. Proc. (4th ed. 1997)

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[8] Section 473, subdivision (b), authorizes a motion to vacate a judgment entered against a party due to that party's or the party's attorney's mistake, inadvertence, surprise, or excusable neglect. Section 473a has been repealed and its substance is now codified at section 473.5, which authorizes a motion to vacate a default judgment entered without actual notice to the moving party.

Appeal, § 154, p. 218; Cf. *Eureka & T.R. Co. v. McGrath* (1887) 74 Cal. 49, 51 [motion to vacate judgment not appealable where "there [was] no statutory provision for the motion"].)

According to this Court's clear pronouncements, the general "rule to the effect that an appeal will not lie from an order refusing to vacate a judgment has *no application* to one made pursuant to section 663." (*Rounds*, *supra*, 34 Cal.2d at p. 61, emphasis added.**)** As this Court has explained, "notwithstanding the obvious fact that on an appeal from a judgment which the court below refuses to set aside, the very same matters may be reviewed, . . our law gives a separate appeal from an order made by the court on the motion referred to in sections 663 and 663a." (*California Delta Farms*, *supra*, 201 Cal. at p. 203, internal citation omitted.) Simply stated, "[a]ppeals from orders made under section 663 are set apart from and are made an exception to the rule" that the denial of a motion to vacate generally is not appealable. (*Funk*, *supra*, 15 Cal.2d at p. 251.)

D. The Statutory Limitations On Section 663 Motions Minimize the Concerns Underlying The General Rule Making Denial Of A Motion To Vacate A Judgment Non-Appealable.

As mentioned, the principal justification for the general rule of practice making denial of a motion to vacate a judgment non-appealable is that, otherwise, "every unsuccessful litigant [would have] two appeals, the time of one [i.e., appeal from the judgment] being fixed by law, [and] the time of the other being

fixed by his own convenience, after denial of his motion to vacate the judgment complained of." (*Estate of Baker*, *supra*, 170 Cal. at p. 582.)

This Court has recognized that this concern underlying the general rule applies more to nonstatutory motions to vacate than to statutory motions such as those brought under section 663. As this Court has explained: "Because the grounds supporting a nonstatutory motion are not specifically defined, the 'no second appeal' rule . . . serves as a procedural device to discourage defendants from raising *any* postjudgment claim that could have been raised before imposition of judgment or by way of direct appeal from the original judgment. . . . On the other hand, [where] the Legislature has established specific requirements for a motion to vacate . . . .and affords [litigants] a means to obtain relief by way of a *statutory* postjudgment motion to vacate, the 'no second appeal' rule loses its urgency and a denial order qualifies as an [appealable] 'order made after judgment. . . .'" (*Totari*, *supra*, 28 Cal.4th at pp. 886–887, original emphasis.)[9]

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[9] Although *Totari* was a criminal case, the rules regarding the appealability of orders denying motions to vacate a judgment are similar in the civil and criminal contexts. In criminal cases, as in civil cases, "ordinarily, no appeal lies from an order denying a motion to vacate a judgment. . . on a ground which could have been reviewed on appeal from the judgment," because "[i]n such a situation . . . allowance of an appeal from the order denying the motion to vacate would virtually give defendant two appeals from the same ruling and, since there is no time limit[] within which the motion may be made, would in effect indefinitely extend the time for appeal from the judgment." (*Totari*, *supra*, 28 Cal.4th at p. 882, internal quotations and citation omitted.) However, "[c]ourts have made various exceptions to the . . . general rule of nonappealability, such as when the record on appeal would not

To be sure, section 663 by its terms imposes several requirements which serve as their own "procedural device" to limit the assertion of postjudgment claims that could have been raised before judgment or on direct appeal from the judgment. (*Totari*, *supra*, 28 Cal.4th at p. 886.)

First, to be valid, a section 663 motion to vacate a judgment must be "based on some *recognized grounds* for vacation: it cannot be stretched to include any motion, regardless of the basis for it." (*Payne*, *supra*, 167 Cal.App.4th at pp. 1574–1575, original emphasis, internal quotations and citation omitted.) The only recognized grounds for a section 663 motion are (1) an incorrect or erroneous legal basis for the judgment, not consistent with or not supported by the facts, or (2) a judgment not consistent with or not supported by the special verdict, where the facts or verdict entitle the moving party to a "different judgment." (Code Civ. Proc., § 663.)

Thus, a section 663 motion "appertains after rendition of a judgment 'based upon a decision by the court, or the special verdict of a jury.'" (*Forman*, *supra*, 173 Cal.App.3d at p. 203, citing Code Civ. Proc., § 663.) Such a motion does not lie, for example, to vacate a stipulated judgment, because a stipulated judgment is a decision of the parties, not of the court or jury. (*Plaza Hollister*, *supra*, 72 Cal.App.4th at p. 4.) A section 663 motion also does not lie to vacate a judgment entered pursuant to

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have shown the error . . ., when the final judgment that is attacked is void. . ., or when clarification of the law is deemed important in the court's discretion . . . ." (*Ibid.,* internal citations omitted.) *Totari* added statutory motions to vacate to this list of exceptions to the general nonappealability rule in criminal cases. *(Id.* at pp. 886–887.)

an order sustaining a demurrer without leave to amend, since a demurrer tests only the sufficiency of the pleadings and does not involve the admission of evidence or any findings of fact. (*Payne*, *supra*, 167 Cal.App.4th at pp. 1574–1575.) Nor does a section 663 motion lie to vacate a summary judgment, unless the moving party filed a cross-motion for summary judgment entitling that party to entry of a new and different judgment in its favor. (*Forman*, *supra*, at p. 203 & fn. 1.) As explained, a section 663 motion may not be used to challenge the sufficiency of the evidence to support a judgment, to secure additional findings not made before entry of judgment, or to remit the matter for trial. (*Hassell*, *supra*, 247 Cal.App.4th at p. 1350, rev. granted 381 P.3d 231, 208 Cal.Rptr.3d 284; *Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 152–153 *(Simac)*; *Mardesich v. C.J. Hendry Co.* (1942) 51 Cal.App.2d 567, 576 *(Mardesich)*.)

Apart from these substantive restrictions, section 663a imposes time limitations on filing a motion to vacate a judgment under section 663 and on the trial court's power to rule on the motion. (See *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 477–478 *(Garibotti)*.) Subdivision (a) of section 663a requires "[a] party" to file a notice of intent to bring a section 663 motion within 15 days after "service upon him or her by any party," or the clerk's mailing, of notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest. (Code Civ. Proc., § 663a, subd. (a).) Although an aggrieved nonparty who moves to vacate a judgment under section 663 is not subject to the time limitations of section 663a, subdivision (a) (see *Aries Dev. Co. v. California Coastal Zone Conservation Com.* (1975) 48 Cal.App.3d 534, 542), subdivision (b) of section 663a provides

that the power of the court to rule on a section 663 motion expires by an outside limit of 60 days after "the moving party" is served with notice of entry of judgment. (Code Civ. Proc., § 663a, subd. (b); see *Hassell*, *supra*, 247 Cal.App.4th at pp. 1350–1351, rev. granted 381 P.3d 231, 208 Cal.Rptr.3d 284.) If the court fails to rule within the allotted time the motion is deemed denied by operation of law. (Code Civ. Proc., § 663a, subd. (b).) This temporal limitation on the court's power to rule is jurisdictional (*Garibotti*, *supra*, at pp. 478–479), and applies whether "the moving party" (Code Civ. Proc., § 663a, subd. (b)) was a party all along or only became a party by filing the motion to vacate the judgment (*Hassell*, *supra*, at pp. 1350–1351).

Accordingly, the statutory restrictions on section 663 motions significantly limit the circumstances under which parties have the opportunity to raise on appeal from the denial of such motions issues that could have been addressed on appeal from the judgment. Because section 663's statutory restrictions adequately protect the general "no second appeal" rule, that general rule does not apply to orders denying section 663 motions, and such orders are appealable. (See, e.g., *Socol*, *supra*, 34 Cal.2d at pp. 296–297.)

E. *Clemmer* Misapplied The General Rule To Denial Of A Section 663 Motion And Caused Unnecessary Confusion.

For over half a century, the intermediate appellate courts were clear based on this Court's consistent decisions on the subject that "[a]n order of denial of a motion to vacate a judgment and enter a different one under Code Civ. Proc. § 663 is

appealable as a special order after final judgment. . ., notwithstanding that the same grounds could be urged on an appeal from the judgment."[10] (*Polk v. Polk* (1964) 228 Cal.App.2d 763, 768 fn. 1; see, e.g., *Domarad v. Fisher & Burke, Inc.* (1969) 270 Cal.App.2d 543, 547 fn. 1; *Am. Mach. & Foundry Co. v. Pitchess* (1968) 262 Cal.App.2d 490, 491 fn. 1; *Iacovitti v. Fardin* (1954) 127 Cal.App.2d 348, 356; *McKenna v. Elliott & Horne Co.* (1953) 118 Cal.App.2d 551, 555; *Douglas v. Westfall* (1952) 113 Cal.App.2d 107, 114–115; *Estate of Barton* (1937) 20 Cal.App.2d 648, 649; *Gittelson v. Gandolfo* (1927) 85 Cal.App. 320, 321–322; *Andreoli v. Hodge* (1925) 71 Cal.App. 762, 766; *Potter v. Pigg* (1917) 35 Cal.App. 707, 708–709; *Taylor v. Darling* (1912) 19 Cal.App. 232, 233.)[11]

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[10] We are aware of only one exception. In *Pitino-Capasso Fruit Co. v. Hillside Packing Co.* (1928) 90 Cal.App. 191 (*Pitino-Capasso*), the appellate court, relying on *Modoc Co-Op. Ass'n v. Porter* (1909) 11 Cal.App. 270, 274 (*Modoc*), concluded it lacked jurisdiction to review an order denying a motion to vacate a judgment under section 663. (*Pitino-Capasso, supra,* 90 Cal.App. at p. 192.) *Modoc*, however, does not support this conclusion. *Modoc* held only that the pendency of a motion to vacate a judgment under section 663 did not excuse the appellant from failing to perfect the record on appeal *from the judgment*. (*Modoc*, *supra*, 11 Cal.App. at pp. 273–274.) Moreover, *Modoc* was decided before this Court held unequivocally in *Bond* that an order denying a motion made under section 663 is an appealable post-judgment order. (See *Westervelt v. McCullough* (1923) 64 Cal.App. 362, 363.)

[11] Likewise, the appellate courts have been clear that an order denying a statutory motion to vacate a judgment under section 473 is appealable. (See, e.g., *Shisler v. Sanfer Sports Cars, Inc.* (2008) 167 Cal.App.4th 1, 5; *Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394; *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1469; *Tunis v. Barrow* (1986)

But, in 1978, this Court's decision in *Clemmer* generated confusion which led to a split of authority in the courts of appeal. (Compare, e.g., *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 820–823 *(Glair)*, with *Howard v. Lufkin* (1988) 206 Cal.App.3d 297, 301–303 *(Howard)*.)

In *Clemmer*, plaintiffs, the widow and son of a murder victim, obtained a jury verdict against the defendant insurer in the amount of a prior wrongful death judgment in their favor against the insured slayer. (*Clemmer*, *supra*, 22 Cal.3d at pp. 871–873.) After entering judgment for plaintiffs in accordance with the jury's verdict, the trial court granted the insurer's motion for new trial on the sole issue submitted to the jury — whether the killing was willful — and denied the motion on all other issues. (*Id.* at pp. 871, 873.) Plaintiffs appealed from the order granting a partial new trial, and the insurer appealed from orders denying its

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184 Cal.App.3d 1069, 1074–1075; *Martin v. Johnson* (1979) 88 Cal.App.3d 595, 603–604; *Marriage of Simmons* (1975) 49 Cal.App.3d 833, 835–836*; Palmese v. Superior Court of Los Angeles County* (1961) 193 Cal.App.2d 600, 602; *Fitzsimmons v. Jones* (1960) 179 Cal.App.2d 5, 11–12.) There is one recognized exception: In probate matters, such orders are not appealable because, as previously explained (see p. 18, fn. 5, above), "the Probate Code specifies the orders and judgment[s] in probate from which an appeal will lie, and an order denying relief under section 473 of the Code of Civil Procedure is not one of the orders so specified." (*Estate of O'Dea*, *supra*, 15 Cal.2d at p. 638; accord *Conservatorship of Harvey* (1970) 3 Cal.3d 646, 652; *Kramer v. Superior Court* (1950) 36 Cal.2d 159, 161; *Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 576; *Linstead v. Superior Court of Mendocino County* (1936) 17 Cal.App.2d 9, 11.)

motions for JNOV, to vacate the judgment and enter a new and different judgment under section 663, and for a new trial on all issues. (*Clemmer*, *supra*, at p. 871.)

Without any analysis or citation to authority, and without explicitly overruling or even mentioning its long line of prior decisions holding that denials of section 663 motions are appealable orders, this Court concluded that "the purported appeals from the orders denying the motion to set aside and vacate the judgment and enter a new and different judgment and the motion for a new trial on all issues must . . . be dismissed, said orders being nonappealable." (*Clemmer*, *supra*, 22 Cal.3d at p. 890; see also *id.*, at p. 871.)

The *Clemmer* Court's dismissal of the appeal from the order denying the section 663 motion was directly contrary to this Court's long line of prior decisions on the matter. Moreover, "[t]he procedural step had no significant effect," because the *Clemmer* Court fully reviewed the issue raised by the section 663 motion (whether plaintiffs were collaterally estopped by the killer's murder conviction from asserting that the killing was not willful) in considering the appeals from the judgment and from the order granting a limited new trial. (9 Witkin, Cal. Proc. (5th ed. 2008) Appeal § 200.) As the Court put it, the insurer's "argument that it was entitled to have the judgment set aside and a new judgment entered pursuant to Code of Civil Procedure section 663 because the findings of the trial court compel[led] a determination that plaintiffs [we]re precluded from litigating the issue of willfulness . . . [wa]s but a reassertion of its collateral estoppel argument couched in procedural language." (*Clemmer*, *supra*, 22 Cal.3d at p. 888).

For these reasons, despite the split in appellate court decisions post-*Clemmer*, the overwhelming weight of authority from the appellate courts has been that, notwithstanding *Clemmer*, denials of section 663 motions remain separately appealable orders. (See *Gallup v. Bd. of Trs.* (1996) 41 Cal.App.4th 1571, 1574 *(Gallup)*; *Norager v. Nakamura* (1996) 42 Cal.App.4th 1817, 1819 *(Norager)*; *Brun v. Bailey* (1994) 27 Cal.App.4th 641, 651 *(Brun)*; *Howard*, *supra*, 206 Cal.App.3d at pp. 301–303; *City of Long Beach v. Crocker Nat'l Bank* (1986) 179 Cal.App.3d 1114, 1118 fn. 6 (*City of Long Beach*).)

Only two appellate courts have held that denials of section 663 motions are not appealable in the wake of *Clemmer*. (*Glair*, *supra*, 153 Cal.App.4th at pp. 820–823; *Neufeld v. State Bd. of Equalization* (2004) 124 Cal.App.4th 1471, 1476 fn. 4; see also *Forman*, *supra*, 173 Cal.App.3d at pp. 202–203 [finding it unnecessary to decide the issue, but noting that *Clemmer*'s "incongruous" statement raises "a perplexing question of stare decisis" in any appeal from an order denying a section 663 motion, and urging this Court to provide clarification]; *Lippman v. City of Los Angeles* (1991) 234 Cal.App.3d 1630, 1633 fn. 1 [same].)

Clemmer is such an outlier that, since it was decided, most appellate court decisions on the appealability of orders denying section 663 motions have not even bothered to mention it. (See *Gallup*, *supra*, 41 Cal.App.4th at p. 1574; *Norager*, *supra*, 42 Cal.App.4th at p. 1819; *Brun*, *supra*, 27 Cal.App.4th at p. 651; *City of Long Beach*, *supra*, 179 Cal.App.3d at p. 1118 fn. 6.) Instead, most of those cases cite *Howard*, in which the First District, Division Three, dismissed *Clemmer*'s statement on the

issue as "ill-reasoned" dicta, and further noted that *Clemmer*'s "precedential value . . . is doubtful," given that "[w]ithout discussion of the established rule, and in a statement superfluous to the opinion, the court contradicted a long standing judicially created rule of civil procedure." (*Howard*, *supra*, 206 Cal.App.3d at p. 302, citing *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 533 ["The summary and conclusory nature of the decision of the issues . . ., virtually devoid of reasoning, undermines its status as substantial authority."], cert. den. sub nom. *Santa Fe Land Improvement Co. v. City of Berkeley* (1980) 449 U.S. 840.)

We agree. More than likely, *Clemmer*'s unsupported statement that the denial of a section 663 motion to vacate a judgment is nonappealable was an inadvertent error. The *Clemmer* Court may have been misled by the same line of cases cited in the ABOM and discussed at pages 20-23, above. As explained, those cases invoked the general rule that a denial of a motion to vacate is not appealable, but without discussing the many exceptions to the rule, likely because the exceptions were inapplicable in those cases. In particular, none of those cases involved denial of a statutory motion to vacate a judgment and enter a new and different judgment under section 663. (See *Funk*, *supra*, 15 Cal.2d at pp. 252–254, Carter, J., concurring [lamenting the "loose language" in opinions holding that an order denying a motion to vacate a judgment is non-appealable without describing the nature of the motion made in those cases, and noting that "[i]t does not appear in the opinion in any of those cases that the . . . motion [was] pursuant to sections 663 and 663a of the Code of Civil Procedure"].) As this Court has made crystal clear in

multiple carefully reasoned decisions, an order denying a section 663 motion is an appealable post-judgment order. (See *Socol*, *supra*, 34 Cal.2d at pp. 296–297; *Rounds*, *supra*, 34 Cal.2d at p. 61; *Funk*, *supra*, 15 Cal.2d at p. 251; *California Delta Farms*, *supra*, 201 Cal. at pp. 202–204; *Spotton*, *supra*, 177 Cal. at p. 720; *Condon*, *supra*, 160 Cal. at pp. 750–751; *Bond*, *supra*, 159 Cal. at p. 273.)

F. As A Policy Matter, No Justification Exists For Treating The Denial Of A Section 663 Motion To Vacate A Judgment Differently Than The Denial Of A JNOV Motion, Which Is Appealable.

This Court's decisions recognizing the appealability of orders denying section 663 motions make policy sense when comparing section 663 motions to other types of post-trial motions.

As explained, "a motion to vacate a judgment pursuant to . . . section 663 does not contemplate merely the setting aside of the judgment, as does a motion for new trial," but the entry of a different judgment consistent with the facts found. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1260, internal quotations and citation omitted.) Unlike a motion for new trial, a section 663 motion may not be used to challenge the sufficiency of the evidence to support the judgment, or to secure new and different findings of fact than those made before judgment was entered. (*Hassell*, *supra*, 247 Cal.App.4th at pp. 1350–1351, rev. granted 381 P.3d 231, 208 Cal.Rptr.3d 284;

Garibotti, *supra*, 243 Cal.App.4th at pp. 476–478; *Simac*, *supra*, 92 Cal.App.3d at p. 153; *Mardesich*, *supra*, 51 Cal.App.2d at p. 576).

Rather, a motion to vacate a judgment under section 663 is more akin to a motion for JNOV. The difference is that a section 663 motion seeks entry of a judgment consistent with the findings made by a court or jury, while a JNOV motion seeks entry of a judgment compelled by the evidence as construed in the light most favorable to the non-moving party notwithstanding the jury's verdict. (Compare, e.g., *Forman*, *supra*, 173 Cal.App.3d at pp. 202–203, with *Sweatman v. Dep't of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

There is no question that the denial of a JNOV motion, unlike the denial of a new trial motion, is appealable. (See Code Civ. Proc., § 904.1, subd. (a)(4); *Walker v. Los Angeles Cnty. Metro. Transp. Auth.* (2005) 35 Cal.4th 15, 19; *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452, 466.) Because a section 663 motion to vacate judgment is more like a JNOV motion than a new trial motion, no policy basis exists for treating the denial of a section 663 motion differently than the denial of a JNOV motion for purposes of appeal. Just as the denial of a JNOV motion is appealable, so should be the denial of a motion to vacate judgment under section 663.

CONCLUSION

For the reasons explained above, and for those set forth in opening and reply briefs on the merits, the California Academy of

Appellate Lawyers urges this Court to reverse the judgment of the Court of Appeal and hold that the denial of a section 663 motion to vacate a judgment is an appealable order.

Respectfully submitted,

Dated: January 26, 2017

By: /s/ Orly Degani

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Dated: January 26, 2017

By: /s/ Orly Degani

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