TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND **APPELLATE DISTRICT, DIVISION** FIVE	Court of Appeal Case Number: B242400
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Terrence Collingsworth (admitted PRO HAC VICE; DC Bar 471830) Conrad & Scherer, LLP 1156 15th Street NW, Suite 502 Washington, D.C. 20005 TELEPHONE NO.: 202-543-4001 FAX NO. *(Optional)*: 866-803-1125 E-MAIL ADDRESS *(Optional)*: tcollingsworth@conradscherer.com ATTORNEY FOR *(Name)*: Emperatriz Marina Mendoza Gomez, et al.	Superior Court Case Number: BC412620 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Emperatriz Marina Mendoza Gomez, et al. RESPONDENT/REAL PARTY IN INTEREST: Dole Food Company Inc., et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Emperatriz Marina Mendoza Gomez, et al.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	Emperatriz Marina Mendoz Gomez	Plaintiff/Appellant
(2)		(List of all Plaintiffs/Appellants continued on attachment 2).
(3)	Dole Food Company, Inc.	Defendant/Respondent
(4)		
(5)		

☑ Continued on attachment 2.

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

Date: December 20, 2012

Terrence Collingsworth
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

ATTACHMENT 2

Complete list of 65 Plaintiffs-Appellants by full name

1. Alcira Esther Sandoval Garcia
2. Alicia Matilde Tovar Lopez
3. Alidys Esther Rodriguez Arzuaga
4. Andrea del Carmen Lora Calderon
5. Angel Torres Niebles
6. Angela Bolano Morales
7. Angela Cecilia Orozco Badillo
8. Angelica Maria Wolf Ferreira
9. Aquilino Rafael Merino Caceres
10. Bernardina Rojas Villamizar
11. Blanca Nieves Juvinao de Avila
12. Cristobal del Cristo Ariza de Aguas
13. Damaso Teran Perez
14. Delfina Judith Osias Perez
15. Dominga Dolores Carrillo Echorbot
16. Dubis Mercedes Merino Suarez
17. Duvis Esther Carillo Cantillo
18. Edith Encarnacion Cabrera Zambrano
19. Emel Segundo Ortega Monsalvo
20. Emilio de Jesus Alfaro Hernandez
21. Emperatriz Marina Mendoza Gomez
22. Enelda Patricia Morelli Navarro
23. Esmeralda Cecilia Fontalvo Caceres
24. Flor Catalina Franco Gutierrez
25. Gilma Isabel Teran Perez
26. Gladys Calvo Parra
27. Gladys Maria Reales Melendrez
28. Graciela Maria Navas Pina
29. Ilaria Isabel Suarez de Martinez
30. Iluminada Escorcia de Silva
31. Jairo Segundo Banquez Correa
32. Jesus Manuel Obregon Mercado
33. Joohnys Arturo Bustamente Montiel

34. Josefa Cecilia Martinez de Manga
35. Josefa Isabel Polo Buelvas
36. Josefina Yaneth Nunez Avila
37. Juana Maria Torres de Ariza
38. Judith del Carmen Diaz Bolano
39. Julia Marina Garizado Amor
40. Lida Isabel Morales Pina
41. Marta Elizabeth Martinez Torres
42. Luis Yefrith Candanoza Toscano
43. Luz Marina Julio Diaz
44. Mabel del Socorro Sarmiento Julio
45. Magalis del Carmen Batista Mozo
46. Manuel de los Santo Mancilla Ferrer
47. Maria Esther Ferreira Diaz
48. Maria Victoria Sarco Polo
49. Mirian Esther Soto Charris
50. Nayeth Sofia Teran Noriega
51. Nelsis Maria Fernandez Sanjuan
52. Nelvis Maria Mendoza Caicedo
53. Niris Socorro Cantillo Rivera
54. Petrona Merino Caceres
55. Rocio Beatriz Martinez Meza
56. Rosalia Hernandez Mendoza
57. Rosiris Judith Garcia Cervantes
58. Sara Matilde Arza Martinez
59. Silvia Rosa Velasquez de Bermejo
60. Soraida Padilla Florez
61. Suleima Esther Sanjuan Castro
62. Tomas Segundo Amaranto Parejo
63. Yadira Isabel Merino Lea
64. Yanett del Carmen Lara Cuello
65. Yolanda Diaz Plata

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is the second time that Plaintiffs-Appellants are before this Court on appeal. Plaintiffs largely prevailed on the first appeal when this Court held that many of them had pled timely claims and others deserved the chance to amend their allegations to demonstrate timeliness. The superior court, however, has now misconstrued this Court's prior opinion and certain provisions of the California Code of Civil Procedure, and has dismissed the claims again. Accordingly, Plaintiffs respectfully submit that this action should once more be returned to the superior court.

The events most pertinent to this appeal begin when Judge Ann I. Jones of the superior court sustained in part a demurrer by Defendant-Respondent Dole Food Company, Inc. ("Dole"). The superior court ruled that the statute of limitations barred the claims of all but two heirs of 167 decedents murdered by members of a violent paramilitary organization known as the United Self-Defense Forces of Colombia ("AUC"). (Vol. III, JA-734 & JA-744.)[1] Plaintiffs appealed the superior court's ruling on the demurrer, and Division Five of the Second Appellate District reversed in part. (Vol. V, JA-1131.) Of note, this Court held that some Plaintiffs had

[1] References to the Joint Chronological Appendix are by volume and appendix page number and will be denoted by (Vol. __, JA-__). References to the reporter's transcript will be denoted by (R.T. at __). References to sections of Plaintiffs' brief will be denoted by (Part __).

pled timely claims while others should be given the opportunity to amend to add delayed discovery allegations. (Vol. V, JA-1124.)

Because Plaintiffs' counsel was unaware of the deadline imposed by Code of Civil Procedure section 472b,[2] none of the Plaintiffs who needed to amend filed a timely amended complaint. (Vol. V, JA-1207-1208.) The superior court, with Judge Jane L. Johnson now presiding, dismissed the entire action upon Dole's ex parte request. (Vol. V, JA-1190-1191.) The superior court, however, erred because ex parte applications are not authorized for the type of dismissal sought by Dole, and Dole did not even comply with the rules governing ex parte applications. (Part V.A, *infra*.) The superior court also erred in dismissing the claims of *all* Plaintiffs for failing to timely amend even though the majority of Plaintiffs participating in this appeal did not need to amend the active Complaint for their claims to proceed. (Part V.C, *infra*.)

Plaintiffs timely sought to set aside the dismissal, seeking relief under section 473, subdivision (b). (Vol. V, JA-1200-1209.) Plaintiffs submitted declarations by Plaintiffs' counsel describing how they inadvertently missed the filing deadline. (Vol. V., JA-1210-1214.) The superior court denied the requested relief. (Vol. VIII, JA-1991-1997.) In doing so, the superior court erred given that the mandatory relief provision

[2] Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

of section 473 was specifically intended to apply to a case dismissed for the failure to timely file an amended complaint. (Part V.B, *infra*.)

Simultaneously with their section 473 motion, Plaintiffs requested to be exempt from any cost bond requirement under section 1030. (Vol. VI, JA-1321-1331.) The superior court again denied Plaintiffs' request (Vol. VIII, JA-1985-1988) but erred in two respects. First, it erred in refusing to consider Plaintiffs' showing of indigency. (Part V.D.1, *infra*.) In so doing, the superior court denied these indisputably indigent Plaintiffs the right to litigate their case and ignored Plaintiffs' right to have their financial status duly considered by the superior court. Second, it erred in holding that these Plaintiffs should have sought appellate review of a cost bond order that did not apply to them, on which their prior dismissal was not based, and as to which they could not have properly sought review given that the order and dismissal only applied to two Plaintiffs who are no longer parties to this action. (Part V.D.2, *infra*.)

In light of the superior court's errors, Plaintiffs seek a reversal of the superior court's orders (1) dismissing the entire action (in response to an ex parte application for dismissal) and entering final judgment for Dole based on the failure to file an amended complaint within the time allowed under section 472b; (2) denying relief from dismissal under the mandatory relief provision of section 473; and (3) refusing to consider Plaintiffs' showing of

indigency and misinterpreting the prior cost bond rulings in relation to Plaintiffs' requested cost bond exemption.

II. PROCEDURAL HISTORY AND STATEMENT OF APPEALABILITY

Plaintiffs-Appellants filed suit against Dole on April 28, 2009 in the Superior Court for the County of Los Angeles, alleging claims for wrongful death, survival, battery, assault, negligent hiring and supervision, intentional infliction of emotional distress, and negligent infliction of emotional distress. (Vol. I, JA-1-68.) On April 9, 2010, Plaintiffs filed the First Amended Complaint (FAC), adding additional Plaintiffs and causes of action for civil conspiracy and negligence. (Vol. I, JA-69-225.) Plaintiffs allege that Dole paid the AUC, under the guise of "security," to carry out violent services on its behalf, which included killing the decedents whose heirs brought suit against Dole. (Vol. I, JA-69-70 at ¶¶ 1-2.) Plaintiffs seek general, special, and exemplary damages from Dole. (Vol. I, JA-225.)

On May 17, 2010, Dole filed a demurrer to the FAC on the grounds, among others, that all claims were barred by the statute of limitations. (Vol. I, JA-228-253.) On May 27, 2010, Dole also filed a cost bond motion under section 1030. (Vol. II, JA-256-274.) On June 8, 2010, Plaintiffs filed their oppositions to Dole's demurrer and cost bond motion. (Vol. III, JA-649-669 & JA-672-694.) On June 14, 2010, Dole filed its replies in support of its demurrer and cost bond motion. (Vol. III, JA-697-710 & JA-

713-725.) Oral argument on both matters was held on July 6, 2010. (R.T. at 1-45.)

On July 7, 2010, the superior court sustained in part and overruled in part Dole's demurrer. (Vol. III, JA-734 & JA-755.) The superior court held that Plaintiffs made sufficient allegations as to Dole's direct liability for their claims for civil conspiracy, intentional torts, and negligence. (Vol. III, JA-751-755.) The superior court, however, sustained the demurrer as to all but two Plaintiffs on statute of limitations grounds without leave to amend. (Vol. III, JA-755.) Regarding the two then-active Plaintiffs (Arelis Hernandez and Julio Medina) that the superior court found had pled timely claims, the superior court granted leave to amend the FAC. (Vol. III, JA-755-756.)

On the same day it ruled on the demurrer, the superior court granted Dole's cost bond motion as to two former Plaintiffs. (Vol. III, JA-757 & JA-766-767.) In its opinion, the superior court stated that, "[a]fter the ruling on the demurrer, there are only two plaintiffs remaining in this lawsuit." (Vol. III, JA-766.) (The superior court was referring to Hernandez and Medina.) The superior court then required "each plaintiff in this action" (i.e., Hernandez and Medina) to post a cost bond. (Vol. III, JA-767.)[3]

[3] Because of security concerns stemming from being the only two individuals remaining to challenge Dole and its AUC collaborators,

On September 10, 2010, Dole sought ex parte dismissal of the FAC. (Vol. III, JA-768-773.) Dole requested that all Plaintiffs' claims be dismissed for various reasons, but only requested that the claims of Hernandez and Medina be dismissed for failing to post a cost bond. (Vol. III, JA-773.) On September 14, 2010, the superior court dismissed the action with prejudice and entered judgment for Dole. (Vol. IV, JA-785-786 & JA-787-796.)

On November 15, 2010, Plaintiffs filed a notice of appeal. (Vol. IV, JA-845-846.) On October 27, 2011, Division Five of the Second Appellate District affirmed in part and reversed in part. (Vol. V, JA-1131.) On the statute of limitations issue, this Court ruled that some Plaintiffs had pled timely claims while others should be given the opportunity to amend to add delayed discovery allegations. (Vol. V, JA-1124.)

On January 3, 2012, the clerk of the Court mailed notice of the issuance of the remittitur. (Vol. V, JA-1132.) Plaintiffs did not file an amended Complaint within the 30-day period of section 472b following that notice. (Vol. V, JA-1207-1208.) On February 14, 2012, Dole filed an ex parte application for dismissal, setting the hearing for the following day. (Vol. V, JA-1163-1168.) Plaintiffs asked Dole to re-schedule the hearing for the following week because Plaintiffs' counsel could not personally

---

Hernandez and Medina decided not to proceed with the action after all other Plaintiffs were dismissed. (R.T. at 609:21-610:6.)

attend it as scheduled. (Vol. V, JA-1219.) Dole refused and the hearing was held on February 15, 2012. (R.T. at 603:17-604:5.) Plaintiffs' counsel participated by telephone during part of the hearing, but only after a significant portion of the hearing had already occurred. (R.T. at 301:9-308:4 [excluding Plaintiffs' counsel]; R.T. at 308:5-322:28 [including Plaintiffs' counsel].) The superior court entered an order of dismissal that same day. (Vol. V, JA-1190-1191.)

On April 2, 2012, Plaintiffs filed a motion for relief from dismissal under section 473, subdivision (b). (Vol. V, JA-1200-1209.) The motion was accompanied by a proposed Second Amended Complaint on behalf of 65 Plaintiffs whose claims were still viable in light of this Court's opinion on the statute of limitations issue. (Vol. V, JA-1222-1320.) That proposed pleading added, among other things, allegations concerning delayed discovery for Plaintiffs that this Court determined required such allegations. (Vol. V, JA-1226 ¶ 13.) On the same day, and in response to exchanges with the superior court at the February 2012 hearing, Plaintiffs submitted 63 declarations individually attesting to their financial status and requested an exemption from any cost bond requirement under section 1030. (R.T. at 312:28-313:16 & R.T. at 317:25-318:12 [exchanges at hearing]; Vol. VI,

JA-1321-1331 [motion]; Vol. VI, JA-1335-1588 & Vol. VII, JA-1589-1831 [declarations].)[4]

Dole filed an opposition to Plaintiffs' section 473 motion on April 24, 2012 (Vol. VIII, JA-1858-1877) and Plaintiffs filed their reply on May 2, 2012 (Vol. VIII, JA-1902-1912). Dole filed an opposition to Plaintiffs' motion for a cost bond exemption on May 3, 2012 (Vol. VIII, JA-1917-1930) and Plaintiffs filed their reply on May 15, 2012 (Vol. VIII, JA-1949-1959). The superior court held oral argument on May 30, 2012 (R.T. at 601-652), and then, on May 31, 2012, denied both motions (Vol. VIII, JA-1985-1988 & JA-1991-1997). Judgment was entered on July 2, 2012. (Vol. VIII, JA-2001-2011.) Plaintiffs filed their notice of appeal on the same day. (Vol. VIII, JA-2115-2116.)

Judge Ann I. Jones presided over this action through at least July 7, 2010. (Vol. VIII, JA-2138.) Judge Jane L. Johnson began presiding over it no later than February 15, 2012. (*Ibid.*) Judge Jones issued all relevant rulings prior to the first appeal, and Judge Johnson issued all rulings following that appeal.

This appeal is from the judgment for Dole based on the failure to file an amended complaint within the time allowed under section 472b; from the order denying relief from dismissal under the mandatory relief

[4] Plaintiffs submitted one additional declaration with their reply brief. (Vol. VIII, JA-1950-1951 at fn. 3 & JA-1969-1976.)

provision of section 473; and from the order denying an exemption from any cost bond requirement under section 1030. The appeal from the judgment is authorized by section 904.1, subdivision (a)(1). Orders denying motions for relief under section 473 and entering judgment against plaintiffs for an alleged failure to pay a cost bond under section 1030 are likewise appealable. (*Huh v. Wang* (2008) 158 Cal.App.4th 1406, 1413 (*Huh*) ("if the appeal is from the denial of a motion for relief under section 473, as it purports to be, the order is appealable"); *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 136 (*English*) (involving appeal of denial of motion under section 473); *Yao v. Super. Ct.* (*Lovell*) (2002) 104 Cal.App.4th 327, 330 n.2 (holding that judgment of dismissal after court finds that plaintiff failed to furnish a cost bond is appealable as a final judgment); *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421 (*Alshafie*) (involving appeal of dismissal based on failure to pay section 1030 cost bond).)

III. STATEMENT OF FACTS

The Plaintiffs-Appellants are heirs of decedents murdered in Colombia by the AUC, a paramilitary terrorist organization to which Dole provided financial support in exchange for the AUC's violent services. (Vol. I, JA-69-70 at ¶¶ 1-2.) Several AUC leaders, including Salvatore Mancuso and Jose Gregorio Mangones, have confirmed that Dole provided substantial support to the AUC. (Vol. I, JA-71-72 at ¶¶ 5-7.) For more

details, Plaintiffs incorporate by reference the statement of facts from the prior appeal. (Vol. IV, JA-866-874.)

IV. STANDARD OF REVIEW

"Statutory interpretation is a question of law, which appellate courts review de novo." (*Huh*, *supra*, 158 Cal.App.4th at p. 1418.) Plaintiffs' challenges relating to the availability of ex parte procedures for a dismissal under section 472b; what conduct violates Superior Court of Los Angeles County Local Rules, rule 3.26, appendix 3.A(j)(2); and the scope of section 473's mandatory relief provision are therefore all subject to de novo review. (E.g., *Huh*, *supra*, 158 Cal.App.4th at p. 1418 [holding that review is de novo where appeal turns on construction of section 473].) Plaintiffs' challenges to Judge Johnson's interpretation of prior orders by this Court and by Judge Jones are likewise subject to de novo review. (*Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779-80 [holding that an issue involving case law is a "pure question of law" subject to de novo review].) Finally, a court's refusal to waive or vacate a cost bond is reviewed for abuse of discretion. (*Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1436 (*Baltayan*) [superior court abused its discretion when it required an indigent plaintiff "to do the impossible, i.e., post a $22,000 undertaking"].)

V. ARGUMENT

A. The Superior Court Erred in Dismissing the Action Based on Dole's Improper Ex Parte Application.[5]

Instead of noticing a motion and seeking dismissal after the issue could be fully researched and briefed by Plaintiffs, Dole rushed to the superior court with an improper ex parte application. Indeed, until the day before the hearing on Dole's ex parte application, Plaintiffs had no idea Dole intended to seek dismissal. Making matters worse, Dole did not abide by the rules governing ex parte applications. For both reasons, the superior court's judgment granting Dole's ex parte request should be reversed. Refusing to reverse on these grounds would punish Plaintiffs for their procedural mistake (missing a filing deadline) while rewarding Dole for a similar mistake.

[5] Plaintiffs' objections to Dole's ex parte application highlight the fact that the superior court did not provide Plaintiffs with a full and fair opportunity to oppose the requested dismissal. Nonetheless, if the Court reverses the superior court on this ground, Plaintiffs request that it still consider Plaintiffs' arguments concerning relief from dismissal under section 473 and the requested cost bond exemption. Otherwise, it is possible that the superior court will dismiss the action again and deny Plaintiffs' renewed motions concerning relief from dismissal and the cost bond exemption, forcing Plaintiffs to appeal yet again. Resolving all issues now would avoid yet more delay in this action and conserve the resources of all involved.

1. Ex Parte Applications Are Not Authorized Where the Defendant Seeks Dismissal Based on a Plaintiff's Failure to Comply with Section 472b.

There is no dispute that Plaintiffs who needed to file amended allegations did not file an amended pleading "within 30 days after the clerk of the reviewing court mails notice of the issuance of the remittitur." (Code Civ. Proc., § 472b.) But Dole should not have sought dismissal via an ex parte application. The plain language of the governing statutes and rules demonstrates that ex parte applications are not allowed under these circumstances.

Dole now claims that it moved for dismissal under section 581, subdivision (f)(2) (hereafter "section 581(f)(2)").[6] Under Rule of Court 3.1320, subdivision (h) (hereafter "Rule of Court 3.1320(h)"), ex parte applications to dismiss are allowed where dismissal is premised on section 581(f)(2). Yet section 581(f)(2) does not apply to the type of dismissal at issue here, so it follows that Dole improperly used ex parte procedures.

Section 581(f)(2) only applies, by its terms, to demurrers sustained with leave to amend *by the superior court*, and dismissal is allowed under

[6] Dole originally announced that it would base its ex parte application for dismissal on section 581, subdivision (f)(1). (Vol. V, JA-1189.) Dole then relied on that subdivision in part of its ex parte application. (Vol. V, JA-1164.) Although neither subdivision (f)(1) nor (f)(2) of section 581 was an appropriate ground for dismissal here, Plaintiffs suspect that Dole is actually relying on section 581(f)(2). Nonetheless, the confusion caused by Dole's inability to clearly identify the subdivision of section 581 that it relied on is yet another reason for reversing the superior court judgment.

the statute when "the plaintiff fails to amend [the complaint] within the time allowed by the court." (Code Civ. Proc., § 581, subd. (f)(2).) The statute's use of the term "court" refers to the superior court. (Code Civ. Proc., § 581, subd. (a) [defining "court" as "the court in which the action is pending"].) Dismissal was entered, of course, when the action was pending before the superior court. The deadline at issue, however, was not set by the superior court, so section 581(f)(2) is not applicable. Moreover, section 581(f)(2) cannot apply to remand orders from the appellate court. Remand orders do not include court-imposed deadlines for amending, and section 581(f)(2) only applies to court-imposed deadlines. (Code Civ. Proc., § 472b [involving 30 day statutory deadline]; Code Civ. Proc., § 581, subd. (f)(2) [statute applies when "the plaintiff fails to amend within the time allowed by the court"].)

In this case, the superior court neither granted leave to amend nor set the time allowed to amend. Rather, this Court granted Plaintiffs leave to amend, and a statute (section 472b) set the deadline for amending. Section 581(f)(2) has no application here and the ex parte procedures authorized by Rule of Court 3.1320(h) (which expressly apply to section 581(f)(2) dismissals) are therefore inapplicable. Furthermore, Rule of Court 3.1320(h) says nothing about section 472b, and Plaintiffs have not been

able to identify any authority holding that an ex parte application for dismissal is allowed when section 472b's deadline is missed.[7]

Without a valid basis for using ex parte procedures, Dole should have filed a noticed motion. By dismissing the action without requiring a noticed motion, the superior court erred.

2. Even If Ex Parte Applications Are Authorized Here, Dole Did Not Comply with the Requirements for Such Applications.

Given the unique nature of ex parte proceedings, special requirements apply to avoid prejudice to the opposing party. The superior court's rules state:

> Where the law permits an ex parte application to the court, a lawyer must make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and make reasonable efforts to accommodate the schedule of the party or lawyer to permit that person to be present when the application is made.

(Super. Ct., L.A. County, Local Rules, rule 3.26, appendix 3.A(j)(2).) Dole indisputably violated this rule. Plaintiffs requested that the ex parte hearing be re-scheduled for the following week, citing the fact that counsel

[7] While *Pagarigan v. Aetna U.S. Healthcare of California, Inc.* (2007) 158 Cal.App.4th 38, 41 (*Pagarigan*), involved an ex parte application for dismissal under similar circumstances, the opinion did not discuss the propriety of the ex parte process, and there is no indication that the plaintiffs even objected to the process. Notably, instead of deciding the matter at the first ex parte hearing, the court ordered further briefing and continued the matter for about a month. (*Ibid.*) The events in *Pagarigan* thus more closely resembled the timeline of a noticed motion than an ex parte application.

Terrence Collingsworth was in Washington, D.C. and that counsel David Grunwald had a conflict. (Vol. V, JA-1219 [requesting that Dole "work with us to schedule a hearing date next week that will permit an appearance by counsel for the Plaintiffs"].) Dole refused to re-schedule the hearing. (R.T. at 603:17-604:5.) Accordingly, Dole made no "reasonable efforts to accommodate" Plaintiffs' counsel's schedule to allow counsel to be "present" at the ex parte hearing. (Super. Ct., L.A. County, Local Rules, rule 3.26, appendix 3.A(j)(2).)

Notably, if the tables were turned and Plaintiffs were seeking a default from Dole for failing to file an answer, Plaintiffs would have to allow Dole an opportunity to cure its default. (*Fayusi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 701, emphasis in original [providing opposing counsel with a "warning" about the required responsive pleading before seeking a default "is at the least an *ethical* obligation of counsel"]; *id.* at p. 702, emphasis in original ["'If you're representing plaintiff, and have had *any* contact with a lawyer representing defendant, don't even *attempt* to get a default entered without first giving such lawyer *written* notice of your intent to request entry of default, and a *reasonable time* within which defendant's pleading must be filed to prevent your doing so.'"].)

As a matter of professional courtesy, Dole should have allowed Plaintiffs a reasonable time to file their amended complaint after learning of the expired deadline. As a matter of law, Dole should not have rushed to

the superior court to seek an ex parte dismissal while ignoring its duty to make "reasonable efforts to accommodate" Plaintiffs' counsel's schedule. (Super. Ct., L.A. County, Local Rules, rule 3.26, appendix 3.A(j)(2).) The superior court erred by allowing Dole to violate the rules and prevail on its ex parte request, thereby denying Plaintiffs any opportunity to reach the merits of their serious claims against Dole.

B. The Superior Court Erred in Denying Plaintiffs' Motion for Mandatory Relief Under Section 473.[8]

Plaintiffs moved for relief under the discretionary and mandatory provisions of section 473, subdivision (b). The superior court denied relief under both provisions. While firmly believing the superior court erred in both respects, Plaintiffs do not want to burden the Court with significantly

[8] The relevant part of the statute reads: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310." (Code Civ. Proc., § 473, subd. (b).)

overlapping arguments. Instead, Plaintiffs will focus their argument on the mandatory provision of section 473.[9]

The superior court made a clear error in denying mandatory relief under section 473. As demonstrated below, the provision for mandatory relief from dismissals was specifically designed for situations where, as here, a plaintiff fails to file an amended complaint on time. Accordingly, mandatory relief from dismissal is more appropriate here than for any other type of dismissal.

1. Plaintiffs Meet All Statutory Requirements for Mandatory Relief Under Section 473.

Mandatory relief under section 473 has three basic statutory requirements: (1) the request must be made "no more than six months after entry of judgment"; (2) the request must be "in proper form"; and (3) the request must be "accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect." (Code Civ. Proc., § 473, subd. (b).) Plaintiffs met each requirement (Vol. V, JA-1206-1208), and Dole did not contend otherwise (Vol. VIII, JA-1875-1876).[10] As

[9] Plaintiffs, for example, could demonstrate that discretionary relief should have been afforded based on their "inadvertence." (*Baratti v. Baratti* (1952) 109 Cal.App.2d 917, 921 [defining inadvertence "as lack of heedfulness or attentiveness"].) Although each ground for discretionary relief under Section 473 has a separate meaning, (*ibid.* [defining each term differently]), the trial court mistakenly conflated the meanings. (Vol. VIII, JA-1995-1996.)

[10] Instead, both Dole and the superior court apparently took the position that the factual situation at issue—where Plaintiffs did not file an amended

demonstrated in the following sections, no other factor bars relief here, so the superior court was *required* to grant it. (*SJP Ltd. P'ship v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516 ["If the prerequisites for the application of the mandatory relief provision of Section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief."]; *Rodrigues v. Superior Court* (2005) 127 Cal.App.4th 1027, 1033 ["Relief is mandatory when a complying affidavit is filed, even if the attorney's neglect was inexcusable."].)

2. Relief Is Mandatory Under Section 473 for Dismissals Resulting from the Failure to Timely File an Amended Complaint.

The purpose of amending section 473 in 1992 to include relief from a "dismissal" was to provide "a remedy when a case is dismissed for failure to file a charging pleading." (*Yeap v. Leake* (1997) 60 Cal.App.4th 591, 604 (*Yeap*) (dis. opn. of Epstein, J.); see also *Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1071 (*Jerry's Shell*) [stating that "Justice Epstein's reasoning [in *Yeap*] has found favor with courts"].) Here, Plaintiffs failed to file a charging pleading (i.e., an amended complaint), and their action was dismissed. (E.g., *Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1135 [describing an amended

---

complaint on time—is not something the statute was aimed at addressing. (Vol. VIII, JA-1875-1876 [part of Dole's brief] & JA-1996-1997 [part of section 473 opinion].) As demonstrated below, section 473 is intended to provide relief for that precise situation. (Part V.B.2.a & V.B.2.b, *infra*.)

complaint as a "charging pleading"].) Section 473 mandatory relief is thus tailor-made for this case, and the superior court erred in denying such relief.

a. The 1992 Amendments to Section 473 Were Designed to Provide a Remedy for a Dismissal for Failing to Timely File an Amended Complaint.

Prior to 1992, the mandatory relief provision of section 473 did not expressly apply to dismissals. As Justice Epstein of Division Four of the Second Appellate District has explained, the "dismissal provision was added to the mandatory portion of section 473, apparently as a response to [*Billings v. Health Plan of America* (1990) 225 Cal.App.3d 250 (*Billings*)]. In *Billings*, the court held that a default had not occurred after an action was dismissed following the sustaining of a demurrer with leave to amend and the failure of the plaintiff to amend within the allotted time." (*Yeap*, *supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).)

Because section 473, at the time *Billings* was decided, did not provide relief for a plaintiff missing the deadline for filing an amended complaint, the Legislature acted to provide such relief: "The purpose of the [1992] amendment was to give plaintiffs the functional equivalent of the 'default' provision for defendants: a remedy when a case is dismissed for failure to file a charging pleading or an answer." (*Yeap*, *supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).) The purpose of the 1992 amendments was thus entirely consistent with the historical purpose of section 473's mandatory relief provision, which was to provide relief when

attorneys miss filing deadlines. (*Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 911, emphasis in original [quoting letter from drafter of 1988 amendment to section 473 stating that "[c]lients *who have done nothing wrong* are often denied the opportunity to defend themselves, simply because of the mistake or inadvertence of their attorneys *in meeting filing deadlines*"].)

In summary, *Billings* held that the 1988 amendment to section 473 (which added the mandatory relief provision for defaults only) did not apply to a dismissal resulting from the plaintiff's failure to file an amended complaint on time. (*Billings*, *supra*, 225 Cal.App.3d at pp. 252-53.) In 1992, the Legislature patched the hole in section 473 that *Billings* exposed by including dismissals under the mandatory relief provision. (See *Yeap*, *supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).) Accordingly, the Legislature, in amending section 473 in 1992, intended to provide mandatory relief, at the very least, for the situation encountered in *Billings* and the case at bar: when a dismissal occurs because the plaintiff fails to file a timely amended complaint.

b. Section 473 Jurisprudence Demonstrates that a Dismissal for Failing to Timely File an Amended Complaint Merits Mandatory Relief.

The evolution of section 473 decisions in the Second Appellate District is consistent with the purpose of the 1992 amendment and demonstrates that Justice Epstein's *Yeap* dissent provides the best

description of the scope of the term "dismissal" under the mandatory relief provision. In short, a "dismissal" for purposes of the statute occurs where "a case is dismissed for failure to file a charging pleading." (*Yeap*, *supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).)

Decided in 1997, the *Yeap* majority took an expansive view of section 473 that was largely detached from the statutory language. (*Yeap*, *supra*, 60 Cal.App.4th at p. 601 [granting mandatory relief where the judgment "was analogous to a default because it came about as a result of appellant's failure to appear and litigate at the arbitration hearing"].) Justice Epstein disagreed with the majority's statutory interpretation, asserting that "[i]f the Legislature had intended to require relief whenever a client loses his or her day in court due to attorney error, it could easily have said so." (*Id.* at p. 604 (dis. opn. of Epstein, J.).) He reasoned, instead, that dismissals under section 473 are those that occur "when a case is dismissed for failure to file a charging pleading or an answer." (*Ibid.*; see also *ibid.* ["The Legislature has balanced the competing interests so that, where a party is out of court for failure to file a charging or responsive pleading due entirely to the fault of counsel, relief is mandatory; otherwise it is discretionary."].) Under Justice Epstein's approach, the instant case (involving the failure to file a "charging pleading" on time) merits relief.

The very next year, the Second Appellate District (with Justice Epstein concurring) applied section 473's mandatory provision in ruling

that it was error to refuse to vacate a dismissal stemming from the failure of an attorney to file a signed amended complaint on time. (*Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 770-71 (*Vaccaro*).) In *Vaccaro*, the defendants moved to strike the amended complaint because it was not signed by counsel. (*Id.* at p. 764.) Although the plaintiff's attorney later submitted a signed (but untimely) pleading, the court granted the motion to strike and dismissed the action, and subsequently denied the plaintiff's motion for mandatory relief under section 473. (*Id.* at p. 766.) The appellate court did not discuss the meaning of the term "dismissal" under section 473, but it had no trouble finding that the statute's mandatory relief provision applied. (*Id.* at p. 770 ("Plaintiff fully satisfied the conditions of this provision mandating that the dismissal be set aside.").) Accordingly, *Vaccaro* reversed the superior court's denial of mandatory relief under section 473 where a signed amended complaint was not filed on time. (*Id.* at p. 771.)

Several years later, the Second Appellate District was confronted with another opportunity to apply section 473's mandatory relief provision in a case involving the failure to file a proper amended complaint on time. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 607 & 611-12 (*Leader*) [involving a late amended complaint and a section 473 motion filed before dismissal].) Yet in affirming the denial of relief under section 473 (*id.* at p. 621), the court in *Leader* virtually ignored *Yeap*,

and instead claimed "[w]e have not been cited to any case precisely on point." (*Leader*, *supra*, 89 Cal.App.4th at p. 617.) The failure of the parties in *Leader* to bring relevant authority to the court's attention is also underscored by the omission of any discussion of *Vaccaro* in the opinion. *Leader*'s outcome and the absence of any discussion of the relevant aspects of *Yeap* and *Vaccaro* demonstrate that it is an outlier among cases discussing how section 473 applies to missed deadlines for complaints. (*Leader*, which the superior court appears to have relied on, is fully critiqued and distinguished in Part V.B.6 below.)

After the detour in *Leader*, the Second Appellate District began to embrace the *Yeap* dissent. In 2005, the majority opinion in another section 473 case noted that "recently . . . Justice Epstein's reasoning has found favor with courts." (*Jerry's Shell*, *supra*, 134 Cal.App.4th at p. 1071.) The majority there quoted Justice Epstein's statement that the purpose of the 1992 amendment to section 473 was "to give plaintiffs the functional equivalent of the 'default' provision for defendants: a remedy when a case is dismissed for failure to file a charging pleading or an answer." (*Ibid.*) Given the limited issue it faced, the *Jerry's Shell* majority felt that it "need not resolve at this time, however, whether this means we should reconsider [the majority] holding in *Yeap*." (*Jerry's Shell*, *supra*, 134 Cal.App.4th at p. 1073.) In addition to the majority's favorable discussion of the *Yeap* dissent, Justice Epstein wrote a concurring opinion stating that he continued

to believe that *Yeap*'s majority opinion "was wrongly decided," specifically invoking his dissent in that case. (*Jerry's Shell, supra*, 134 Cal.App.4th at p. 1075.)

While the *Yeap* dissent was cementing its place in Second Appellate District jurisprudence, it was also gaining adherence from other appellate districts. (*English, supra*, 94 Cal.App.4th 130.) *English* relied heavily on language from the *Yeap* dissent. (*English, supra*, 94 Cal.App.4th at p. 145 [quoting approvingly the *Yeap* dissent's description of the purpose of the 1992 amendment: "to give plaintiffs the functional equivalent of the 'default' provision for defendants"];[11] *id.* at p. 148 [citing the *Yeap* dissent three more times].) *English* thus endorsed Justice Epstein's discussion of the scope of section 473. (*Huh, supra*, 158 Cal.App.4th at p. 1417 ["[*English*] embraced the rationale expressed in Justice Epstein's dissent in *Yeap*. [Citation.] Subsequent cases have also endorsed that reasoning."].)

Finally, in 2007, the Second Appellate District, in an opinion by Justice Epstein, abrogated the majority holding in *Yeap*. (*Hossain v. Hossain* (2007) 157 Cal.App.4th 454, 458 (*Hossain*) [criticizing the "broad reading" *Yeap* gave to section 473 and approving of cases that "interpret the mandatory provision according to its terms"].) Because *Hossain* turned on

[11] The entire sentence from the *Yeap* dissent reads: "The purpose of the amendment was to give plaintiffs the functional equivalent of the 'default' provision for defendants: a remedy when a case is dismissed for failure to file a charging pleading or an answer." (*Yeap, supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).)

the scope of the terms "default" and "default judgment," the court was not presented with the opportunity to expressly adopt the definition of "dismissal" laid out in the *Yeap* dissent. Yet *Hossain* was written by Justice Epstein and it abrogated a majority opinion issued over his dissent, so *Hossain* at least implicitly endorsed the entire *Yeap* dissent. (*Hossain*, *supra*, 157 Cal.App.4th at p. 458 [contrasting *Yeap* majority and dissenting opinions].)[12] Accordingly, this Court should now confirm that section 473 provides "a remedy when a case is dismissed for failure to file a charging pleading." (*Yeap*, *supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).) Such a holding would be true to the statute's history and purpose and would "interpret the mandatory provision according to its terms." (*Hossain*, *supra*, 157 Cal.App.4th at p. 458.)

Because Justice Epstein's opinions, including in *Yeap* and *Hossain*, reflect the correct view of section 473, Plaintiffs' dismissal qualifies for relief and the superior court's denial of mandatory relief must be reversed.

3. In the Alternative, a Dismissal for Failure to Timely Amend the Complaint Is Akin to a Default.

Dole has advanced the view, supported by some early decisions interpreting the amended statute, that section 473 only affords relief for dismissals that are akin to defaults. (Vol. VIII, JA-1875; *Peltier v.*

[12] Notably, *Hossain* also cited *Vaccaro* favorably. (*Hossain*, *supra*, 157 Cal.App.4th at p. 457 [citing *Vaccaro* for the proposition that "there is no requirement that the attorney's mistake or inadvertence be excusable" under Section 473's mandatory relief provision].)

McCloud River R.R. Co. (1995) 34 Cal.App.4th 1809, 1817 (*Peltier*) [discussing "dismissals which are procedurally equivalent to a default"].) This standard, when divorced from the statutory language and history, has unfortunately caused more conflicts than clarity. (Compare *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868 [granting mandatory relief in summary judgment context because plaintiff's late opposition was "directly analogous to a default judgment"] with *English*, *supra*, 94 Cal.App.4th at pp. 144-47 [disagreeing with *Avila*].) Indeed, in abrogating the *Yeap* majority opinion, *Hossain* emphasized the importance of focusing on the statutory terms rather than this confusing standard:

> [The plaintiff] cites a line of authority granting relief under the mandatory provision in situations which they describe as the procedural equivalent of a default. [Citations.] These cases, of which *Yeap* is by this Division, give a broad reading to the statutory term 'default' and 'default judgment.' Other cases interpret the mandatory provision according to its terms. We find these cases more persuasive.

(*Hossain, supra,* 157 Cal.App.4th at pp. 457-58.) *Hossain* thus explicitly held that cases "interpret[ing] the mandatory provision according to its terms" are "more persuasive" than cases turning on a finding of whether "the procedural equivalent of a default" was involved. (*Ibid.*)

If this Court, however, embraces the standard that only dismissals which are the procedural equivalents of defaults qualify for mandatory section 473 relief, Plaintiffs are still entitled to such relief. The dismissal at issue could be no more default-like. Defaults occur when a defendant does

not file a pleading—an answer—on time. (*English, supra*, 94 Cal.App.4th at p. 143; *Hossain, supra*, 157 Cal.App.4th at p. 458.) The dismissal here occurred when Plaintiffs did not file a pleading—an amended complaint—on time. Thus, the dismissal was the procedural equivalent of a default because it happened (just like a default) when a pleading was not filed on time. Indeed, the "purpose of the [1992] amendment [to section 473] was to give plaintiffs the functional equivalent of the 'default' provision for defendants: a remedy when a case is dismissed for failure to file a charging pleading or an answer." (*Yeap, supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).)

A leading treatise on California law recognized that a dismissal for failing to timely file an amended complaint is the procedural equivalent of a default. In discussing the 1988 amendment to section 473 providing for mandatory relief from defaults (which pre-dated the parallel relief for dismissals), the treatise cautioned:

> The amendment primarily benefits defense counsel. There is *no equivalent provision for mistakes by plaintiffs' counsel!* (For example, relief is not mandatory where a complaint is dismissed for plaintiff's counsel's failure to amend after a demurrer is sustained.)

(*Billings, supra*, 225 Cal.App.3d at p. 257, emphasis in original [quoting Weil and Brown, Cal. Practice Guide: Civ. Proc. Before Trial (The Rutter Group 1990) Defaults, § 5:182.7a].) The 1992 amendment was, of course,

the "equivalent provision" for plaintiffs that the treatise recognized the statute had lacked.

Ignoring the obvious parallel between a default and dismissal resulting from the failure to file the relevant pleading (an answer and complaint, respectively), some cases have advanced the position that section 473 applies to "only those dismissals which occur through failure to oppose a dismissal motion." (*Peltier*, *supra*, 34 Cal.App.4th at p. 1817.) Even if this Court agrees that section 473 may *sometimes* apply to a plaintiff's failure to oppose dismissal, there is no reason to conclude that section 473 *only* applies to that situation. As previously demonstrated, section 473's dismissal provision was actually designed for where "a case is dismissed for failure to file a charging pleading." (See *Yeap*, *supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).) Thus, the provision must at least apply to the situation at issue here; its application to other situations is beyond the scope of this appeal.

4. The Superior Court Erred in Relying on Plaintiffs' Limited Participation in the Ex Parte Hearing to Deny Mandatory Relief.

The superior court's discussion of the mandatory relief provision ran fewer than two full pages. (Vol. VIII, JA-1996-1997.) The superior court ruled that "the mandatory provisions of §473 is [sic] not applicable" because Plaintiffs "had an opportunity to appear and oppose the motion to dismiss." (Vol. VIII, JA-1997.) Its denial of section 473 relief, premised

on Plaintiffs' limited participation in the ex parte hearing over Plaintiffs' objection that the hearing should have been rescheduled, was incorrect for several reasons.

First, a rule denying mandatory relief from dismissal when the plaintiff has "an opportunity to appear and oppose" is based on the faulty premise that section 473 relief only applies to plaintiffs who fail to oppose a motion to dismiss. As demonstrated above, section 473 relief from dismissal applies, at the very least, where a plaintiff fails to file a timely amended complaint. (Part V.B.1 & V.B.2, *supra*.) The availability of relief turns on why the plaintiff's action was dismissed, not whether an opposition was filed prior to dismissal. (*Ibid.*) By contrast, basing relief on whether or not a plaintiff opposes dismissal has no basis in the statute's language or purpose.

Second, imposing a no-opposition requirement under section 473 would lead to absurd results by penalizing plaintiffs who act diligently once they learn about a prospective dismissal. Here, had Plaintiffs' counsel not been able to make their objections known to Dole by letter and participate in the ex parte hearing telephonically—all with just a day's notice—Dole would not be able to claim that Plaintiffs' actions in opposition to the relief sought by Dole had any significance. Under the superior court's approach, Plaintiffs' diligence was penalized, an outcome that cannot be reconciled with other parts of the statute. (*Huh*, *supra*, 158 Cal.App.4th at p. 1420

[stating that discretionary relief "is not warranted unless the moving party demonstrates diligence in seeking it"].) The statute should not be interpreted to require plaintiffs to sometimes act swiftly to correct the consequences of their mistakes but at other times do nothing.

Third, even if this Court adopts a rule categorically denying section 473 relief where the plaintiff opposes dismissal, such a rule could not apply where, as here, Plaintiffs had no *meaningful* opportunity to oppose. As outlined above (Part V.A.1, *supra*), Dole should have noticed a motion rather than seek an ex parte dismissal. And to the extent an ex parte process was permissible, Dole did not even follow the applicable rules.

Furthermore, the superior court's ruling badly misconstrues the factual context by asserting that Plaintiffs "had an opportunity to appear and oppose the motion to dismiss." (Vol. VIII, JA-1997.) First, there was no "motion to dismiss," just an ex parte application. (Vol. V, JA-1163-1168.) Second, rather than being allowed to make a personal appearance, the ex parte hearing was scheduled without regard to Plaintiffs' counsel's schedule and excluded Plaintiffs' counsel from even telephonic participation for approximately one-third of the hearing. (Part V.A.2, *supra* [discussing Dole's refusal to reschedule hearing]; R.T. at 301:9-308:4 [excluding Plaintiffs' counsel from hearing].) Third, Plaintiffs did not have the opportunity to file a proper opposition brief to Dole's ex parte application in the superior court. (R.T. at 304:5-14.) Instead, the superior

court was only provided with a copy of Plaintiffs' two-page letter to Dole opposing Dole's requested relief and specifically requesting that the hearing be postponed a few days. (R.T. at 301:17-22, 308:15-18 & 603:26-604:5 [exchanges concerning Plaintiffs' letter]; Vol. V, JA-1219-1220 [Plaintiffs' letter].)

5. There Was No Misconduct by Plaintiffs That Would Allow the Denial of Mandatory Relief.

As shown herein, plaintiffs failing to file an amended complaint on time are entitled, as a general rule, to mandatory relief under section 473. But there is an exception for plaintiffs engaged in intentional misconduct. (*Pagarigan, supra,* 158 Cal.App.4th at pp. 45-46 [denying mandatory section 473 relief for failure to timely file an amended complaint because the failure was due to "knowing and intentional conduct"]; *Jerry's Shell, supra,* 134 Cal.App.4th at p. 1073 [holding that section 473 relief is not available for an "intentional strategic decision" causing the dismissal].)

Plaintiffs have not engaged in any misconduct intended to lead to the dismissal at issue. The record is clear that Plaintiffs made an honest mistake (Vol. V, JA-1210-1214), and no finding by the superior court suggests otherwise. Plaintiffs certainly did not stand to benefit from missing the filing deadline. To the contrary, Plaintiffs will suffer, at the least, a significant delay in trying their case, even if they prevail on appeal.

6. *Leader* Is Not Persuasive Authority for the Definition of "Dismissal" Under Section 473.

Dole's argument on mandatory relief under section 473 before the superior court rested essentially on one case: *Leader*, *supra*, 89 Cal.App.4th 603. The superior court erroneously embraced that decision, dedicating a significant portion of its brief discussion of section 473's mandatory provision to a long block quote from *Leader*. (Vol. VIII, JA-1997.) While the use of selective quotes from *Leader* may suggest it supports Dole's position and the superior court's ruling, a closer read of the lengthy opinion demonstrates the many flaws in applying *Leader* to the case at hand. The superior court thus erred in relying on *Leader*.

First, *Leader* involved an attempt to use section 473 to preempt dismissal. (*Leader*, *supra*, 89 Cal.App.4th at p. 611, emphasis in original [noting that plaintiffs' "motion under section 473 was brought to preclude *entry* of a dismissal, rather than to vacate one"].) After missing the court-imposed deadline to amend, the plaintiffs in *Leader* filed a motion for relief under section 473, but did so before the defendants had even moved to dismiss the action. (*Id.* at pp. 608-10.) That makes any discussion of whether section 473 could have been used to vacate a dismissal *dicta*. Indeed, the *Leader* court expressly acknowledged that plaintiffs were not appealing the denial of a request to vacate a dismissal. (*Ibid.* ["An order denying a motion to vacate a judgment or dismissal under section 473 is

appealable [citation], but plaintiffs have not specifically noticed such an appeal . . . ."]; *id.* at p. 607 [the plaintiffs argued that "section 473's mandatory relief provision . . . precluded dismissal of the action"].)

Under these circumstances, the *Leader* court was faced with deciding whether the plaintiffs' preemptive use of section 473 was permitted. The court held, in no uncertain terms, that plaintiffs' proposed use of section 473 was not allowed by the statute:

> Mandatory relief only extends to *vacating* a default which will result in the entry of a default judgment, a default judgment, or an *entered* dismissal. Plaintiffs' preemptive use of the mandatory relief provision to avoid any potential adverse ruling on the pending motions was therefore inappropriate.

(*Leader*, *supra*, 89 Cal.App.4th at p. 616, emphasis in original.) Plaintiffs agree that section 473 may only be used in reaction to a dismissal—not in anticipation of one. Accordingly, because *Leader's* discussion of when section 473 could be used to vacate a dismissal (as opposed to preempting dismissal) was *dicta*, the superior court erred in relying on it.

Second, even if not *dicta*, *Leader*'s purported holding was expressly limited and does not reach the facts of this case. Specifically, *Leader* purported to expand a supposed list of dismissals not qualifying for mandatory relief under section 473 to include "discretionary dismissals based on the failure to file an amended complaint after a demurrer has been sustained with leave to amend, at least where, as here, the dismissal was

entered after a hearing on noticed motions which required the court to evaluate the reasons for delay in determining how to exercise its discretion." (*Leader*, *supra*, 89 Cal.App.4th at p. 620.) By contrast, the dismissal at issue here was not "entered after a hearing on noticed motions." (*Id.* at p. 620.) Dole instead filed an ex parte application.

Also, unlike *Leader*, Plaintiffs here did not fail to file an amended complaint after the superior court sustained a demurrer with leave to amend. (*Leader*, *supra*, 89 Cal.App.4th at p. 620.) Rather, Plaintiffs failed to file an amended complaint after remand from an appellate court. Under such circumstances, a different deadline for filing applies. (Compare *id.* at p. 608 [superior court allowed 20 days to amend] with Code Civ. Proc., § 472b ["any amended complaint shall be filed within 30 days after the clerk of the reviewing court mails notice of the issuance of the remittitur"].) In addition, the defendants in *Leader* moved to dismiss under section 581(f)(2), a discretionary dismissal statute not applicable here. (Part V.A.1, *supra*.) As opposed to cases where the superior court sustains the demurrer with leave to amend, this matter could not have been dismissed under section 581(f)(2)—again distinguishing this case from *Leader*.

Third, *Leader* is outdated[13] and cannot be reconciled with contrary authority. When decided in 2001, it failed to discuss the lively debate as to

[13] While a 2001 decision may be recent for certain statutes, the relevant portion of Section 473 was amended in 1992. Accordingly, *Leader* was

the scope of mandatory relief under section 473 from *Yeap*, a contemporary Second Appellate District decision. (See *Yeap*, *supra*, 60 Cal.App.4th 591.) *Leader*'s failure to consider relevant authority is beyond dispute. (*Leader*, *supra*, 89 Cal.App.4th at p. 617 ["We have not been cited to any case precisely on point."].) *Leader* likewise failed to cite and cannot be reconciled with *Vaccaro*. In both cases, plaintiffs failed to file a proper amended complaint on time. In *Vaccaro*, the court reversed the denial of mandatory relief under section 473. (*Vaccaro, supra*, 63 Cal.App.4th at pp. 770-71). In *Leader*, the court purported to affirm a similar denial. (*Leader*, *supra*, 89 Cal.App.4th at p. 620.) Because only *Vaccaro* is consistent with the language and purpose of section 473, the reasoning of Justice Epstein's *Yeap* dissent, and the clear trend in the jurisprudence in the Second Appellate District (Part V.B.2.b, *supra*), *Vaccaro* should be followed over *Leader*.

Furthermore, as set out above in Part V.B.2.b, since *Leader* was decided, courts in the Second Appellate District and beyond have embraced Judge Epstein's approach to interpreting the key terms in section 473. (*Jerry's Shell*, *supra*, 134 Cal.App.4th at p. 1071 ["Justice Epstein's reasoning [from *Yeap*] has found favor with courts"]; *English*, *supra*, 94 Cal.App.4th at pp. 144-48 [citing approvingly Justice Epstein's *Yeap*

---

decided before the mid-point of the amended statute's life, and many more cases have been decided since that time.

dissent several times].) With all due respect, *Leader* reflects a mistaken view of what dismissals qualify for mandatory relief under section 473, and provides no guidance for the task faced by this Court.

C. The Superior Court Erred in Dismissing the Entire Action Because Most Plaintiffs Did Not Need to Amend for Their Claims to Proceed.

The superior court dismissed the claims of *all* Plaintiffs for failing to timely amend even though the majority of the Plaintiffs participating in this appeal did not need to amend the active Complaint for their claims to proceed. The July 7, 2010 superior court order and this Court's October 27, 2011 opinion demonstrate that most current Plaintiffs have always had viable claims for direct liability against Dole not requiring amendment.

In evaluating Dole's demurrer, the superior court considered Plaintiffs' allegations going both to direct and secondary liability. As to the latter, the court ruled that, "[t]o the extent that plaintiffs' causes of action against Dole are predicated on theories of alter ego and agency, the demurrer is sustained." (Vol. III, JA-747.) By contrast, the court overruled Dole's demurrer on direct liability, finding that Plaintiffs had stated causes of action under several theories. The court held that "plaintiffs have adequately stated a cause of action for civil conspiracy against Dole" (Vol. III, JA-752); made sufficient allegations going to ratification "to show that Dole may be held liable for the intentional torts of the AUC" (Vol. III, JA-

753); and "sufficiently stated causes of action for negligence based on allegations of agency and negligent hiring" (Vol. III, JA-755).

Because the superior court found that all of the claims of Plaintiffs participating in this appeal were time-barred and denied leave to amend (Vol. III, JA-755), Plaintiffs were forced to appeal. This Court reversed the superior court in two ways on the statute of limitations issue. First, it held that "the trial court erred in finding all claims (save those of Hernandez and Medina) barred by the two-year statute of limitations." (Vol. V, JA-1124.) It went on to explain that some claims were timely as pled: "the claims in the original pleading are viable under the discovery rule because it was not until May 2007 that Mancuso's statement gave plaintiffs reason to suspect Dole's complicity in the underlying killings." (*Ibid.*) Second, it held that the "claims first brought in the FAC" are "presumptively time-barred," but reversed the superior court ruling denying leave to amend. (*Ibid.*) This Court thus identified two classes of claims: (1) claims filed in the original Complaint, which "are viable under the discovery rule," and (2) claims first filed in the FAC, which are "presumptively time-barred" but still entitled to amend. (*Ibid.*)[14]

Based on the superior court's rulings, as modified by this Court, all Plaintiffs who were named in the original Complaint should have been

[14] Dole did not cross-appeal from the superior court's direct liability rulings and this Court did not address them in its opinion.

allowed to proceed on the FAC without needing to amend. The superior court found that they had adequately pled various theories of direct liability and this Court found their claims to be timely. Although these Plaintiffs would prefer to amend to fortify their allegations related to secondary liability, they need not have done so for their case to remain active. (As to the Plaintiffs first named in the FAC, Plaintiffs concede that they were and are required to amend.)

When the superior court, in the ruling by Judge Johnson being appealed, dismissed the entire action, it did so without acknowledging that a prior superior court ruling, by Judge Jones, upheld Plaintiffs' claims for direct liability. As Plaintiffs informed the superior court, following this Court's decision, the originally-named Plaintiffs had timely claims for direct liability against Dole. (Vol. V, JA-1219; R.T. at 312:15-27.) The superior court's refusal to recognize this fact requires reversal.

D. The Superior Court Erred When It Refused to Consider Plaintiffs' Evidence of Indigency Even Though the Cost Bond Order Did Not Apply to Them or Cause Their Dismissal.

The 65 Plaintiffs in this case are indisputably indigent; refusing to consider their evidence of indigency and subjecting them to a cost bond requirement under section 1030 would entirely deprive them of their ability to litigate their claims. Such a result is intolerable regardless of the procedural posture of the issue. Plaintiffs' indigency alone is sufficient to

reverse the superior court on the cost bond issue and allow Plaintiffs to proceed in the superior court without posting a cost bond.

The superior court's refusal to consider Plaintiffs' evidence of indigency is particularly egregious here because the cost bond order never applied to any of these Plaintiffs and they were never dismissed for failing to comply with it. (Part V.D.2, *infra*.) Everyone at the July 2010 hearing understood that the cost bond issue was being considered as to only two Plaintiffs. (Part V.D.2.a, *infra*.) The resulting decision by Judge Jones expressly applied only to those two Plaintiffs because, "[a]fter the ruling on the demurrer, there [we]re only two plaintiffs remaining in the lawsuit." (Vol. III, JA-766.) And Dole sought dismissal on the basis of the failure to pay the cost bond by those two Plaintiffs only. (Vol. III, JA-773.)

Yet against the incontrovertible evidence that Judge Jones never assessed a cost bond against the Plaintiffs participating in this appeal, Judge Johnson erroneously held that the cost bond order applied to all Plaintiffs and that they should have appealed or sought reconsideration of the cost bond ruling. (Vol. VIII, JA-1985-1988.) Judge Johnson relied on an erroneous interpretation of proceedings prior to her involvement in this action to refuse to consider Plaintiffs' overwhelming demonstration of indigency, established by 64 detailed individual financial status declarations. (Vol. VI, JA-1335-1588, Vol. VII, JA-1589-1831 & Vol. VIII, JA-1969-1976.)

In summary, Judge Johnson erred twice, and both errors independently warrant reversal of the cost bond ruling. First, the superior court abused its discretion by refusing to consider Plaintiffs' incontestable showing of indigency. This error violated the basic principle that access to justice trumps the comfort of a cost bond and ignored Plaintiffs' right to have their financial status duly considered by the superior court. Second, Judge Johnson erred as a matter of law when she held that Plaintiffs waived their right to present evidence of their indigency because they did not appeal or seek reconsideration of Judge Jones's cost bond order, an order which did not apply to them and did not form the basis of their dismissal. That ruling is inconsistent with the plain language of Judge Jones's ruling and contrary to well-established law that no party can contest an order that does not affect her rights.

1. The Superior Court Abused Its Discretion When It Refused to Consider Plaintiffs' Undisputed Showing of Indigency.

It is an abuse of discretion to impose a cost bond on a poor plaintiff without identifying the deficiencies in that plaintiff's showing of indigency and providing an opportunity to supplement that showing. (*Alshafie, supra*, 171 Cal.App.4th at pp. 435-36.) California courts thus require that plaintiffs have an opportunity to correct any deficiencies in a cost bond waiver application. (*Id.* at p. 435.) This rule stems from the fundamental

principle that a plaintiff's access to courts precedes a defendant's interest in recovering costs in the event it prevails.

a. Plaintiffs Are Entitled to an Opportunity to Prove Their Indigency.

It is well settled in California that "one party's economic interest in receiving its costs of litigation should it win cannot be used to deny an indigent party his fundamental right of access to the courts." (*Baltayan*, *supra*, 90 Cal.App.4th at p. 1442 (conc. opn. of Johnson, J.).) "The public policy underlying an indigent's entitlement to a waiver of security costs is essentially 'access trumps comfort.'" (*Alshafie*, *supra*, 171 Cal.App.4th at p. 429, citing *Baltayan*, *supra*, 90 Cal.App.4th at p. 1442 (conc. opn. of Johnson, J.); see also *Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 185 ["Restricting an indigent's access to the courts because of his poverty . . . contravenes the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis."].) In fact, an earlier version of section 1030 was deemed unconstitutional because it did not provide plaintiffs with adequate process, including notice and the opportunity to present evidence and be heard. (*Alshafie*, *supra*, 171 Cal.App.4th at pp. 428-29.)

The law is clear, therefore, that Plaintiffs were entitled to an opportunity to prove their indigency, particularly where their poverty is so extreme that the imposition of a cost bond would completely deny them

access to the courts. Nonetheless, the superior court wholly refused to consider Plaintiffs' incontestable showing of indigency and ignored Dole's virtual concession that each Plaintiff is, in fact, indigent. (Vol. VIII, JA-1988 [part of superior court opinion] & JA-1917-1930 [Dole's cost bond brief].) The result—that Plaintiffs' indigency will deprive them of the opportunity to litigate their case—is manifestly unjust, was unintended by the statute, and should not be countenanced by this Court.

Some opinions go one step further in recognizing that courts have *no* discretion to deny the waiver of a cost bond where a plaintiff has established his indigency. (*Baltayan*, *supra*, 90 Cal.App.4th at p. 1442, emphasis in original ["[I]t has been settled for over a quarter century—indigent out-of-state plaintiffs, such as the appellant in the instant case, are *entitled* to waiver of the 1030 security bond or deposit if they are indigent, even if this deprives the in-state defendants of a guarantee their costs will be covered should they prevail."] (conc. opn. of Johnson, J.); *Alshafie*, *supra*, 171 Cal.App.4th at p. 434 ["[A] plaintiff who has been granted in forma pauperis status has the right to a waiver of the undertaking. However, a plaintiff is not obligated to obtain in forma pauperis status to be entitled to a waiver of the section 1030 requirement."].) The rationale for those opinions seeks to avoid dismissals that "effectively preclude[] appellant from litigating his claims simply because he is indigent," as such

dismissals would impermissibly work a "manifest miscarriage of justice." (*Baltayan, supra*, 90 Cal.App.4th at p. 1435.)

b. The Superior Court Never Considered Plaintiffs' Evidence of Indigency.

Putting aside the issue of whether these Plaintiffs are entitled to a waiver as a matter of law because of their incontestable showing of indigency, they have not even had the opportunity to be heard on that issue. During the July 2010 hearing, both Judge Jones and Dole indicated that, if the superior court affirmed its tentative opinion on the demurrer, only two Plaintiffs would remain in the case, and therefore the cost bond motion would apply only to those two Plaintiffs. For example, an exchange between the superior court and counsel for Dole acknowledged that the argument was limited to "the two remaining plaintiffs in the case." (R.T. at 33:5-12.) The indigency of the other Plaintiffs (including all Plaintiffs to this appeal) was simply not an issue at that hearing.

Next, no cost bond was assessed against the currently active Plaintiffs after the July 2010 hearing. Judge Jones's order on the cost bond specifically stated that, "[a]fter the ruling on the demurrer, *there are only two plaintiffs remaining in this lawsuit*." (Vol. III, JA-766, emphasis added.) The requirement that each plaintiff "in this action" post bond necessarily referred only to those two plaintiffs. (Vol. III, JA-767.)

Plaintiffs to this appeal therefore had no chance to seek reconsideration or appeal of that ruling since it did not apply to them. (Part V.D.2, *infra*.)

Finally, Judge Johnson improperly refused to consider Plaintiffs' supplemental evidence of indigency when it was presented in July 2012. After being invited to present evidence on their indigency (R.T. at 312:28-313:15 & 317:25-318:12), Plaintiffs went to great lengths to provide individualized declarations of their financial status, which irrefutably establish their indigency (Vol. VI, JA-1335-1588, Vol. VII, JA-1589-1831 & Vol. VIII, JA-1969-1976). Nonetheless, the superior court unilaterally deemed Plaintiffs' showing untimely and refused to consider it. (Vol. VIII, JA-1986 & JA-1988.) Plaintiffs, however, were entitled to an opportunity to supplement their evidence of indigency based on guidance from the superior court. (*Alshafie*, *supra*, 171 Cal.App.4th at p. 435 [holding that "the court must review the plaintiff's showing, identify deficiencies, if any, and give the plaintiff the opportunity to supply additional information that may be necessary to establish his or her entitlement to a waiver under the circumstances of the particular case"].)

Moreover, nothing in the law imposes a deadline by which plaintiffs must supplement evidence of their indigency in order to have such evidence considered. Without citing any authority, the superior court claimed a deadline had existed and was missed. (Vol. VIII, JA-1986.) In doing so, it erred. (*Alshafie*, *supra*, 171 Cal.App.4th at pp. 435-36 [requiring superior

court to permit plaintiff to file a second declaration attesting to his indigency after the time had lapsed in which to post the bond because plaintiffs must be provided "the opportunity to supply additional information"]; *Baltayan*, *supra*, 90 Cal.App.4th at p. 1435 [holding it was error not to waive or reduce a cost bond even though the plaintiff had waited nearly six months before informing the court of his in forma pauperis status].) Even where a plaintiff misses a court-imposed deadline to supplement evidence of indigency, any evidence presented must be considered if failing to do so would prevent a plaintiff's litigation of his case. (E.g., *Baltayan*, *supra*, 90 Cal.App.4th at p. 1435 [holding court abused its discretion when it refused to consider clear evidence of indigency offered after a court-imposed deadline].)

These impoverished Plaintiffs are precisely the type of litigants who are entitled to a cost bond waiver because section 1030 "cannot be used to deny an indigent party his fundamental right of access to the courts." (*Baltayan*, *supra*, 90 Cal.App.4th at p. 1442 (conc. opn. of Johnson, J.).) Consistent with this rule and at the behest of the superior court, Plaintiffs presented overwhelming evidence of their indigency on an individual basis. The superior court improperly refused to consider that evidence, which was a clear error of law meriting reversal.[15]

[15] Refusing to consider Plaintiffs' evidence of indigency is also constitutionally infirm. (*Alshafie, supra*, 171 Cal.App.4th at pp. 428-29

c. Plaintiffs' Incontrovertible Evidence Satisfies Any Standard of Indigency.

Had the superior court reviewed Plaintiffs' declarations, it would have had no choice but to recognize their indigency and, therefore, the impropriety of a cost bond. Plaintiffs' showing of indigency was sufficient by any standard. (See *Conover v. Hall* (1974) 11 Cal. 3d 842, 852 [holding formal *in forma pauperis* application not required]; *Hood v. Superior Court* (1999) 72 Cal.App.4th 446, 450 [tax records not required where no reason to doubt veracity of sworn statement].)

Plaintiffs' individual declarations, which attest to each active Plaintiff's current income, expenses and assets, establish their indigency beyond a doubt. (Vol. VI, JA-1335-1588, Vol. VII, JA-1589-1831 & Vol. VIII, JA-1969-1976.) The amount of the supposed undertaking ($16,926) exceeds in every case—and in most cases significantly—each Plaintiff's annual income from all sources. (*Ibid.*) Indeed, Plaintiffs' average annual income is just $3,038—not even 20% of the requested bond. (Vol. VII, JA-1833-1834 [chart summarizing declarations].) Very few Plaintiffs have a bank account, and most with bank accounts have a zero balance. (*Ibid.*) Only two Plaintiffs own a vehicle of any kind, which is a motorcycle in

---

[noting that an earlier version of section 1030 was deemed unconstitutional because it did not provide for adequate process, including notice, the opportunity to present declarations and evidence, and the opportunity to be heard].)

both cases. (*Ibid.*) Put simply, these Plaintiffs are very poor, something which Dole has made no effort to contest.

In short, Plaintiffs made an indisputable factual showing of their indigency, demonstrating that it would be impossible for them to post a cost bond. Yet the superior court refused to consider their showing because of its misreading of the record. (Part V.D.2, *infra*.) This result unfairly deprives indigent Plaintiffs of the ability to litigate their claims.

2. The Superior Court Erred As a Matter of Law When It Held That the 65 Plaintiffs in This Case Should Have Appealed or Sought Reconsideration of a Cost Bond Order and Dismissal That Did Not Apply to Them.

Judge Johnson wrongly held that the Plaintiffs to this appeal should have sought reconsideration or appeal of Judge Jones's cost bond order. That error stems from the fact that the cost bond order was not entered against any of those Plaintiffs, and none of them therefore had standing to challenge it on the prior appeal. Even if the cost bond order was entered against all current Plaintiffs (and not just two former Plaintiffs), such an order is not directly appealable. It only becomes appealable when a dismissal is based on the order. Since the dismissal of Plaintiffs to this appeal was not based on the cost bond order, they could not have appealed it because a party cannot appeal or seek reconsideration of an order or judgment that does not affect that party's own rights. (*Lake v. Superior Court of California in & for City & County of San Francisco* (1921) 187

Cal. 116, 120 (*Lake*) [a party is entitled to appeal only a portion of the judgment that affects that party].)

a. All Parties and the Superior Court Understood That the Cost Bond Order and the Cost Bond-Based Dismissal Applied to Only Two Plaintiffs.

As demonstrated in the ensuing paragraphs, all parties and Judge Jones (who was then presiding over the action) understood that the cost bond order applied only to two Plaintiffs (Hernandez and Medina), the only ones originally deemed to have timely claims. All other Plaintiffs were dismissed for having untimely claims, and they were therefore no longer active in the case for purposes of the cost bond decision. As a consequence, the dismissal for failure to post a cost bond applied only to the two Plaintiffs who survived the demurrer with leave to amend; the other Plaintiffs (including all Plaintiffs to this appeal) were dismissed based on the demurrer alone.

Judge Jones considered Dole's demurrer and cost bond motion at the same hearing but entertained oral argument first on the demurrer. (R.T. at 1:11-33:3.) Before the substantive argument began, the superior court advised the parties that its tentative opinion as to the demurrer "informs the cost bond motion, so I want you all to look at it first." (R.T. at 3:22-24 & 4:11-12.) The tentative opinion sustained the demurrer on statute of limitations grounds as to everyone but Hernandez and Medina. (See R.T. at 4:26-5:1, 33:5-12 & 43:9-12.)

Then, at the start of the cost bond argument, counsel for Dole engaged in the following exchange with the superior court:

> MS. NEUMAN: On the cost bond, your honor, *I assume that the order applies to the two remaining plaintiffs* if we get past the indispensable party argument?
> THE COURT: Yes. . . .

(R.T. at 33:5-9, emphasis added.) Plaintiffs' counsel had a similar exchange with the superior court:

> THE COURT: It may be a poor country. I don't know that *the two plaintiffs who are left in this case* are indigent and I don't know that that's a reasonable inference to draw.
> . . .
>
> MR. COLLINGSWORTH: In my declaration I do observe that 158 of cases involving the 167 decedents was the loss of the sole breadwinner of the family.
>
> THE COURT: *I'm only back to two right now*. On this motion with the current where we are is [sic] *I don't know if those are your two*. I don't know.

(R.T. at 43:9-25.) Accordingly, at the hearing, both the superior court and the parties plainly understood that the cost bond issue was relevant only to Hernandez and Medina.

The opinion on the cost bond issue was entirely consistent with that understanding. In that opinion, which directly followed the opinion on the demurrer, the superior court explicitly stated that, "[a]fter the ruling on the demurrer, *there are only two plaintiffs remaining in this lawsuit*." (Vol. III, JA-766, emphasis added.) The superior court then required those two plaintiffs to post a cost bond. (Vol. III, JA-766-767.) It never ordered any

Plaintiff currently a party to this action to post a cost bond. Any other interpretation of the cost bond order, no matter how creative, cannot be squared with the superior court's holding that "there are only two plaintiffs remaining in this lawsuit." (Vol. III, JA-766.)

Dole's request for dismissal, filed after the cost bond hearing and opinion, reflects its continuing understanding that the cost bond order applied to only two Plaintiffs. In its ex parte request, Dole sought "dismissal with prejudice of the claims of all Plaintiffs except [Hernandez and Medina] . . . under Code of Civil Procedure Section 581(f)(1)" because Dole's demurrer on statute of limitations grounds was sustained without leave to amend. (Vol. III, JA-771.) Critically, Dole did not seek dismissal of the claims of those 183 Plaintiffs on any other basis. (Vol. III, JA-768-773.) Next, Dole argued that because Hernandez and Medina had not timely amended their Complaint, dismissal was statutorily proper. (Vol. III, JA-772-773.) Finally, Dole sought dismissal of just Hernandez and Medina for failing to post a cost bond. (Vol. III, JA-773) [seeking "dismissal with prejudice of the claims of [Hernandez and Medina] under Code of Civil Procedure Section 1030(d)"].) Dole never sought the dismissal of any other Plaintiff under section 1030 for failing to post a cost bond.

Dole's ex parte request was accompanied by a declaration by its counsel stating that "neither [Hernandez nor Medina] has posted a bond for

costs as required by the Court's July 7, 2010 order." (Vol. III, JA-774a ¶ 5.) Dole's lawyer explicitly identified those two Plaintiffs by name, and never implied that the cost bond order might have had implications for any other Plaintiff. Furthermore, the declaration was supported by an exhibit in the form of an e-mail from Dole's lawyer with similar language. The email noted "the failure of plaintiffs [Hernandez and Medina] to . . . post the requisite cost bond as ordered by the Court." (Vol. III, JA-784.) Again, Dole failed to make any statement even suggesting that a dismissal could be premised upon the failure of any other Plaintiff to pay a cost bond.[16]

As the record demonstrates, neither at the hearing nor in its papers did Dole ever ask the superior court to dismiss the currently active Plaintiffs' claims based on a purported failure to post a cost bond. Such a request would have been illogical, of course, because no cost bond had been imposed on those Plaintiffs, who instead had been dismissed on statute of limitations grounds. Dole's submissions should be taken as admissions that it understood that the cost bond order did not apply to any Plaintiff other than Hernandez and Medina, and that a dismissal based on the cost bond order could therefore not apply to any other Plaintiff.

[16] Dole's previous representation to this Court is consistent with its prior representations to the superior court. (Vol. IV, JA-928 ["Plaintiffs Hernandez and Medina Fail To File A Second Amended Complaint Or Post A Cost Bond; The Trial Court Dismisses All 185 Plaintiffs' Claims With Prejudice."].)

b. Judge Johnson Erred in Interpreting Judge Jones's Cost Bond Order.

While Judge Jones dismissed all Plaintiffs, the basis for each dismissal is the critical issue, as it was not the same for every Plaintiff. As thoroughly demonstrated above, no cost bond was ever imposed on any Plaintiff other than Hernandez and Medina. Therefore, no dismissal could have been premised on any other Plaintiff's supposed failure to post a cost bond. Judge Johnson's holding to the contrary is plainly erroneous and based on a misapprehension of the clear record. There is simply no evidence to support the conclusion that the dismissal of the Plaintiffs presently in the case was based on their failure to pay a court-ordered cost bond.

Judge Johnson's error occurred because she took out of context part of Judge Jones's opinion stating that "each plaintiff in this action must post $16,926 within 30 days of entry of this order." (Vol. III, JA-767 [Judge Jones's opinion]; Vol. VIII, JA-1986 [Judge Johnson's opinion].) Judge Johnson, however, wholly ignored key language in Judge Jones's opinion stating that, "[a]fter the ruling on the demurrer, there are only two plaintiffs remaining in this lawsuit." (Vol. III, JA-766.) Judge Jones thus defined "each plaintiff in this action" as being the two Plaintiffs "remaining" in the action: Hernandez and Medina. (Vol. III, JA-766-767.) Judge Johnson erred in overlooking Judge Jones's holding as to the actual number of

Plaintiffs "remaining in this lawsuit" (two) and instead ruling that the cost bond order applied to all Plaintiffs.

Judge Johnson similarly erred in holding that the dismissal for failure to post a cost bond applied to all Plaintiffs. As established by the record, no cost bond had been assessed against these Plaintiffs, so they could not have been dismissed for failing to post such a cost bond. In addition, Dole's ex parte application for dismissal clearly contemplated that a dismissal for failure to post a cost bond was sought only as to Hernandez and Medina, and the superior court's dismissal order expressly incorporated that application for dismissal. Judge Johnson's holding that the cost bond dismissal actually applied to all Plaintiffs is a clear error of law.

c. Because the Cost Bond Order and Related Dismissal Did Not Apply to These Plaintiffs, They Could Not Have Properly Sought Reconsideration or Appeal of the Cost Bond Issue.

After wrongly holding that the cost bond order applied to all Plaintiffs, Judge Johnson compounded her error by stating that "they failed to seek reconsideration of that order or to provide supplemental evidence in the two months between the entry of the cost bond order and the dismissal." (Vol. VIII, JA-1986.) The superior court further erred in holding that "[b]ecause plaintiffs did not challenge on appeal that portion of the judgment incorporating the cost bond order, they have 'waive[d] [their] right to challenge th[at] determination on remand.'" (Vol. VIII, JA-1987.)

This holding was error because a party cannot seek reconsideration or appeal of an order that does not apply to it, and there is no basis in the law for a requirement that plaintiffs seek review of a cost bond order within two months of the order or prior to dismissal.

Only a party adversely affected by an order may seek reconsideration or appeal of that order. (*Lake*, *supra*, 187 Cal. at pp. 119-20 ["An appeal from a judgment by some of the defendants, although the notice of appeal is general in its terms, is of necessity an appeal from only that portion of the judgment which injuriously affects the appealing defendants, and is thus, in effect, an appeal from a portion of the judgment . . ."]; *Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 943-44 [reconsideration is available only to unsuccessful moving or opposing parties].) Furthermore, there is no requirement to seek reconsideration prior to an appeal. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 500.) Because the cost bond order affected only Hernandez and Medina, the remaining Plaintiffs could not have sought reconsideration or appeal of that order. The superior court's holding to the contrary is inconsistent with this well-established law.

This conclusion holds true even though all of the currently active Plaintiffs appealed the dismissal insofar as it was based on the demurrer. The law is clear that a party does not have standing to raise issues affecting only another party's interests. (*In re J.T.* (2011) 195 Cal.App.4th 707, 724

["Without a showing that the party's personal rights are affected by a ruling, the party does not establish standing. [Citation.] . . . In sum, a would-be appellant 'lacks standing to raise issues affecting another person's interests.'"].) Therefore, although these Plaintiffs did have proper standing to appeal the statute of limitations issue, they did not have standing to appeal the cost bond issue because it did not affect their rights.

Judge Johnson also erred in imposing an arbitrary deadline on Plaintiffs to seek reconsideration of the cost bond order. (Vol. VIII, JA-1986 ["They failed to seek reconsideration of that order or to provide supplemental evidence in the two months between the entry of the cost bond order and the dismissal."].) Even if the cost bond order had affected the rights of the remaining Plaintiffs (which it did not), no court has imposed an arbitrary two-month deadline to supplement evidence of indigency, nor a requirement that such a showing of indigency must precede an unrelated dismissal. Contrary to enforcing such a strict deadline, California courts have held it is reversible error not to consider such evidence, even outside court-imposed deadlines or after periods of six months or more. (*Baltayan*, *supra*, 90 Cal.App.4th at p. 1435 [despite plaintiff's "belated showing[,] . . . given the finding of indigency necessarily underlying the in forma pauperis order, the trial court acted arbitrarily and capriciously in refusing to either vacate or reduce the amount of the undertaking"].)

No one disputes that a cost bond order cannot be appealed unless and until a dismissal is based upon it. (Code Civ. Proc., § 1030, subd. (g).) In this case, the dismissal of the active Plaintiffs was based on the demurrer, not a failure to post bond. Therefore, these Plaintiffs could not have appealed the cost bond order, and it is illogical to conclude that the superior court could not have considered supplemental information related to the cost bond issue, which Plaintiffs were entitled to present. (E.g., *Alshafie*, *supra*, 171 Cal.App.4th at pp. 435-36.) Indeed, Plaintiffs are aware of no case that precludes a party from supplementing a factual record on remand and addressing an issue that had never before been ripe as to that party. The superior court's holding that Plaintiffs were required to appeal a cost bond order that did not form the basis of their dismissal is a clear error of law warranting reversal.

Notably, this Court implicitly acknowledged that the cost bond issue would not have been properly raised in the prior appeal. There, Plaintiffs originally focused their briefing on the statute of limitations issue. (Vol. IV, JA-847-898.) Dole, in response, argued that Plaintiffs had failed to appeal three additional issues: the alter ego/agency and indispensable party issues, as well as "the trial court's ruling on Dole Food's Cost Bond Motion." (Vol. IV, JA-930.) This Court acknowledged that "appellants' reading of the lower court order is correct" as to the scope of issues ruled upon, but out of "concerns of judicial economy," ordered the parties to brief

the alter ego/agency and indispensable party issues "despite the wording of the lower court's order." (Vol. IV, JA-1003-1004.)

Although it requested briefing on other possible grounds for sustaining the demurrer, this Court never sought additional briefing on the cost bond issue, nor did it address the issue in its ruling. If this Court had believed that dismissal for failure to post bond applied to all Plaintiffs involved in the appeal, it could have ordered briefing on that issue as well out of the same "concerns of judicial economy." (Vol. IV, JA-1004.) Its choice not to do so evidences the impropriety of appealing the cost bond issue at that time.

Moreover, if Dole had believed that all Plaintiffs had violated the cost bond order and had been dismissed for that reason, it should have so advised this Court to attempt to prevent any further proceedings in the superior court. In other words, if the cost bond order and dismissal represented independent grounds for affirming the judgment against all Plaintiffs, Dole should have raised it with the Court on the first appeal. Instead, Dole represented to the Court that "The Only Issue Properly Before The Court Is Whether The Trial Court Abused Its Discretion By Denying Leave To Amend As To 183 Of The Plaintiffs/Appellants Following Its Ruling Sustaining Dole Food's Demurrers." (Vol. IV, JA-929.) The prior failure to raise the issue forecloses Dole from doing so now, and also underscores Dole's previously-expressed understanding that the cost bond

order and dismissal applied to only two Plaintiffs. Dole's belated decision to abandon that understanding, meanwhile, does nothing to change the clear procedural history demonstrating the limited scope of the cost bond order and related dismissal.

Given that limited scope, the superior court erroneously held that the decision by these 65 Plaintiffs not to seek review of the cost bond order and dismissal precludes appellate review now. That error requires reversal.

VI. CONCLUSION

Plaintiffs-Appellants respectfully request that the Court reverse the superior court's orders dismissing the entire action and entering final judgment for Dole; denying relief from dismissal under the mandatory relief provision of section 473; and refusing to consider Plaintiffs' showing of indigency in relation to their requested exemption from any cost bond requirement under section 1030, as well as misconstruing Judge Jones's cost bond order.

Respectfully submitted,

Dated: December 20, 2012

By 

Terrence P. Collingsworth
(admitted *Pro Hac Vice*)
CONRAD & SCHERER, LLP
1156 15th Street NW, Suite 502
Washington, DC 20005
Tel.: (202) 543-4001
Fax: (866) 803-1125

David Grunwald
(State Bar No. 137155)
ATTORNEY AT LAW
2029 Century Park East, Suite 4393
Los Angeles, CA 90067
Tel: (323) 650-6088
Fax: (323) 622-8720

Attorneys for Plaintiffs-Appellants