B196639

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

(DIVISION 4)

HUB CITY SOLID WASTE SERVICES, INC., and MICHAEL ALOYAN

Plaintiff, Cross-Defendants and Appellants

vs.

CITY OF COMPTON

Defendant, Cross-Complainant and Respondent

Appeal from the Superior Court of Los Angeles County
Hon. Joanne O'Donnell, Judge
Los Angeles Superior Court Case No. BC 323801

RESPONDENT'S BRIEF

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1. INTRODUCTION

This action presents two important questions of public policy: (1) Under what circumstances is a municipal waste management franchise deemed *void* to protect the important public interest of maintaining honesty and integrity in the process by which public contracts are awarded to private contractors? and (2) How much control do local governments have to determine whether to *terminate* a municipal waste management franchise to protect the health, safety, peace, welfare or morals of the community?

This is a public corruption case arising from appellants' flagrant violation of state conflict of interest laws governing public contracts. The judgment in this case should be affirmed. After a multi-week trial, a unanimous jury concluded that appellants procured a fifteen year, no-bid, $90 million public contract—the Integrated Waste Management Franchise Agreement ("Franchise")—from respondent City of Compton ("City") in violation of Government Code section 1090.[1] Section 1090, which embodies important public policy principles prohibiting conflicts of interest in the creation of public contracts, declares void any contract made by a

[1] All further statutory references are to the California Government Code, unless otherwise noted.

city officer or employee in his official capacity if he is financially interested in the contract.[2]

As a result of the verdict, the Franchise was declared void *ab initio* and judgment was entered in favor of City and against appellant Hub City Solid Waste Services, Inc. ("Hub") on Hub's complaint and City's cross-complaint to recover the more than $22 million Hub was paid under the void Franchise. Judgment on City's cross-complaint was entered jointly and severally against Hub and appellant Michael Aloyan ("Aloyan") (collectively "Appellants"), based on the trial court's separate finding that Aloyan was Hub's alter-ego. Appellants appeal both results, asserting multiple claims of error. As demonstrated below, no error has been demonstrated.

Appellants contend that judgment must be reversed "as a matter of law." Their contention disregards both the broad scope of the conflict of interest laws and the standard of review on appeal. As demonstrated below, substantial evidence supports the conclusion that Appellants obtained the Franchise as a result of multiple prohibited financial conflicts of interest.

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[2] Section 1090 states: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members...."

First, Aloyan was performing the function of a city officer or employee at the time he acquired the Franchise and he made the Franchise in his official capacity. Acting nominally as an independent contractor, Aloyan was hired by City to establish its in-house waste management operations and then served as the de facto director of City's waste management division. In that capacity, he had direct responsibility, supervision and control over City's employees, equipment and day-to-day waste collection operations. California law is clear that Section 1090 applies to independent contractors who, like Aloyan here, perform a public function. See *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682, 690-695. In that capacity Aloyan participated in City's decision to franchise out its waste management operations. Aloyan's ownership of the franchisee, Hub, constituted an impermissible financial interest in the Franchise that renders it void under Section 1090.

Second, substantial evidence supports the conclusion that the city councilmembers who voted in favor of awarding Appellants the Franchise also had impermissible financial interests, in that they received tens of thousands of dollars in illicit "campaign contributions" from Hub in return for their votes awarding Appellants the Franchise. The proceeds of the Franchise disguised

as "campaign contributions" bought and rewarded the councilmembers' violations of the public trust imposed on them by their public offices.[3]

Contrary to Appellants' argument, the trial court did not abuse its discretion by admitting evidence of Aloyan's long-standing practice of influence peddling among City's local politicians, which evidence was relevant to demonstrate the improper, collusive relationship between Aloyan and the members of city council who voted for the Franchise. As important, Appellants waived their objections and invited any error in admitting such evidence, by voluntarily playing at trial the entire, unedited video of a December 19, 2000 city council meeting at which Aloyan's history of bribing City officials was discussed at length. (See RT7201-7202, 7227-7228, 7231, 7238; AA955-1056.)[4] Further, substantial evidence—other than evidence of Aloyan's background—supports the conclusion that at the time the Franchise was made, a *quid pro quo* agreement existed between Aloyan and members of the city council that constituted a prohibited financial interest in the Franchise.

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[3] "A public office is a public trust created in the interest and for the benefit of the people. Public officers are obligated, virtue officii, to discharge their responsibilities with integrity and fidelity." *Terry v. Bender* (1956) 143 Cal.A2d 198, 206.

[4] Record references throughout this Brief are to Appellants' Appendix ("AA"), Reporters' Transcript ("RT"), Respondent's Supplemental Appendix ("SA"), and Trial Exhibits ("Ex").

Appellants also challenge the trial court's decision, in a bifurcated bench trial that was conducted before the jury trial, that Aloyan and Hub were alter-egos. Appellants complain it was error to adjudicate alter-ego before the jury found Hub liable on the cross-complaint. The trial court did not err by resolving alter-ego first, because Aloyan's fully litigated the corporate defendant's underlying liability in phase two. Appellants further contend that no evidence supports the trial court's conclusion that inequity would result absent a finding of alter-ego liability. This argument, too, lacks merit. As will be demonstrated below, the record catalogues substantial evidence demonstrating that Aloyan abused the corporate privilege to perpetrate a fraud on City and to avoid the natural and legal consequences of his own misconduct.

Finally, Appellants challenge two other rulings by the trial court that become material only if this Court reverses the judgment. First, Appellants contend the trial court erred in granting City's motion for summary adjudication, which established as a matter of law that City was authorized by its municipal code to terminate the Franchise based on Aloyan's conviction for attempted bribery. Second, Appellants challenge the trial court's post-verdict grant of nonsuit on Hub's complaint on the ground that the Franchise was void because it lacked the mayor's signature. As explained below,

each of these rulings was proper and should be affirmed even if other error is found in the judgment.

2. ISSUES FOR REVIEW

Issue No. 1: In *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682, the court confirmed that Section 1090 applies to independent contractors who perform a public function. See also, *People v. Gnass* (2002) 101 Cal.App.4th 1271. The first issue on appeal is:

Does substantial evidence support the jury's unanimous verdict that the Franchise was made in violation of Section 1090 where Aloyan was an independent contractor who managed the day-to-day operations of City's in-house waste collection division at the time City awarded him the Franchise, and where he made the Franchise in his official capacity by proposing the Franchise and representing City in preliminary negotiations, discussions and solicitations?

Issue No. 2: Violations of Section 1090 need not be proven by direct evidence; rather, forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances. *People v. Gnass*, 101 Cal.App.4th 1271, 1298-99 (2002). Substantial evidence may consist of inferences that are "a

product of logic and reason" that "rest on the evidence." *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584. The second issue on appeal is:

Does substantial evidence support the jury's unanimous verdict that the Franchise was the product of a financial conflict of interest that violated Section 1090, where Aloyan made tens of thousands of dollars in unreported "campaign contributions" to councilmembers who voted to award the Franchise to Appellants (but not to the only councilmember who opposed the Franchise), Aloyan admitted he would not have made the payments if the councilmembers had not awarded him the Franchise, and abundant additional evidence supports the inference that the payments were made pursuant to an express or implied *quid pro quo* agreement?

Issue No. 3: Trial courts have discretion to set the order of precedence of issues at trial. Code of Civil Procedure § 598; Code of Civil Procedure § 1048(b). The third issue presented on appeal is:

Did the trial court have discretion to conduct a bifurcated bench trial to decide the alter-ego issue *before* the jury determined Hub's liability on the cross-complaint?

Issue No. 4: In California, alter-ego liability of a corporation's sole owner is appropriate where an inequitable result will follow if the acts in question are treated as those of the corporation alone.

Sonora Diamond Corp. v. Superior Court , (2000) 83 Cal.App.4th 523, 538. The fourth issue on appeal is:

Does substantial evidence support the trial court's finding that inequity would result if Aloyan is not treated as Hub's alter-ego, where Aloyan abused the corporate privilege, diverted corporate assets to personal use to the detriment of corporate creditors and misrepresented the identities of Hub's officers and directors to avoid the consequences of his illegal acts and perpetrate a fraud on City and the trial court ?

Issue No. 5: All contracts are subject to applicable laws in existence when the contracts are made (*White v. Davis* (2002) 108 Cal.App.4th 197, 230-31), and laws made for a public benefit cannot be waived. *Terry v. Bender* (1956) 143 Cal.App.2d 198, 214. The fifth issue on appeal is:

In granting City's motion for summary adjudication, did the trial court correctly rule that City's municipal code authorized it to terminate the Franchise without notice or administrative review based on Aloyan's felony conviction for attempted bribery of a city official and Hub's violation of California's Political Reform Act, Government Code Section 81000, *et seq*.?

Issue No. 6: A contract with a municipality that is not lawfully executed is void and the contractor can claim no rights arising under

it. *Midway Orchard v. County of Butte* (1990) 220 Cal.App.3d 765, 783; *Miller v. McKinnon* (1942) 20 Cal.2d 83, 88-89. The sixth issue on appeal is:

Did the trial court correctly grant nonsuit on Hub's complaint for breach of the Franchise, where the mayor did not execute the Franchise as required by City's municipal code?

3. STANDARD OF REVIEW

Appellants attack the judgment based on a statement of decision made by the trial court following a week-long bench trial and the jury's subsequent unanimous verdict following a three week jury trial. Appellants also attack the trial court's grant of summary adjudication, and its grant of nonsuit on the complaint.

Rulings not challenged by Appellants in their opening brief are not preserved for appellate review. A party cannot raise an issue for the first time in a reply brief. *See Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 ("Points raised for the first time in a reply brief ordinarily will not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument") (quoting *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453).

A. Substantial Evidence Test

The trial court's finding that Aloyan and Hub are alter-egos and the jury's finding that Appellants obtained the Franchise in violation of Section 1090 are reviewed under the substantial evidence standard, resolving all evidentiary conflicts and drawing all legitimate and reasonable inferences in favor of judgment. *Roze v. Department of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1184. "'[T]he power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' " *Road Sprinkler Fitters Local Union No. 699 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 781 (italics in original).

The standard is the same in cases where the evidence is primarily circumstantial. *People v. Stanley* (1995) 10 Cal.4th 764, 792. The reviewing court may not substitute its judgment for that of the jury where the circumstances reasonably justify the factual findings supporting the verdict. *Id.* at p. 793. A reversal for insufficient evidence is unwarranted unless it appears that " 'upon no hypothesis whatsoever' " is there substantial evidence to support the judgment. *People v. Bolin* (1998) 18 Cal.4th 297, 331.

An appellant who presents a one-sided version on appeal of the evidence at trial waives any claim that the trial court's findings

lack substantial evidence. *See, e.g., G & G Fire Sprinklers, supra,* 102 Cal.App.4th at 782 ("G & G sets forth only its own evidence, ignoring the trial court's findings and the evidence in support of those findings. It has therefore waived its substantial evidence claim.")

In disputing the sufficiency of the evidence, "the appellant has the burden to fairly summarize all of the facts in the light most favorable to the judgment." *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1658, *cert. denied,* 126 S.Ct. 1567, 164 L.Ed.2d 297. "Further, the burden to provide a fair summary of the evidence 'grows with the complexity of the record. [Citation.]'" *Boeken, supra,* 127 Cal.App.4th at 1658.

B. Abuse of Discretion

Appellants challenge the trial court's decision to try Aloyan's alter-ego liability before liability on City's cross-complaint was established. The trial court's decision cannot be reversed, however, unless Appellants demonstrate the trial court manifestly abused its discretion. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086.

Additionally, Appellants contend the trial court erred by admitting evidence of Aloyan's past misconduct both for credibility

and pursuant to Evidence Code section 1102(b). The trial court's decisions admitting or excluding evidence are reviewed for an abuse of discretion, as are rulings in general on motions in limine. *City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900 (decisions to admit or deny evidence are generally reviewed for abuse of discretion); *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493 (rulings on in limine motion are generally reviewed for abuse of discretion.)

Error does not merit reversal unless it was prejudicial. "The burden is on the appellant in every case to show that the claimed error is prejudicial; i.e., that it has resulted in a miscarriage of justice." *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 (internal quotations omitted); *see* Calif. Const., Art. VI, § 13 and Code Civ. Proc. § 475.

C. De Novo Review for Legal Determinations

The court's grant of City's summary adjudication motion is reviewed de novo. *Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 36 ("We review an appeal from a grant of summary adjudication de novo"). Summary judgment may be affirmed on any theory, regardless of the ground relied on by the

trial court . *Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47, 54.

Appellants' challenge of the order granting nonsuit on the complaint is also subject to independent review, and must be affirmed unless Appellants' claim is supported by both substantial evidence and applicable law. *Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 895.

4. STATEMENT OF FACTS

A. Aloyan's Background in Waste Management and Buying Political Influence

Michael Aloyan began working in the waste industry in 1988, within a year after immigrating to the United States from Armenia. (RT8763-8766.) His education in the business of public corruption began shortly thereafter, under the tutelage of his employers at Murcole Disposal, the company that then held the franchise for City's residential waste collection. (RT8764-8766.) Aloyan also became acquainted with City's future mayor, Omar Bradley, around that time. (RT7933, 8781-8783.)

By 1990, Aloyan was Murcole's general manager (RT8765-8766). In 1992, he passed a check purporting to represent

"campaign contributions" to a committee for City's then-mayor, Walter Tucker, to buy Tucker's vote in favor of a rate hike for Murcole that was pending before City Council. (RT8768-8771.) In 1995, under a grant of immunity Aloyan testified at Tucker's criminal trial, and admitted his involvement in the illegal influence-peddling scheme. (RT8773-8774.)

Also in or about 1992, Aloyan made "campaign contributions" by check to then-City councilperson Patricia Moore, to buy Moore's support for a casino that Aloyan's company, Compton Entertainment, Inc. was seeking to open in City. (RT8776-8779.) Moore was indicted, but Aloyan again testified under a grant of immunity. (RT8780.) He admitted that he sought immunity because he knew his involvement in the transaction was illegal. (RT8780.)

Although recognizing that paying politicians for votes on matters pending before them was illegal, Aloyan continued to pursue that same strategy in City (discussed below) and elsewhere. Specifically, in 2001 after securing the Franchise for Hub, Aloyan sought to expand Hub's business into neighboring communities by bribing Manuel Ontal, a city councilmember in Carson.[5] (RT8903-

[5] In 2000, Aloyan threateningly previewed his plan to Ray Burke, an executive at Waste Management, Inc. (RT9012-9013.)

8904.) Aloyan was indicted, and pled guilty to the federal crime of attempted bribery. (RT8905.)

B. History of City's Waste Management Operations

City is a California charter city of approximately 94,000 residents. It is governed by a five member city council, including the mayor. (RT6332, 7909.) Aloyan knew that a three member majority vote was required to pass measures. (RT7909, 8768.)

Prior to 2000, City's waste collection responsibilities were franchised out to two private vendors (one for residential waste, the other for commercial and industrial waste) pursuant to City's authority under Chapter 21 of its municipal code, entitled "Integrated Waste Management." (RT6428, 8531; AA156-171.) Kareemah Bradford, a contract administrator in City's Water Department, was responsible for monitoring the waste franchisees' performance, and in 1999, she officially became the City employee with primary responsibility for waste management. (RT8530-8531.)

City's waste franchises were set to expire in June 2000. (RT8531.) Consequently, in 1999, Bradford prepared a Request for Proposals ("RFP") to solicit bids for new waste franchisees. (RT8531-8532.) City never posted the RFP. Instead, in June 1999 local elections were held. When the new city council was seated in

July 1999, it included councilmembers Amen Rahh and Delores Zurita. (RT7908-7909, 8532-8533.) Omar Bradley was already mayor.[6] (RT7909.)

The new council almost immediately hired Lawrence Adams as Assistant City Manager. (RT6091, 8532.) He instructed Bradford to suspend the RFP and to instead investigate bringing waste collection functions in-house. (RT8533-8534.)

Working with a professional consultant, Bradford prepared a feasibility study that included data on costs, revenues, expenses, personnel and equipment requirements, and recycling programs. (RT8534-8535; SA1292-1312 (Ex53).) The study recommended against bringing services in-house at that time, reasoning that more study and planning were required. (RT8536-8537; SA1312.)

C. City Creates In-House Waste Management Division

Despite the recommendations of the feasibility study, in September 1999 City moved forward with establishing an in-house waste management division, which was to be operated through City's Water Department. (RT6126, 6676-6677, 8537-8539.) Between

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[6] By then, Aloyan and Bradley were well acquainted. (RT7933.) Aloyan knew Bradley's family. They first met in 1991, and socialized occasionally. (RT8782-8783.)

November 1999 and January 2000, Bradford prepared a business plan that City used to secure financing for the operation. (RT8540-854, 8551-8554; SA1348-1363 (Ex200).) The business plan projected well over seven hundred thousand dollars of annual profits if City performed waste collection itself. (RT8555.)

Project financing took the form of six million dollars in tax exempt municipal bonds that City issued in mid-2000. The bonds financed the acquisition of trucks, containers, equipment, personnel and real estate so that City would be prepared to commence operations in or about September 2000, upon the expiration of the then-existing waste hauling franchises. (RT7245, 7255-7256 8839; AA978-979, 985.)

1. City Hires Aloyan to Establish In-House Waste Operations

Hoping to get hired by City, in 1999 Aloyan proposed to assist City's efforts to establish an in-house waste division, initially using the name Compton Waste & Recycling. (RT6442-6444, 8795, 8798, 8800.) Adams had little knowledge of Aloyan's background when he accepted Aloyan's help (RT6445-6447), other than familiarity with Aloyan's history with Murcole from a decade earlier. (RT6407-6408.) Although Kareemah Bradford was in charge of City's waste

management operations, Adams did not consult her about hiring Aloyan; she did not believe he was well-qualified to operate City's in-house waste division. (RT6433, 8563-8565.)

Nonetheless, from 1999 until City began its own waste collection activities in September 2000, City relied on Aloyan's assistance. Aloyan identified vendors and negotiated to acquire trucks and refuse containers for City; he negotiated a transfer station disposal contract for City and a contract to acquire a maintenance facility. (RT6722, 8819-8828.) Aloyan had discretion which vendors to solicit on City's behalf. (RT6722.) He had influence in City's staffing decisions. (RT8567.) He also helped City obtain insurance (RT6152, 8825), and discussed with City personnel and outside contractors the possibility of outsourcing the City's waste hauling operations to a private contractor. (RT8843, 8846-8847.)

Significantly, during the same period he was actively assisting City to create an in-house waste operation, Aloyan contacted three private waste haulers and offered to sell them City's waste collection franchise—in exchange for a fee ranging from $1 million to $5 million. (RT8172-8179, 8229-8231, 8235-8236, 8236-8239, 9011-9013.) When asked how he could deliver what he was promising (i.e., a franchise that had to be approved by City Council), Aloyan "suggested that he knew the City of Compton officials very well."

(RT9013.) One hauler described Aloyan's communication as "extortion." (RT9036-9038.)

2. Aloyan Manages City's Waste Division Through Corporate Shell AUS

While his activities on City's behalf were on-going, Aloyan formed a company called American Utility Services, LLC ("AUS"). AUS had no business at the time it was formed. (RT8803.) It had no employees other than Aloyan (RT8566, 8805), no equipment and no offices. (RT6692, 8566-8567). Nonetheless, because Adams purportedly wanted Aloyan's particular management expertise (RT6688), in May 2000, City and AUS entered into a seven year Management Agreement ("AUS Agreement") pursuant to which Aloyan would continue to be intimately involved in all aspects of developing and managing City's in-house waste operations. (RT6147, 6151-6152, 6685-6686; AA1059-1068.)

Once City's in-house waste division was fully operational, Aloyan was to earn $300,000 a year under the AUS Agreement, making him the highest paid City official. (RT6688-6690, 8806-8807.) The AUS Agreement also allowed Aloyan to share in the profits from City's collection activities and gave him a right of first refusal on any potential future waste franchise. (RT8807-8808,

8813-8814.) At the insistence of City's bond counsel who was concerned they could affect the tax exempt status of the bonds, these latter two provisions were removed in August 2000. (RT6698-6700, 6712-6713, 6724, 7287-7290, 8807-8808, 8813-8814; AA1070-1079.)[7]

Under the AUS Agreement, Aloyan was hired to achieve self-sufficiency and profitability of City's in-house waste division (RT8842) and acted as its director. (RT6386, 8563.) In this role Aloyan worked alongside Kareemah Bradford, and he oversaw staffing and employment of City employees (RT6719-6720, 6693-6694, 8567, 8828-8829); oversaw all day-to-day operations of City's waste management division (RT8818-8832); supervised collection operations; supervised recycling operations; was responsible for public education (RT6694-6696); was responsible for City's state-mandated waste reduction and recycling efforts (RT6694-6695); and was intimately involved in administrative activities (RT8830-8831), including most significantly the decision to franchise out City's waste collection duties almost immediately after establishing its own in-house operation. (RT7212-7213, 6754, 8845-8847.)

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[7] This is significant. Aloyan admitted that the loss of these two lucrative provisions at the insistence of bond counsel motivated him to propose the Franchise to City in the first place, thus illustrating his self-interested motive from the outset. (RT6725-6726.)

D. Aloyan Makes Unsolicited Bid for Franchise on City's In-House Waste Operations

In early August 2000, while contractually obligated to operate City's in-house waste division for the next seven years (and before City had even commenced operations), Aloyan made an unsolicited bid to take over the entire operation on a franchise basis. (RT6313-6314, 6754, 8832-8833; SA1364 (Ex219).) Aloyan proposed to give City a $2 million up-front franchise fee plus $700,000 in annual fees, in exchange for a fifteen year exclusive contract to collect City's residential, commercial and industrial waste.[8] (RT6364.) Since Aloyan was not equipped to perform the services he was offering, he proposed to use City's newly purchased trucks, equipment and facilities, and to hire City's waste management employees.[9] (RT8842; AA1080 (Ex225).) Aloyan did so because he knew a waste franchise in City was extremely profitable and was coveted by other waste haulers. (RT6672-6673, 8808, 8813, 8838-8839, 8848.)

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[8] The original proposal was for a 25 year exclusive franchise and a $5 million franchise fee, but it was later reduced. (RT6314, 8835-8838; SA2087 (Ex219).)

[9] In this way, Aloyan literally created a fully operational waste hauling company overnight, at City's expense.

E. Aloyan Creates Hub to Take City's Waste Franchise and Abuses the Corporate Privilege

But for Aloyan's unsolicited franchise proposal, City would have operated its in-house waste division permanently. (RT6912-6913.) Although Aloyan purportedly suggested to Adams that City solicit bids from other potential franchisees, City instead pursued negotiations exclusively with Aloyan. (RT7220.)

Aloyan originally submitted his proposal in the name of AUS. (RT8855, SA1364 (Ex219).) At the suggestion of his attorney, however, Aloyan substituted Hub as the proposed franchisee. Aloyan formed Hub on September 27, 2000, after significant terms of the Franchise had already been negotiated and draft agreements exchanged. (RT8854-8855; SA1313-1317 (Ex63).)

City did not challenge Aloyan's substitution of Hub as the proposed Franchisee even though Hub was a newly formed company that had no assets, no trucks, no equipment, no employees, no facilities and no operational experience, and even though Aloyan had to borrow the $2 million up-front franchise fee he offered to induce City to award him the Franchise. (RT7223, 8854-8857.)

Throughout Hub's short existence, Aloyan was its sole shareholder, officer and director, and exercised total domination and

control over the corporation. (SA1281-1283; AA866.)[10] Hub was capitalized entirely with debt, and from the day it commenced operations to the day it closed its doors in 2004, the corporation's liabilities exceeded its assets. (SA1281; AA866). Aloyan treated the corporate assets as his own, routinely causing the corporation to pay for his personal expenses; he also diverted Hub's assets to non-corporate purposes, including more than $270,000 in "political contributions" during its first year of operation alone that Aloyan admitted did not benefit the corporation; and payment of Aloyan's personal criminal defense legal expenses in violation of Hub City's Articles of Incorporation and California Corporation's Code Sections 204 and 317. (SA1281-1283; AA866-867.)

Aloyan continually siphoned off all of the company's cash reserves, causing Hub to default on more than $1 million in debt to third party creditors. (SA1281-1282; AA867.) He caused Hub to loan money to other corporations controlled by him without proper documentation or official corporate action, and in the absence of terms and conditions at market value. (SA1281-1282; AA867.) He also misrepresented the identities of the corporation's board of directors and officers to governmental entities; to creditors; and to

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[10] Citations here are to the trial court's Tentative Ruling and Statement of Decision, as Appellants do not contest those findings on appeal. (AOB71.)

the trial court. (SA1282; AA867.) Within days after City terminated the Franchise, Hub went out of business permanently.

F. Questionable Circumstances Surround Franchise Negotiations

Within a short time after Aloyan made his unsolicited proposal that City abandon its new in-house waste division and franchise the entire operation to him, Adams and Aloyan had negotiated many of the deal terms. (RT8854.) The original draft was prepared by Aloyan's attorney. (RT7247-7248.) Rather than consulting with Rufus Young, an attorney who had advised City in the past regarding waste management franchises, (RT7623-7624), Adams instead contacted William Strausz, City's bond counsel. (RT7244.) Strausz's input on the proposed Franchise primarily related to the bonds used to finance City's creation of its in-house waste division. (RT7247-7248.)

Significantly, Adams concealed Aloyan's proposal from Kareemah Bradford, even though she was City's most knowledgeable employee regarding waste management and Adams relied on her expertise. (RT8573-8574.) When Bradford finally heard about the back-room deal she confronted Adams. He gave her just forty eight hours to review the contract and told her to meet with him and

Aloyan at an I.H.O.P. restaurant to discuss her concerns. (RT8576-8577.) At the meeting, Adams did not advocate City's interests (as was his duty). Instead, he negotiated between Aloyan and Bradford. (RT8577.) The result was a watering down of Bradford's proposals. (RT8577-8578.)

1. Important Provisions Inexplicably Disappear

In January 2001, the City Attorney finally consulted attorney Young. (RT7546-7547, 7624.) After reviewing the draft, Young advised, "While the Hub Agreement is very similar to the agreements I draft, you should not be lulled into a false sense of security, as there are a number of provisions which appear to have been modified so that they are more protective of the hauler, Hub City, than the City of Compton." (RT7624, 7628; SA1343 (Ex96).) One provision Mr. Young advised City to add was Aloyan's personal guarantee. (RT7623-7629; SA1347.) Aloyan's attorney agreed to add a personal guarantee, but the provision was inexplicably removed from the final version of the Franchise that went into effect in February 2001. (RT7623-7629, 7632-7633, 7635; SA1341 (Ex63); [11] AA1116 (Ex225).)

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[11] For economy, ecology and convenience, only the relevant pages of Exhibit 63 are included in City's Supplemental Appendix.

Also mysteriously absent from the signed Franchise was the signature block for the mayor, which had been in prior drafts and was expressly required by City's municipal code. (RT6342, 6967-6974, 7637; AA1117 (Ex225); SA1315, 1318, 1321, 1323, 1327, 1334, 1336, 1339, 1342 (Ex63).)

G. City Council Ignores Overwhelming Public Opposition to Proposed Franchise

On December 19, 2000, City council conducted a public hearing regarding the proposed Franchise. (RT6941, AA957-1006.) Aloyan's history of political influence-peddling was a primary topic of discussion at the hearing, as was City's failure to solicit bids from competing waste haulers. (AA997-1055.) Marvin Dymally, then a member of the United States Congress, urged City Council to reject the proposed Franchise because of Aloyan's involvement in past acts of political corruption. (AA1002-1005.) Former City councilperson Patricia Moore, who called Aloyan "one of the biggest sharks known to mankind," made an impassioned plea that City not do business with Aloyan, based on her personal involvement in Aloyan's history of illegally purchasing political influence.[12] (AA1044-1047.) And,

[12] Remarkably, Appellants were the proponents of this evidence at trial, after the court sustained their evidentiary objections to it. (RT6602-6629, 6636-6661, 7054-7070, 7201-7202, 7227-7228,

even Basil Kimbrew (Moore's campaign manager to whom Aloyan passed the illicit "campaign contributions" in 1992) unequivocally declared at that hearing, "Yes, in 1992 there was a bribe, let's be clear."[13] (RT8779, AA1014.)

Despite the clear outcry of concern from almost every citizen who addressed the council, Mayor Bradley would not allow discussion of Aloyan's background or relationship with councilmembers. Instead he continually focused only on the benefits the City would receive under the Franchise. (AA1050, 1052.) According to Mayor Bradley, the City had never received a similar proposal from any other waste hauler.[14] (AA1020.)

More importantly, no mention was made during the entire hearing that an alleged police-fiscal crisis was the impetus for the Franchise, despite the public's repeated inquiries as to why City would transfer its new in-house waste division to Aloyan without even soliciting bids from other companies. (AA1005, 1019-1020, 1025-1026, 1030-1034.) Appellants contend the only reason City awarded Aloyan the Franchise was because he offered a solution to a

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7231, 7238, 8459, 9139-9141.)

[13] This did not stop Aloyan from giving Kimbrew thousands of dollars when he ran for public office in Lynwood. (RT9063-9064.)

[14] Contrary to the mayor's representation, City had received a competing proposal for a $1.6 million up-front franchise fee on an eight year contract. (RT8557-8559.)

fiscal crisis caused by the dissolution of City's police department. (RT6912-6913.) Yet at the hearing, Adams said the franchise fee would go directly into City's general fund (AA1053-1055), and Mayor Bradley misleadingly declared that the Franchise funds would be available for other City projects. (AA1031-1032, 1037.)[15]

Also at the hearing, a representative of a company with waste franchises throughout Southern California requested just forty eight hours to submit a bid that he promised would be "very, very competitive." (AA1037-1038.) Mayor Bradley responded sarcastically and dismissively, despite that the individual's comments were met with applause from the assembled public. (AA1038.)

The only member of the public who spoke in favor of the Franchise was Lorraine Cervantes, whom Aloyan had sued for slander for her comments opposing the AUS Agreement. (RT8872; AA1041-1042.) At trial, Aloyan admitted (after first denying) that he paid Cervantes more than $50,000 after the Franchise was awarded. (RT8870-8872, 9045-9048.)

At the conclusion of the hearing, City Council voted 4-1 in favor of awarding the Franchise to Aloyan. (RT8873-8874.) The

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[15] The jury could easily have concluded that the so-called police-fiscal crisis was a mere pretext.

only councilmember who voted against the Franchise was Yvonne Arceneaux. (RT8874.)

H. Hub Gives Money and Indirect Financial Benefits to the Councilmembers Who Voted for Franchise

On February 22, 2001, only two weeks after the Franchise went into effect, Hub made a $10,000 "contribution" to a campaign committee for Mayor Bradley. (RT8878; SA1365 (Ex243).) Neither Bradley nor Hub reported the contribution to the City Clerk's office, in violation of California's campaign finance disclosure laws. (RT8492, 9057; Ex266.) Just ten days later, Hub paid another $2,000 to Bradley's committee; three weeks after that Hub paid another $10,000 to Bradley's committee. (RT8878; SA1365.) Hub made additional "campaign contributions" to Bradley in April ($10,000) and May ($11,000) 2001. (RT8878; SA1365.) Thus, within four months after the Franchise began, Hub had paid Bradley $43,000 in purported "campaign contributions," none of which was reported by Bradley or Hub. (RT8878; Ex266.) All the payments came directly from Franchise proceeds. (RT8886.) Despite Hub's financial support Bradley was not reelected. He was subsequently

convicted in an unrelated matter for misappropriating public funds while in office. (RT7922.)

Hub made similar "campaign contributions" to two other councilmembers who voted in favor of the Franchise, Amen Rahh (totaling $49,500) (who was also convicted in an unrelated matter for misappropriating public funds while in office (RT7921-7922; SA1376-1388 (Ex244), and Delores Zurita ($20,000). (RT8882, 9060-9062; SA1408-1411 (Ex247).) Hub was the largest contributor—by far—to their campaigns. (RT8473, 8478; SA1421-1479 (Ex287), SA1480-1555 (Ex288).) Although Rahh and Zurita disclosed these payments in campaign finance disclosure filings, Hub did not. (RT8492.) Hub also gave more than $10,000 to an organization of which Zurita was a board member. (RT9054-9055.) Arceneaux, the only councilmember who voted against the Franchise, did not receive any contributions from Hub. (RT8874.) Although denying any explicit agreement to that effect, Aloyan admitted he gave money to Bradley, Rahh and Zurita to protect his interest in the Franchise. (RT8885.)

Hub also made numerous "campaign contributions" outside Compton so it could expand its business and compete against larger, better established waste haulers. (RT8896, 8903). Indeed, Hub made $270,000 in so-called "campaign contributions" in its first

year of operation alone. (RT8896, 8900-8901.) Recipients included politicians and/or candidates in the neighboring communities of Carson (where Aloyan was later convicted of attempted bribery) (RT8903-8905), Lynwood (RT9063-9064), and Southgate (RT9053-9054).

After the Franchise was awarded, Hub also hired several of Mayor Bradley's relatives, including his brother Henry, an ex-con whom Aloyan called out-of-the-blue one day to oversee all of Hub's operations while Aloyan was out of the country. (RT7934, 8889.) At the time, Henry Bradley had no experience in waste management (RT7940, 8889), yet Aloyan chose Henry because he was the "biggest bookie in Compton" and would "keep [his] eye on the money." (RT8889-8890.)

Hub also hired Janna Zurita, Mayor Bradley's cousin (and Councilperson Delores Zurita's daughter). (RT8890.) Kareemah Bradford refused Aloyan's request that she train Janna Zurita, and was offended that he expected Bradford to train an unqualified relative of the mayor's. (RT8580-8581.) Shortly after this incident, Lawrence Adams transferred Bradford out of her waste management position, over her objection, to a job where she had no assignments. After filing a grievance, Bradford was returned to her waste management duties. (RT8581-8584.) Upon her return, Bradford

noted that in her absence Hub had been paid outside the terms of the Franchise, resulting in an overpayment of more than $382,000. (RT8584, 8588.)

Hub also hired and/or gave money to other relatives of the mayor, including Wayne Bradley (RT8891); Fatin Bradley (RT8895); Jerome Taylor (RT8890); Charlotte Bradley (RT8892); and Jamal Bradley. (RT8893.)

I. City Learns of Aloyan's Bribery Conviction and Terminates the Franchise

On September 7, 2004, the city council (of which Bradley and Rahh were no longer members), voted to terminate the Franchise pursuant to Compton Municipal Code section 21-1.3(g), which authorized City to terminate any waste management franchise for any violation of State or Federal law. (AA174-177.) Termination was based both on Aloyan's conviction for attempted bribery of Carson councilperson Manuel Ontal, and on Hub's failure to file required campaign finance disclosures. (Id.) Hub thereafter filed the instant action.

5. STATEMENT OF THE CASE

Hub commenced this action on October 29, 2004. (AA1-20.) The operative complaint was filed in a later-consolidated action on December 27, 2004, and included claims for Breach of Contract; Bad Faith; Unjust Enrichment and Declaratory Relief. (AA21, 109.)

On January 5, 2005, City filed its cross-complaint asserting claims for violation of Section 1090 and Declaratory Relief, and asserting alter-ego liability against Aloyan. (AA112-115.) After consolidation (AA109), answers were filed. (AA112, AA117.)

A. Trial Court Denies City's Motion for Summary Adjudication

On September 7, 2005, City filed a motion for summary adjudication, which sought to establish that City legally terminated the Franchise pursuant to its municipal code. (AA124-141.)

On November 30, 2005 the trial court denied City's motion. (RTH20.) The court ruled that although City had met its prima facie burden, Appellants had raised triable issues of fact, including whether City was required to comply with a contractual administrative review process before terminating the Franchise, and whether Aloyan's illegal conduct could be imputed to Hub as a ground to terminate the Franchise pursuant to City's municipal code,

which authorized termination "for cause" if the franchisee violates any Federal or State law. (RTH1-H20; AA311-314.)

B. Trial is Bifurcated

Trial was originally scheduled to commence January 18, 2006. On December 19, 2005, both sides filed motions to bifurcate trial on the issue of alter-ego liability. (AA315; SA1252.) After trial was continued, the motions (styled as motions in limine), were not heard. Instead, on March 20, 2006, City filed its Motion to Bifurcate. (SA1262.) All parties agreed bifurcation was appropriate; they only disputed the order of issues to be tried. The court requested additional briefing. (AA374, AA386.) City's motion to bifurcate was argued at the final pretrial conference on April 12, 2006. (RTL1-L17.) In response to an argument Appellants first raised at the hearing, the court permitted additional briefing (AA423, 429), and after a hearing on April 26, 2006, ruled that trying Aloyan's alter-ego liability first would not violate due process.[16] (RTM1-M5; AA438.)

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[16] The court concluded, "The court's found and is still persuaded that not permitting Mr. Aloyan to try the merits of the cross-complaint in the course of the alter-ego trial will not interfere with his substantive and procedural due process rights." (RTM4-M5.)

C. Phase I: Bench Trial on Aloyan's Alter-Ego Liability

The parties submitted trial briefs (AA490, 503), and from May 22, 2006 to May 31, 2006, the court conducted a bench trial on Aloyan's potential liability as the alter-ego of the corporate cross-defendant, Hub. (RT601-1861; AA533-542.) Aloyan moved for judgment after City rested, but did not present a defense case. (RT1935, 2101.) After additional briefing by the parties (AA543, AA566), on June 9, 2006 the trial court issued its tentative decision finding that "cross-defendant Michael Aloyan is the alter-ego of cross-defendant Hub City for purposes of the claims alleged against Hub in the cross-complaint of the City of Compton. . .." (AA592.) On July 21, 2007, the trial court signed its Statement of Decision. (AA865.)

D. Trial Court Reconsiders, and Grants City's Motion for Summary Adjudication

Meanwhile, on June 30, 2006, following the evidence adduced during the first phase of trial and in light of the numerous evidentiary and legal issues raised by the parties' respective motions in limine (several of which sought to clarify issues created by the court's denial of City's motion for summary adjudication), the court

sua sponte reconsidered its earlier denial of said motion. (RT2701-2707; AA681.) On July 17, 2006, the parties briefed enumerated issues and on July 21, 2006, the court heard argument. (RT3301-3344; AA771, 817, 872.) The court then reversed its earlier order and granted City's motion for summary adjudication, finding as a matter of law that City was authorized to terminate the Franchise without notice or administrative review. (AA872-874.) The trial court signed its order on August 11, 2006. (AA878.) The effect of the ruling was to eliminate Hub's multi-million dollar claim for future lost profits.

E. Phase II: Jury Trial on Breach of Contract and Section 1090 Liability; Trial Court Grants City's Nonsuit

The issues remaining for trial in phase two were Hub's claim for money owed under the Franchise prior to termination and City's cross-claim for restitution of all amounts paid under the Franchise. As to both claims, City contended the Franchise was void *ab initio* because Appellants procured it in violation of Section 1090.

A jury was impaneled and the second phase of trial commenced on October 18, 2006. At the close of Hub's case-in-chief on November 6, 2006, City moved for nonsuit, arguing the Franchise

was void because it lacked the mayor's signature. (AA938.) Hub filed its opposition on November 20, 2006 (AA1140), and the court took the matter under submission. On November 22, 2006, counsel made their closing arguments. (RT9901 et seq.) The jurors returned to deliberate on November 27, 2006, and within three hours returned a unanimous verdict finding the Franchise was obtained in violation of Section 1090, and awarding City $22,402,759 on its cross-complaint. (RT10232-10235; AA1213.) The court then granted City's nonsuit on the complaint. (RT10502.) On December 15, 2006, judgment was entered for City and against Appellants on the complaint and cross-complaint. (AA1223.) Appellants did not seek a new trial or JNOV. They timely filed this appeal on February 2, 2007. (AA1217.) On March 16, 2007, the trial court amended judgment to include costs awarded to City as the prevailing party. (AA1173.)

ARGUMENT

6. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT ALOYAN WAS A CITY OFFICIAL WHO VIOLATED SECTION 1090

The primary issue resolved at trial is that the Franchise was the product of an illegal conflict of interest that rendered it void under Section 1090. Appellants challenge this conclusion on several grounds.

Attacking the judgment based on Aloyan's relationship with City under the AUS Agreement, Appellants contend that Aloyan was not within the scope of individuals to whom Section 1090 applies. (AOB30-41.) Although they attempt to frame the issue as one of statutory interpretation subject to de novo review (AOB30), Appellants do not challenge the legal premise of City's first theory of liability, i.e., that Section 1090 applies to independent contractors who perform a public function. (AOB35.)

Rather, Appellants contend the evidence adduced at trial does not support the conclusion that Aloyan functioned as a city official or employee who made the Franchise in his official capacity. (AOB31). Consequently, the issue Appellants first present on appeal is subject to the deferential substantial evidence test. *Roze v. Department of*

Motor Vehicles (2006) 141 Cal.App.4th 1176, 1184 ("On appeal, we review the record to determine whether the trial court's findings are supported by substantial evidence, resolving all evidentiary conflicts and drawing all legitimate and reasonable inferences in favor of the trial court's decision"). Similarly, with respect to City's second theory of liability based on a collusive agreement between Aloyan and the councilmembers who voted for the Franchise, Appellants concede the substantial evidence test is the proper standard. (AOB43.)

We begin with a discussion of the substantive rule of law at issue.

A. Section 1090 is a Public Protection Statute that Must be Interpreted Broadly

A conflict of interest exists whenever a government officer's unqualified devotion to his public duty is compromised or potentially compromised. *Marin County v. Messner* (1941) 44 Cal.Aapp.2d 577, 590; *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298. The State has a compelling interest in protecting its citizens from actual or apparent conflicts of interest in state and local government, because even the appearance of impropriety has a strong tendency to undermine the public's trust and confidence in

their elected officials. *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1331. Erosion of trust in elected officials undermines the integrity of the entire representative form of government.

This principle appears repeatedly throughout California's constitutional and statutory framework, including Article 4, Sections 4 and 5 of the State Constitution, which proscribes most forms of payment to legislators by lobbyists and others. It is also manifested at the state and local government levels in Section 1090, among other statutes.[17]

> Section 1090 is the State's primary public corruption and conflict of interest statute. It "is founded on the ancient and self-evident principle that no man can faithfully serve two masters, a principle which has always been an essential attribute of every rational system of positive law." *People v. Watson* (1971) 15 Cal.App.3d 28, 38.

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[17] "Of greatest statewide application are Government Code sections 1090, 1091, 1092, 1097, and 87100, and Education Code sections 35233, 35240, and 72539. Other provisions designed to meet particular conflict of interest problems are scattered throughout the other codes. (See, e.g., Health & Saf. Code, §§ 50904, 50905; Pen. Code, §§ 99, 100; Pub. Util. Code, §§ 12722, 12392; Bus. & Prof. Code, § 19423.)" *Thomson v. Call* (1985) 38 Cal.3d 633, 637, fn. 1.

The principle that a public official may not have a financial interest in any contract he makes in his official capacity is long-standing and well-established in California. *See*, *e.g.*, Section 87100 ["No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."] As early as 1924, the supreme court in *Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 601, explained the relevant public policy as follows:

> The personal interest of an officer in a contract made by him in his official capacity may be indirect only, still such interest would be sufficient to taint the contract with illegality. If his interest in the contract is such as would tend in any degree to influence him in making the contract, then the instrument is void because contrary to public policy, the policy of the law being that a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of

> the obligations that he owes to the public at large.

More recently, the statute's fundamental purpose and effect was explained this way:

> For over a hundred years our courts have consistently held that our conflict of interest statute, now embodied in section 1090, is intended to enforce the government's right to the absolute, undivided, uncompromised allegiance of public officials by proscribing any personal interest. (See *Thomson v. Call* [(1985) 38 Cal.3d 633,] 648; *Stigall v. City of Taft* [(1962) 58 Cal.2d at p. 565,] 569.) To this preventative end, section 1090 establishes a broad, objective proscription which is violated when an official places himself in an 'ambivalent position' or an 'ambiguous situation,' by having any financial interest in an official contract, and which does not depend upon the actuality of a personal influence on his decisions.

People v. Honig (1996) 48 Cal.A4th 289, 324-325.

Conflict of interest statutes such as Section 1090 are strictly construed and broadly applied to effectuate the public policy interests represented. *Hobbs, Wall & Co. v. Moran* (1930) 109 Cal.App. 316, 320 ("Our courts have been very scrupulous in the enforcement of the spirit of statutes similar to the one which is here involved. [Citations omitted.] When it appears that an officer is substantially benefited, financially or otherwise, by his participation in a contract with the municipality which he represents, the transaction is invariably declared to be illegal").

For the reasons explained below, accepting the technical arguments offered by Appellants to relieve them of their liability under Section 1090 would eviscerate the statute and prevent it from achieving its essential purpose of removing, to the fullest extent possible, any incentive on the part of public officials to use their offices for their own financial benefit to the detriment of the public.

B. Section 1090 Applies to Outside Advisors and Independent Contractors

Although Appellants do not contest the abstract legal premise that Section 1090 can encompass independent contractors who perform a public function, they fail to acknowledge the broad scope

of its practical application. Contrary to Appellants' restrictive approach, this rule of broad application has resulted in courts taking a pragmatic view of precisely who is an officer or employee for purposes of Section 1090.

Schaefer v. Berinstein, 140 Cal.App.2d 278 (1956) is perhaps the best example. Bender, the target defendant in *Schaefer* was a private attorney with whom City contracted for the task of clearing title to tax-deeded land situated within the city limits. *Id.* at 285. The pleading alleged that he was in a position to and did in fact, advise the city counsel regarding action to be taken on the lands. *Id.* at 285-286, 291. However, like Aloyan here, Bender allegedly profited from his position by advising the city to sell the properties to persons and entities in which he had a financial interest or for a fee paid to him by the purchasers of the properties. *Id.* at 285-287.

Schaefer found the allegations stated a cause of action under Section 1090 as to Bender. *Id.* at 291-292. In doing so, it articulated the rule relevant to this appeal: "A person merely in an advisory position to a city is affected by the conflicts of interest rule." *Id.* at 291. *See also, People v. Gnass*, 101 Cal.App.4th 1271, 1287, n.3 (2002) (attorney hired under contract to act as city attorney was a public official or employee for purposes of section 1090).

The same conclusion was recently reaffirmed in *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682. There, an attorney working as an independent contractor for a governmental agency influenced the agency to enter into a service contract with a company in which the attorney was a secret owner. The Court of Appeal had no problem concluding that Section 1090 applied under such circumstances. The court reasoned:

> The common law distinction between an employee and independent contractor developed as the courts attempted to establish the parameters for imposing tort liability on the master for the acts of the servant.
>
> * * *
>
> In contrast to the common law, section 1090 is not concerned with holding a public entity liable for harm to third parties based on its agent's acts. . . . Thus, the common-law employee/independent contractor analysis is not helpful in construing the term "employee" in section 1090.
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> * * *

> Consistent with the above authorities, we conclude that an attorney whose official capacity carries the potential to exert "considerable" influence over the contracting decisions of a public agency is an "employee" under section 1090, regardless of whether he or she would be considered an independent contractor under common-law tort principles.

Hanover, 148 Cal.App.4th at 690, 693.

Consistent with these authorities, the trial court instructed the jury that, "[a]s used in the conflict-of-interest law, the phrase 'city councilmember, city officer or employee' includes an independent contractor who performs a public function for or on behalf of a public entity, such as a city."[18] (RT9631; SA1285-1291.)

C. Substantial Evidence Established that Aloyan Was a City Officer or Employee

"A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure

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[18] *Hanover* was published some four months after the jury's verdict, yet it relies on the same authority as the trial court did here, and precisely supports the jury instruction given below.

of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. [Citation.]" *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 210.

Here Aloyan had a contractual agreement with City to personally supervise its in-house waste operations, including exercising direct authority over City property and employees. (RT6688, 6693, 8828-8829.) His duties bore all the badges of serving a public function. He had the ear of City management and City management depended upon his "expertise." He had the power to influence City decisions relating to waste management.

Appellants contend that they are not subject to liability under Section 1090 because Aloyan was an "independent contractor." Appellants contend that this technicality freed him from Section 1090's restrictions so that he could, with impunity, manipulate City into granting him a franchise to take over City's newly established waste management services, utilizing City's trucks, equipment, employees and offices, and thereby place in his own pocket millions of dollars of profit—which would have remained in City's own coffers but for the Franchise.

It is worth considering the implications of Appellants' argument. Such a rule would be entirely inconsistent with Section

1090's intent and application. It would permit public officials, simply by insisting that they be paid as "independent contractors" rather than "employees" to breach the public trust unrestrained by Section 1090. No authority supports such an outcome.

D. It is Irrelevant that Aloyan Performed his Public Functions Through AUS

Appellants argue that, because AUS, and not Aloyan, managed City's in-house waste division, Aloyan had no conflict of interest because City did not prove he was AUS's alter-ego. (AOB30-33.) Such a position is wholly contrary to the broad sweep and vital public policy concerns underlying Section 1090.

A similar argument was made and rejected in *People v. Gnass*, 101 Cal.App.4th 1271, 1290 (2002). In *Gnass*, the issue was whether the defendant could be found criminally liable for violating Section 1090. Defendant was an attorney in a private law firm that the city hired to act as its counsel, a scenario that is materially indistinguishable from Aloyan's relationship to City under the AUS Agreement.[19] The city paid the defendant, not as an "employee" but as an independent contractor pursuant to a standard retention

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[19] This parallel was acknowledged by Lawrence Adams. (RT6131-6132.)

agreement. *Gnass*, 110 Cal.App.4th at 1280. Despite his independent contractor status, the court concluded that the defendant was an "officer or employee" under § 1090. *Id.* at 1287, n.3. The court found no need to "pierce the corporate veil." Instead, it found "[i]n enacting the conflict of interest provisions the Legislature was not concerned with the technical terms and rules applicable to the making of contracts, but instead sought to establish rules governing the conduct of governmental officials. Accordingly, those provisions cannot be given a narrow and technical interpretation that would limit their scope and defeat the legislative purpose." *Id.* at 1290. (Citations omitted.) As such, it observed that "[w]e must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts." (Citations omitted.) *Id.* Similarly, in *People v. Honig* the court noted, "[h]owever devious and winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection made, a conflict of interest is established." *People v. Honig* (1996) 48 Cal.App.4th 289, 315.

Appellants attempt to dismiss or distinguish the numerous cases that support City's position on the ground that none of them is factually identical to the situation presented here. (AOB36-37.) Yet Appellants do no more than identify distinctions without a

difference. Appellants do not explain any rational basis for treating an independent contractor acting as a "special city attorney" (which Appellants admit is "plainly a public position" (AOB36)), differently than an independent contractor who functions as the director of City's in-house waste division. Under the AUS Agreement, Aloyan supervised City-owned resources and City-employed personnel. (RT6151-6152, 8818-8832.) This can be contrasted with outside vendors who use their own employees and equipment to perform a service under contract with a municipal entity. Indeed, Lawrence Adams, the Assistant City Attorney at the middle of the Franchise controversy, described AUS as "providing private management" of City's in-house waste operations. (AA999.)

Nor was City required to show that Aloyan was the alter-ego of AUS in order to prevail on its claim that Aloyan had an untenable conflict of interest in his negotiations with City for the Franchise.[20] It is enough that he proposed taking over City's waste management responsibilities while concurrently managing City's in-house

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[20] Sufficient evidence that Aloyan was in fact the alter-ego of AUS does, however, exist in the record. Such evidence includes that Aloyan was AUS's sole shareholder, director and employee (RT8803, 8805); that AUS was the original corporate shell under which Aloyan submitted his unsolicited bid for what became the Franchise, and that Aloyan replaced Hub as the franchisee as a mere matter of convenience (RT8833, 8855); and that it would be unjust to permit Aloyan to avoid liability for his breach of the public trust merely because he committed the breaches in the name of a corporate shell.

operations. (RT6151-6152, 8818-8832, 8845.) After all, Aloyan was the sole shareholder of AUS and indeed, its only employee. (RT8803-8805.) Lawrence Adams was very clear that no matter the name or form of entity, he was contracting for Aloyan's personal expertise. (RT6131, 6915-6916, 8855.) Focusing on the technical legal relationship of the parties would serve only to undermine the cogent public policy concerns underlying Section 1090 and thwart the process of justice.

Indeed, Appellants admit that Aloyan's duties under the AUS Agreement were "important functions, to be sure." (AOB37.) When considered under the proper legal standard, the evidence of Aloyan's duties under the AUS Agreement certainly constitute substantial evidence that Aloyan was a city "official or employee" subject to Section 1090.

E. Substantial Evidence Established that Aloyan Made the Franchise in his Official Capacity

Appellants also contend that City failed to adduce substantial evidence that Aloyan "made" the Franchise in his "official capacity." (AOB38.) Once again, Appellants fail to acknowledge the abundant evidence supporting the opposite conclusion.

The "making" of a public contract, as that term is used in Section 1090, is a broad concept. It is not necessary that the interested officer actually execute the contract himself. A contract "made" in an official capacity includes one in which a person governed by the section engages in "preliminary discussions, negotiations, compromises, and reasoning...." *Millbrae Ass'n for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237. In *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 295, the court stated, "a person merely in an advisory position to a city is affected by the conflicts of interest rule."

In *Stigall v. City of Taft* (1962) 58 Cal.2d 565, where a member of the city council participated in preliminary matters leading to the adoption of a contract including planning, preliminary discussion, compromises, drawing of plans and specifications and solicitation of bids, but resigned before the formal award of the contract, the court refused to construe the word "made" in a narrow and technical sense. Instead it held that "the negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense." *Id.* at 569. As noted in *Gnass, supra*, "[i]t is these preliminary discussions and negotiations, the [*Stigall*] court pointed

out, that give the resulting contract 'its substance and meaning.'" *Gnass* at 1293 (citing *People v. Vallerga* (1977) 67 Cal.App.3d 847, 868-869 (defendant, who did not participate in preliminary discussions and negotiations to sell a computer program was nonetheless held to have "made" the contract in that he conducted a test run that helped convince the prospective buyer to consummate the deal)).

Here, the evidence that Aloyan "made" the Franchise in his "official capacity" includes the following:

- Prior to making his own unsolicited bid to assume City's waste management duties under the Franchise, Aloyan solicited interest from at least three other waste contractors for such a franchise deal. (RT9008-9011.) Aloyan could *only* have done so on City's behalf, as the franchise was City's to award, not Aloyan's, and his only ability to deliver a franchise was if City awarded it to Aloyan's recommended franchisee. Ultimately, Aloyan recommended himself to Adams, to the exclusion of all other potential bidders. (RT8838.) These facts describe Aloyan's involvement in the "solicitation of bids" for the contract that are sufficient under *Stigall* to establish

that Aloyan "made" the Franchise in his "official capacity." See *Stigall, supra* 58 Cal.2d at 569.

- Under the AUS Agreement, Aloyan, on City's behalf (and spending nearly $6 million of City's public bond funds), negotiated with vendors and suppliers to acquire the trash trucks, containers, equipment, real property and transfer station agreements that Appellants assumed under the Franchise. (RT8819-8828.) Aloyan thus assisted City to obtain the very *property* that became the object of the Franchise.
- Similarly, under the AUS Agreement, Aloyan, on City's behalf, was involved in hiring the City employees who staffed City's in-house waste division—the same employees over whom Aloyan assumed authority under the Franchise. (RT6152, 8842.) Aloyan thus assisted City to employ the very *people* who became the object of the Franchise.
- Under the AUS Agreement, Aloyan assisted City to establish waste collection processes, including routing and recycling programs. (RT6694-6695.) Aloyan thus assisted City to develop the very *procedures* that became the object of the Franchise.

- After being paid tens of thousands of dollars to assist City to create an in-house waste management division of which City's citizens were notably proud (RT8840, 1032-1034), and while contractually bound to manage and oversee that division for seven years (RT6710), Aloyan made an unsolicited bid to take City's in-house operations under franchise. (RT8832-8833.) Aloyan thus exploited City in a way that was available only to him, given his unique knowledge (including specific knowledge of the value of the proposed franchise *to City*) and position of influence within City and on whom City's other officials relied regarding waste management issues.
- Aloyan continued to perform his management duties under the AUS Agreement until February 2001, well after the Franchise was signed and had officially been "made." (RT8829.)

Appellants contention that Aloyan did not "make" the Franchise in any "official capacity" because he and City were on opposite sides of the bargaining table ignores all of the foregoing facts, which are within the broad concept of what it means to "make a contract" under Section 1090. Appellants' discussion of

Campagna v. City of Sanger does not compel a contrary conclusion. (AOB39-41) *Sanger* involved an attorney who negotiated his own compensation for services requested by the city that were beyond the scope of duties under his existing retainer agreement. Following the rule that it is not unlawful for a public official to negotiate his own compensation, the court held the attorney's negotiations for his own compensation did not violate Section 1090. *Campagna v. Sanger* (1996) 42 Cal.App.4th 533, 540.

That is not what happened here, however. Aloyan did not merely negotiate additional pay for additional services requested by City beyond the scope of the AUS Agreement. He proposed that City suddenly and fundamentally change its waste management plan for the next fifteen years—a proposal that Aloyan admitted was made for City's benefit, in Aloyan's advisory capacity as a de facto City official.[21] (RT8843-8849.) In short, Aloyan was attempting to do that which the law prohibits—simultaneously serve the competing interests of two masters. *People v. Watson, supra*, 15 Cal.App.3d at 38.

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[21] If Aloyan was not acting on City's behalf when he made the proposal, why would he have suggested that City obtain competing bids to his own unsolicited offer? (RT8843, 8846-8847.) Doing so was clearly not in Aloyan's interest, as he might have lost the Franchise to a competitor.

7. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT CITY COUNCILMEMBERS HAD A PROHIBITED FINANCIAL INTEREST IN THE HUB FRANCHISE

As demonstrated above, the jury's verdict is fully supported based on the theory that Aloyan was within the scope of Section 1090 despite performing his public function as an independent contractor. Yet at trial, City also proved a second, independently sufficient ground to support the verdict, i.e., the prohibited financial interests of the councilmembers who voted in favor of the Franchise, and in return received substantial payments and other benefits from Hub. Appellants attack this aspect of the judgment by contending, "this record simply falls far short of [sic] as a matter of law of establishing bribery."[22] (AOB42.) Indeed, Appellants suggest only *direct* evidence of bribery will suffice (AOB53), then confusingly argue that bribery can *never* constitute a financial interest prohibited under Section 1090. (AOB54-55.)

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[22] Appellants do not dispute that Mayor Bradley and Councilpersons Rahh and Zurita made the Franchise in their official capacity and are within the scope of Section 1090. (AOB42.)

A. Direct Evidence of a Prohibited Financial Interest is Not Required

Appellants purport to hold City to a burden of proof unsupported by law. Contrary to Appellants' argument that only *direct* evidence of *bribery* will suffice, it is well established that "prohibited financial interests are not limited to express agreements for benefit and *need not be proven by direct evidence*. Rather, forbidden interests extend to expectations of benefit *by express or implied agreement and may be inferred from the circumstances*." *People v. Honig* (1996) 48 Cal.App.4th 289, 314-315 (emphasis added); *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298-99.

Moreover, "substantial evidence includes circumstantial evidence and any reasonable inferences flowing therefrom. [citation.] An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in an action." *People v. Cole,* 23 Cal.App.4th 1673, 1678 (1994). (citing Evid. Code § 600(b).) Viewed by this standard, the record undeniably contains abundant substantial evidence to support the verdict.

Appellants also contend that greater scrutiny is required because City's contention that the councilmembers violated 1090 by accepting political contributions implicates free speech concerns.

(AOB53.) Yet this contention lacks merit. Prophylactic laws already greatly limit this form of free speech to protect the compelling public interest of maintaining the integrity of the political process. See, *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1228 (discussing Section 87103, which precludes public officials from voting on a matter affecting a donor if they received campaign contributions from the donor aggregating $250 or more within 12 months prior to the vote.) No greater scrutiny is required simply because here the councilmembers voted *before* receiving the contributions. The circumstances surrounding the vote constitute substantial evidence the votes were cast pursuant to an express or implied agreement that Appellants would reward their cooperation through campaign contributions and other financial benefits. Thus, while one may not rely on *speculative* evidence that campaign contributions violate Section 1090, the quantum of evidence presented here that a conflict existed is more than adequate to offset any countervailing free speech concerns.

B. Proof of Bribery is Not Required; Section 1090 is Violated if a City Official Awards a Public Contract Expecting Recompense in Return

Appellants' entire premise—that judgment must be reversed unless City proved bribery—is false. To prevail, City was not required to prove the elements of bribery, much less by direct evidence. Rather, judgment must be affirmed so long as the record contains substantial evidence that a councilmember had an "expectation of benefit" at the time he voted for the Franchise. *People v. Honig* (1996) 48 Cal.App.4th 289, 315. A benefit may take myriad forms, yet it remains prohibited under Section 1090 if it compromises in any way the "absolute, undivided, uncompromised allegiance of public officials."[23] *Id.* at 325. As the *Honig* court observed:

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[23] Financial interests sufficient to constitute a violation of Section 1090 include: bribes paid to a city official by a waste management company and a waste management consultant (*County of San Bernardino v. Walsh* (2008) 158 Cal.App.4th 533); payments extorted by a city official to guarantee approval of a government loan (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323); campaign committee contributions and in-kind political contributions paid to secure a waste management franchise (*Klistoff v. Sup. Ct.* (2007) 157 Cal.App.4th 469); an employment contract awarded by a public agency to a member of its board (*Finnegan v. Schrader* (2001) 91 Cal.App.4th 572); a contract given to a special city attorney to act as bond disclosure counsel, where the attorney indirectly influenced the public entity's decision to hire him in that capacity (*People v. Gnass* (2002) 101 Cal.App.4th 1271); a consulting fee paid to a county assessor involved in the sale of the county's computerized appraisal system (*People v. Vallerga* (1977) 67

> We must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts. However devious and winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection made, a conflict of interest is established.

Honig, 48 Cal.App.4th at 314-15.

Here, although devious, the trail is direct, clear and obvious. Councilmembers Bradley, Rahh and Zurita, voted in favor of the Franchise. (RT8873-8874.) In return, each received direct proceeds of that public contract, in the form of "campaign contributions" from Hub, as well as indirectly benefiting from the Franchise by Hub's hiring and/or giving money to at least seven members of Bradley's family. (RT7921, 8878, 8882, 8890-8895; SA1365 (Ex243), SA1376 (Ex244, SA1408 (Ex247).) The only veil that enshrouds their activities is the form of payment. Yet as the case law instructs, the Court must look behind that veil to discern the vital facts.

Cal.App.3d 847); contracts to purchase real property from a city by an attorney retained to advise the city regarding the disposition of the property (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278); a fee-splitting agreement between an attorney hired by a city and an outside law firm the attorney hired on city's behalf (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533); and administrative fees paid under an insurance premium collection arrangement (*Cal. Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682).

Here are the vital facts. After spending a great deal of time, effort and public funds to create an in-house waste collection division from which City stood to reap great financial benefits (Section 4.C., *supra*), councilmembers Bradley, Rahh and Zurita voted to suddenly hand the entire operation over to Hub for fifteen years, contrary to City's original intent. (Section 4.E., *supra*.) The deal was made without competing bids, without early input from City's most knowledgeable employee or attorney (Section 4.F., *supra*), strongly inferring a backroom transaction in which City's interests were not well protected. Hub, a company literally created overnight, had no assets, equipment, personnel or operational history to recommend it as City's best choice for franchisee (Section 4.E., *supra*), yet no other franchisee was even considered. Hub was owned by a man whose qualifications was questionable (at least to Kareemah Bradford, who was in a position to have an informed opinion) (Section 4.C.1., *supra*), with a demonstrated history and willingness to pay politicians to support his businesses. (Section 4.A., *supra*) He also had a long personal history with Mayor Bradley (who was later convicted of misusing public funds). At the public hearing, neither councilmembers nor City staff mentioned anything about a purported police-fiscal crisis despite citizens' questions and concerns about the necessity for the Franchise and the process by

which it was awarded to Appellants, thus creating a strong inference that the entire police situation was a pretext. (Section 4.G., *supra*.) Mayor Bradley also belittled a competing hauler's offer to submit an alternative bid, which suggests his vote was preordained and the public hearing was a mere formality. An important provision for City's protection disappeared without explanation from the execution copy of the Franchise, as did a place for the mayor's signature, suggesting City's complicity in making sure the Franchise benefited Appellants to City's own detriment. (Section 4.F.1., *supra*.) Within days after Franchise operations commenced, Hub began paying tens of thousands of dollars to Bradley, Rahh (both convicted of misusing public funds) and Zurita in the form of "contributions" taken directly from the proceeds of the Franchise. (Section 4.H., *supra*.) Hub was by far the largest campaign contributor to both Rahh and Zurita, but it made no contributions to the only councilmember who voted against the Franchise. (RT8874.) Moreover, Aloyan admitted he made the contributions to protect his economic interest in the Franchise. (RT6725-6726.) Hub and Bradley both illegally failed to report the contributions, creating a reasonable inference that the payments were intentionally concealed. (RT8878; Ex266.) Hub also gave jobs and/or money to several of Bradley's relatives, including one whose only job

qualification was his status as "Compton's biggest bookie."[24] One may reasonably infer that in so doing, Appellants were not simply magnanimous, but were repaying a debt to Bradley. After Kareemah Bradford refused Aloyan's demand that he train another of Bradley's unqualified relatives, she was transferred out of her position in City's waste management division to a job where she had no duties. (RT8580-8584.) These facts support the reasonable inference that Bradford's transfer was in retaliation for interfering with Aloyan's effort repay Bradley by employing his unqualified relatives. When Bradford finally returned to her waste management duties after filing a grievance, she discovered the Franchise terms had not been enforced in her absence, which resulted in an overpayment to Hub of more than $380,000. (RT8584, 8588.) Again, this supports and inference that City was not acting to protect its own interests, because it was controlled by someone (Mayor Bradley) whose personal interests took precedence. Shortly after securing the

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[24] Although Appellants contend that jobs given to relatives did not financially benefit Bradley (AOB46), similar benefits to family members have been found sufficient to constitute a financial interest prohibited under Section 1090. See, e.g. *People v. Honig* (1996) 48 Cal.App.4th 289, 319 (state superintendent of public education violated 1090 by arranging contracts between the Department of Education and school districts to pay the salaries of educators employed by a nonprofit entity that also employed the superintendent's wife.) Even if the jobs to Bradley's relatives are too remote to constitute a prohibited financial interest, they nevertheless are further evidence of a quid pro quo agreement.

Franchise, Appellants pursued a similar contract in a neighboring community, which resulted in Aloyan's conviction for attempted bribery. (RT8903-8905.) That action was in pursuit of a scheme to control waste hauling in Southern California that Aloyan had described more than a year earlier to Ray Burke. (RT9012-9013.) Burke worked for a competing waste hauler to whom Aloyan offered a City waste franchise at a time he could not have legitimately known City was even considering replacing its in-house operations with a franchise.

Admittedly, these facts may not preclude any inference contrary to the verdict. Nonetheless, when taken together, indulging every reasonable inference that supports the verdict and disregarding all contradictory inferences (as the Court must), they indisputably constitute substantial evidence that at the time they voted for the Franchise, the councilmembers knew or expected that Appellants would reward them financially for their votes.

Significantly, Appellants cite *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205 for the proposition that campaign contributions are not evidence of a financial interest that contravenes Section 1090. (AOB46-47.) Yet the facts of *BreakZone* are markedly different than this case, and justify a different result. There, the plaintiff challenged a city council vote denying plaintiff a

conditional use permit, on the ground that *two years before* the vote, several councilmembers had received small campaign contributions from someone who would benefit financially if plaintiff's permit was denied. Plaintiff could not demonstrate that any councilmember was financially interested in the outcome of the vote. *Id*. at 1230-31. Under those facts, it was easy for the court to conclude that the relationship between the campaign contributions and the vote was too speculative to be actionable. As if anticipating the instant case, however, the *BreakZone* court, at page 1233, noted:

> We contrast the facts of this case with one in which it is alleged the campaign contribution is made in return for an express promise to act in a particular way in exercising governmental authority with respect to a particular matter then pending or which may be presented for governmental review and action at a later date. No such factual circumstance is alleged to exist in the instant case. (We do not foreclose a circumstance in which an earlier governmental action is "rewarded" in an illegal manner; this circumstance also is not suggested in this case.)

This description precisely describes the evidence here. By voting to award the Franchise to Appellants with an expectation

(based on an express or implied agreement that may be inferred from the surrounding circumstances) that they would be rewarded with substantial campaign contributions and other indirect economic benefits (e.g., employment of relatives), the councilmembers violated Section 1090 and the Franchise is therefore void.

C. Bribery can Constitute a Financial Interest Prohibited Under Section 1090

Appellants make what is largely a "throw-away" argument, i.e., that "bribery is not a financial interest under section 1090." (AOB54-55.) Appellants contend that Section 1090 requires the prohibited financial interest to be "in" the contract, and therefore must consist of direct proceeds of the contract, rather than an interest running "parallel to the contract." (AOB54.)

The argument should be disregarded, both because Appellants acknowledge that it is contrary to established case law (AOB55), and because it is contrary to the entire public policy behind the conflict of interest statutes. Indeed, it has long been acknowledged "that the law does not require that the defendant share directly in the profits to be realized from the contract in order to have an 'interest' prohibited under Government Code section 1090." *People v.*

Vallerga (1977) (citing *People v. Darby* (1952) 114 Cal.App.2d 412, 425).

As significant, here the evidence does not even support the general principle of law Appellants urge the Court to adopt, because it is undisputed that the illicit "campaign contributions" received by the councilmembers came directly from the proceeds of the Franchise. (RT8886.) Therefore, even if Appellants are correct to interpret the statutory language narrowly, it would not provide a basis to reverse the judgment in this case.

D. The Trial Court Did Not Abuse its Discretion by Admitting Evidence of Aloyan's Prior Bad Acts

Appellants also challenge the admission of evidence they characterize as "prior misconduct by Aloyan," which "painted Aloyan as a 'bad' person." (AOB56.) Appellants contend the admission of such so-called "character evidence" constitutes grounds to reverse judgment. As Appellants acknowledge, here the trial court balanced the probative value of the evidence against its prejudicial effect under Evidence Code section 352, and then found evidence of Aloyan's past misconduct admissible under Evidence Code section 1101(b) to establish "common plan or scheme, as well as to prove Mr. Aloyan's knowledge, motive and intent, i.e., to influence government

action for Mr. Aloyan's benefit." (AOB59, AA932.) As demonstrated below, the trial court did not abuse its discretion in so ruling.

1. Evidence of Uncharged Acts was Admissible to Demonstrate Aloyan's Knowledge, Intent, Common Scheme or Plan

Although evidence of prior acts is generally not admissible to prove a person's conduct on a particular occasion, it is admissible when relevant to issues such as knowledge, intent or common scheme or plan. *People v. Ewolt* (1994) 7 Cal.4th 380, 393-394. Other acts evidence must bear a similarity to the conduct at issue to be relevant. *People v. Scheer* (1998) 68 Cal.App.4th 1009. How much similarity depends on its evidentiary purpose. As noted in *Ewolt*:

> The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. (See *People v. Robbins* (1988) 45 Cal.3d 867, 880.) "[T]he recurrence of a similar result ... tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the

> presence of the normal, i.e., criminal, intent accompanying such an act ....' (2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 302, p. 241.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" (*People v. Robbins*, *supra*, 45 Cal.3d 867, 879.)

At issue here is evidence of Aloyan's involvement in illegal schemes to buy votes from two former Compton councilmembers in 1992, and a Carson councilmember in 2001.[25] Each of these episodes meets the above standard for admissibility, and Appellants' challenge is nothing more than semantics. Appellants cling to labels—"bribery," "extortion," "valid campaign contributions,"—in an effort to distinguish one from the other, but the essential characteristics of each event are sufficiently similar to the events at issue in this case to justify their admission.

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[25] Although Appellants also take issue with evidence of payments Appellants made to Citizens for Good Government, a front organization for convicted Southgate treasurer Albert Robles, no objection was made to it at trial. (RT9053-9054.) Therefore, it cannot provide a basis for appeal. *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 140 (Failure to preserve evidentiary objections at trial waives them on appeal); Evid. Code, § 353.

In each instance Aloyan provided funds to a city councilmember for the purpose of influencing that member's vote on a matter regarding a business venture in which Aloyan had a direct pecuniary interest. (RT8765-8780.) As here, both the Tucker and Ontal incidents regarded waste hauling franchises, one of them in City and one in an adjacent community. In this case, as in both Tucker and Moore, Aloyan's corrupt practices took the form of checks purporting to be campaign contributions, but which were understood and intended by both sides to pay for city council votes.

As suggested by the above-quoted passage from *Ewolt*, the more times Aloyan was involved in paying for council votes, the less likely it becomes that the payments in this case were innocent or accidental. The evidence at trial established three incidents in less than ten years—other than this case—in which Aloyan was directly involved in illegally buying a councilmember's vote. That astonishingly brazen frequency undeniably supports a reasonable inference that Aloyan was not merely making "valid campaign contributions" to Bradley, Rahh and Zurita, but was acting pursuant to a mutual understanding and agreement with the councilmembers that the payments would reward their decisive votes in favor of the Franchise.

In challenging the admission of this evidence, Appellants point to only immaterial differences between the acts—payments to Ontal in cash rather than checks; Aloyan's status as "employee" of Murcole rather than "owner" when he bribed councilman Tucker; [26] Moore "extorted" Aloyan whereas Aloyan "bribed" Ontal; payments were made before the vote rather than after. This is not a criminal case, and the evidence was not offered to prove identity. The necessity of similarity is more relaxed under such circumstances. *Robbins v. Wong*, *supra* 27 Cal.App.4th at 273 (different rights enjoyed by criminal defendants and civil litigants and diminished level of prejudice in civil proceedings justifies different standards of admissibility in civil and criminal cases); *Ewolt*, *supra* 7 Cal.4th at 403 (greatest degree of similarity required for evidence of uncharged misconduct to be relevant to prove identity).

2. <u>The Burke Testimony Does Not Even Qualify as "Other Acts Evidence" Subject to Evidence Code 1101</u>

Among the evidentiary rulings Appellants claim as error is the admission of Raymond Burke's testimony. (AOB58.) Burke, an

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[26] This protestation is disingenuous, because as general manager, Aloyan controlled all day-to-day operations of Murcole and interacted directly with the city council. (RT8765-8766.)

executive at Waste Management, Inc. ("WM"), testified that Aloyan approached him in 2000 and attempted to sell him a waste hauling franchise in City. (RT9012-9013.) As explained above, this testimony was admissible as direct evidence that Aloyan "made" the Franchise "in his capacity as a City official or employee" under Section 1090. As such, it does not constitute "character evidence" at all, and is not subject to exclusion under Evidence Code section 1101. As Appellants did not request a limiting instruction, City was free to use the evidence for any purpose.

More importantly, Burke described Aloyan's plan to go after WM's business in other communities—including Carson and Southgate—by following the same strategy he pursued in City. (RT9012-9013.) In other words, Burke provided direct evidence of Aloyan's plan to pursue a singular scheme in three communities—City, Carson and Southgate. Clearly, this supports a reasonable inference that Appellant's subsequent "contributions" to public officials in all three cities were acts in furtherance of that singular plan, and makes the evidence of the Ontal bribe and Hub's contributions to Citizens for Good Government relevant and probative.

3. The Trial Court Performed §352 Balancing

Even if "other acts" evidence is relevant, the court must balance its probative value against its prejudicial effect under Evidence Code Section 352. *Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274.

Appellants concede the trial court subjected the "other acts" evidence to balancing under Evidence Code section 352. (AOB59.) Indeed, the court allowed substantial briefing and argument on the subject (RT342-388), and offered to give a limiting instruction (which Appellants did not request). (AA932.) Nonetheless, they claim the court simply "got it wrong." (AOB66.) On this record, the Court cannot find the trial court's exercise of discretion erroneous. The totality of the record fully supported the trial court's conclusion that the evidence's probative value outweighed its prejudicial effect, and Appellants have done nothing to demonstrate otherwise.

4. As the Proponent of Evidence of Aloyan's Past Misconduct, Appellants Waived Any Claim of Error

Appellants filed several motions in limine to exclude evidence of the Tucker and Moore incidents. (AA232, AA439, AA633, AA653.) The trial court entertained literally hours of argument on the subject. (RT342-388.) The trial court also spent several hours

reviewing the videotape of the December 19, 2000 City council meeting, and sustained Appellants objections to large portions of it that included references to the Tucker and Moore incidents. (RT6602-6629, 6636-6661; 7054-7070.)

Remarkably, after prevailing on their efforts to exclude large sections of the most incriminating and inflammatory comments regarding Aloyan's past, Appellants then voluntarily put the entire, unedited videotape into evidence, playing the entire two and half hours for the jury. (RT7201-7202, 9139-9141, 8459.) This occurred on the third day of testimony, in the middle of examining the first witness, before City had introduced *any* evidence of Aloyan's past misdeeds. In so doing, Appellants opened the door wide and waived any objection to the admission of evidence relating to the Tucker and Moore incidents, and arguably to evidence of Aloyan's character generally. *Estate of Zalud* (1972) 27 Cal.App.3d 945, 958 (In will contest, counsel's comment "Well, if any of them go in, I want them all in," waived objection to admission of earlier wills.) As such, the admission of this evidence cannot constitute error on appeal.

E. The Verdict Supports Judgment Under Either Theory of Section 1090 Liability

Relying on no authority, Appellants complain the verdict form did not differentiate between City's alternative theories of liability. (AOB67.) The verdict supports judgment, however, if either theory of liability was correct. *Babcock v. Omansky* (1972) 31 Cal.App.3d 625, 631 (no defect in verdict that did not specify which of two alternative fraud theories jury accepted).

Further, Appellants waived any potential defect or ambiguity in the verdict by failing to present to the judge before closing argument "in writing the issues or questions of fact on which the findings are requested, in proper form for submission to the jury." Cal. Rule Ct. 3.1580. As such, although the record supports judgment under both theories of liability, judgment should be affirmed if the verdict is supported under either theory.

8. APPELLANTS HAVE IDENTIFIED NO ERROR IN THE REMEDY

As a fallback position, Appellants essentially pray for mercy. Citing no supporting authority, Appellants ask the Court to reverse judgment awarding City restitution of all amounts paid under the void contract. (AOB68-69.) Appellants' argument is unavailing.

The remedy of disgorgement for violation of Section 1090 is automatic. *Carson Redevelopment Agency v. Michael Padilla* (2006) 140 Cal.App.4th 1323, 1335, citing *Thomson v. Call* (1985) 38 Cal.3d 633. Where Section 1090 is violated, the public entity is entitled to recover any consideration it has paid under the void contract without restoring the benefits. *See Carson*, *supra*; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 583, interpreting *Thomson*.

Further, the California Supreme Court "observed that although the remedy was harsh, it was consistent with the policy of strictly enforcing conflict of interest statutes and provided a bright-line remedy and a strong disincentive for officeholders tempted to misuse their offices." *Finnegan*, *supra* at 584. The *Padilla* court found automatic disgorgement was the appropriate remedy for a violation of Section 1090 even though the defendant was an "innocent victim" of extortion. *Padilla*, *supra* at 1336. It explained: "We do so for two reasons. Based on stare decisis, we pay deference to the long history of consistent appellate case law recognized in *Thomson*. Also, as a policy matter, it is the most effective way to give section 1090 all the teeth that it needs." *Id*. at 1336. Moreover, as also noted in *Padilla*, because a violation of Section 1090 involves such significant public policy considerations, the interests of the

individual defendant must yield to the greater public interest. *Id.* at 1337.

Each of these principles applies here. Accordingly, if the judgment of liability for violation of Section 1090 is affirmed, so too should be the remedy imposed.

9. THE TRIAL COURT CORRECTLY RULED THAT ALOYAN IS JOINTLY AND SEVERALLY LIABLE AS HUB'S ALTER-EGO

Appellants mount a two-prong attack on the court's finding that Aloyan was Hub's alter-ego, one procedural and the other substantive. Appellants first argue the trial court erred by conducting a bifurcated trial on Aloyan's alter-ego liability before the jury found the corporate defendant primarily liable on an underlying debt. Second, Appellants contend the evidence does not support the trial court's conclusion that if the acts of malfeasance proved at trial are treated as those of Hub alone, an inequitable result will follow. (AOB71.) Neither contention amounts to error.

A. Background of Alter-Ego Doctrine

The alter-ego doctrine is invoked when a defendant has used the corporate form unjustly and in derogation of the plaintiff's rights. *Mesler v. Bragg* (1985) 39 Cal.3d 290, 300. Under various

circumstances, the court is empowered to look behind the corporate fiction; pierce the corporate veil. After all, "[a]s the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted." *Id.*

"There is no litmus test to determine when the corporate veil will be pierced." *Id.* The results instead depend upon the individual circumstances of each case. *Id.* Courts have, however, recognized two general requirements: "(1) that there be such a unity of interest and ownership that the separate personalities of the corporation and the individuals no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."[27] *Id.*

When the corporate privilege is abused, the fiction "will be disregarded. . . *so that the corporation will be liable for the acts of the stockholders* or the stockholders liable for the acts done in the name of the corporation." *Mesler v. Bragg*, *supra* 39 Cal.3d at 300 (emphasis added); *see also Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal. App. 2d 825, 837 (where both alter ego factors present, corporation's acts and obligations are legally

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[27] Respondents concede that City established the first factor by substantial evidence. (AOB71.) Thus, the sufficiency of the evidence in support of the first prong is conclusively established.

recognized as those of a particular person, *and vice versa*).[28]

B. The Trial Court did not Abuse its Discretion by Adjudicating Aloyan's Alter-Ego Liability First

Appellants argue the trial court erred per-se by deciding Aloyan's alter-ego liability *before* trial on the merits of Hub's underlying liability, because alter-ego was not ripe for determination. They claim it is impossible for the court to find an inequitable result will follow if underlying liability is not established first. (AOB73.) Without citation to a single case, treatise or academic work, and ignoring the court's ability to make a *conditional* finding of alter-ego liability (i.e., conditioned on a finding of underlying liability in a subsequent trial phase) Appellants advocate an entirely new rule regarding order of proof—that alter-ego may *never* be tried before underlying liability. This Court should not be the first to so limit a trial court's discretion.

Trial courts have broad discretion to bifurcate issues for trial. *See e.g.*, Code of Civil Procedure §§ 1048(b); 598. This discretion similarly extends to the order of proof. Evidence Code § 350 ("[e]xcept as otherwise provided by law, the court in its discretion

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[28] Appellant's complaint that the court erred by applying "the doctrine in reverse" (AOB79) is thus unfounded.

shall regulate the order of proof"); *Grappo v. Coventry Fin. Corp.* (1991) 235 Cal.App.3d 496, 504 ("trial courts have broad discretion to determine the order of proof, in the interest of economy"). A trial court's order severing issues for trial and determining the order of proof is subject to such a high degree of discretion, that it "will not be reviewed except in a case of palpable abuse." *Carpenson v. Najarian,* (1967) 254 Cal.App.2d 856, 862. Further, at least one general rule of precedence of proof supports the court's decision here, i.e., equitable issues should be tried before legal issues (*Nwosu v. Uba,* (2004) 122 Cal.App.4th 1229, 1238). 7 Witkin Cal. Procedure 4th, (West 1997) Trial, § 163, p. 191, because alter-ego liability is an equitable doctrine. *Dow Jones Company, Inc. v. Gerard Avenel* (1984) 151 Cal.App.3d 144, 148. Moreover, trying alter-ego before substantive issues is not uncommon, yet has never been the subject of a published opinion. *See Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826 (alter-ego bifurcated and tried first); *TC Rocket, LLC v. Supersyrocket, LLC* (S.D.Cal. 2007 No. 06-CV-1765 R(CAB)) 2007 WL 1110723 (resolving discovery dispute; alter-ego issue tried first).

There is no overarching public policy concern that would exempt alter-ego issues from the trial court's broad discretion or general principles regarding order of proof. Certainly, no such

concern is inherent in the second alter-ego factor, as Appellants suggest. That factor is met if respecting the corporate privilege would perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose." *Say & Say, Inc. v. Eberhoff* (1993) 20 Cal.App.4th 1759, 1769. As the California Supreme Court has stated, "the essence of the alter-ego doctrine is that justice be done. 'What the formula comes down to, once shorn of verbiage about control, instrumentality, agency, and corporate entity, is that liability is imposed to reach an equitable result.'" *Mesler v. Bragg* (1985) 39 Cal.3d 290, 301.

Therefore, a finding of alter-ego liability in advance of a verdict on the underlying corporate liability is appropriate so long as sufficient evidence is adduced to support a finding of inequity absent a piercing of the corporate veil. Appellants contend the trial court cannot assess this factor "in the abstract," meaning, unless and until there has first been a finding of underlying liability. (AOB73.) This contention is absurd on its face. The trial court's alter-ego finding in phase one was conditioned on the jury's finding liability in phase two, and would have had no impact on the judgment if the jury had not so found. More importantly, the first phase of trial was not conducted in a vacuum. The trial court was well aware of the legal and factual theories City intended to pursue in phase two, and it

could easily conclude that if City prevailed, an inequitable result would follow if alter-ego liability was rejected.

Equally significant, here the evidence adduced during the first phase of trial was sufficient, in and of itself, to support the trial court's conclusion.

C. The Record Contains Substantial Evidence of an Inequitable Result Absent Alter-Ego Liability

Reference to the court's statement of decision and tentative ruling is all that is necessary. (SA1279-1284; AA865-869.) The court found, without equivocation, that Hub was inadequately capitalized and Aloyan removed funds from the corporation for his own benefit and that of Hub's other investors, without regard to its effect on Hub's ability to satisfy creditors. In short, Aloyan used Hub as his own personal piggy bank, skimming off revenue at every turn and leaving the corporation an empty shell that shuttered its doors permanently days after City terminated the Franchise.[29]

More importantly, despite Aloyan's claim that Hub did not authorize his bribe of a Carson councilperson, Aloyan admitted the

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[29] These facts distinguish this case from *Tucker Land Co. v. California* (2001) 94 Cal.App.4th 1191, upon which Appellants rely. (AOB76.)

contrary at trial. (RT916, 1211-1213, 1221-1224.)[30] Hub also paid Aloyan's personal criminal defense in violation of Corporations Code Sections 204 and 317 and Hub's articles of incorporation. Aloyan then misrepresented the identity of Hub's corporate officers in this action in an effort to conceal the true relationship between Hub and his bribery conviction. (RT646:11-647:15; 654:2-655:2; 656:25-27; 659:26-660:12; 1202:3-1205:9; 1208:22-1209:18; 1210:27-1213:13; 1221:15-1223:3.) Using the corporate form as both a shield and a sword, Aloyan invented a "board of directors" and asserted it instructed him not to pursue a waste contract in Carson, but then caused Hub to pay his defense in the criminal prosecution that followed his purportedly rogue actions. Most significantly, Aloyan caused Hub to use corporate funds to make the campaign contributions the jury later found violated Section 1090.[31] These facts constitute substantial evidence that Aloyan used the corporate form to perpetrate a fraud, circumvent statutes and accomplish other wrongful and inequitable purposes, such as hide from creditors, including City.

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[30] These "new facts" justified the court's reconsideration and grant of City's motion for summary adjudication. (RT3336-3343.)

[31] In this way, Aloyan used Hub to commit a wrongful action directly against Compton, despite Appellants' protestations to the contrary. (AOB76-78.)

While alter-ego is not intended to provide a remedy for *every* creditor whose debt will be unsatisfied if the corporate veil is not pierced, the doctrine is intended to protect unsatisfied creditors "where some conduct amounting to bad faith makes it inequitable . . . for the equitable owner of a corporation to hide behind its corporate veil." *Associated Vendors, Inc. v. Oakland Meat Co* (1963) 210 Cal.App.2d 825, 842. Here, if Aloyan and Hub are not deemed alter-egos, City would have no chance of collecting on its debt, and Aloyan would avoid any consequences despite his manifest abuse of the corporate privilege. It can hardly be said that the court did not consider whether the malfeasance shown justified the application of alter-ego. In fact, the court stated as much its tentative ruling (SA1283-1284).

Appellants' argument that alter-ego is inappropriate because Hub cannot be expected to maintain a reserve account sufficient to satisfy an adverse judgment on 1090 liability is a red herring. (AOB75-76.) No authority supports such a proposition. While a corporation's financial inability to satisfy a creditor is not, in and of itself, sufficient to find an inequitable result, a different case is presented where, as here, the corporate privilege was abused through the bad faith conduct of the stockholder. *Associated Vendors, Inc. v. Oakland Meat Co* (1963) 210 Cal.App.2d 825, 842.

Under the latter situation, the stockholder should not be allowed to escape liability by hiding behind a corporate fiction "the purpose of which has been perverted," regardless of whether the stockholders actions directly *caused* the corporation's inability to pay the judgment debt. *Mesler, supra* at 301. That is exactly what the evidence here established, and it justifies the judgment against Aloyan as Hub's alter-ego.

10. THE TRIAL COURT CORRECTLY GRANTED SUMMARY ADJUDICATION

Appellants contend that if judgment is reversed, the Court should also reverse the trial court's grant of summary adjudication in City's favor. (AA878-880.) That ruling established as a matter of law that City did not breach the Franchise by terminating it in 2004 pursuant to Compton Municipal Code Section 21-1.3(g)(4),[32] which authorizes termination when a waste franchisee violates any state or federal law. (AA878-880.) The court relied on two undisputed violations of law in support of the motion: Aloyan's conviction for attempted bribery of a public official,[33] and Hub's violation of California's campaign finance disclosure laws.[34] (AA880.)

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[32] Section 21 of the Compton Municipal Code appears in the record at AA797-813.

[33] During the alter-ego trial, both Aloyan and his transactional attorney, Richard Haft, admitted that their declarations in support of

On appeal, Appellants contend the trial court committed reversible error by ruling:

> Compton was not obligated by Section 16(a)-(c) of the Franchise Agreement or Section 21-1.3(h) of the Compton Municipal Code to give Aloyan notice, hearing and/or an opportunity to cure prior to terminating the Franchise Agreement pursuant to Section 21-1.3(g)(4) of the Compton Municipal Code. Neither the statute nor the Franchise Agreement can reasonably be interpreted to require Compton to provide Aloyan notice and an opportunity to cure prior to terminating the Franchise Agreement pursuant to Section 21-1.3(g)(4).

(AA880; AOB81-85.) As explained below, the court's interpretation was correct and no error has been shown. Consequently, even if the judgment is reversed, summary adjudication should be affirmed.

Hub's opposition to City's motion for summary adjudication were false. In truth, Hub did not have a board of directors other than Aloyan, and when Aloyan bribed the Carson councilman, he did so on behalf of Hub. (RT646:11-647:15; 654:2-655:2; 656:25-27; 659:26-660:12; 1202:3-1205:9; 1208:22-1209:18; 1210:27-1213:13; 1221:15-1223:3.) Based on these shocking admissions and the trial court's finding that Hub and Aloyan were alter-egos, the trial court concluded that Aloyan's criminal conviction was imputed to Hub. (AA878-880; RT3336-3343.)

34 It was undisputed that Hub violated California's Political Reform Act, Government Code § 81000 *et seq*. by failing to file required

A. City's Municipal Code Authorized it to Terminate the Franchise Without Notice or Administrative Review

Appellants argue that City was obligated to undertake the administrative review process described in section 16A-C of the Franchise before terminating it *for any reason*. (AOB84-85.) In resolving this issue, the Court must interpret the Franchise and Chapter 21 of the Compton Municipal Code to determine whether City's authority to terminate a franchise under Section 21-1.3(g) is conclusive, or whether it is subject to a contractual administrative review process prior to termination. This Court reviews *de novo* the trial court's interpretation of statutes and unambiguous contracts. *Maggio v. Windward Capital Management Co.* (2000) 80 Cal.App.4th 1210, 1215. The Court's "obligation is to consider the consequences that might flow from a particular construction and to construe the statute to promote rather than defeat its purpose and policy." *Escobedo v. Estate of Snider* (1997) 14 Cal.4th 1214, 1223.

The analysis begins with the express and unambiguous language of the statute. Section 21-1.3(g) specifies enumerated grounds that "*shall* constitute a basis for the revocation or suspension of a collector's. . . license. . . ." Section 21-1.3(g)(2)

"major donor reports" for several years. (AA880.)

(emphasis added). (AA805.) Nothing in the statute describes or limits the manner in which City may effectuate a revocation under this provision. Based upon rules of statutory construction the Court is not empowered to infer any such limitation. "We may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349. Nor may the court "insert qualifying provisions not included in the statute." *Estate of Griswold* (2001) 25 Cal.4th 904, 917.

Municipal Code section 21-1.3(h) parallels Section 16A-C of the Franchise, and provides an administrative review process if City claims deficiencies in a waste franchisee's performance. Administrative review is authorized "[i]f City Manager. . . determines that the performance of a [franchisee] may not be in conformity with reasonable industry standards which obtain in Southern California or the California Integrated Waste Management Act including, but not limited to, requirements for implementing diversion, source reduction and recycling, or any other applicable Federal, State or local law or regulation. . . ." (AA806.)

On its face, the language of subsection (h) is narrower than the proscription against violation of "*any* Federal or State Law. . . " as set

forth in subsection (g). Under the former, only suspected violations of "applicable" laws that relate to "performance" require the administrative review process described in subsection (h). In contrast, subsection (g) proscribes the violation of "*any*" Federal or State law. Interpreting these two provisions together leads to the inevitable conclusion that while "any" in-fact violation of Federal or State law will justify revocation or suspension of the franchise under Section 21-1.3(g)(4), only "suspected violations" of "applicable laws" relating to "performance" require the franchisee to receive notice and an opportunity to cure under Section 21-1.3(h). Thus, on its face, the trial court correctly interpreted City's termination rights under the statute.

B. Section 16 of the Franchise Does Not Entitle Appellants to Notice or Administrative Review and is Consistent with Section 21-1.3 of the Compton Municipal Code

The identical conclusion can be reached by reviewing the express language of Section 16 of the Franchise. (AA1109-1112.)[35]

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[35] Section 16(A)(1) of the Franchise provides in relevant part: "*If* the City Manager determines that Hub's *performance* under this Agreement *may not be* in conformity with the provisions of this Agreement, the California Integrated Waste Management Act (including but not limited to, requirements for diversion, source

Like Section 21-1.3(h), the statute from which it derived, Section 16.A of the Franchise Agreement is limited. By its express language it only applies if the City Manager suspects the franchisee's *performance* may be deficient. Thus, it does not apply to non-performance-based grounds for termination (such as violations of non-performance-related State or Federal laws).

What of deficiencies or issues that are not directly related to performance under the Franchise? Consistent with Section 21-1.3(g) of the municipal code, non-performance-based deficiencies are governed by Section 16.D of the Franchise, entitled "Reservation of Rights by City." Pursuant to that section, "City further reserves the right to terminate this Agreement in the event of any material breach of this Agreement. . . ." (AA1111.)

The City's authority to terminate the Franchise unilaterally, without notice or administrative review, is further confirmed by Section 16.F, which states, "Cumulative Rights. City's rights of termination are in addition to any other rights of City upon a failure of Hub to perform its obligations under this Agreement." (AA1112.)

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reduction and recycling as to the waste stream subject to this Agreement), or any other *applicable* federal, state or local law or regulation, including but not limited to the laws governing transfer, storage or disposal of solid and Hazardous Waste, the City Manager may advise Hub in writing of such *suspected* deficiencies, specifying the deficiency in reasonable detail. (Emphasis added.)

Additionally, Civil Code section 3513 provides in relevant part that "a law established for a public reason cannot be contravened by a private agreement." *Civil Code* § 3513; *Covino v. Governing Board* (1977) 76 Cal.App.3d 314, 322 ("A law established for a public reason cannot be waived or circumvented by a private act or agreement."); *Terry v. Bender* (1956) 143 Cal.App.2d 198, 214 ("[T]he requirements of a law or ordinance enacted for a public reason may not be waived by an official or a governmental body").[36] Further, it is settled that a government entity may not contract away its right to exercise its police power in the future. (See, e.g., *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 800; *County Mobilehome Positive Action Com., Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727, 736-739; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1724.) A contract that purports to do so is invalid as against public policy. (*County Mobilehome*, *supra*, at p. 736.) Thus, the parties to the Franchise could not by agreement limit or restrict City's right to terminate the Franchise under City's municipal code.

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[36] Section 21-1.3(g) is unquestionably a law established for a public reason. See *Benane v. International Harvester Co.* (1956) 142 Cal.App.2d Supp. 874, 878. Waste management is one of the core "police powers" of a municipality such as City. *Waste Resource Technologies v. Department of Public Health* (1994) 23 Cal.App.4th 299, 304-306.

C. Appellants' Interpretation is Inconsistent with the Municipal Code, is Internally Inconsistent, and is Inconsistent with Public Policy Considerations

To adopt Appellants' interpretation of Section 16 one must ignore the language of Section 16.F, contrary to basic rules of construction. *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 387 ("Where one interpretation can reasonably reconcile the language of each part of a contract and another interpretation cannot, it is safe to say that the contract is not reasonably susceptible to the second interpretation.") In fact, Section 16.F would be completely superfluous under Appellants' construction of the Franchise, because City's rights of termination would be *subject to* City's others rights and duties in the event of a performance breach, rather than *in addition to*. (AOB84-85.)

Subsection 16.F of the Franchise Agreement indicates City's clear intent to preserve its discretion to effectuate a remedy, including termination, in the event it determines that a basis to terminate exists. That discretion would be effectively eliminated if the Franchise is interpreted to require City to await the conclusion of an administrative review process that by its own terms can last no

less than 84 days.[37] Section 16.F. contains no exception from this administrative quagmire even for emergency situations, despite the parties' mutual recognition that City "may suffer irreparable injury and incalculable damages" in the even Appellants breached the Franchise. (AA1112 at Section 16.E.2.)

In short, Appellants' interpretation of Section 16 would lead to an absurd and untenable result. It would create a potential situation under which City would be forced to wait nearly three months before terminating the Franchise, regardless of the threat to public health, safety, welfare, peace or morals continuation of the Franchise might represent. Such restriction of City's right to terminate for cause is contrary to the very public purpose for which the Franchise was created in the first place.

In summary, the trial court correctly interpreted the Franchise and its authorizing statute to grant City power to terminate the Franchise for Appellants' violations of law, without requiring notice or administrative review. Thus, the trial court's July 21, 2006 order granting City summary adjudication should be affirmed.

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[37] This represents the total number of days of advance notice required by Sections 16A-C.

11. THE TRIAL COURT'S ORDER GRANTING NONSUIT ON THE COMPLAINT WAS CORRECT

A. A Waste Hauling Franchise That Does Not Strictly Comply with Law Is Void

A city's power to contract is generally governed by statute. *South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231, 1235, *citing* Gov. Code § 34000 *et seq*. A contract made by a city or public agency without compliance with the controlling statute is void and unenforceable as being in excess of power. *Miller v. McKinnon* (1942) 20 Cal.2d 83, 88-89.[38] As the supreme court stated:

> Certain general principles have become well established with respect to municipal contracts, and a brief statement of these principles will serve to narrow the field of our inquiry here. The most important one is that contracts wholly beyond the powers of a municipality are void. They cannot be ratified; no estoppel to deny their validity

[38] Superseded in part(regarding bidding by contractors) by Pub. Con. Code § 5110.

> can be invoked against the municipality; and ordinarily no recovery in *quasi* contract can be had for work performed under them. It is also settled that the mode of contracting, as prescribed by municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable.

Miller v. McKinnon, 20 Cal.2d at 88.

Cities that adopt a charter, such as City here, are subject to state statutes except with regard to "municipal affairs" governed by the charter. *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 660. The cardinal principle is that the city charter is the supreme law of the city, subject only to constitutional limitations and preemptive state law. *Id.* at 661, *citing Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170. A city's charter controls "municipal affairs," which historically includes the formation of city contracts. *First Street Plaza Partners, supra*, 65 Cal.App.4th at 661.

Appellants do not dispute that City has charter power to enact ordinances governing municipal affairs, including waste management within the City's borders, and that to that end, City

enacted the ordinances creating Chapter XXI of the Compton Municipal Code, entitled "Integrated Waste Management." Chapter XXI imposes requirements on municipal waste franchises.

B. The Compton Municipal Code Requires the Mayor's Signature on all Waste Management Franchises

Section XXI of the Compton Municipal Code, entitled "Integrated Waste Management," sets forth the specific requirements for waste hauling contracts with the City of Compton. As relevant here, it provides:

> Each franchise, contract, license, or permit for the collection of residential solid wastes issued or awarded by the City shall be in writing, expressly adopted by the City Council, by resolution, as a franchise, contract, license or permit with a solid waste enterprise named in that franchise, contract, license or permit, shall meet all requirements of this Chapter for indemnifications and insurance, and shall be signed by the Mayor, approved as to

> form by the City Attorney, and filed with the City Clerk. No solid waste enterprise or any other person or entity shall infer the existence of any other form of franchise, contract, license or permit not meeting all the foregoing requirements.

(AA804, section 21-1.3(d)(1).)

The term "shall" is mandatory. *See South Bay Senior Housing, supra,* 56 Cal.App.4th at 1236; *First Street Plaza Partners, supra,* at p. 663. Use of the term "shall" indicates that contracts not executed in the specified form are *void*. *South Bay Senior Housing, supra,* at p. 1236. Moreover, the above-quoted statute is specifically directed at waste management franchises, and expressly states that no contract will be inferred if it lacks the required mayoral signature. (AA804.)[39] Appellants do not dispute that the mayor did not execute the Franchise. (RT6341-6342; AA1117 (Ex225).)

A party who enters into a contract with a municipality that is not lawfully executed is "wholly void," ultra vires, and unenforceable and the contractor can claim no right based upon an agreement that is void from the beginning. See *Midway Orchard v. County of Butte*

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[39] The same requirement applies for the collection of commercial solid wastes. (AA805, Section 21-1.3(f)(4).)

(1990) 220 Cal.App.3d 765, 783. That is what happened here, and that is why the trial court's nonsuit order was correct as a matter of law.

C. Compton Cannot be Estopped to Assert the Franchise is Invalid

Contrary to Appellants' assertion, Compton cannot be estopped to assert the Franchise is invalid. *First Street Plaza Partners,* 65 Cal.App.4th at 667-68; *Dynamic Industries Company v. City of Long Beach* (1958) 159 Cal.App.2d 294, 299. Though Hub argues it would be inequitable to deny it recovery under the Franchise merely because it lacked the mayor's signature, this argument is unavailing. That a contractor expended a substantial sum in reliance on the invalid contract is "immaterial" in light of the statutory limitations. *Dynamic Industries,* 159 Cal.App.2d at 299-300. As the court reiterated:

> It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in

> the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and he suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard.

Dynamic Industries, 159 Cal.App.2d at 299-300, *citing Zottman v. City and County of San Francisco* (1862) 20 Cal.96, 104-105. Further, "[i]t is an emphatic postulate of both civil and penal law that ignorance of the law is no excuse for a violation thereof." *Hale v. Morgan* (1978) 22 Cal.3d 388, 396.[40]

Williams v. Stockton (1925) 195 Cal.743, on which Appellants rely, is easily distinguishable. *Williams* involved a plain vanilla construction contract, not a waste management franchise that necessarily implicates fundamental concerns of public health and safety. In contrast to City's municipal code here, Stockton's charter did not expressly require the mayor to sign the contract. In *Williams*

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[40] "This is a maxim which the law itself does not permit anyone to gainsay. . . . The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement." *Hale,* 22 Cal.3d at 396.

the contract sat unsigned on the mayor's desk for months while he assured the contractor of his intent to sign it. Here the Franchise was altered to remove the mayor's signature block and replace it with one for the city manager, which was expressly contrary to statute, a fact that Appellants knew or should have known at the time. Thus, while the contractor may have been induced to rely on the contract absent the mayor's signature, Appellants were not similarly justified. They could not have reasonably believed the Franchise was or would be executed in conformance with the mandates of law.

For these reasons, even if judgment on the verdict is reversed, the Court should affirm the trial court's grant of nonsuit on Hub's complaint.

12. CONCLUSION

For all the foregoing reasons, the Court should affirm the judgment in all respects.

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies pursuant to Rule 14(c)(1) of the California Rules of Court, the enclosed brief of Respondents is produced using 13-point type including footnotes and contains 19,701 words, exclusive of the caption page, tables and this certification. Counsel relied upon the word count feature of the computer program used to prepare this brief.

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