A162259

IN THE

COURT OF APPEAL
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

Division Five

IRVIN MUCHNICK,
Petitioner & Respondent,
vs.
REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendant & Appellant.

Appeal from the Superior Court of California,
County of Alameda
The Hon. Jeffrey Brand (case no. RG17857115)

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This certificate is submitted on behalf of respondent Irvin Muchnick. There are no interested entities or persons that must be listed in this certificate under rule 8.208 of the California Rules of Court.

March 3, 2022

THE LAW OFFICE OF
JOHN DERRICK,
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by _____
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INTRODUCTION

Appellant — a public university — seeks to overturn the judgment in an action under the California Public Records Act. As a threshold issue, this Court lacks jurisdiction. Appellant purported to appeal an "amended" judgment. But it was actually a duplicate judgment that amended nothing and was entered more than 60 days after clock-triggering notice of an earlier one.

If the merits are reached, appellant's arguments should be rejected, not least because they invite this Court to stray outside the scope and limits of appellate review and step into the shoes of a trial court.

Respondent — an investigative journalist — made a public records request as part of his investigation into a culture of abusive treatment within the strength and conditioning program at the University of California, Berkeley football team. The journalist's investigation focused, in part, on the death of a student athlete. Eventually, his investigation revealed evidence of a cover-up, but not before he was forced to litigate to obtain records the University resisted handing over.

Before the litigation, the University produced only a limited number of records and told the journalist it viewed the matter as closed. The University's main excuse was that further records were, supposedly, exempt under a federal statute protecting student privacy. However, that statute does not apply to deceased students. And it would anyway not have covered all the records sought. The University also contended the request was too broad. But it did not

meet its statutory obligation to work with the requester to try to fine-tune it to its obvious purpose.

Having no other option, the journalist filed a petition for a writ of mandate seeking to compel the production of further records. More than a year into the litigation, under the direction of the Alameda Superior Court, which had instructed the parties to identify categories of nonexempt documents that could be responsive, the University *finally* produced numerous additional records.

The trial court then made findings of fact that the filing of the petition had caused the production of further records. On that basis, it found the journalist to be the prevailing party, awarding him attorney fees as mandated by statute.

On appeal, the University challenges these factual findings. It purports to present its argument as one of law, claiming the trial court applied an incorrect legal standard and that the records produced during the litigation were not responsive to the original request. As shown in this brief, that argument is flawed on multiple levels. Much of appellant's opening brief reads like an attempted do-over of the Superior Court proceedings. Even if reasonable minds could differ on some of the issues, the University is asking this Court to make its own determinations as to whether the litigation was a catalyst for the production of responsive records. Case law instructs this is an inherently *factual*, case-specific inquiry.

Two key terms are missing from appellant's opening brief — "abuse of discretion" and "substantial evidence." Those are the operative standards of review, which the University seeks to evade. When applied, they compel affirmance, *if* the merits are reached.

STATEMENT OF FACTS & PROCEDURAL HISTORY

Muchnick's Public Records Act Request

In November 2013, a student-athlete on the intercollegiate football team at the University of California, Berkeley was hospitalized following a beating by a teammate. (1 CT 16.[1]) Public controversy ensued over whether this incident had been incited by the team's assistant coach for strength and conditioning. (1 CT 16.) About two months later, another student-athlete on the UC Berkeley football team, Ted Agu, died during a conditioning drill directed by the same coach. (1 CT 17.) In 2016, the Regents of the University of California settled a civil lawsuit about Agu's death for $4.75 million. (1 CT 17.)

Irvin Muchnick is a freelance journalist and author. (1 CT 16.) He is the author of three books and hundreds of articles in major magazines and newspapers. (1 CT 16.) Muchnick began to investigate excesses in the strength and conditioning program in a series of articles beginning three months before Agu's death and continuing after. (6 CT 1450.) This included investigating whether there had been a cover-up about the link between the program and Agu's death. (1 CT 17.)

In April 2016, Muchnick made a written request to the University under the California Public Records Act ("CPRA"[2]) (Gov.

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[1] Citations for background facts in this narrative are to the verified petition for a writ of administrative mandate that led to the appealed judgment.

[2] Also referred to in parts of the record as the "PRA" without the "C." The official title is "the California Public Records Act." (Gov. Code, § 6251.)

Code, § 6250, et seq.). (1 CT 18, 46.) This stated: "I seek any and all written records, reports, or emails dealing with any internal investigation within the University of California-Berkeley of the facts surrounding: (a) the death of Ted Agu; (b) an altercation between football players J.D. Hinnant and Fabiano Hale, which occurred on or around November 1, 2013. This request includes, but is not limited to, any document with a general review of the strength and conditioning program for Cal football players." (1 CT 46.)

Following this request, the University did produce certain documents, although only after Muchnick pressed for their release. (1 CT 19-21, 121.) However, according to Muchnick, his requests generally went unfulfilled and were met with reactions constituting delay and obstruction in breach of Government Code section 6253, subdivision (d). (1 CT 18-23.) In March 2017, the University stated it considered the request "closed," signaling nothing more would be produced. (1 CT 21, 121.)

The Litigation Resulting in the Production of Public Records

In April 2017, the month after the University declared the matter "closed," Muchnick filed a petition for a writ of mandate in Alameda Superior Court, seeking an order directing the University to comply with the CPRA. (1 CT 15.)

As the litigation got underway, the University asserted that all further responsive documents were exempt under the CPRA, because they, by definition, concerned one of three individually identifiable students and were, therefore, exempt under the Federal

Educational Rights and Privacy Act ("FERPA"), 20 USC 1232g.[3] (See 2 CT 306-307 [court minute order dated June 11, 2018, summarizing litigation thus far].) The flaws with that contention are discussed in the argument section of this brief. Muchnick, however, maintained the University was withholding non-exempt documents. (2 CT 306.) The University proposed some solutions, including an attorney-eyes-only review and inspection by Muchnick under a protective order, but neither of those was acceptable. (2 CT 306.)

On March 25, 2018, the University did produce 84 pages of records after it obtained a privacy waiver from the Agu family. (7 CT 1905.) And on June 1, 2018, it released the settlement agreement in the Agu family lawsuit that was signed after Muchnick's CPRA request. (7 CT 1905.)

At around this time — a little over a year into the lawsuit — there was argument about whether the University should produce something known as a "Vaughn Index," which is a log containing the information claimed as exempt and the corresponding claimed exemption. (2 CT 305-306; see *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 82.) However, the court ruled this was not appropriate under the facts of the case. (2 CT 308.)

Instead, the court ordered the parties to identify categories of documents that were responsive and arguably FERPA-exempt. (2 CT

[3] FERPA is a law that protects the privacy of student education records. It applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

308.) This led to 22 categories being identified in the court order dated June 11, 2018. (2 CT 308-309 [see listing of categories].)

Following this, the University did release further documents during the remainder of 2018 and 2019. On August 27, 2018, it produced 194 pages of public records that were responsive to four categories identified in the court's order dated June 11, 2018. (7 CT 1905.) These concerned the following (see 2 CT 308-309, 7 CT 1905):

- ***Category 10:*** The public relations aspects of the player altercation and the Agu death incident.
- ***Category 12:*** Feedback, advice, or concerns from program boosters or corporate sponsors regarding the two events.
- ***Category 17:*** Documents counseling those speaking at the Agu memorial event on campus.

There was no suggestion that these records implicated FERPA. Also on August 27, 2018, the University produced 57 additional pages that were responsive to a further category:

- ***Category 3:*** Policies regarding when and how to conduct an internal investigation.

On September 6, 2018, the University produced 387 pages of public records, which were heavily redacted ones the court considered "were the equivalent of a privilege log." (7 CT 1905.) Finally, on March 28, 2019, it released a two-page email, mostly redacted. (7 CT 1905.)

On February 26, 2019, the court denied a motion by Muchnick seeking the production of a campus police report binder. (3 CT 767-781.) And on January 28, 2020, it ruled against Muchnick regarding whether the University should release an email from Solly Fulp, the

Deputy Director of Athletics and Chief Operating Officer, to his father. (4 CT 1137-1147; 7 CT 1905.) So Muchnick did not succeed in obtaining *everything* he sought, but — as shown in the argument portion of this brief — that fact is not relevant to the issue on appeal. At this point, the University had produced substantial quantities of public records, despite its pre-litigation assertion that the matter was "closed" as there were no further non-exempt documents.[4]

The Prevailing Party/Attorney Fee Motions

Once the litigation about the Fulp email was complete, there were no further issues before the court about the production of specific documents or categories. What remained was a determination of prevailing party status and entitlement to statutory attorney fees and costs.

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[4] Muchnick's use of the documents produced as a result of the litigation is not an issue impacting the correct resolution of this appeal. However, purely by way of background, the record on appeal shows he did write articles based on records produced during the litigation, explaining in detail how they evidenced an effort by university officials to cover up the culture and coaching techniques of the "strength and conditioning" program; his articles showed Agu was a carrier of the sickle cell trait, a fact known to team doctors, which put him at mortal risk during the type of high-intensity training exercise that culminated in his death. (See 5 CT 1407-1412 [story titled "Background of University of California Team Doctor's Deception of Coroner in 2014 Football Death Is Revealed in Internal Emails"]; 5 CT 1414-1417 [story titled "NEW TED AGU PAPERS: As Public Records Act Case Awaits Court Moves on 141-Page Campus Police Report in 2014 Football Death, A New Outline of Internal University of California Emails Is Revealed"]; 5 CT 1419-1420 [story titled: "'Inadvertently' Omitted Documents in California Public Records Act Case Show Berkeley Football Team Doctor Casey Batten — Point Person in the Ted Agu Sickle Cell Trait Death Cover-Up — Corresponding With Chief Campus Counsel].)

On August 13, 2020, the University filed a motion seeking to have it declared as the prevailing party. (5 CT 1252.) And on August 20, 2020, a week later, Muchnick filed a motion for attorney fees, contending he was the prevailing party. (6 CT 1432.)

A hearing on both motions took place on September 10, 2020. (7 CT 1902-1903.) On October 16, 2020, the court issued orders denying the University's motion and granting Muchnick's. (7 CT 1904, 1911.) The court made factual findings that the filing of the petition had caused most — although not all — of the productions in various categories in 2018 and 2019. (7 CT 1907-1908, 1914-1915.) On that basis, it concluded that Muchnick was the prevailing party and entitled to attorney fees. (7 CT 1906, 1908, 1913, 1915.) The University did not request a statement of decision on the court's factual findings as to who was the prevailing party.

Neither of the competing motions had requested a specific amount in fees. So the court invited the parties to meet and confer about stipulating to an appropriate amount to be paid to Muchnick. (7 CT 1909, 1915-1916.)

The Judgment and the Appeal

For reasons that are not made clear in the record, the court entered judgment *three* times on different dates — each judgment stating either literally or substantively the same thing, which was that Muchnick was the prevailing party and that the University was directed to pay him $125,000 as a stipulated amount in fees and costs. (7 CT 1921, 1924, 1930.) The details of the three judgments, and the noticing thereof, and the resulting jurisdictional issue, are described and discussed in the argument portion of this brief.

On March 16, 2021, the University filed a notice of appeal. (7 CT 1933.) That notice stated the appeal was from the third version of the judgment, the one entered on January 15, 2021. (7 CT 1933.)

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment. Such an appeal is authorized by Code of Civil Procedure section 904.1, subdivision (a)(1). The issue of whether the appeal was timely filed — and whether it was taken from the operative version of the final judgment — is discussed next in the argument portion of this brief.

ARGUMENT

- 1 -

This Court Should Dismiss the Appeal as it Was Taken From a Duplicate Judgment and Filed After the Time to Appeal had Expired

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1.1 The court entered judgment three times without there being any substantive amendments

As explained in the preceding narrative, the trial court entered judgment in this case three times. Each time, the judgment was substantively or literally the same. The reason for the multiple judgments is not apparent from the record. All three file-stamped versions of the judgment and declarations of service are included in the record on appeal. As shown below, the University appealed the third version, but that was not the operative final judgment and, by

then, more than 60 days had passed since notice of entry of an earlier one.

Judgment # 1: The first judgment was signed and entered on November 23, 2020, and read as follows:

> The Order of October 16, 2020, determined that petitioner Muchnick was the prevailing party in this case under Govt Code 6259(d) and ordered the parties to meet and confer regarding the amount of fees and to make a reasonable effort to settle the issue of the amount of attorney fees and costs without requiring a determination by the Court. The parties informed the court that they met and conferred and agreed to set the amount of costs and fees at $125,000. The parties represented to the Court that there are no remaining issues in the case for the Court to adjudicate. Therefore:
> IT IS ORDERED, ADJUDGED AND DECREED as follows:
> 1. The Petition is GRANTED on the CPRA claims to the extent set forth in the Court's Orders in this case;
> 2. Judgment is entered in favor of petitioner Irvin Muchnick and against respondent the Regents of the University of California for costs and fees total amount of $125,000.
> 3. The case is concluded. The court retains jurisdiction only as necessary to address ancillary matters concerning the enforcement of this judgment.
> (7 CT 1921-1922.)

The Clerk's Declaration of Service by Mail was dated February 18, 2021, about five to six weeks later. (7 CT 1923.) However, the Declaration of Service did not state *when* it was served — the only date shown is the date of the Declaration itself. (7 CT 1923.)

Judgment # 2: Before the Declaration of Service regarding the first judgment was signed, the court had already entered a

second judgment that was signed on January 3, 2021, and file-stamped on that same day:

> This court having, on October 16, 2020, granted the Motion for an Order Designating Petitioner as the Prevailing Party and as Entitled to Court Costs and Attorney's Fees, and having not addressed in the Order, or decided, the amount of costs or fees that might be awarded, but having ordered the parties to meet and confer regarding the amount of fees and to make a reasonable effort to settle the issue of fees, and the parties having met and conferred and stipulated to set the amount of costs and fees at $125,000,
> IT IS ORDERED, ADJUDGED AND DECREED as follows:
> 1. The Petition is GRANTED IN PART.
> 2. The amount of fees of costs and fees is fixed at $125,000.
> (7 CT 1924)

The language above, although different from that in the first judgment, was substantively the same.[5] The Clerk's Declaration of

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[5] The Clerk's Transcript shows that attached to the second judgment was a further version providing for the same outcome, also signed on January 3, 2021, but not file-stamped. (7 CT 1926-1928.) The pages starting with the file-stamped judgment at 7 CT 1924 and ending with the Declaration of Service at 7 CT 1929 are *a single document in the court file* (including the two blank pages). Counsel signing this brief has verified that by downloading the document from the Superior Court website. The significance is that the Declaration of Service at the end of the document covers the file-stamped judgment at the start. Indeed, the Declaration of Service expressly refers to the "Judgment *filed* on January 3, 2021," necessarily referring to the file-stamped judgment of that date, not just to the unstamped attachment. (7 CT 1929, emphasis added.) For the convenience of the reader, a copy of the second judgment — with the attachment and Declaration of Service — is included in the Addendum at the back of this brief. (See Cal. Rules Ct., rule 8.204(d).)

Service by Mail was dated January 5, 2021, and states that this judgment was also mailed to both sets of counsel on that day (i.e., before the date on which the Declaration of Service of the *first* judgment was signed). (7 CT 1929.)

Judgment # 3: Then, on January 15, 2021, the court entered a judgment for the third time. (7 CT 1930.) This used language that was identical to that in the first one:

> The Order of October 16, 2020, determined that petitioner Muchnick was the prevailing party in this case under Govt Code 6259(d) and ordered the parties to meet and confer regarding the amount of fees and to make a reasonable effort to settle the issue of the amount of attorney fees and costs without requiring a determination by the Court. The parties informed the court that they met and conferred and agreed to set the amount of costs and fees at $125,000. The parties represented to the Court that there are no remaining issues in the case for the Court to adjudicate. Therefore:
> IT IS ORDERED, ADJUDGED AND DECREED as follows:
> 1. The Petition is GRANTED on the CPRA claims to the extent set forth in the Court's Orders in this case;
> 2. Judgment is entered in favor of petitioner Irvin Muchnick and against respondent the Regents of the University of California for costs and fees total amount of $125,000.
> 3. The case is concluded. The court retains jurisdiction only as necessary to address ancillary matters concerning the enforcement of this judgment.
> (7 CT 1930-1931.)

A handwritten date next to the signature on this version indicates that it was signed on January 3, 2021 — i.e., the date of the second judgment and 12 days before this one was actually entered.

On the third judgment, the word "AMENDED" appears in handwriting on the caption before the printed word "JUDGMENT." (7 CT 1930.) However, there was nothing whatsoever in the substantive content of this version constituting an "amendment" to the previous ones. A Declaration of Service by Mail was dated January 15, 2021. (7 CT 1932.) That Declaration does not state when the service was actually made, but it could not have been before January 15, since — as noted — this version of the judgment was filed on that day. (7 CT 1930.)

1.2 Appellant's opening brief fails to inform the Court about the sequence of judgments

Appellant's opening brief fails to provide a narrative of the three judgments. It simply states: "The court entered an Amended Judgment, which it signed January 3, 2021, and filed January 15, 2021. (VII CT 1930-1931.) On January 15, 2021, the Clerk mail-served the Amended Judgment. (VII CT 1932.)" (AOB 22.)

That is hardly an adequate description of the sequence of events. In particular, the brief ignores the judgment entered *and* served on January 3, 2021. This is despite the fact that the University must have been aware of all three judgments being entered, *as it listed all of them in its Notice Designating Record on Appeal.* (7 CT 1944.)

1.3 The deadline for filing a notice of appeal is jurisdictional

Rule 8.104 of the California Rules of Court defines what it terms the "normal" deadline as the earliest of: (1) 60 days after the superior court clerk mails the party filing the notice of appeal a

document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed; (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or (3) 180 days after entry of judgment.[6]

"The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) And our Supreme Court reminds us: "Nor can jurisdiction be conferred upon the appellate court by the consent or stipulation of the parties, estoppel, or waiver." (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666, citing to and quoting from *Estate of Hanley* (1943) 23 Cal.2d 120, 123, quotation marks omitted.)

Furthermore, because the deadline is jurisdictional, relief to file a late appeal may not even be granted under Code of Civil Procedure section 473, subdivision (b). "In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal, even to relieve against mistake, inadvertence, accident, or misfortune." (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 373, quotation marks and citation omitted.)

1.4 The third judgment was not the operative final one

As noted earlier, the University purported to appeal the

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[6] Rule 8.108 allows for certain limited extensions to the "normal" time with things such as post-judgment motions and cross-appeals, none of which are applicable here.

judgment entered on January 15, 2021 — i.e., the third one. (7 CT 1933.) The notice of appeal was dated March 16, 2021. (7 CT 1933.) So *if* the January 15, 2021 judgment was the operative one for the purposes of calculating an appellate deadline, then the appeal would be timely as it was filed exactly 60 days after the entry of that judgment.

However, the January 15, 2021 judgment was not the operative one. This is because the court had already filed *and* served a judgment on January 3, 2021. (7 CT 1924-1929.) That was more than 60 days before the filing of the notice of appeal.

It is true that the subsequent January 15 judgment was — with a handwritten annotation to the caption — denoted as an "Amended Judgment." But, as already shown, that judgment contained *nothing* that in any way amended the substance of what the court had earlier stated in the previous two judgments. An amended judgment only becomes the final appealable judgment, thereby restarting the time to appeal, if it substantially changes the judgment. (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 843.) A "substantial modification" occurs by an amendment that materially affects the rights of the parties. (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 764.)

Here, there was no substantial modification from the second version of the judgment. All three versions were substantively the same (or, depending on which you compare, literally the same). It is a mystery as to why and under what circumstances that third judgment came to be annotated as "amended," but what matters is its substance, not some handwritten change to its caption.

1.5 The appeal should not be liberally construed as taken from the first judgment

It is unclear when the very first version of the judgment was served, as the date of service is not stated on the clerk's Declaration of Service by Mail. As noted earlier, the only date shown is the one on which the Declaration itself was signed. (7 CT 1923.) However, that is surely not relevant under these facts. This is because once the second judgment was entered — substantively identical — and once notice of entry of that was served on a date certain, the parties were on notice that a judgment was in place.

While an amended or duplicate judgment does not restart the time to appeal if it does not substantially change the first one, there is no authority that *notice of entry* of what is substantively a duplicate judgment would not be effective as to the existence of a judgment if it predates notice of the first one. To put it another way, if two judgments, substantively the same or identical, are entered, the second would not restart the clock to file an appeal; but *notice* of that duplicative judgment should surely be effective for setting the time to appeal if the first one has not already been noticed. Muchnick is not aware of a case that has reviewed the exact procedural circumstance presented here, but his conclusion is consistent with the plain language of Rule 8.104 and with the principle — captured by that rule — that once a qualifying form of notice has been given that a judgment has been entered, a 60-day clock begins.

Furthermore, the University did not appeal the first judgment, whose actual notice date is unclear from the record. It appealed the

third one, which was plainly not appealable for reasons already discussed. Even if in some cases an appellate court might liberally construe an appeal purportedly taken of one thing to refer to another in order to save it, there would be no justification for doing so here where appellant has *chosen* not to brief the court on this issue. As noted above, appellant's opening brief refers to an "amended" judgment without even mentioning that it did *not* actually amend anything. By simply ignoring the timeliness and jurisdictional issue — despite apparently knowing about all three judgments as can be seen from its record designation — appellant has surely forfeited any claim to liberal indulgence, even assuming, arguendo, such indulgence could possibly save the appeal.

- 2 -

If the Court Reaches the Merits, the Judgment Finding Muchnick the Prevailing Party Should be Affirmed

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2.1 The California Public Records Act embodies a strong policy in favor of disclosure of public records and mandates an award of attorney fees to a prevailing plaintiff

The California Public Records Act states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250.) This principle is also enshrined in the state Constitution: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, ...

the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const, Art I, Sec. 3(b)(1).)

"The Act's core purpose is to prevent secrecy in government and contribute significantly to the public understanding of government activities." (*San Diego County Employees Retirement Assn. v. Superior Court* (2011) 196 Cal.App.4th 1228, 1244.) "The [Act] embodies a strong policy in favor of disclosure of public records, and any refusal to disclose public information must be based on a specific exception to that policy. Statutory exemptions from compelled disclosure are narrowly construed." (*California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 831, citations omitted.)

Government Code section 6259, subdivision (d), provides "[t]he court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section." This means that an award of fees to a prevailing plaintiff in a CPRA action is mandatory. (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 900.) The self-evident rule that a prevailing plaintiff or petitioner is entitled to fees is not at issue in this appeal. The only issue is whether there was reversible error in the trial court's finding that Muchnick *did* prevail.

2.2 This Court reviews a trial court's determination of whether a litigant is a prevailing party under the CPRA for abuse of discretion

A merits argument in an appeal can only be as good as its understanding of the underlying standard of review. "However convoluted the facts, or complex the issues, the standard of review is

the compass that guides the appellate court to its decision. It defines and limits the course the court follows in arriving at its destination. Deviations from the path, whether it be one most or least traveled, leave writer and reader lost in the wilderness." (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.)

The Court of Appeal reviews a trial court's determination of whether a petitioner is a prevailing party under the CPRA, so as to be entitled to statutory attorney fees, for abuse of discretion. (*Sukumar v. City of San Diego* (2017) 14 Cal.App.5th 451, 464.) To the extent that the exercise of discretion involves making factual determinations, this Court accepts the trial court's resolution of conflicting substantial evidence, and its choice of reasonable inferences from the evidence. (*Ibid.*)

In short, contrary to what the University argues, the standard of review is not de novo. And, as shown later in this argument, the University's effort to morph it into that is entirely without merit.

2.3 A plaintiff prevails if a CPRA action is a catalyst that causes or influences an agency to release records

The final judgment in this case did not order the release of records, because — by the time it was entered — the University had produced documents during the course of the litigation. However, it is not necessary that a plaintiff obtain a judgment directing the release of records in order to prevail. Rather, as this Division has explained, a plaintiff prevails if a CPRA action merely spurs an agency into releasing records or acts as a catalyst. (*Belth v. Garamendi*, *supra*, 232 Cal.App.3d at pp. 901-902.) "A plaintiff is considered the prevailing party if his lawsuit motivated defendants

to provide the primary relief sought or activated them to modify their behavior, or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result." (*Ibid.*, citations omitted.) In fact, it is sufficient that "the litigation substantially contributed to or was *demonstrably influential in setting in motion the process* which eventually achieved the desired result." (*Id.* at p. 902, emphasis added.) "In sum, recovery under the catalyst theory turns on *causation*." (*Sukumar v. City of San Diego*, *supra*, 14 Cal.App.5th at p. 464, emphasis added.)

2.4 The trial court's finding that various productions were caused by the filing of the petition is supported by substantial evidence

Here, the court expressly found the causation test *was* satisfied. (7 CT 1907-1908, 1914-1915.) Referring to what it listed as production numbers 3, 4, 5, and 6, the court wrote *each* time: "*This production was caused by the filing of the petition.*" (7 CT 1907-1908, emphasis added.)

There is no authority that some particular quantum of documents must be produced as a result of a CPRA action for a plaintiff to prevail. That said, it is worth adding that the quantity here was not trivial. The court's findings referred to 640 pages produced in August-September 2018 and March 2019. (7 CT 1907-1908, 1914-1915.) This included documents in the following categories (see 7 CT 1907-1908, 1914-1915):

- The public relations aspects of the player altercation and/or the Agu death incident.

- Feedback, advice, or concerns from football program boosters or corporate sponsors regarding the player altercation and/or the Agu death incident.
- Records counseling those speaking at the Ted Agu memorial event on campus following his death.
- Policies regarding when and how to conduct an internal investigation.

Clearly, *none* of those documents inherently called for confidential information related to any of the three students.

There was substantial evidence supporting the court's conclusion that the causation requirement was met. It is undisputed these records were not produced *prior* to the filing of the petition. Muchnick alleged in his verified petition that the University had obstructed his requests. (1 CT 18-19.) Answering the petition, the University claimed "zero documents" were responsive and nonexempt. (1 CT 174.)

So the University itself admitted it told Muchnick that, after exhausting all possibilities, there was nothing more to produce. Indeed, on March 30, 2017 — shortly before Muchnick filed his petition — the official with whom he was dealing emailed his lawyer confirming: "[W]e currently do not have any open California Public Records Act (CPRA) requests from Mr. Irvin Muchnick." (6 CT 1451.)

It was perfectly reasonable for the trial court to infer from the above that the production of documents over a year into the litigation would not have occurred but for the filing of the petition and was, therefore, caused by the filing. Indeed, in *Sukumar*, the Court of Appeal stressed that a city's statement before the filing of a

petition that it had nothing more to produce did *itself* constitute evidence that the subsequent production was caused by the litigation. (*Sukumar v. City of San Diego*, *supra*, 14 Cal.App.5th at pp. 465-467.) As the *Sukumar* court explained: "[T]he City's argument fails because it ignores this crucial fact: On March 8, 2016 [before the filing of the petition], the City told the court and Sukumar that it had produced everything and there was nothing more to produce." (*Id.* at pp. 465-466.) So, too, here.

The scope and limits of appellate review require this Court to defer to the trial court on its conclusion on causation in a CPRA action. "Courts have recognized that this causation question [in a CPRA prevailing party analysis] is *an intensely factual and pragmatic one*, frequently requiring courts to go outside the merits of the precise underlying dispute and focus on the condition that the fee claimant sought to change. *An appellate court must defer to the trial court's determinations on the causation issue*, unless there is no evidence to support the trial court's factual conclusion." (*Pasadena Police Officers Association v. City of Pasadena* (2018) 22 Cal.App.5th 147, 167, citations omitted, emphasis added.)

In short, whether the University disclosed those documents because of the pressure of the litigation is plainly a *factual* issue. It is not an issue of law. Either it did, or it did not. *Either way, it is a factual issue* — there is *no* rule of law dictating the answer to the question. Even if reasonable minds could differ on the factual issue, the University is asking this Court to substitute *its* own factual conclusion for that of the trial court.

That, plainly, is improper. "Applying the substantial evidence test on appeal, we may not reweigh the evidence, but consider that evidence in the light most favorable to the trial court, indulging in every reasonable inference in favor of the trial court's findings and resolving all conflicts in its favor." (*Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1078.) "We do not review the evidence to see if there is substantial evidence to support the losing party's version of events. Our power begins and ends with a determination if there was substantial evidence in the winning party's favor." (*Ashby v. Ashby* (2021) 68 Cal.App.5th 491, 513.)

2.5 The fact that Muchnick did not get everything he wanted, or that not everything he did get resulted from the litigation, is legally irrelevant

The fact that the court found the causation requirement was not met with *all* documents eventually produced does not alter the analysis.[7] Nor does the fact that Muchnick did not receive everything he sought. "Nothing in any case decided under the act supports the contention that a plaintiff who obtains only one of two documents sought has not prevailed within the meaning of the act. Other cases, without discussion, have awarded fees where disclosure is ordered for fewer than all of the documents sought." (*Los Angeles Times v. Alameda Corridor Transp. Authority* (2001) 88 Cal.App.4th 1381, 1391.) Thus, a petitioner or plaintiff has prevailed under the CPRA attorney fee provision if successful on *any significant* issue in the

[7] Muchnick disagrees with the trial court's finding that the causation requirement was not met with certain productions, but — mindful of the scope and limits of appellate review — he accepts those findings as the operative ones for the purposes of this appeal.

litigation and achieves just *some* of the benefit sought in the lawsuit. (*Garcia v. Bellflower Unified School Dist. Governing Bd.* (2013) 220 Cal.App.4th 1058, 1065.)

Even if in some circumstances a de minimis production caused by the filing of a petition might not suffice, here the production was far from insubstantial. And, indeed, the University has not even attempted to argue that while the litigation did cause certain documents to be produced, the *quantity* was insufficient. Rather, as discussed next, the University's argument is to the effect that no documents produced while the litigation was underway were nonexempt ones responsive to Muchnick's initial request. The University contends that its supposedly gratuitous act in producing them should not factor into the prevailing party analysis.

2.6 The University's argument that the trial court applied an incorrect legal standard is without merit

The University argues that the court's causation findings were erroneous because the court was, supposedly, applying an incorrect legal standard. On that basis, the University tries to conjure this case as one of pure law subject to de novo review. That sleight of hand should not be indulged.

The University focuses on language in the trial court's decision that referred to "records not expressly in the PRA request, but reasonably related to the PRA request." (See 7 CT 1905-1906, 1912.) It likewise points to similar language relating to two of the productions: "The production was not clearly the subject of the PRA request but was within a reasonable reading of the subject matter of

the PRA request." (7 CT 1907, 1914 [referring to production nos. 3 and 4].)

The University's argument appears to be that this language constituted an improper broadening of Muchnick's pre-litigation request such that it was being penalized for not earlier providing records that were not responsive.

This argument is without merit. Muchnick's request was framed quite broadly. The University itself repeatedly acknowledges it was broad (albeit characterizing it as "overly" so).[8] (AOB 9, 22, 27, 29, 34, 39, 41-42, 53, 54, 56.) It embraced a lot of specific topics that were not individually identified but plainly fell within the contours of what he was asking about. From the context, what the trial court was saying in the language on which the University fixates is that while Muchnick's original request did not expressly reference, for example, the public relations aspects of the player altercation and/or the Agu death and university policies regarding when or how to conduct an internal investigation, and so forth, such things were implicitly covered by the umbrella request he *did* make.

That request referred — among other things — to records concerning an internal investigation of "the facts surrounding" Agu's death and the altercation between the other two players. (1 CT 46.) That which "surrounds" something by definition includes that which is tangential. And the term "tangential" means — among other dictionary definitions — "relating to." (New Oxford American Dictionary.) So when the court described the various categories of

[8] Confusingly, the University also at one point in its opening brief describes Muchnick's request as "too narrow." (AOB 27.)

documents in which productions eventually took place as "reasonably related to" Muchnick's CPRA request, it was saying nothing more than that they were generally responsive.

By analogy, if a citizen made a CPRA request relating to, say, an accident involving a government vehicle, but did not expressly ask for documents relating to whether the driver had consumed alcohol, or what discussions had taken place about such a fact, a production of a document discussing the fact that the driver had been drinking would not be responsive to an "express" request about that aspect but would nonetheless be "reasonably related" to the more general one. There is no requirement that public record requests by citizens be framed with the laser-like precision of discovery demands in civil litigation.

The University also takes exception to language in the court's orders on the prevailing party motions that referred to the 22 categories of documents as "either subsets of the PRA request or logical extensions of the PRA request." (7 CT 1906-1907, 1913-1914.) Something that is a "subset" is plainly embraced by a request. The word "subset" means "a part of a larger group of related things." (New Oxford American Dictionary.) And the court did not explain — nor did the University ask it to — which categories it claimed as "subsets" and which as "logical extensions." But even "logical extensions" would be embraced by the request if they merely expressly stated what was more generally requested.

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2.7 If the University felt Muchnick's request was too broad, it was obligated under law to work with him to refine it consistent with its purpose

This segues to a key point, which is that even if a request as initially stated appears to the agency to be too broad, that does not relieve it of any obligations. Government Code section 6253, subdivision (b), requires an agency to respond to "a request for a copy of records that reasonably describes an identifiable record or records…." "An agency may legitimately raise an objection that a request is overbroad or unduly burdensome. However, the courts need not take literally a request's language to deem it clearly excessive, but instead should construe the request reasonably, in light of its clear purposes." (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1425, citation omitted.)

Furthermore, and crucially, *if* Muchnick's request could have been framed to more expressly refer to certain records related to the death and altercation, the University had a legal obligation to help him better identify what he was seeking at the outset. "Generally, public records must be described clearly enough to permit the agency to determine whether the writings or information of the type described in the request are under its control. *However, the requirement of clarity must be tempered by the reality that a requester, having no access to agency files, may be unable to precisely identify the documents sought.*" (*Community Youth Athletic Center v. City of National City*, *supra*, 220 Cal.App.4th at p. 1424, citation and quotation marks omitted, emphasis added.)

Thus, Government Code section 6253.1 places an obligation on an agency to work with a member of the public to better frame a request in light of its superior knowledge of what is there to be found that could be responsive to the overall *purpose* of the request. Specifically, subdivision (a) of that statute provides: "When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, *shall* do all of the following, to the extent reasonable under the circumstances: (1) *Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated*. (2) Describe the information technology and physical location in which the records exist." (Emphasis added.) This language means the agency, not the requester, bears the burden of clarifying an unclear request. Furthermore, if the University felt constrained in what it could produce by privacy issues, it should have proactively sought waivers before the litigation. (See *Belth v. Garamendi*, *supra*, 232 Cal.App.3d at p. 902 [fee awards that encourage public agencies to seek consent for disclosure of possibly confidential records *before* refusing requests would further CPRA's objective of increasing freedom of information].)

Had the University initially carried out its legal duty to work with Muchnick to identify documents that were responsive to the purpose of the request — which was clearly to get to the bottom of the nexus between the strength and conditioning program and the altercation between the two students and the death of Agu and how

the University handled the aftermath — that would have allowed him to expressly identify "subsets" and "logical extensions." However, nothing in the record indicates the University met that obligation before Muchnick filed his petition after being told there was nothing more the University could or would do. In fact, it took the litigation — *and the directions of the court* — to get to the point where the University finally agreed to work with Muchnick to formulate categories of documents that were responsive to the original request.

It makes no sense for the University to complain that these categories were more express than the original request, when it failed in its initial obligation to help better frame that request. And, again, the fact that records were eventually turned over without a judgment requiring it does not prevent the University from being liable for fees. To the contrary, plaintiffs should not be denied attorney fees because resolution in their favor after litigation begins is reached in some sort of collaborative or consensual process. (*Belth v. Garamendi*, *supra*, 232 Cal.App.3d at p. 901, citing to *California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 742.)

2.8 The University asks this Court to conclude the documents produced were not responsive without a record of what they actually were

Equally flawed is the University's other effort to present this as a case subject to de novo review, where it argues the appeal is about determining the "meaning of a disputed writing." (AOB 24.) The "writing" to which the University refers is Muchnick's CPRA request. But it cites to cases having nothing to do with the CPRA.

The case of *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861 has to do with contract interpretation. And *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898 is all about unfair practice claims filed by unions after a mayor sponsored a citizens' initiative to eliminate pensions for new municipal employees. None of this is in the least bit relevant.

The case of *Lorig v. Medical Board* (2000) 78 Cal.App.4th 462 *does* deal with the CPRA, but that case applied de novo review after the parties agreed the issue involved interpretation of the CPRA itself where the facts were undisputed. (*Id.* at p. 467.) It was not about the interpretation of a "writing" in the CPRA context, so it does not even begin to support the argument the University is trying to make when citing it. Here, moreover, the facts were *not* undisputed. There was a factual dispute as to (a) whether the records produced were responsive to Muchnick's request, and/or to that request as it should have been fine-tuned with the help of the University under the statutory rules just discussed, and (b) whether the filing of the petition spurred their production.

This segues into another matter, which is that — *even if* this Court were inclined for some reason to step into the shoes of a fact-finder to try to decide whether the documents produced during the litigation were responsive to the original request, and whether the filing of the petition caused their production — it would not be possible to fulfill that improbable role based on the record before it. The University's opening brief does not discuss the specifics of a *single* document produced after Muchnick filed his petition. And the University did not make a record in the trial court of all the specific

documents it did produce — or, if it did, it has not included it in the record on appeal.[9] So the University is not only asking this Court to substitute its own factual conclusions for those of the trial court, but it is also asking it to do so "blind" *without even seeing the specifics of what it would be dealing with*.[10]

2.9 The University has no basis to shelter under FERPA

The University places emphasis on the role FERPA played and on its efforts — after Muchnick filed his petition — to obtain a FERPA waiver from the family of Agu. In the proceedings below, it repeatedly invoked FERPA as the reason why it could not release records concerning any of the three students named in Muchnick's CPRA request (i.e., Agu and the two students involved in the earlier altercation). Putting aside the fact that the listed categories allowed for the production of documents, such as communications among university officials, that did not necessarily implicate FERPA, this argument by the University is deeply flawed.

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[9] Some are attached to papers Muchnick filed in the prevailing party/fee proceedings. (See 7 CT 1465-1579 [ones with "UC" prefix Bates stamps].) But that is not a complete set. Interestingly, the University has stated that the record it has designated for the appeal does "not include all of the testimony in the superior court." (7 CT 1940.) It is not clear what this refers to, as there was no live testimony, but the University appears to be stating that *it* does not think it has produced a record of all the evidence that was before the trial court.

[10] The record leaves unclear the extent to which the trial court itself reviewed individual records, as opposed to categories in which they apparently fell. The University's opening brief does not raise that as an issue, so it is not before the Court (not that Muchnick believes there would be any issue to raise). (See, e.g., *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466 [issues not properly raised in appellant's brief deemed forfeited or abandoned].)

First, neither a deceased student nor his or her family has continuing privacy rights under FERPA. While Muchnick is not aware of a case that has opined on this, the U.S. Department of Education has issued the following advisory opinion, which, in this context, surely must carry considerable weight:

> **Does FERPA protect the education records of students that are deceased?**
> Consistent with our analysis of FERPA and common law principles, *we interpret the FERPA rights of eligible students to lapse or expire upon the death of the student*. Therefore, FERPA would not protect the education records of a deceased eligible student (a student 18 or older or in college at any age) and an educational institution may disclose such records at its discretion or consistent with State law.[11]

Furthermore, the record shows that the U.S. Department of Education took this position as long ago as 2009. (See 1 CT 233, 238 [letter to Florida Department of Education].) So this rule interpretation should have been known to the University when it processed Muchnick's CPRA request.

Thus, far from helping to accommodate Muchnick by gratuitously obtaining a waiver from the Agu family — which is how the University tries to characterize its actions — there was never any basis to invoke FERPA in the first place with regard to Agu.

Significantly, the University's opening brief on appeal *concedes* that FEPRA did not apply to Agu. (AOB 28.) That marks a

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[11] https://studentprivacy.ed.gov/faq/does-ferpa-protect-education-records-students-are-deceased <as of January 11, 2022 [opinion goes on to note that a different rule would apply to deceased elementary/secondary students]>, emphasis added.

change from what it argued in the trial court. There, it repeatedly said — prior to obtaining the waiver from the Agu family — that FEPRA *was* a bar to producing records relating to *any* of the three students named in Muchnick's CPRA request. (See, e.g., 1 CT 177, 199; 1 RT 10, 13.)

Despite now conceding FERPA did not, in fact, apply to the deceased student, the University claims Agu's family nonetheless "had privacy rights which afforded the same kind of protection." (AOB 28.) Tellingly, the University does not say *what* these unspecified equivalent rights actually were. It refers to no statutes. And in California, the right of privacy under tort law is — with very limited exceptions — purely a personal one. (*Kelly v. Johnson Publishing Co.* (1958) 160 Cal.App.2d 718, 721 [cannot be asserted by anyone other than the person whose privacy has been invaded].) And, furthermore, it does not survive the individual.[12] (*Hendrickson v. California Newspapers, Inc.* (1975) 48 Cal.App.3d 59, 62.)

Second, with regard to the other two students, even if there were a basis to withhold some records under FERPA, that would not mean Muchnick was not the prevailing party. This is because, as already shown, it is not necessary that he obtained everything he sought. (*Los Angeles Times v. Alameda Corridor Transp. Authority*,

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[12] To the extent there is any exception to this rule, it is in gruesome cases that do not come close to the present one. (See *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 868-874 [family members of 18-year-old decedent had sufficient privacy interest to maintain invasion of privacy action against Highway Patrol officers who emailed photographs of decapitated corpse following auto accident to unconnected members of the public].)

supra, 88 Cal.App.4th at p. 1391.) And there *must* have been numerous documents produced after the petition was filed that did *not* violate the FERPA rights of those other two students (who never did sign waivers) — because otherwise, presumably, those documents would not have been released.

Furthermore, the University cites to no authority indicating that the scope of FERPA is so broad that it prevents the release of all records concerning an event in which a student takes part. And that is no oversight, because there is no such authority. It is worth adding that FERPA anyway does not actually prohibit a university from disclosing any records. Its provisions merely prohibit the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons, and they create no personal rights of enforcement. (*Doe v. United States Swimming, Inc.* (2011) 200 Cal.App.4th 1424, 1439, fn. 7.) Furthermore, as noted earlier, case law encourages public agencies to proactively try to obtain waivers before turning down CPRA requests on privacy grounds. (See *Belth v. Garamendi*, *supra*, 232 Cal.App.3d at p. 902.)

It is surely obvious that Muchnick was not seeking to pry into the private affairs of any students. He was trying to investigate the football team's strength and conditioning program and how the University handled the aftermath of the two events at issue. The University cannot take shelter under FERPA. It is irrelevant to the outcome of this appeal.

2.10 This Court should infer all necessary findings to support the trial court's decision

Ultimately, to be found the prevailing party, Muchnick did not

need to prove either that the University deliberately obstructed his request prior to the filing of his petition or that it was in breach of its obligation under Government Code section 6253.1 to assist him in better framing it. (See *Sukumar v. City of San Diego*, *supra*, 14 Cal.App.5th at p. 466 ["bad faith is not the test"].) All that Muchnick *needed* to establish was that the production of certain documents was caused — at least in part — by the filing of his petition. And, perhaps for that reason, the court did not make express findings on those other factors.

But those pre-filing factors do have evidentiary value as to whether the petition did cause the subsequent release of documents. If it was an operative fact that the University *had* deliberately obstructed the request, and/or failed in its statutory obligation to assist Muchnick, that would be evidence tending to weigh further in favor of a conclusion that the subsequent filing of the petition was what caused the later release of documents. So to the extent that — even if not necessary — those pre-petition aspects of the University's conduct further underscored Muchnick's position as the prevailing party, this Court should presume the trial court *did* make such findings to his benefit. And the reason for the presumption is that the University *failed to ask for a statement of decision*.

Code of Civil Procedure section 632 provides: "In superior courts, upon the trial of a question of fact by the court… [t]he court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." The term "trial" is construed broadly in this context, to include not only a

"traditional" trial that gives rise to a judgment at the climax of a lawsuit, but any hearing that has the overall attributes of a trial in terms of the court resolving disputed issues of fact. (See *Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 688.)

"A hearing on a petition for writ of mandamus constitutes a 'trial of a question of fact' within the meaning of section 632 of the Code of Civil Procedure and therefore *requires* a statement of decision upon a timely request." (*Ochoa v. Anaheim City School Dist.* (2017) 11 Cal.App.5th 209, 224, emphasis added; see also *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1326 [hearing on petition for writ of administrative mandamus is a trial of a question of fact for purposes of the Code of Civil Procedure section requiring a statement of decision upon the trial of a question of fact].)

Absent a request for a statement of decision in a circumstance where one would be required if requested, an appellate court will invoke the doctrine of implied findings and presume the trial court made *whatever* findings of fact are necessary to support the judgment. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 61.) Here, the doctrine of implied findings dooms the University's appeal, even it were not flawed for other reasons. This is because this Court has to presume, for example, that the trial court — as well as making its express rulings on causation — found in Muchnick's favor on the factual issue of whether the University had, prior to the filing of the petition, obstructed his legitimate access to public records and whether it failed in its obligations under Government Code section 6253.1 to assist him in framing his request.

Case law confirms the general rule about statements of decision applying in mandamus proceedings does apply to actions under the CPRA as much as to other types. In *County of Los Angeles v. Superior Court (Anderson-Barker)* (2012) 211 Cal.App.4th 57, the court reviewed whether a public entity could refuse to produce documents relating to attorney fees charged by its litigation counsel following a request under the CPRA. (*Id.* at p. 60.) There, the trial court found that, based on the evidence before it, the records in question were not prepared for use in litigation even though they related to pending litigation and, on that basis, ordered the documents produced. (*Id.* at p. 67.) Reviewing the trial court's decision, the Court of Appeal found that substantial evidence supported that decision. (*Ibid.*) And the Court of Appeal added: "To the extent findings could have been more explicit in the statement of decision, *petitioner's failure to request a more detailed statement means we imply all necessary findings*." (*Id.* at p. 67, fn. 6, emphasis added, citing to *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

Like the present matter, *Anderson-Barker* involved a petition for a writ of mandate filed in the trial court. (*County of Los Angeles v. Superior Court*, *supra*, 211 Cal.App.4th at p. 61.) And like the present matter, there was no "trial" in the traditional sense to resolve the public records dispute. (*Ibid.*) As the Court of Appeal opinion explains: "Before the hearing on the matter, the trial court issued a tentative decision which became the ruling of the court after the parties submitted on the tentative without substantive argument." (*Ibid.*) Thus, even though this was a mandamus action decided on

the papers without a formal "trial" in the popular sense, the appellate court invoked the doctrine of implied findings where a statement of decision appeared less than explicit and given the County's failure to request a more detailed one. Plainly, had the appellate court considered a statement of decision was not applicable in the first place given the nature of the proceeding, it would not have invoked the doctrine. Thus, applying precedent, the doctrine of implied findings should be applied here, where the University did not even request a statement of decision, let alone any specific findings.

The resolution in *Anderson-Baker* involved a determination on whether certain documents should be produced, as opposed to whether documents that were produced made the petitioner the prevailing party. But that distinction does not affect the analysis. Nothing in the law about entitlement to a statement of decision concerns the precise subject matter of the pre-judgment factual determination giving rise to one. All that matters is that there was a determination as to a disputed issue of fact — here, whether the filing of the petition caused certain of the document productions.

2.11 The University's argument that it was denied an opportunity to make a record is nonsensical

One of the more puzzling aspects of the University's argument on appeal is that the court's decision supposedly deprived it of an opportunity to make a record with extrinsic evidence of why the documents produced were not responsive to Muchnick's CPRA request. (See AOB 41-43.) The fact is that it had *every* opportunity to make such a record. It could have made it in its motion seeking to be made the prevailing party, or in its opposition to Muchnick's motion.

It knew all along that Muchnick would be seeking to be designated the prevailing party entitled to attorney fees — his petition made that abundantly clear. (1 CT 24.) And before the two sides filed their respective motions, the parties filed a stipulation acknowledging that each would do so and bifurcating the initial issue of entitlement from the subsequent issue of amount. (5 CT 1243-1244.)

There was no "ambush." The University knew Muchnick was seeking to be made the prevailing party on the basis of the document productions that had occurred. And it knew that the only way he could succeed would be by making the argument that the court accepted (at least, in large part) — i.e., that various responsive record productions were caused by the filing of his petition. Not only did it have a chance to submit declarations with its papers, but it took advantage of that opportunity. (5 CT 1271.) So to say the fact that the manner in which the University lost on the prevailing party determination meant it did not get a chance to make its case is, to put it mildly, nonsensical. Muchnick does not believe that any additional record the University might have made would alter the correct outcome on appeal. But if the University thinks otherwise, it has only itself to blame.

- 3 -

The University's Argument That Muchnick's Petition was "Clearly Frivolous" is *Itself* Frivolous

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The University asks this Court not only to find that Muchnick should not have been found to have prevailed, but that his petition

was frivolous such that *he* should be liable for *its* fees. (AOB 55-56.) This portion of its argument should not even be reached. But if it is reached, it is devoid of any merit.

As discussed above, Government Code section 6259, subdivision (d), provides for a mandatory award of attorney fees to a plaintiff that prevails in a CPRA action. In contrast, public agencies are ordinarily *not* entitled to attorney fees and costs from a requester who fails to secure public documents in a court challenge based on a CPRA request. Rather, a public agency may recover its attorney fees and costs *only* if the trial court "finds that the plaintiff's case is clearly frivolous." (Govt. Code, § 6259, subd. (d).) "The California Supreme Court has described these disparate fee provisions as 'protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure.'" (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 368, citing to and quoting from *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 427.)

The CPRA does not define the term "clearly frivolous." (*Bertoli v. City of Sebastopol*, *supra*, 233 Cal.App.4th at p. 368.) However, as *Bertoli* points out, courts deciding CPRA cases have applied a *Marriage of Flaherty* standard similar to what is used to decide whether to award sanctions for a frivolous appeal. (*Id.* at pp. 368-369; see *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [an appeal should be held to be "frivolous" only when it is prosecuted for an improper motive, i.e., to harass the respondent or delay the effect of an adverse judgment, or when it indisputably has no merit, i.e., when any reasonable attorney would agree that the appeal is totally

and completely without merit].) In practice, appellate courts tend to find appeals frivolous under *Marriage of Flaherty* standards when *both* of the grounds — i.e., total lack of any merit *and* improper motive — are present, each providing evidence of the other. (Civil Appeals & Writs (Rutter) § 11:04; see, e.g., *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 32, fn. 9.)

The Regents do not even acknowledge — let alone discuss — the *Marriage of Flaherty* standard. Nor do they cite to a single case in which an appellate court has held a petition under the CPRA was frivolous — let alone one where the trial court had found it to be successful.

And the University does not even try to point to any improper motive on the part of Muchnick. As for the suggestion that his petition was utterly void of *any* merit, the fact is it was good enough for the Superior Court to enter judgment in his favor. Muchnick believes the judgment should be affirmed. But even if this Court were to reverse, that would not make Muchnick's petition frivolous under *Marriage of Flaherty* standards as applied to the CPRA. At worst, it would render his position merely flawed (not that Muchnick concedes there is any reason so to find). (*Bertoli v. City of Sebastopol*, *supra*, 233 Cal.App.4th at pp. 372-373.)

Indeed, the suggestion that the University would be entitled to fees is *itself* frivolous. If a powerful state institution makes such a meritless demand in a case such as this, it suggests a purpose to chill the right of journalists — and citizens generally — to petition under the CPRA by threatening potentially life-changing consequences for those who dare to not take "no" for an answer. And, implicitly, the

University is suggesting that this respondent's brief — disputing its view — is *itself* necessarily "clearly frivolous" and, therefore, sanctionable, since it is advocating the merits of Muchnick's position. The University's unreasonable aggression in this regard is, perhaps, indicative of how it has handled this entire matter and sheds light on why this case has got to this point.

Appellate sanctions may be imposed if only *part* of an appeal is frivolous. (*Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1010.) Muchnick — in the spirit of winding down, not ramping up, the litigation — is disinclined to bring a motion for appellate sanctions relating to this part of the University's opening brief. But the University should be admonished for its overreach.

- 4 -

This Court Should Direct That Muchnick be Awarded Attorney Fees for the Appeal in an Amount to be Determined on Remand

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It is settled that attorney fees, if recoverable at all pursuant to statute, are available for services both at trial and on appeal. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 637.) Therefore, Muchnick requests that in the event this Court either dismisses the appeal or affirms the judgment, it orders he be entitled to recover reasonable attorney fees for the appeal, with a remand to the trial court for a determination as to the amount. (*Los Angeles Times v. Alameda Corridor Transp. Authority*, *supra*, 88 Cal.App.4th at p. 1393.)

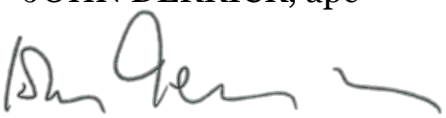
CONCLUSION

For the reasons stated above, the Court is urged to dismiss or affirm. Costs and statutory attorney fees should be awarded to respondent.

March 3, 2022

Respectfully submitted,

THE LAW OFFICE OF
JOHN DERRICK, apc



By John Derrick
Attorney for Respondent
Irvin Muchnick

CERTIFICATE OF WORD COUNT

I certify that the text of this brief, as counted by Microsoft Word, consists of 11,469 words (including footnotes but excluding the tables of contents and authorities, this certificate, and the attached proof of service).

March 3, 2022

THE LAW OFFICE OF
JOHN DERRICK,
a professional corporation

by _____
John Derrick
Attorney for Respondent

PROOF OF SERVICE

I am over 18 years of age and not a party to this action. I am a resident of the county where the service described herein was initiated. My business address is 21 E. Pedregosa Street, Santa Barbara, CA 93101.

On March 3, 2022, I sent from Santa Barbara, California, the following document:

RESPONDENT'S BRIEF

I served the document by:

Electronic service: As shown on the proof of service generated by TrueFiling or by email.

Service by mail: Enclosing it in envelopes and depositing the sealed envelopes with the United States Postal Service, postage fully prepaid, addressed as shown on the attached service list.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

March 3, 2022

John Derrick

Service List

Michael Goldstein
Office of the General Counsel
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607
(Electronic service via TrueFiling)

Office of the Clerk
Alameda County Superior Court
24405 Amador Street
Hayward, CA 94544
(Mailed for the attention of Judge Brand)

ADDENDUM

Cal. Rules Ct., rule 8.204(d)

Judgment entered on January 3, 2021,
and served on January 5, 2021
(7 CT 1924-1929)

The Skelton Key

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

IRVIN MUCHNICK,

Petitioner,

v.

UNIVERSITY OF CALIFORNIA, BOARD OF REGENTS,

Respondent.

CASE NO. RG17857115

ASSIGNED FOR ALL PURPOSES TO
JUDGE Jeffrey Brand
DEPARTMENT 22

~~[PROPOSED]~~ JUDGMENT

This court having, on October 16, 2020, granted the Motion for an Order Designating Petitioner as the Prevailing Party and as Entitled to Court Costs and Attorney's Fees, and having not addressed in the Order, or decided, the amount of costs or fees that might be awarded, but having ordered the parties to meet and confer regarding the amount of fees and to make a reasonable effort to settle the issue of fees, and the parties having met and conferred and stipulated to set the amount of costs and fees at $125,000,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The Petition is GRANTED IN PART.

2. The amount of costs and fees is fixed at $125,000.

Dated: ~~November __, 2020~~ 1/03/2021

Jeffrey Brand
Judge of the Superior Court

4849-4165-7810.1

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

IRVIN MUCHNICK, Petitioner, v. UNIVERSITY OF CALIFORNIA, BOARD OF REGENTS, Respondent.	**CASE NO. RG17857115** ASSIGNED FOR ALL PURPOSES TO JUDGE Jeffrey Brand DEPARTMENT 22 **~~[PROPOSED]~~ JUDGMENT**

Whereas, on October 16, 2020, this Court granted Petitioner's Motion for an Order Designating Petitioner as the Prevailing Party and as Entitled to Court Costs and Attorney's Fees and denied a cross-motion by Respondent on the same subject;

Whereas, in those Orders of October 16, 2020, the Court did not determine the amount of costs or fees that will be awarded because the parties had previously stipulated, and as was earlier affirmed by the Court, that the designation of the prevailing party entitled to attorney fees was to be bifurcated from a decision by the Court on the amount of attorney fees and costs to be awarded;

Whereas the Court's Orders of October 16, 2020, ordered the parties to meet and confer regarding the amount of fees and to make a reasonable effort to settle the issue of the amount of attorney fees and costs without requiring a determination by the Court;

Whereas the parties met and conferred and agreed to set the amount of costs and fees at $125,000;

Whereas the parties have represented to the Court that there are no remaining issues in the case for the Court to adjudicate;

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. In accordance with this Court's rulings during the course of this proceeding, the Petition is GRANTED to the extent set forth in this Order and in the Court's previous Orders;.
2. The amount of costs and fees is fixed at $125,000 (One hundred and twenty five thousand dollars).
3. The Court shall retain jurisdiction over this Petition and the parties until receiving notification from Petitioner that the above-referenced consideration has been received.

Dated: ~~November __, 2020~~ 1/03/2021

Jeffrey Brand
Judge of the Superior Court

4849-4165-7810.1

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG17857115

Case name: MUCHNICK v. UNIVERSITY OF CALIFORNIA BOARD OF REGENTS

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of **Judgment** filed on January 3, 2021 was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 5, 2020.

Chad Finke, Executive Officer/Clerk of the Superior Court

By: _____
Aquetta Scoggins
Deputy Clerk

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