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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN DONALDSON, et al., Plaintiffs and Appellants, v. CITY OF LONG BEACH, et al., Defendants and Respondents.	B172318 (Los Angeles County Super. Ct. No. BC251505)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Judge. Affirmed.

Hadsell & Stormer, Dan Stormer, and Virginia Keeny; Robert D. Newman for Plaintiffs and Appellants.

Robert E. Shannon, City Attorney, Carol A. Shaw, Deputy City Attorney; Hancock, Rothert & Bunshoft, Patrick A. Cathcart and Kathryn C. Ashton for Defendants and Respondents.

Individuals who were residents of the City of Long Beach (the City) and customers of the Long Beach Gas Department (Long Beach Gas), filed a lawsuit against the City and others. The individuals alleged rate setting violations and illegal transfers from Long Beach Gas to the City's General Fund. The trial court sustained demurrers to the causes of action alleging illegal transfers and granted summary judgment on the two causes of action alleging rate setting violations. This appeal followed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

John Donaldson, Adrea and Pete Stoker, Amelia Nieto, Roger Erickson, John Richard Deats, Trace Wilson-Kleekamp and Steve Kleekamp, Joseph Weinstein, Colette Marie and Richard McLaughlin, Ronald B. Noe, individuals, and a group named Long Beach Citizens for Utility Reform (collectively referred to as appellants) filed their original complaint in May 2001 (the Original Complaint) against the City of Long Beach, the City Council, and the former City manager, Henry Taboada (collectively referred to as respondents). The complaint addressed increases in their gas rates during the period from December 2000 to May 2001.

A demurrer was sustained to two of the four causes of action in the Original Complaint and appellants filed a First Amended Complaint[1] containing three causes of action: (1) violation of the Long Beach City Charter section 1502; (2) violation of Long Beach Municipal Code (hereinafter LBMC) section 15.36.100; and (3) unlawful expenditure of public funds, in violation of Code of

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[1] Apparently after a First Amended Complaint was filed, appellants filed a "Corrected First Amended Complaint." Only the Corrected First Amended Complaint is contained in the record and it is that complaint to which we refer.

Civil Procedure section 526a. Another demurrer was sustained, this time without leave to amend, to the Third Cause of Action.

The gist of the first two causes of action was improper rate setting. Substantively, the actions turned on the language of section 1502 of the City Charter, and similar language within LBMC section 15.36.100, which provides that utility rates "shall be based upon the prevailing rates for similar services and commodities supplied or sold by *other like utilities*, whether public or private, operating in the Southern California area." (Italics added.) Appellants contended that this language, as evidenced by the will of the voters and past practice, required respondents to set rates similar to those set by Southern California Gas. Respondents disagreed and contended that rates must fall within a reasonable range of all "like utilities" in Southern California which included Southern California Gas, San Diego Gas & Electric and Southwest Gas. Addressing this dispute, respondents filed a "Motion for Legal Determination" requesting that the trial court declare which interpretation was correct. Appellants opposed the motion.

The court granted the motion on February 4, 2003, providing a Statement of Decision: "In analyzing a legislative provision, California courts consider extrinsic evidence if language is unclear or ambiguous. [Citation.] Here, the language plainly states Long Beach's gas rates shall be based on rates charged by 'other like utilities.' By employing the plural form of 'utility,' the language unambiguously indicates that gas rates may be based on multiple gas utilities. Per the plain language, then, Long Beach need not set rates exclusively in accordance with So Cal Gas's rates because at least three gas utilities operate within Southern California: (1) So Cal Gas; (2) San Diego Gas & Electric; and (3) Southwest Gas. [¶] . . . The question before the Court concerns statutory clarity. Though the phrase 'the Southern California area' erects a geographical limitation, nothing in the language of the Charter or Code narrows Southern California to those areas

within or near Long Beach city limits. By its plain meaning, 'the Southern California area' extends well beyond Long Beach's boundaries. As such, that So Cal Gas operates in close proximity to Long Beach does not bear on interpretation of the legislative language. [¶] In summary, the Court finds the legislative language clear and unambiguous. The Charter and Code allow for rates based on those charged by more than one Southern California gas utility."

Respondents then moved for summary judgment on the first two causes of action. Respondents provided evidence of how the rates were set and how the rates compared to those of the other three utilities for the period of time challenged. Citing to and relying on language from *City and County of S.F. v. Boyd* (1943) 22 Cal.2d 685, respondents argued that appellants would be unable to establish that the rates were '"fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. [*City and County of S.F.*, *supra*, 22 Cal.2d] at 690)." The separate statement of undisputed facts set out specifically how the rates were established, supported by the declaration of Christopher J. Garner, the General Manager/Director of Long Beach Gas. Appellants did not dispute these facts, which we reference later.

The trial court granted summary judgment on September 11, 2003. Judgment was then entered in favor of respondents.

Appellants appeal from the orders sustaining the demurrers as well as the order granting summary judgment.

DISCUSSION

1. *Interpretation of Sections 1502 and 15.36.100*

Long Beach City Charter section 1502 provides that: "The rates to be charged users for any services or commodities supplied by any public utility owned and operated by the City shall be based upon the prevailing rates for similar

services and commodities supplied or sold by other like utilities whether public or private, operating in the Southern California area."

LBMC section 15.36.100 provides that: "The General Manager of the City's Gas Department shall regularly review rates, tariffs, fees, charges and services of other like utilities whether public or private operating in the Southern California area and submit to the City Manager a schedule of natural gas rates, fees, charges which are reasonable and comparable to rates, fees, and charges by other like utilities in the Southern California area. The City Manager shall adjust gas rates, fees, and charges for the City contained in Chapter 15.36 of the Municipal Code to reflect increases or decreases in the price of the commodity, transportation, charges, fees, and related services. The City Clerk shall post such new rates, fees, charges, and service at three conspicuous places within the City. The City Manager shall report changes in rates, charges, fees, and services to the City Council as soon as practicable. The City Council may approve, disapprove or modify such changes by resolution."

The gravamen of appellants' complaint is that because the sudden rate increases imposed during the period of December 2000 to May 2001 were not similarly imposed by Southern California Gas, a violation of the City Charter and the LBMC occurred.

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public

policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340.)

"A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844 [157 Cal.Rptr. 676, 598 P.2d 836]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224], and cases cited; see also *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484-485 [208 Cal.Rptr. 724, 691 P.2d 272].) Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688 [104 Cal.Rptr. 110].)" (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

We agree with the trial court that the use of the plural "utilities," as well as the procedures for review set out in the LBMC, clearly indicate that Long Beach Gas should not be concerned just with the rates set by Southern California Gas.

Appellants argue that voter intent favors an interpretation that the City should only compare its gas rates to Southern California Gas. We find no evidence of such intent here. Appellants demonstrate only that no changes to the City Charter were contemplated by the voters in 1980 when the statutes were enacted. This is not sufficient to indicate that the voters intended to enact a statutory scheme which would ensure that Southern California Gas be used as the exclusive benchmark for setting gas rates in Long Beach.

Appellants also argue that the practice of the City prior to 2000 in setting prices in accordance with those charged by Southern California Gas is evidence that the statue is to be interpreted accordingly. While contemporaneous administration is a factor to be considered in statutory construction, we do not find such an interpretation to be warranted here. (See *Brown v. Fair Political Practices Com.* (2000) 84 Cal.App.4th 137, 150.) If only one company were to be considered, there would have been no need at all for the enactment of LBMC section 15.36.100 which dictates that a schedule of comparable rates be submitted by the City Manager for review. Certainly there may be circumstances where the City Manager concludes that the only "like" utility for a period of time is Southern California Gas. But it does not require that the City take such a restrictive view in the future.

Having concluded that sections 1502 and 15.36.100 do not require the City to set its rates only in conformity with those set by Southern California Gas, we turn to the motion for summary judgment.

2. *Summary Judgment Motion*

Summary judgment was sought based on the ground that appellants would be unable to prove that Long Beach Gas violated the City Charter or the LBMC in setting gas rates.

The pertinent portions of the declaration of Christopher Garner relating to how the rates were set are paragraphs 11 through 13, as follows:

"11. The rates and fees of all California investor-owner utilities are regulated and approved by the California Public Utilities Commission ('CPUC'). Beginning in the mid-90's, the CPUC authorized private utilities to change their methodology of charging customers for the gas commodity within the rate

structure to reflect the true 'weighted average cost of gas' (generally called the 'WACOG') adjusted on a monthly basis.

"12. Following the lead of the CPUC-regulated utilities, Long Beach changed its rate structure in 1998 with a rate resolution similar to that of So Cal Gas where the rates charged by Long Beach consisted of a fixed transportation rate and a variable gas cost (commodity charge) rate. The variable commodity charge rate reflected the City's cost of gas each month being passed through to the customer without any markup or profit . . . . This combined fixed transportation rate and variable commodity cost rate structure is very similar to that of So Cal Gas and other CPUC-regulated utilities.

"13. The Long Beach WACOG is calculated on a monthly basis and billed to the customer. The WACOG represents the City's cost of gas for the month with no markup to the customer. . . . The variable portion of the Long Beach Rate is a pure pass-through of cost of gas. Long Beach Rate Resolution No. C-27411 . . . became effective October 1, 1998, and authorized Long Beach to change its rate structure so that the City's actual monthly cost of gas was billed to the customer each month without any markup or profit. This pricing change occurred because the CPUC had approved a similar change in So Cal Gas' pricing methodology. . . . Pursuant to the 1998 rate resolution, the rates charged by Long Beach consisted of both a fixed transportation rate and a variable gas cost commodity rate. The fixed transportation rate remains unchanged unless modified by a subsequent rate resolution. The variable gas commodity charge rate, called the weighted average cost of gas (WACOG), is the utility's cost per therm for gas. . . . The WACOG is to be calculated on a monthly basis, and '[t]here will be no markup to the customer above the City's true cost of gas.' . . . Long Beach makes no profit on the gas commodity charge paid by the customer."

In the separate statement of undisputed facts in support of the motion for summary judgment, respondents set forth the following facts which were undisputed by appellants:

"3. There are at least three other gas utilities operating in the Southern California area and they are: Southern California Gas Company; San Diego Gas & Electric; and Southwest.

"4. The Long Beach Gas utility's rate structure is similar to the other CPUC-regulated utilities and is based on a fixed transportation element and a variable gas commodity element called the WACOG (weighted average cost of gas).

"5. The WACOG rate reflects the actual cost to the City of procuring gas each month.

"6. Because there is no markup to the customer on the price that the City pays for gas each month, the WACOG is a pure pass-through of the cost of gas.

"7. Adjustments to the WACOG from prior months will occur on a forward basis only in the current month's WACOG for billing purposes. [¶] . . . [¶]

"9. Long Beach, SDG&E, and Southwest were all affected by the increased gas costs at the California border.

"10. Because So Cal Gas had rights to a substantial amount of interstate pipeline capacity that the other three utilities did not have, it was not similarly affected by the increase in gas costs at the California border."

Separate statement of fact No. 8 states: "Gas prices at the California border increased dramatically in November 2000 and for several months thereafter." Appellants' response to this item was: "8. Disputed in part. Gas prices began increasing significantly in May 2000."

Respondents also submitted tables which compared the weighted average cost of gas for three utilities (Southern California Gas, San Diego Gas & Electric and Southwest Gas) over the period from December 2000 to May 2001.

The trial court agreed with respondents that appellants failed to present any evidence to suggest that respondents' rate setting actions were fraudulent, palpably unreasonable, or arbitrary to indicate an abuse of discretion as a matter of law.

Appellants raise two contentions on appeal with respect to this cause of action, first that the City Charter should be interpreted in accordance with the past practice of the City to mean that gas rates should be comparable to those set by Southern California Gas. We have already decided this issue against appellants. Secondly, appellants argue that if the City Charter is interpreted according to its literal language, then the rates charged by Long Beach Gas were far in excess of those charged by other like utilities.

A defendant moving for summary judgment must present facts to negate each claim in the complaint or establish a defense to each of those claims. If it does so, the burden shifts to the plaintiff to demonstrate the existence of a triable material issue of fact. (Code Civ. Proc., § 437c, subd. (c); *Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 750.) In determining the propriety of a summary judgment, the trial court is limited to facts shown by the evidentiary material submitted as well as those admitted and uncontested in the pleadings. (*Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1261.) On appeal, the court determines de novo whether any triable issues of material fact exist and thus whether the moving party is entitled to judgment as a matter of law. (*Bjork v. Mason* (2000) 77 Cal.App.4th 544, 548.)

In support of their motion, respondents submitted the declaration of Garner establishing how the rates were set. He established there are two calculations which make up the rate: a fixed transportation portion and the weighted average cost of gas, or WACOG. The WACOG will fluctuate depending on what respondents have to pay for the price of gas and this is passed on to the consumer. Garner's declaration, and the undisputed separate statement of facts, establish that the rates were consistently set in this manner before and during the challenged period when the prices spiked. It is undisputed the reason for the spike in prices during the challenged period was the increased cost of gas at the California border. Consistent with past practice, this cost was passed on to the consumer. The tables provided by respondents do not suggest the rates charged by respondents were so out of line with those of the other utilities to raise an inference that respondents acted fraudulently, unreasonably or arbitrarily. (*City and County of S.F. v. Boyd*, *supra*, 22 Cal.2d at p. 690.)

3. *Demurrer to Second Cause of Action*

Appellants' second cause of action in their Original Complaint alleged that Long Beach Gas transferred over $250 million of profits to the City's General Fund in violation of City Charter section 1501. The trial court sustained respondents' demurrer to this cause of action with leave to amend. Appellants did not amend this cause of action, apparently because they had stated all facts known to them and had nothing to amend, and omitted this cause of action from their First Amended Complaint.

Section 1501 of the City Charter provides: "All revenues received from the operation of each public utility owned and operated by the City shall be deposited and kept in a separate revenue fund in the name of the utility operation generating the revenue and shall be disbursed therefrom on behalf of each utility

operation in the following order of priority: [¶] (a) Payment of interest and principal coming due on any bonded indebtedness relating to the utility which generates the revenue in each such specified fund; [¶] (b) Payment of the annual operating and maintenance expenses, acquisitions, improvements and extensions of the respective utility system; [¶] (c) Set aside a portion of each fund as a reserve to be used for contingencies in the operation of each such utility; [¶] (d) The remainder in any of these funds determined by the City Manager to be unnecessary to meet the above obligations may be transferred into the General Purpose Fund of the City as approved in the annual budget by the City Council."

The original second cause of action alleged: "Defendants have further violated Section 1501 of the City Charter by failing to establish adequate reserves to be used for contingencies in the operation of each such utility; including meeting their obligations under Section 1502. Over the past twenty years, the Gas Department has made over $250 million over expenses, which has been paid into the general fund and has not been placed in reserves. As a result of defendants' failure to maintain adequate reserves which could have been tapped to ensure rate stabilization, the proposed plaintiff class has suffered significant damages, in an amount estimated to exceed $38 million."

The trial court sustained respondents' demurrer to this cause of action, stating, "It is unclear from the pleadings and matters from which judicial notice can be taken what reserves were maintained in the Gas Fund for contingencies in the operation. Nonetheless, plaintiffs['] contention that 'contingencies' include a buffer for any dramatic pass through of cost to residents is unsupported by the language of the statue. . . . [¶] The clear language of Code § 1501 (c) and (d) permits legislative discretion in the amount of transfers to the General Fund and provides no specific amount that must be kept in reserves."

Appellants challenge the order sustaining the demurrer, contending that the court misinterpreted section 1501 as allowing the City unfettered discretion to dispose of the reserve funds because it specifically sets forth what the monies should be used for, only allowing transfer to the City's General Fund if they are found to be unnecessary to meet the other obligations. Appellants also argue that section 1501 must be read in conjunction with section 1502 and thus requires the City to safeguard the profits to cover operating costs so as to ensure rates which complied with those set by Southern California Gas, that is, to cover losses occasioned by the setting of lower prevailing gas rates.

On review of an order sustaining a demurrer, we assume that all the properly pled allegations in the complaint are true and determine whether the complaint states a cause of action. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We give the complaint a reasonable interpretation, reading it as a whole and viewing its parts in context. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

We agree that the statute does not give "unfettered" discretion to the City. Clearly, the statute sets forth priorities in which the funds must be allocated. But once the City Manager determines that no more funds are necessary to meet the four priorities listed, he or she is vested with discretion to transfer the remaining monies into the General Fund. In addition, the City Manager is only to set aside a "portion" of the funds as reserves. The statute does not specify what portion, or how that portion is to be determined.

Because the complaint did not allege that the City failed to appropriate the funds as required (e.g. by failing to pay operating expenses or the bonded indebtedness of the utility), and only alleged in conclusory fashion that it failed to establish "adequate" reserves, the demurrer was properly sustained.

4. *Demurrer to Third Cause of Action*

In the third cause of action of their First Amended Complaint, appellants alleged respondents violated Code of Civil Procedure section 526a by illegally setting gas rates and collecting monies paid by the public at these rates.

Section 526a provides: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein."

"The purpose of this statute, which applies to citizen and corporate taxpayers alike, is to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement. [Citation.] To this end, the statute has been construed liberally. [Citation.] . . . [¶] Regardless of liberal construction, the essence of a taxpayer action remains an illegal or wasteful expenditure of public funds or damage to public property. [Citation.] The taxpayer action must involve an actual or threatened expenditure of public funds. [Citation.] [¶] General allegations, innuendo, and legal conclusions are not sufficient [citation]; rather the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur. [Citations.]" (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240.)

In the Original Complaint, appellants alleged in their fourth cause of action: "54. Defendants' actions and practices complained of in this complaint

and petition constitute a waste of public funds within the meaning of Code of Civil Procedure § 526a. It would be futile to make a demand on defendants. [¶] 55. There is no adequate remedy at law and plaintiffs, as taxpayers, will suffer irreparable injury if the requested injunction does not issue to prevent the illegal expenditure of taxpayer monies. [¶] 56. Plaintiffs have no plain, speedy, or adequate remedy at law other than the relief requested in this complaint. [¶] 57. An actual controversy exists between plaintiffs and all the defendants concerning their rights, privileges, and obligations in that plaintiffs contend that defendants' above-mentioned actions have violated and will continue to violate Section 1502 of the City Charter and Section 15.36.100 of the Long Beach Municipal Code, and defendants contend in all respects to the contrary."

The court sustained respondents' demurrer with leave to amend, stating, "Plaintiffs['] allegations are that the funds should not have been transferred to the General Fund and that such transfer constituted waste. They make no allegation the monies were improperly or illegally used by the General Fund."

Appellants' third cause of action in their First Amended Complaint is virtually identical to that alleged in the Original Complaint, but alleges instead that "Defendants' actions and practices complained of in this complaint *constitute illegal expenditure and use of public funds* (*in violation of Section 1502 of the City Charter and Section 15.36.100 of the Long Beach Municipal Code*) and a waste of public funds within the meaning of Code of Civil Procedure § 526a. It would be futile to make a demand on defendants." (Italics added.)

The court again sustained respondents' demurrer, this time without leave to amend, stating "Donaldson has re-alleged the same cause of action and has only added the legal conclusion that the City of Long Beach illegally spent public funds. Donaldson has not alleged facts new to the First Amended Complaint which would tend to show how the City of Long Beach illegally spent public

funds. Thus, the Third Cause of Action remains flawed and it does not reasonably appear possible for this flaw to be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)"

On appeal, appellants contend that the court erred in sustaining the demurrer, and subsequently in dismissing the taxpayer claim, arguing that other cases have upheld section 526a actions even when there has been no actual expenditure of public funds, citing *Trickey v. City of Long Beach* (1951) 101 Cal.App.2d 871. *Trickey* involved an almost identical factual setting, that is, a taxpayer sought to prevent the City of Long Beach from transferring funds from the city's gas revenue fund to its general purpose fund. The court of appeal held that a taxpayer suit under section 526a was proper because the revenue from the sale of oil and gas constituted trust funds from the State of California which may not be used for general municipal purposes. (*Id.* at pp. 878-879.) Because the taxpayers of the city are the owners of the trust fund, the court held that "any expenditure of the trust funds for general municipal purposes would be illegal in the sense that it is, and would be, a violation of the trust. [Citation.]" (*Id.* at p. 881.)

However, here, the 526a action is not based upon the transfer of funds to the general purpose fund, but on the charging of excessive rates. In their opposition to the demurrer, appellants stated: "It bears emphasis that plaintiffs' taxpayer claim is *no longer* based in any way upon their claims under Section 1501, to which the Court sustained defendants' prior demurrer (with leave to amend). Rather, this claim under Section 526a is founded on the same facts underlying plaintiffs' claims that defendants have violated Section 1502 of the Charter and Section 15.36.100 of the Municipal Code. Thus, plaintiffs have cited specific facts and their reasons for believing that 'some illegal expenditure or injury to the public fisc is occurring or will occur.' [Citation.]"

Appellants also cite *Kehoe v. City of Berkeley* (1977) 67 Cal.App.3d 666, for the proposition that no actual expenditure of funds is necessary to support a section 526a action. This citation is inapposite. There, the court determined that while the taxpayer citizens had standing, the demurrer to their cause of action challenging the issuance of permits by city officials was properly sustained. (*Id.* at pp. 671, 677.)

As we understand it, in this cause of action appellants seek to invalidate the imposition of rates and collection of the rates billed, not the use of the funds or a plan to spend those funds once they were collected. Because appellants have not alleged any transfer or expenditure of public funds in this cause of action, we conclude the demurrer was properly sustained.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, P.J. GRIMES, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.