No. S132814
(Court of Appeal No. B163115)
(Los Angeles County Super. Ct. No. BC 206388)

IN THE SUPREME COURT OF CALIFORNIA

THE OAKLAND RAIDERS,
Plaintiff-Appellant,

vs.

NATIONAL FOOTBALL LEAGUE,
Defendant-Respondent,

and

PAUL TAGLIABUE AND NEIL AUSTRIAN,
Defendants-Respondents.

Appeal from Los Angeles County Superior Court
Honorable Richard C. Hubbell, Judge

ANSWER BRIEF ON THE MERITS

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> "The Court finds that the objectively ascertainable acts of Juror misconduct were prejudicial to the Oakland Raiders' right to a fair trial."
>
> (CT 5133.)

Without providing *any* further explanation, without preparing the "specification of reasons" required by section 657 of the Code of Civil Procedure, without describing "the objectively ascertainable acts of Juror misconduct" upon which it relied – *indeed, without even identifying the juror or jurors whose conduct it deemed improper* – the Superior Court ordered a new trial, setting aside the eleven-week culmination of years of litigation, and imposing on the courts and the parties the burden of trying for a second time claims arising out of events that occurred more than a decade ago.

The trial court's failure to state its reasons was not a mere technical oversight; by failing to comply with its statutory obligation, the trial court precluded meaningful appellate review of its order. The Raiders had attacked the integrity of *three* jurors, each for *different kinds* of alleged misconduct. A specification of reasons was therefore essential for the parties to know, and for any reviewing court to assess, the basis upon which the trial court had acted in setting aside the verdict.

The question presented, therefore, is this: Under what circumstances may an appellate court affirm a new trial order that is not supported by the specification of reasons required by statute and deemed

"mandatory" by this Court? Section 657 of the Code of Civil Procedure provides the answer: Such an order may be affirmed only if the reviewing court determines that a new trial "should have been granted" below.

In making that determination, the appellate court is not permitted to speculate about factual findings that *might* have been made, or about reasons upon which the trial court *might* have relied. Nor may the appellate court reweigh the evidence or resolve factual disputes. Instead, as this Court has confirmed, the sole issue on appeal from a non-compliant new trial order is whether a new trial was "*legally require[d]*." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 905 [emphasis added].)

The alternative urged by the Raiders – the abuse-of-discretion standard – does not and should not apply where the trial court has failed to specify reasons. That is especially true where the stated ground for the order turns on disputed issues of fact.

The abuse-of-discretion standard makes sense if the trial court has *complied* with its obligation to specify reasons. But where, as here, "[t]he court's appraisal of the evidence bearing on any one of . . . multiple issues might have been the 'reason'" for its order (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 369) – where the record affords no indication of the legal standard applied, the factual issues resolved, or the evidence considered – it is impossible to identify any exercise of discretion to which the abuse-of-discretion standard could apply. And it is similarly impossible to know

against what reason or finding to measure any assertedly "substantial" evidence.

The order at issue here illustrates the wisdom of the governing statutory standard as well as the problems with the Raiders' proposed alternative. Did the trial court order a new trial because one juror was bossy, or because another whispered in the jury room, or because another had poor language skills, or for some other reason that it failed to disclose? The trial court offered no clue.

As a result, the reviewing court does not know, and cannot determine, whether the order was premised on a reason that could not, as a matter of law, justify a new trial. The reviewing court does not know, and cannot determine, whether the order was premised on a reason supported only by inadmissible evidence, to which timely objections, never addressed by the court, were made and renewed. Nor does the reviewing court know which factual disputes were resolved by the trial court, much less how those disputes were resolved.

In these circumstances, section 657 requires the reviewing court to determine *not* whether a new trial *could* have been granted, i.e., not whether some unarticulated finding or undisclosed reason *might* have justified a new trial, but rather whether a new trial "*should* have been granted" below, i.e., whether a new trial was "legally required."

STATEMENT OF FACTS

A. The Underlying Claims And The Trial

Immediately following their 1995 relocation from Los Angeles to Oakland, the Raiders filed suit, seeking $1.2 billion in damages from their NFL partners. (CT 40-92.[1])[2]

The Raiders' claims reflected two broad theories. They alleged an implied right in the NFL Constitution to compensation from the NFL for the opportunity, assertedly "created" by their relocation, to place another team in Southern California. (CT 65-70.) And they alleged that the League had breached an obligation to accommodate their unprecedented demand to schedule two Super Bowls at a stadium that the club had considered building in Los Angeles. (CT 73-80.) (The Raiders elected not to pursue the Los Angeles stadium because, as a senior Raiders executive testified, they "got a better deal in Oakland." (RT 4357.))

Following extensive discovery and motions practice, the Raiders' claims were tried in the spring of 2001. The trial, including jury

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[1] This brief employs the following abbreviations: "BOM" means Appellant's Opening Brief On The Merits; "CT" means the Clerk's Transcript; "SCT" means the sealed portion of the Clerk's Transcript; "RT" means the Reporter's Transcript; and "Opn." means the Court of Appeal's slip opinion.

[2] The Raiders initially brought their claims in federal court. After four years of litigation, the NFL was granted summary judgment on the Raiders' federal law claims; the state law claims were dismissed for want of an independent ground of federal jurisdiction. (See CT 41-42.) The Raiders then refiled their state law claims in Superior Court.

selection and deliberations, lasted eleven weeks. The record was extensive: 29 witnesses, 4,780 transcript pages, and 165 exhibits (which collectively constituted more than 2,000 pages of text, charts, and graphs). On May 21, 2001, the jury returned a verdict for the NFL on each of the Raiders' claims. (CT 3393-3394.)

At no time during the trial was there an indication of anything amiss with the jury. There was no such suggestion during the weeks prior to closing argument, during the sixteen days of deliberations (which included numerous communications from the jury to the trial judge), at the time that the jurors were required to begin deliberations anew (when an alternate replaced a juror excused for personal reasons (see RT 4728-4831)), or when the jurors were individually polled after their verdict was announced (RT 4779).

B. The New Trial Motion And Supporting Declarations

On July 26, 2002, fourteen months after the verdict (and following a bench trial on unrelated claims), the Raiders filed a motion for new trial on multiple grounds, including asserted juror misconduct. (CT 4041-4134.) The motion was accompanied by a cookie-cutter collection of declarations alleging, in identical words, a broad array of purportedly improper conduct by *three* jurors. (CT 3485-3506.)

The Raiders argued that one juror, attorney Linda Hillman, had committed *at least six* discrete acts of misconduct. (See, e.g., CT 5075 ["providing her own legal instruction[s] for the jurors, selectively editing the

instructions to present what she deemed 'pertinent,' and incorrectly stating the law regarding FC-7, fiduciary duty, and how jurors must vote"], 5074 [engaging in "separate discussions with Ms. Paulino not heard by other jurors," which "constitute prejudicial misconduct . . . because the deliberations had to include all jurors"].).

The Raiders alleged that another juror, Joseph Abiog, had engaged in *at least three* discrete acts of misconduct. (See, e.g., CT 4064 [concealing on voir dire a "long standing bias" against the Raiders], 4066 [refusing to comply with the trial court's instructions], 4068 [engaging in "secret deliberations" in a foreign language].) And the Raiders presented evidence from their declarants alleging that, in addition to engaging in "secret deliberations" with Mr. Abiog and Ms. Hillman, Juror Lagrimas Lalin-Paulino "appeared to have trouble" understanding the English language and the evidence. (See, e.g., CT 3503, 3498.)

The NFL filed timely objections to the Raiders' declarations, substantial portions of which were inadmissible under section 1150 of the Evidence Code. (CT 4344-4347.)

Some of the allegations in the Raiders' declarations could not, as a matter of law, justify a new trial. For example, as noted above, all of the Raiders' declarants, using identical language, alleged that several jurors had

improperly engaged during deliberations in "private conversations" and discussions "in a foreign language." (See, e.g., CT 3503, 3498, 3490.)[3] The Raiders have now disavowed these allegations, asserting that they "did *not* move for a new trial based on [the allegedly] improper private conversations." (BOM 7 n.4 [emphasis in original].) The Raiders' declarants also complained, using identical language, of strenuous and sometimes heated statements by Ms. Hillman during deliberations, and about derisive comments that she assertedly made about the Raiders' lawyers. (See, e.g., CT 3492.)[4]

All of the Raiders' allegations were directly contradicted by one or more of the eight juror declarations submitted in opposition to the new trial motion. For example, as noted above, the Raiders' declarants alleged that, during deliberations, Ms. Hillman, an attorney, offered her own views of the law. (See, e.g., CT 3491, 3499, 3504.) Ms. Hillman's refutation of those allegations (CT 4322) was squarely supported by the testimony of numerous other jurors. (CT 4330 [Taylor] [those allegations are "just not true"], 4342

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[3] Absent "concrete evidence as to the content of [any such] discussions," which the Raiders did not offer, such allegations "fail[] to establish misconduct." (*People v. Majors* (1998) 18 Cal.4th 385, 425 [quoting *People v. Kramer* (1897) 117 Cal. 647, 649].)

[4] Such alleged statements, even if proved, could not constitute misconduct. (See, e.g., *People v. Engelman* (2002) 28 Cal.4th 436, 446 [recognizing that "expressions of 'frustration, temper, and strong conviction'" do not constitute misconduct]; *Tillery v. Richland* (1984) 158 Cal.App.3d 957, 978 ["cutting and sarcastic words" do not constitute misconduct].)

[Wong] ["she did not try to . . . tell us what the law was"].) As the Raiders recognize, the evidence as to Ms. Hillman was in "sharp conflict." (BOM 12.)

Similarly, the Raiders' declarants took issue with a comment by Mr. Abiog, made "[d]uring deliberations" (CT 3502), to the effect that he hated the Raiders. As his declaration makes clear, that statement, which included a reference to a "trivial" bet that he had lost in Las Vegas, was made in jest. (CT 4338 ["The part about 'hating' the Raiders was an obvious joke, no one confronted me about it, and I still cannot believe that anyone took my comment seriously. I made my comment as a joke to relieve the tension in the room."].)[5]

In response to allegations of bias made by the Raiders' declarants, Mr. Abiog testified:

> I never had any such hostility, bias or ill will [toward the Raiders or Mr. Davis]. In answering the jury questionnaire and counsels' questions, I was truthful in every respect. My verdict was based solely on the evidence, the court's instructions, and deliberations with my fellow jurors.

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[5] Mr. Abiog's declaration was corroborated by the testimony of five other jurors who (a) confirmed that he would occasionally make jokes in an effort to defuse tension in the jury room, (b) testified that they could not recall, and would expect to recall, any serious comment by Mr. Abiog suggesting bias for or against any party, and/or (c) testified that whenever Mr. Abiog expressed an opinion about the case, he supported it with references to the evidence. (CT 4327, 4343, 4329, 4323, 4194, 4334.)

(CT 4337). Indeed, one of the *Raiders'* declarants subsequently acknowledged that he "could not tell whether [Mr. Abiog] had formed the[] opinions [that assertedly reflected bias against the Raiders] before his jury service began, or whether he formed them from listening to the evidence and arguments during the trial." (CT 4192 [Liu].) The Raiders acknowledge that Mr. "Abiog's denials created a factual dispute." (BOM 9.)[6]

* * *

On September 5, 2002, ten days after the statutory deadline for such filings (see Code Civ. Proc., § 659a), the Raiders filed six "reply" declarations to which the NFL had no opportunity to respond. (CT 5101-5111, 5118-5123.) The "trial court ha[d] no discretion to admit" these out-of-time declarations. (*Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1672; see Code Civ. Proc., § 659a.)

The inadmissible "reply" declarations included new allegations of purported "misconduct," as well as additional testimony supporting the Raiders' initial allegations. The reply declarations asserted, for example, that during deliberations, Ms. Hillman "interrupted everyone who disagreed with

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[6] The allegations about Ms. Lalin-Paulino's language difficulties (see p. 6, above) were conclusively refuted by her juror questionnaire, as well as her voir dire; in fact, Ms. Lalin-Paulino is a college graduate employed in a supervisory position by the Federal Reserve Bank of San Francisco. (See SCT 5510, 5517-5518; RT 157-160.) The Raiders have now disavowed these allegations as well, contending that they "did *not* move for a new trial based on [Ms. Lalin-Paulino's] language difficulties." (BOM 7 n.4 [emphasis in original].)

her, and would often not let anyone who disagreed with her speak." (CT 5104; see also, e.g., CT 5110 ["She virtually ran the entire deliberation. It was often hard for anyone else to speak."].)

In addition, the Raiders' declarants belatedly asserted that because "[n]either Mr. Abiog [nor] anyone else laughed at his statements," his comments about the Raiders could not have been intended as a joke. (CT 5068, 5110; see also, e.g., CT 5102 ["This was not a joke. I saw his face when he made the statement, and I could tell this from his facial expression, which I saw, and the tone of his voice."].)[7]

The Raiders relied extensively on these untimely declarations in the reply memorandum supporting their new trial motion. (See, e.g., CT 5068-5074.)

The NFL moved promptly to strike the untimely declarations and filed objections to them based on section 1150 of the Evidence Code, among other grounds. (CT 5124.)

C. The New Trial Order

On September 11, 2002, the trial court heard argument on the Raiders' motion. There was no additional evidence. There was not a single

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[7] Notably, one of the Raiders' out-of-time declarations was *written in perfect English* and signed by Ms. Lalin-Paulino, the juror who, according to the Raiders' earlier declarations, had such severe language difficulties that she was unable to understand the evidence. (CT 5118-5120; see p. 6 & n.6, above.)

substantive question or comment from the bench. (RT 4781A-4831A.) Nor was there a response from the court when the NFL orally renewed its motion to strike the Raiders' untimely reply declarations. (RT 4796A.)

On September 23, 2002, the trial court granted a new trial, issuing the following minute order:

> In these matters heretofore submitted on September 11, 2002, the Court now rules as follows;
>
> (1) The motion for new trial is granted. The Court finds that the objectively ascertainable acts of Juror misconduct were prejudicial to the Oakland Raiders' right to a fair trial.
>
> While some of the objections in the motion for new trial premised on erroneous and/or prejudicial jury instructions raise serious questions concerning their use, and having given the Court some pause, having granted the motion for new trial on other grounds, we have not reached these issues.
>
> (2) The motion for judgment notwithstanding the Verdict is denied.

(CT 5133.)

Notwithstanding this Court's prior admonition that the "moving party [may] take steps to ensure that the judge complie[s] with" the specification requirement (*Mercer v. Perez* (1968) 68 Cal.2d 104, 123), the Raiders made no such effort either before or during the ten-day period following entry of the order.

The trial court never specified the reasons for its order. Nor did it rule on the NFL's motion to strike the Raiders' untimely declarations or on the NFL's objections.

D. The Court of Appeal's Decision

The Court of Appeal held that the trial court had adequately specified the *ground* (juror misconduct) for the new trial order, but not the underlying *reason(s)*, as required by section 657 of the Code of Civil Procedure. (Opn., pp. 9-14.) The court observed that the order's reference to "prejudicial" and "objectively ascertainable acts of Juror misconduct" did "nothing more than restate the elements necessary to grant a new trial on the ground of juror misconduct." (Opn., p. 12.) Such conclusory language, the court held, "neither indicates [that the order] was the product of careful deliberation nor provides a basis for meaningful appellate review." (Opn., p. 13.)

In particular, the Court of Appeal observed that the reasons underlying the order could have been premised on any

> of the several acts of misconduct raised by the new trial motion, including Mr. Abiog's remark about the Raiders and their owner as demonstrating a concealed bias; Ms. Hillman's telling the jury they had to vote the same way on related claims; Ms. Hillman's telling the jury that a fiduciary relationship between the parties could not exist as a matter of law; Ms. Hillman's writing her own version of the jury instructions on butcher paper taped to the wall; or Ms. Hillman's having private deliberations with another juror.

(Opn., pp. 12-13.) The court emphasized that in "the absence of any guidance from the trial court as to its reasoning," "we are left to speculate about the trial court's bases for granting a new trial." (Opn., p. 15, 13.)

Recognizing that the absence of reasons rendered the order "defective, but not void," the Court of Appeal set out to determine whether a new trial should have been granted on any ground raised by the new trial motion. (Opn., p 13.) The court rejected the Raiders' contention that an abuse-of-discretion standard should apply. (Opn., pp. 16-18.) The court observed: "Applying an abuse of discretion standard of review to both new trial orders containing and lacking an adequate specification of reasons suggests that there should be no consequence for a trial court's failure to provide a specification of reasons and would effectively render that requirement meaningless." (Opn., p. 16.)

The Court of Appeal unanimously concluded that the new trial order could not be affirmed, holding first that a new trial was not required on the ground of juror misconduct. (Opn., pp. 18-28.)[8]

The court determined that, in light of the "sharp conflict" in the evidence, it could not find that, at the outset of the trial, "Mr. Abiog was

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[8] The court held that the Raiders' reply declarations were "untimely filed beyond the mandatory statutory time limit of 30 days" and thus should not be considered. (Opn., p. 18-19 n.8 [citing Code Civ. Proc., § 659a].) The Raiders do not challenge this holding on appeal. (See, e.g., BOM 9 n.7.)

irrevocably committed to vote against the Raiders." (Opn., pp. 19-20 [citing *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, 996, 991 [to warrant new trial, court must "find that at the outset of the trial, the juror as a demonstrable reality was, because of a general bias against the plaintiff, irrevocably committed to vote against the plaintiff . . ., i.e., that the juror at issue had in fact committed perjury on voir dire"] [citations and internal quotation marks omitted]].) The court expressly declined to "settle the conflicts in the admissible evidence" about Mr. Abiog and noted that the cases upon which the Raiders had relied all "involved uncontradicted evidence establishing juror misconduct." (Opn., pp. 19, 21.)

Similarly, with respect to Juror Hillman, the court found that the evidence "sharply conflicts" and "cannot be reconciled." (Opn., pp. 23, 25.) Accordingly, and again noting that every case upon which the Raiders had relied "involved uncontroverted evidence of misconduct," the court held that it could not find "misconduct warranting a new trial." (Opn., pp. 19, 25, 26.)

With respect to Juror Lalin-Paulino, the court held that the Raiders had waived their allegations against her by failing to address them on appeal. (Opn., p. 27.)[9]

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[9] The court noted that the Raiders' failure to challenge Ms. Lalin-Paulino's conduct on appeal was likely due to "their desire to rely on her untimely declaration submitted in reply." (Opn., p. 27 n.11.) That declaration was the one written in perfect English. (See CT 5118-5120; p. 6 & nn.6-7, above.)

The court then concluded, with respect to the Raiders' other asserted ground for a new trial – erroneous jury instructions – that the trial court had not committed any legal error. (Opn., pp. 28-41.)

Finally, after finding that the Raiders' cross-appeal (which addressed unrelated issues) was without merit (Opn., pp. 41-56), the court reversed the new trial order and directed the trial court to enter judgment in accordance with the jury's verdict. The court affirmed the judgment in all other respects. (Opn., p. 57.)

ARGUMENT

In Part I, below, we discuss the requirement, imposed by section 657 of the Code of Civil Procedure, that a trial court state the reasons, as well as the grounds, for any new trial order. This "clear and unmistakable duty" is principally intended, as this Court repeatedly has recognized, to ensure "meaningful appellate review" of any order that imposes on the judicial system and the parties the burden of retrying claims that have already been tried to verdict.

In Part II, relying on both the plain meaning of the governing statute and this Court's precedents, we demonstrate that new trial orders unsupported by a specification of reasons may be affirmed only if they "should have been granted" by the trial court, i.e., only if a new trial was "legally required" below.

In Part III, we discuss the fundamental flaws underlying the Raiders' argument that the "abuse-of-discretion" standard should apply to *all* new trial orders, even those unaccompanied by the required specification of reasons.

In Part IV, we demonstrate that this Court cannot find that a new trial "should have been granted" below, either with respect to the Raiders' allegations of jury misconduct or with respect to the other claims of error that they have abandoned in this Court.

* * *

Before turning to the substance of our legal argument, one preliminary comment is warranted.

Much of the Raiders' opening brief is devoted to their argument that appellate courts lack authority to make factual findings. We agree.

But, contrary to the Raiders' premise, the Court of Appeal's ruling was *not* based on an exercise of appellate factfinding. Even though it used a different label ("independent review") and *said* that it was rejecting such a standard (Opn., p. 15), the court's *holding* reflected application of the "should have been granted"/"legally required" standard prescribed by statute and this Court's precedents.

Carefully read, the operative product of the Court of Appeal's "independent review" is not a "reweighing of the evidence," as the Raiders repeatedly contend, but rather the conclusion – which cannot reasonably be

challenged – that all facts material to the issue of juror misconduct were disputed. (See, e.g., Opn., pp. 19-20 ["[T]he evidence was in *sharp conflict* [as to whether] Mr. Abiog was irrevocably committed to vote against the Raiders – in other words, that he committed perjury when he promised to be fair."] [emphasis added]; p. 23 ["[T]he evidence *sharply conflicts* with respect to Ms. Hillman's conduct."] [emphasis added].)

The Court of Appeal expressly and repeatedly *declined* to resolve those disputes, to reweigh the evidence, or to premise its ruling on appellate "findings of fact." (See, e.g., Opn. p. 21 [with respect to Mr. Abiog, "*we decline to settle the conflicts in the admissible evidence*"][emphasis added]; p. 25 [with respect to Ms. Hillman, "the conflicting declarations here *cannot be reconciled*"] [emphasis added].)

Instead, the court determined that *because* the evidence was in conflict, it could not conclude that a new trial "*should have been granted*" below. (See, e.g., Opn. pp. 18-19 ["On the basis of the conflicting juror declarations before us, *we cannot find* . . . misconduct warranting a new trial."] [emphasis added]; p. 22 ["[Because] several juror declarations categorically refuted any charge of misconduct . . ., *we cannot conclude* that Mr. Abiog perjured himself during voir dire . . . ."] [emphasis added]; p. 23 ["[W]e find that the Raiders failed to establish that a new trial was *required* because Mr. Abiog concealed a pre-existing bias."] [emphasis added]; p. 26 [the

"*contradicted*, uncorroborated evidence of misconduct on the part of Ms. Hillman *does not justify* a new trial"] [emphasis added].)

* * *

As we demonstrate in the pages that follow, the "should have been granted"/"legally required" standard is not only prescribed by statute and confirmed by this Court's precedents; it is also eminently sensible in terms of sound judicial administration, public policy, and fundamental fairness. In the circumstances presented here, that standard requires reinstatement of the jury's verdict.

I. THE SPECIFICATION REQUIREMENT

A. The Governing Statute

In 1965, the Legislature enacted amendments to section 657 of the Code of Civil Procedure. The amendments were designed to ensure *meaningful* appellate review of any order granting a new trial. They did so by requiring that *all* new trial orders in civil cases be supported by a specification of the ground(s) upon which the trial court relied *and* the reason(s) supporting each such ground.

The amendments further provided (a) that the specification must be in writing; (b) that if not set forth in the order itself, the specification must be filed within ten days of entry of the order; (c) that the specification must be prepared by the trial judge, rather than by counsel for the moving party; and (d) with two exceptions not applicable here, that a new trial order is to be

affirmed if it "should have been granted" by the trial court on any ground stated in the new trial motion. (Code Civ. Proc., § 657.)

The two exceptions pertain to new trial orders premised on the ground of insufficiency of the evidence to support the verdict or the ground of excessive/inadequate damages. Such orders are "conclusively presumed" to be made only for the reasons specified by the trial court and "shall be reversed as to such ground only if there is no substantial basis in the record" to support the specified reasons. (*Id.*)

B. The Purpose Of The Specification Requirement

The 1965 reforms recognized society's "manifest interest in avoiding needless retrials[, which] cause hardship to the litigants, delay the administration of justice, and result in social and economic waste." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 113.) They followed a period of nearly fifty years in which appellate courts, as well as litigants, often struggled in what this Court has referred to as "pre-1965 darkness" in attempting to determine "the true basis" of new trial orders. (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at p. 369.)

Absent specification of both the grounds and the reasons for a new trial order, "the appellant was left in the dark as to which aspect of the trial to defend, and quite understandably struck out blindly in several directions at once. This process, however, was not likely to illuminate the reviewing court, which remained equally uninformed of the basis on which the

trial judge acted." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 113.) As a result, "[an] appellate court could find itself considering alleged insufficiencies totally unrelated to those relied upon by the trial judge." (*Id.* at p. 114.)

As this Court recognized, one of the most important elements of the 1965 reforms was "the addition of a requirement that the court must specify not only the grounds upon which the new trial was granted but also its 'reason or reasons' for doing so." (*Id.* at p. 111.) The Legislature's principal objective was to create "a record sufficiently precise to permit meaningful appellate review" (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at p. 363), and to preclude a reason's being invoked "to affirm the order regardless of whether or not it had in fact been in the contemplation of the trial judge at the time he granted the motion." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 114.) By this requirement, the Legislature also sought to "promote judicial deliberation before judicial action, and thereby 'discourage hasty or ill-considered orders for new trial.'" (*Id.* at p. 113 [citation omitted].)

C. The Mandatory Nature Of The Specification Requirement

This Court has repeatedly made clear that the specification requirement is mandatory, and it has "insisted" upon "full and timely compliance." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 124; see *La Manna v. Stewart* (1975) 13 Cal.3d 413, 419 [refusing "to create a doctrine of 'substantial compliance' with section 657"].) To afford a basis for meaningful appellate review, the trial court has a "clear and unmistakable duty" (*Treber v.*

Superior Court (1968) 68 Cal.2d 128, 136) to provide a "clear statement of the reasons why [it found] one or more of the grounds of the [new trial] motion to be applicable to the case before [it]." (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at p. 370 [quoting *Mercer v. Perez*, *supra*, 68 Cal.2d at p. 115]).

In *Mercer*, for example, this Court observed that the 1965 amendments "*require*[] the trial court to specify its reasons for granting the new trial," and it noted that such specifications are "an *express requirement* of the section." (*Id.* at pp. 115, 117 [emphasis added; footnote omitted].) "As the motion for new trial finds its source and its limitations in the statutes, the procedural steps prescribed by law for making and determining such a motion are mandatory and must be strictly followed." (*Id.* at p. 118 [citations omitted]; accord *id.* at p. 120 ["[T]he requirement of specification of reasons must be deemed to be mandatory, in accordance with its wording."].)

D. The Required Specification Must Afford A Basis For Meaningful Appellate Review.

The specification requirement is not burdensome. All that is required is "a concise but clear statement of the reasons why the [trial judge] finds one or more of the grounds of the motion to be applicable to the case before him." (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at p. 364.) If, for example, a new trial is granted on the ground of "juror misconduct," the trial court need add only a few words to afford an adequate basis for appellate review: "[I]f the ground is 'misconduct of the jury' through their resorting to

chance, the judge should specify this improper method of deliberation as the basis of his action." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 115.)

A "specification of reasons phrased in terms of 'ultimate fact' is *not* adequate." (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at p. 364 [emphasis in original].) Nor is a purported "reason" that merely restates the statutory "ground" for the trial court's decision. (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 115.) Thus, for example, "a specification which merely recites that under the court's view of the evidence 'the defendant was not negligent' . . . is of little if any assistance to the appellant or to the reviewing court. . . . Such a 'reason' simply reiterates the ground of the ruling itself." (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at pp. 366-367.); see also *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 697 ["[W]hile *Mercer* did not require the trial judge to cite page and line of the record, it did require more than a mere reiteration of the ground itself."].)

E. The Trial Court Failed To Comply With The Specification Requirement.

Although the trial court stated its *ground* for granting a new trial (juror misconduct), there is no dispute that it failed to specify any *reasons* why that ground should apply here. (See BOM 11 n.8 [conceding that the new trial order did not specify reasons].)

As a result, we do not know, for example, whether the trial court credited Mr. Abiog's declaration, rejecting the allegations of bias against him,

and instead ordered a new trial due to Ms. Hillman's allegedly strident comments in the jury room. Nor, on the other hand, do we know whether the trial court credited Ms. Hillman's declarations, rejecting the allegations against her, and instead ordered a new trial based on the "private deliberations" in which Mr. Abiog and Ms. Lalin-Paulino allegedly engaged.[10]

And we similarly do not know whether the trial court's ruling was based on inadmissible evidence barred by section 1150 of the Evidence Code or on untimely declarations that the "trial court ha[d] no discretion to admit." (*Erikson v. Weiner, supra*, 48 Cal.App.4th at p. 1672; see Code Civ. Proc., § 659a.)

The Raiders do not – indeed, cannot – argue otherwise.

The trial court's undisputed failure to comply with its "mandatory" statutory obligation brings us to the crux of the issue presented for review: Under what circumstances may an appellate court affirm a new trial order unsupported by the required specification of reasons?

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[10] The uncertainty created by the trial court's failure to specify its reasons is only highlighted by the Raiders' insistence that they "did *not* move for a new trial based on . . . improper private conversations." (BOM 7 n.4 [emphasis in original].) That assertion cannot be reconciled with their position in the trial court. (See, e.g., CT 4068 ["These 'private deliberations' by themselves constituted misconduct . . . ."].) Absent a specification of reasons, there is no way to determine whether the new trial order was premised on one of the "reasons" that the Raiders now disavow.

II. THE GOVERNING STANDARD OF REVIEW

A. General Principles Applicable To Appellate Review of New Trial Orders

"[A]s a general matter, orders granting a new trial are examined for abuse of discretion. *But it is also true that any determination underlying any [such] order is scrutinized under the test appropriate to such determination.*" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859 [citations omitted and emphasis added].)

Thus, for example, if the specified ground was an error of law, such as an assertedly erroneous jury instruction, the reviewing court is required to engage in *de novo* review and, if the instruction was in error, to affirm the new trial order. (*Id.* at p. 860.)

On the other hand, if the ground supporting the new trial order presented a mixed question of law and fact, such as the ground of jury misconduct, the reviewing court should defer to the reasons reflected in the specification and then determine whether, as a matter of law, those reasons support the conclusion that misconduct had occurred. (See, e.g., *Weathers v. Kaiser Found. Hosps.* (1971) 5 Cal.3d 98, 109-111.)

The issue presented here, however, concerns a different, much narrower circumstance: What standard of review applies when (a) there are *no* "reasons" to inform the appellate court's review, (b) there are *no* factual findings to which the appellate court can defer, and (c) multiple "reasons"

were advanced by the movant in the trial court, some of which, as a matter of law, could not sustain a new trial order, some of which were supported only by inadmissible evidence, and all of which turned on unresolved, disputed issues of fact?

The reviewing court may not speculate about the reasons that the trial court *may* have had in mind; appellate courts "are not permitted to infer the trial court's reasons where we have not been told what they are." (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at p. 365.) Accordingly, as we demonstrate below, affirmance of a non-compliant new trial order is permitted only if a new trial "should have been granted" below, i.e., only if, because of an error of law or due to undisputed facts, a new trial is "legally required."

B. The "Should Have Been Granted"/"Legally Required" Standard of Review

In reviewing a new trial order unsupported by a specification of reasons, section 657 obligates a reviewing court to determine whether a new trial "*should* have been granted" on any ground (other than insufficiency of the evidence to support the verdict or excessive/inadequate damages) advanced in the trial court. (Code Civ. Proc., § 657 [emphasis added].)

What does "should have been granted" mean? In both legal and common usage, "should" is "the past tense of shall, ordinarily implying duty or obligation." (Black's Law Dictionary (6th ed. 1990) p. 1379; see also, e.g., Random House Unabridged Dictionary (2d ed. 1993) p. 1771 [same]). "[T]he

usual rule with California codes is that 'shall' is mandatory . . . unless the context requires otherwise." (*Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614; see also *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1389 [repeated references to the Legislature's use of "the mandatory shall"]; *Ford Motor Credit Co. v. Price* (1985) 163 Cal.App.3d 745, 749 ["[T]he use of the word 'shall' in a statute generally imports a mandatory construction."]; *Alabama v. Bozeman* (2001) 533 U.S. 146, 153 ["'[T]he word "shall" is ordinarily the language of command.'"].)

Thus, when the Legislature used the phrase "should have been granted," a usage reflecting the past tense of "shall," it did so to identify a new trial motion that the trial court was compelled to grant either (a) because of an error in law or (b) because of established or undisputed facts demonstrating that a new trial was required below.

If the Legislature had intended to prescribe a less rigorous standard of review – e.g., one that allowed affirmance if a new trial "*could* have been granted" by the trial court – it plainly knew how to do so. Indeed, section 657 itself provides that new trial orders based on certain grounds may be reversed "only if there is no substantial basis in the record for any of [the specified] reasons" supporting the order. (Code Civ. Proc., § 657 [referring to new trial orders based on "insufficiency of the evidence to justify the verdict"

or "excessive or inadequate damages"].) Significantly, the Legislature did not so provide with respect to any other ground for a new trial order.

In accordance with the statutory "should have been granted" standard, twenty years ago this Court held:

> If an order granting a new trial does not effectively state the ground or the reasons, the order [shall be] reversed on appeal where there are no grounds stated in the motion other than insufficient evidence or excessive or inadequate damages. If, however, the motion states any *other* ground for a new trial, an order granting the motion will be affirmed if any such other ground *legally requires* a new trial.

(*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 905 [citations omitted; second emphasis added].)

Invoking the phrase "legally requires," *Sanchez-Corea* confirms that when, as here, a trial court fails to comply with section 657, the statutory language "should have been granted" requires more than a conclusion that a new trial *could* have been granted – i.e., more than a conclusion that, *if* the trial court had relied on certain reasons or *if* the trial court had made certain findings, a new trial order would have been within the bounds of its discretion. *Sanchez-Corea*, like *Mercer* and *Scala*, precludes such speculative inferences.

In *Sanchez-Corea*, after first holding that the order, which was unsupported by a specification of reasons, could not be affirmed on the ground of insufficient evidence to support the verdict, this Court reviewed the other grounds asserted in the trial court to determine if any "legally require[d]" a

new trial. (38 Cal.3d at pp. 905-910.) In doing so, the Court gave meaning to the "should have been granted" standard prescribed by section 657.

As to the asserted ground that the verdict was "against law," the Court gave no deference to the new trial order; rather, it applied a deferential standard *in favor of the verdict*, holding that absent a specification of reasons, the *verdict* must be upheld if supported by substantial evidence. (38 Cal.3d at pp. 906-909.) This Court therefore "consider[ed] the evidence in the light most favorable to the prevailing [i.e., non-moving] party. . . and indulg[ed] in all legitimate and reasonable inferences . . . *to uphold the jury verdict if possible*." (*Id.* at p. 907 [emphasis added].)

This Court then addressed two other asserted grounds for new trial that dealt with the conduct of the jury. Rejecting the asserted ground of "irregularity in the jury proceedings," this Court found a waiver due to the failure of the moving party's counsel "to request that the jury be returned for further deliberation[s]." (*Id.* at p. 909.) Once again, in the absence of a specification, there was no deference to the new trial order.

Then, with respect to the asserted ground of juror misconduct, the Court strictly applied section 1150 of the Evidence Code, which prevents a juror "from upsetting [the] verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent" (*id.* at

p. 910 [quoting *People v. Hutchinson* (1969) 71 Cal.2d 342, 350]), again affording no deference to the trial court's ruling.[11]

Accordingly, this Court concluded that "there is no basis for this Court to affirm the new trial order." (*Id.* at pp. 909-910).

Thus, *Sanchez-Corea* directly refutes the Raiders' contention that all inferences should be drawn in favor of a new trial order unsupported by a specification of reasons. Because this Court could not ascertain a basis that "legally required" a new trial, i.e., a basis upon which a new trial "should have been granted" below, it reversed and ordered reinstatement of the verdict.

Sanchez-Corea echoes this Court's decisions in *Mercer* and *Scala*, among others, which recognize the purposes and mandatory nature of the specification requirement (see pp. 19-22, above), and which squarely reject the suggestion that "section 657 . . . 'attaches no penalty' to a failure of [a] trial judge to specify his reasons for granting a new trial." (*Mercer v. Perez*, *supra*, 68 Cal.2d. at pp. 119-120.) To the contrary, only the "legally required" standard can satisfy section 657's "two-fold purpose of encouraging careful deliberation by the trial court . . . and . . . permit[ting] meaningful appellate review." (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at p. 363.)[12]

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[11] This Court expressly declined to address a fourth asserted ground – "error in law excepted to at trial" – because "[n]o attempt [was] made to show that the order should be affirmed on that ground." (*Id.* at p. 906.)

[12] Relying largely on inapposite legislative history, the Raiders contend that the 1965 amendments did "'not substantially change the law' with respect (continued...)

III. NEITHER THE ABUSE-OF-DISCRETION STANDARD NOR THE SUBSTANTIAL EVIDENCE TEST HAS ANY ROLE IN APPELLATE REVIEW OF A NEW TRIAL ORDER UNSUPPORTED BY A SPECIFICATION OF REASONS.

The Raiders' opening brief reflects a pervasive premise: "in reviewing [the] new trial order, the trial court's resolution of disputed facts must be upheld unless there is no substantial evidence to support it." (BOM 16; see, e.g., *id.* at p. 13 ["'Where the evidence is in conflict, the appellate court will not disturb the findings of the trial court . . . .'" [ellipsis and citation omitted].)

But that premise, with which we fully agree, is of no relevance here. Because the trial court failed to specify reasons for its new trial order, and because *three* jurors were accused of nearly a dozen, different, discrete acts of misconduct, it is impossible to determine "the trial court's resolution of

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(footnote cont'd)

to the standards of appellate review." (BOM 24.) That argument fails on its face: Prior to 1965, in civil cases, only one ground supporting a new trial order – "insufficiency of the evidence to sustain the verdict" – was subject to a specification requirement and a legislatively prescribed standard of review. (See Cal. Stats. 1939, ch. 713, p. 2234.) After 1965, *all such grounds and all reasons supporting such grounds* were subject to a specification requirement and a legislatively prescribed standard of review.

Moreover, the Raiders' argument cannot be reconciled with this Court's decisions in *Mercer, Scala*, and *Sanchez-Corea,* among others, which discuss and demonstrate the import of these reforms for orders that fail to comply with the *new* specification requirement. "[W]hen . . . the Legislature undertakes to amend a statute which has been the subject of judicial construction . . . , it is presumed that the Legislature was fully cognizant of such construction, and when substantial changes are made in the statutory language it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes." (*Palos Verdes Faculty Ass'n v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659.)

disputed facts." We do not know *which* disputed facts were resolved by the trial court, much less *how* those facts were resolved. There can be no deference to "findings" that the trial court never made.

The Raiders never come to terms with these fundamental problems. They argue, for example, that "substantial evidence supports the trial court's finding that Abiog engaged in misconduct." (BOM 38.) *But the trial court made no such "finding."* The Raiders refer to "substantial evidence supporting the trial court's determinations that prejudicial misconduct by two jurors had occurred." (*Id.*) *But the trial court made no such "determinations."* The Raiders cite "[t]he trial court's finding that such conduct constitutes 'objectively ascertainable acts of [j]uror misconduct.'" (BOM 39.) *But the trial court failed to identify any "conduct" to which that conclusion could refer.*

In the end, we do not know if the trial court relied on a "reason" that could not, as a matter of law, support a new trial (see pp. 6-7, above), or on a "reason" that the Raiders have since disavowed (see p. 7 & n.6, above), or on a "reason" supported, if at all, only by inadmissible evidence to which the NFL repeatedly objected but had no opportunity to respond (see pp. 9-10, above). Indeed, we do not even know whether the trial court actually *rejected* one or more of the "reasons" urged by the Raiders as a basis for affirmance here.

This case is therefore fundamentally different from each of the cases upon which the Raiders rely. Not one of those cases suggests that, in the absence of a specification of reasons, an abuse-of-discretion standard applies to a "determination underlying [a new trial] order" *that turns on disputed issues of fact*. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 859.)

Not one of those cases supports the Raiders' claim that, in the absence of a specification of reasons, a new trial order may be affirmed on the basis of reasons "identified *in the briefing*." (BOM 32 [emphasis added].) Indeed, that argument was flatly rejected in *Mercer*, where this Court observed that section 657 "forbids the judge from shifting to the attorney for the prevailing party the duty to prepare . . . the specification of reasons." (68 Cal.2d at p. 113; see *La Manna v. Stewart*, *supra*, 13 Cal.3d at p. 420 ["section 657 was intended to preclude guesswork over 'reasons' stated outside the order that could conceivably be read into a new trial order"].) That would be the result if, as the Raiders suggest, "reasons" could be inferred from the moving party's briefs.

And not one of those cases suggests that, in the absence of a specification of reasons, an appellate court can affirm a new trial order "on the basis of implied findings." (BOM 31.) To the contrary, in *Mercer* this Court refused to premise review on an "implied specification of findings" because "one of the fundamental purposes of the recent amendments to section 657 was to put an end to this kind of speculation." (*Mercer v. Perez*, *supra*, 68

Cal.2d at p. 117.) Similarly, in *Scala*, this Court identified numerous alternative "reasons" that *could* have been supported by the record, but as to which the facts were disputed; yet it refused to imply findings or to resolve those disputes, and instead reinstated the verdict. (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at pp. 368-370.)

This Court has explained unequivocally why such speculative inferences – and, indeed, why an abuse-of-discretion standard – are inappropriate when the reasons for granting a new trial are undisclosed.

> "[The abuse-of-discretion standard's] use or function seems debatable, to say the least, *in the absence of . . . objectively assessable criteria, reasons or facts respecting the granting of a new trial* . . . . Stated somewhat differently, discretion equated only with the feelings and hunches of the trial judge is not amenable to objective evaluation and appellate review, for the end result would be nonreviewable trial judge discretion – in essence, no appeal whatsoever."

(*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 114 n.3 [emphasis added, quoting *Knecht v. Marzano* (Wash. 1964) 396 P.2d 782, 784-785].)

A. The Raiders' Reliance On *Ault*, A Criminal Case In Which The Trial Court Actually Specified Its Reasons For A New Trial, Is Misplaced.

This Court's recent decision in *People v. Ault* (2004) 33 Cal.4th 1250, upon which the Raiders heavily rely, illustrates by comparison the problems with the Raiders' position. In *Ault*, even though it had no obligation

to do so, the trial court provided detailed reasons for its new trial order.[13] The court "took evidence, rendered detailed factual findings leading to its determination that [juror] misconduct had occurred, and carefully analyzed the issue of prejudice." (*Id.* p. 1270; see also *id.* at p. 1258 [quoting trial court findings].)

Because juror misconduct was ultimately conceded by the People in *Ault* (*id.* at p. 1255), only the issue of *prejudice* was presented on appeal, an issue that this Court characterized as follows:

> We may assume that in a juror misconduct case, the prejudice issue is one in which *the historical facts are admitted or established, the rule of law is undisputed*, and the issue is whether the facts satisfy the relevant legal standard.

(Id. at p. 1265 [internal punctuation and citations omitted, emphasis added].)

The situation presented here, where the allegations of misconduct are vigorously contested, could not be more different. Here the "historical facts" are neither "admitted [n]or established." The "rule of law" applied by the trial court below is hardly "undisputed"; indeed, it remains a mystery. And the trial court did not make *any* findings "leading to its determination that misconduct had occurred"; it failed even to identify which

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[13] *Ault* was a criminal case. When a trial court sets aside a guilty verdict in response to a criminal defendant's new trial motion, there is no statutory requirement that it state its reasons. (See Penal Code, § 1181; see also *Mercer v. Perez*, *supra*, 68 Cal.2d at 122 n.7 [noting "the special rules relating to new trial motions in criminal cases"].)

of the three challenged jurors had engaged in the conduct upon which its "determination" was based.

As a result, here, unlike in *Ault*, there is no way for this Court to ascertain the basis – the factual predicate, the governing legal principles, or the evidentiary rulings – underlying the new trial order; there is no way to identify an exercise of "discretion" to which the "abuse of discretion" standard could apply.

Indeed, recognizing "[the] constitutional policy against unnecessary and wasteful retrials" (*id.* at p. 1271), this Court emphasized in *Ault* that "we *need not and do not* consider whether a more stringent standard of review might apply to a trial court's determination of *error* leading to its decision to grant a new trial, where the claim of error involved a mixed law and fact issue." (*Id.* at p. 1267 n.9 [emphases in original].) *Ault* is thus of no help to the Raiders here. (See *id.* at p. 1268 n.10 ["It is axiomatic that cases are not authority for propositions not considered."].)

B. The Raiders' Reliance On *Malkasian*, Which Was Decided Before The Specification Requirement Was Added To Section 657, And *Treber*, Which Focused On The Requirement's *Scope*, Is Misplaced.

The Raiders contend that "[t]his Court squarely decided the issue here [presented] twice" – in *Malkasian v. Irwin* (1964) 61 Cal.2d 738 and in *Treber v. Superior Court* (1968) 68 Cal.2d 128. (See BOM 3.) That contention is nonsense.

Malkasian involved application of section 657 *prior to* its amendment in 1965, i.e., *prior to* adoption of the requirement that trial courts must specify the reasons for a new trial order, and *prior to* addition of the "should have been granted" language upon which the "legally required" standard is based. In *Sanchez-Corea*, this Court expressly distinguished *Malkasian* because it had addressed the "former section 657, as amended in 1939 and prior to the 1965 and 1967 amendments." (*Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 904.)

Malkasian is inapposite for another important reason, as well. In *Malkasian*, the trial court announced that it would grant a new trial on the ground of insufficiency of the evidence to support the verdict, but it failed so to specify in a written order, as required by the version of section 657 then in effect.[14] Barred by statute from affirming on that ground, the Court "searched the record" and, as the Raiders point out, "identified an error upon which it *could* affirm the defective new trial order." (BOM 20 [emphasis in original].)

The nature of that error, however, is crucial. The Court determined, *on the basis of an undisputed record*, that defendant's counsel had argued to the jury facts not contained in the record; on that *purely legal*

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[14] The prior version of the statute required that if a new trial order were based upon the ground of "insufficiency of the evidence," a written specification so stating had to be filed within ten days. (See Cal. Stats. 1939, ch. 713, p. 2234 [former section 657].)

ground, it affirmed the new trial order. (*Malkasian v. Irwin*, *supra*, 61 Cal.2d at pp. 746-747; see *Treber v. Superior Court*, *supra*, 68 Cal. 2d at pp. 133-134 [characterizing *Malkasian* as "affirm[ing] a new trial order upon an *error in law*" (emphasis added)].) *Malkasian* thus has no application here, where the asserted ground for the new trial order turns on unresolved factual issues that are very much in dispute.[15]

Nor does *Treber* support the Raiders' position. (See *Treber v. Superior Court*, *supra*, 68 Cal.2d at pp. 130-131.) In *Treber*, the Court granted an alternative writ of mandate in order to construe the *scope* of the specification requirement, i.e., to identify the range of issues that must be supported by a specification of reasons. The Court held that (a) "if the ground is 'errors in law' [the only ground stated in the *Treber* order] the statute requires the judge to briefly specify the errors that are the basis for his ruling," but (b) the statute does not require the court to specify why "a given error of

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[15] For this reason, the Raiders are incorrect in asserting that the 1965 amendments ratified *Malkasian* in some respect relevant here, or that the citation to *Malkasian* in *Sanchez-Corea* somehow supports their position. (See BOM 21-25, 27 n.18.) To be sure, if one of the jury instructions challenged by the Raiders had been in error, a new trial presumably "should have been granted" below and the Court of Appeal would have been bound to affirm. But *Malkasian* has nothing to say about a situation where the trial court's reasons are undisclosed, and where there are nearly a dozen potential "reasons" upon which the trial court could have relied, some of which could not support a new trial as a matter of law, others of which the trial court may have rejected, some of which the moving party has now disavowed, and all of which turn on disputed issues of fact.

law was prejudicial." (*Id.* at pp. 131-32.)[16] Because the *Treber* Court was engaged in writ review, not appellate review, it was not called upon to address the *standard* of review (except to note that the reviewing court "has the power to determine as a question of law whether any challenged ruling below was erroneous" (*id.* at p. 132), a principle of no relevance here). For these reasons, the Raiders' reliance on *Treber* is misplaced.[17]

C. The Raiders' Reliance On Civil Cases That Address New Trial Orders Actually Supported By A Specification of Reasons Is Misplaced.

The Raiders cite numerous other decisions in civil cases that apply an abuse-of-discretion standard to new trial orders. But those cases, unlike this case, deal with orders that *comply* with the statutory requirement. (See BOM 16-18). Typical is *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405. In *Lane*, unlike here, the court prepared a specification of reasons. (See

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[16] In this respect, *Treber* presaged the result in *Ault*, where this Court observed that the "prejudice determination is one in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the relevant legal standard." (33 Cal.4th at p. 1265 [internal punctuation omitted].)

[17] For similar reasons, neither *Kauffman v. Maier* (1892) 94 Cal. 269 nor *Treber*'s citation to that case supports the Raiders' position. In *Kauffman*, the Court held that the *scope* of appellate review could not be restricted by the trial court's granting a new trial upon a particular ground and declaring that the new trial was granted "upon no other ground or grounds, no error being by this court deemed to have occurred at the trial.'" (94 Cal. at p. 275 [quoting trial court].) This Court rejected the ground upon which the trial court had relied, but nonetheless affirmed the new trial order on the basis of erroneous *legal* rulings involving jury instructions and evidentiary issues. (*Id.*)

22 Cal.4th at p. 413 ["the trial court's specification [of reasons] was adequate"].) Cases like *Lane* have no application here.

D. The Raiders' Reliance On Civil Cases In Which A Specification of Reasons Was Not Required Is Misplaced.

The Raiders' reliance on civil cases assertedly resolved "on the basis of implied findings" is similarly misplaced. (BOM 31-32.) As the Raiders' own authorities confirm, "implied findings" are appropriate *only if the trial court is not required to specify the reasons for its ruling.*

For example, the Raiders rely on cases in which, notwithstanding the trial court's failure to specify reasons, the reviewing court affirmed an order denying preliminary injunctive relief. (BOM 31-32 [citing, e.g., *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450-1451].) But "'[t]he denial of a preliminary injunction does not require any statement of decision or explanation.'" (*Whyte v. Schlage Lock Co., supra*, 101 Cal.App.4th at p. 1450 [quoting *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 858].)

Similarly, the Raiders rely on cases in which, following a bench trial, a party waived its right (or failed to object) to a statement of decision. (BOM 32 [citing, e.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134 ["[U]nder section 634 [of the Code of Civil Procedure], the party must state any objection he may have to the statement [of decision] in order to avoid an implied finding on appeal in favor of the prevailing party."] [footnote

omitted].) But those cases actually undermine the Raiders' position; they also hold that when a statement is sought or objections filed, "the appellate court will *not* imply findings in favor of the prevailing party." (*In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at pp. 1133-1134 [emphasis added].) Indeed, a trial court's failure to render a statement of decision when one is timely requested is "*reversible error per se*." (1 Jon B. Eisenberg et al., Cal. Prac. Guide: Civil Appeals & Writs Ch. 8-B, ¶ 8:25 (The Rutter Group 2004) [citing cases; emphasis in original].)

In contrast, section 657 imposes on a trial court a "clear and unmistakable duty" to specify its reasons for ordering a new trial. (*Treber v. Superior Court*, *supra*, 68 Cal.2d at p. 136.) When a trial court fails to fulfill this "mandatory" obligation, reviewing courts may not infer reasons where none have been stated. (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 117 [expressly rejecting argument that trial court's statement of bare legal conclusion should "be interpreted as an implied specification of findings"].) Indeed, "to read such a sweeping exception into the statute would result in largely reading out the . . . requirement of specification of reasons." (*Id.*)

E. The Raiders' Reliance On Court Of Appeal Decisions That Recite "Abuse-of-Discretion" Language In Reviewing Asserted Errors Of Law Is Misplaced.

The Raiders assert that "[w]ith a single exception, [the] Courts of Appeal have adhered to the abuse of discretion standard of review where the new trial order does not include a specification of reasons." (BOM 27.)

That assertion is simply not true, especially in cases where it is impossible to determine how the trial court resolved disputed issues of fact necessary to determine whether a new trial "should have been granted" below.

Hand Electronics, Inc. v. Snowline Joint Unified School District (1994) 21 Cal.App.4th 862, upon which the Raiders rely, illustrates the point. (See BOM 27.) In *Hand*, the trial court ordered a new trial not on some fact-dependent basis, but rather on the ground of "botched" jury instructions. (21 Cal.App.4th at pp. 865-868.) The Fourth District Court of Appeal (mistakenly relying on cases in which the specification requirement had actually been satisfied) recited the abuse-of-discretion standard in affirming the order on that *legal* ground. (See *id.* at p. 871 ["on the basis of error in law"].)

In contrast, five years later, the same court addressed a case, like this one, in which the trial court had failed to specify the reasons for its order and the asserted ground for a new trial (juror misconduct) turned on disputed issues of fact. In that case, *Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, the Fourth District followed *Sanchez-Corea*, expressly applied the appropriate standard – "whether a new trial is legally required" – and held that, because "[o]ther jurors contradicted" the allegations of misconduct, "a new trial was not required as a matter of law." (71 Cal.App.4th at pp. 550-551 [footnote omitted].)

The same distinction applies to the numerous other Court of Appeal decisions upon which the Raiders rely, none of which involved

disputed issues of fact left unresolved by the trial court's failure to specify reasons for its order. In *In re Marriage of Beilock* (1978) 81 Cal.App.3d 713, for example, the asserted ground for new trial was a verdict "'against the law,' [an] area of judicial action generally . . . not . . . involving discretion . . ., where the evidence is . . . insufficient in law and without conflict on any material point." (*Id.* at p. 728). (See also *Grant v. Hall* (1969) 274 Cal. App.2d 624, 629 [appellants "do not challenge" declarations supporting trial court's finding of "accident or surprise," the stated ground for new trial order]; *People ex rel. Dep't of Public Works v. Hunt* (1969) 2 Cal.App.3d 158 [addressing the *scope* of appellate review and *reversing* after consideration of grounds not stated in new trial order]).

In short, neither *Hand* nor *Beilock* nor any other Court of Appeal decision cited by the Raiders supports application of the abuse-of-discretion standard here.

F. The Raiders Fail To Recognize That The Standard Of Review Depends Upon The Nature Of The Determination Underlying The New Trial Order.

The fundamental problem with the Raiders' position is that it fails to drill down to the appropriate level of analysis. Rejecting application of the abuse-of-discretion standard, this Court made clear in *Aguilar* that "any determination *underlying* [a new trial] order is scrutinized under the test *appropriate to such determination*." (25 Cal.4th at p. 859 [emphases added].)

Thus, the Raiders are simply wrong in assuming that an abuse-of-discretion standard applies to *all* new trial orders, *regardless of the issue under review*. They are similarly wrong in asserting that the "substantial evidence" test applies when there are neither reasons nor findings against which to measure the evidentiary proof. The deference ordinarily afforded to a trial court's findings of fact has no role to play where, as here, the trial court made no findings to which an appellate court could defer.

The Raiders' position is decades out of date. As originally enacted, section 657 did not provide a standard of appellate review; nor did it require the trial court to specify the ground or the reasons for a new trial order. But periodically since 1919, when the Legislature required trial courts to specify "insufficiency of the evidence" if a new trial was granted on that ground, the Legislature has added to section 657 limitations on trial courts' "discretion" to grant new trials.

This Court has confirmed that since 1965, one "*limitation on this discretion is that the trial court must state its reasons* for granting the new trial, and there must be substantial evidence in the record *to support those reasons*." (*Lane v. Hughes Aircraft, supra*, 22 Cal.4th at p. 412; see *id.* at p. 416 [a conflict in the evidence supports affirmance of a new trial order "*so long as the conflict relates to the trial court's reasons for granting a new trial*"] [emphasis added].) Where there are neither reasons specified nor factual determinations stated, it is impossible to determine whether substantial

evidence "supports [the undisclosed] reasons for granting a new trial," and the order under review cannot be affirmed.

This conclusion is squarely supported not only by the substance of the Raiders' brief itself, which argues at length that appellate courts may not resolve disputed issues of fact; but also by *Lane*, which expressly recognizes the applicable limitation on the trial court's "discretion"; *Scala*, which refused to speculate about which of "multiple issues might have been the 'reason'" for a new trial order; *Sanchez-Corea*, which articulates the "legally required" standard of review; and *Mercer*, in which this Court refused to affirm a new trial order that failed to comply with the statutory requirement.

In *Mercer*, plaintiffs urged the Court to remand a new trial order "with instructions to prepare and file the necessary specification of reasons," notwithstanding the fact that the ten-day statutory period for specifying reasons had expired. (68 Cal.2d at pp. 119-121.) Plaintiffs argued that the Court could ignore the ten-day limitations period because section 657 "'attaches no penalty' to a failure of [a] trial judge to specify his reasons for granting a new trial." (*Id.* at p. 120.) This Court flatly rejected this "wholly erroneous" argument, recognizing that "the legislative intent to promote a more effective review of new trial orders would be substantially thwarted if

the judge failed to make an adequate specification of grounds or reasons in the first instance." (*Id.* at pp. 120, 123-124.)[18]

The same is no less true here. By urging this Court to speculate about, and then to defer to, "reasons" never specified by the trial court, the Raiders "in effect, seek[], under the guise of judicial construction, the elimination, as unnecessary, of an express requirement of the section. But a court is prohibited from such a construction as will omit a portion of a statute." (*Id.* at p. 117 [citing Code Civ. Proc., § 1858] [footnote omitted].)

G. If Applied To New Trial Orders Unsupported By A Specification Of Reasons, The Abuse-of-Discretion Standard Would Undermine Important Public Policy Objectives.

There is a compelling public interest "in avoiding needless retrials[,] [which] cause hardship to the litigants, delay the administration of justice, and result in social and economic waste." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 113; see also *People v. Ault*, *supra*, 33 Cal.4th at p. 1271

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[18] The same holding puts to rest the Raiders' suggestion that remand is permitted to secure the required specification of reasons. (BOM 33 n.21.) Such a course was expressly rejected in *Mercer* (see 68 Cal.2d at p. 122 ["neither this Court nor any Court of Appeal has ever deemed it had the power to remand such cases"]), and would be futile here in any event due to the intervening retirement of the trial judge.

The cases upon which the Raiders rely to suggest remand are all inapposite. Each reviewed the *denial* of a new trial motion; accordingly, the jurisdictional time limits associated with granting a new trial motion were not at issue. (See, e.g., *Clemens v. Regents of the University of California* (1970) 8 Cal.App.3d 1, 20-21 [expressly distinguishing *Mercer* on this basis]; cf. *id.* at p. 20 ["Where the trial court has failed adequately to specify its reasons for *granting* a new trial . . . , an appellate court is without power to remand the matter for further specification of reasons"] [emphasis added; citation omitted].)

[recognizing "[the] constitutional policy against unnecessary and wasteful retrials"].) That interest is reflected, in the first instance, in the statutory provision allowing immediate review of any order *granting* a new trial. (Code Civ. Proc., § 904.1(a)(4).)

If the judicial system is to be burdened with a second trial – here, repeating an eleven-week trial addressing events that occurred more than a decade ago – based on an order that, by failing to comply with a mandatory requirement, raises fundamental questions about whether it was "the product of a mature and careful reflection on the part of the [trial] judge," there should at least be some assurance that a retrial is legally required. (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 113.)

And if the specification requirement is indeed "mandatory" – if it warrants "strict compliance," as this Court has repeatedly held – it would make no sense to *excuse* non-compliance by applying the most deferential standard of review – the abuse-of-discretion standard – that our jurisprudence allows.

No public interest would be served by deference to the non-compliant new trial order here. Disregarding its "clear and unmistakable duty," the trial court nullified a jury verdict after a long and costly trial, leaving behind an order – along with a plethora of unresolved factual disputes and unresolved evidentiary issues – that precludes meaningful appellate review. (*Treber v. Superior Court*, *supra*, 68 Cal.2d at p. 136.) The trial

court had no *discretion* to disregard section 657's express command, as to which this Court, again and again, has "insisted" upon "full and timely compliance." (E.g., *Mercer v. Perez*, *supra*, 68 Cal.2d at p. 124.) And, as we discuss further in the pages that follow, the Raiders, the moving party below, took no steps to prevent that from happening.

This is not a "plaintiffs' issue." This is not a "defendants' issue." This is an issue that affects all litigants and the court system itself. The orderly procedures required by statute for granting a new trial are intended to ensure a *meaningful* right of appeal for all litigants, and to protect the courts and society from unnecessary retrials of claims that have already been tried to verdict. When an important element of that procedure is not followed, the resulting order may not warrant *per se* condemnation – it can be affirmed if a reviewing court determines that a new trial was "legally required" below – but it surely does not warrant deference of the kind that the Raiders urge upon this Court here.

Indeed, applying the abuse-of-discretion standard to a non-compliant new trial order would allow affirmance on a basis that the trial court had *rejected*, due to an assessment of witnesses' credibility or for other reasons, thereby turning on its head the notion of deference to the trial court. The same standard would allow affirmance on a basis that the moving party had flatly disavowed, on the basis of "evidence" barred by section 1150 of the Evidence Code, or on the basis of untimely declarations that the trial court had

no discretion to admit. Such outcomes, any one (or all) of which could result if the abuse-of discretion standard were applied here, would abrogate numerous important principles of California jurisprudence, while at the same time vitiating the parties' right to meaningful appellate review.

None of these problems would be cured, or even addressed, by the Raiders' proposed two-pronged "solution": assigning to the moving party the burden of *going forward* in the Court of Appeal and then adopting an abuse-of-discretion standard of review. (BOM 31.)

The Raiders purport to infer the first element of that "solution" from *Sanchez-Corea*, where this Court noted that, in the absence of a timely specification, "the burden is on the movant to advance any grounds stated in the motion upon which the order should be affirmed, and a record and argument to support it." (*Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 906.) But the Raiders ignore the fact that in *Sanchez-Corea*, notwithstanding the moving party's having satisfied the burden of going forward, this Court still ordered reinstatement of the verdict because it was unable to conclude that a new trial was "legally require[d]." (*Id.* at pp. 906, 910.)

More important, shifting the burden of going forward does not change the fact that the parties, and the reviewing court, remain entirely uninformed about the *reasons* upon which the trial court relied to grant a new trial. Unless those reasons are identified by the trial court, it is impossible to

identify an exercise of discretion to which the Raiders' proposed abuse-of-discretion standard could apply.

H. Considerations Of Fairness And The Equities Weigh Against Application Of The Abuse-of-Discretion Standard To New Trial Orders Unsupported By A Specification Of Reasons.

If a party secures a jury verdict and the verdict is to be taken away, that party should be told the reasons for the decision, and it should have an opportunity for *meaningful* appellate review of those reasons. If applied to non-complaint new trial orders, the abuse-of-discretion standard would preclude any such opportunity. The prejudice associated with such a consequence is clear.

In contrast, especially where, as here, the moving party fails to take any steps to ensure compliance with the statutory requirement, it should not be heard to demand application of the deferential "abuse-of-discretion" standard or to complain that a more exacting standard is in some way unfair.

This Court has previously recognized that the "*moving* party [may] take steps to insure that the judge complied with" the specification requirement. (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 123 [emphasis added]; *La Manna v. Stewart*, *supra*, 13 Cal.3d at p. 424 ["[T]he attorney for the moving party [may] assist the court by calling its attention within the 10-day period to any such deficiency in the order, thereby enabling it to be corrected within the jurisdictional period."] [internal quotation marks and citation omitted].) The Raiders failed to do so here notwithstanding the fact that the

Courts of Appeal have repeatedly cautioned that "[w]hile section 657 places upon the judge the sole duty of composing his order, in practice, equal responsibility rests *upon the party who is granted a new trial* to assure himself that the order complies with the statutory procedure." (*Gaskill v. Pacific Hospital of Long Beach* (1969) 272 Cal.App.2d 128, 133 [emphasis added]; see also, e.g., *Laborne v. Mulvany* (1974) 43 Cal.App.3d 905, 916-917 [recognizing burden of movant and reversing new trial order where trial court failed to specify reasons]; *Tagney v. Hoy* (1968) 260 Cal.App.2d 372, 377 [same].)

Indeed, this Court has cautioned against a *moving party's* tactical election, after it prevails on its motion, to allow a defective new trial order to stand. (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 124.) It would not be unreasonable to assume that that is precisely what happened here.

The Raiders nonetheless argue that *the NFL* had some obligation, upon receipt of the order, to advise the trial court that its ruling "was open to challenge." (BOM 38.) But the Raiders' premise is flatly incorrect. The new trial order was *not* then "open to challenge"; the statute expressly provides that the trial court may file a specification at any time "within 10 days after filing" the new trial order. (Code Civ. Proc., § 657.)

Moreover, the Courts of Appeal have expressly rejected the argument that the party *against whom a new trial order is granted* has a duty to remind the court of its obligation to specify reasons. For example, finding

neither "authorities [nor] any logical reason" supporting such an argument, the Court of Appeal for the Second District, from which this case arises, has squarely held that there is "no duty on the part of the appellant" to do so. (*Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 494 [noting, among other things, that a defective "order of the type here made does not foreclose the possibility that the court will later [during the ten-day period] file a separate adequate statement of reasons"].)

In any event, this Court has recognized as immaterial any "element of unfairness to the successful movant . . . when an appellate court's review is circumscribed due to the error of the trial court" in failing to specify reasons for a new trial order; the "wisdom of or necessity for certain requirements are matters for legislative and not judicial consideration." (*Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 905 n.5; see also *La Manna v. Stewart*, *supra*, 13 Cal.3d at pp. 423-425.)

IV. THERE IS NO BASIS UPON WHICH THIS COURT CAN CONCLUDE THAT A NEW TRIAL "SHOULD HAVE BEEN GRANTED" BELOW.

A. The Asserted Ground of Juror Misconduct

Because the trial court failed to specify its reasons, we do not know whether the new trial order was premised on "reasons" that could not, as a matter of law, justify a new trial. (See, e.g., p. 7 & n.4, above [strident advocacy in the jury room; derisive comments about the lawyers].)

We do not know whether the new trial order was based on reasons that the Raiders have since disavowed. (See p. 7 & n.6, above [alleged whispered conversations in a foreign language; alleged language difficulties].)

Nor do we know whether the new trial order was based on reasons supported, in whole or in part, by one or more of the reply declarations, which "the trial court ha[d] no discretion to admit" (*Erikson v. Weiner*, *supra*, 48 Cal.App.4th at p. 1672), or by other inadmissible evidence. (See, e.g., pp. 9-10, above; CT 5102 ["This was not a joke. I saw his face when he made the statement, and I could tell this from his facial expression, which I saw, and the tone of his voice."].)

Finally, we do not know whether the trial court *rejected*, on credibility or other grounds, reasons advanced by the Raiders as a basis for affirmance in this Court.

What we do know is that there are material, disputed issues of fact about every one of the Raiders' multiple allegations of misconduct. We also know that some of those allegations, even if credited by the trial court, could not justify a new trial. The Raiders have never contended otherwise; nor could they reasonably do so. Under these circumstances, in part because it cannot make findings of fact, this Court cannot conclude that a new trial "should have been granted" below.

Finally, the harmless error doctrine cannot salvage a new trial order unsupported by the required specification of reasons. (See BOM 35-36 [citing Cal. Const. art. VI, § 13].) The Raiders' argument to the contrary has been squarely rejected by this Court. For example, in *La Manna v. Stewart*, this Court held:

> No . . . showing [of prejudice resulting from a trial court's failure to specify reasons] has ever been demanded by this court, either in *Mercer* or any of its progeny. . . . To require the appellant in such a case to prove not only that the trial court violated section 657 but also that such violation caused him particular and identifiable prejudice would obviously frustrate the salutary purposes of this legislation. In section 657 the Legislature has said to the trial courts, "You must follow certain specific steps in granting a motion for new trial"; it has not said, "You need not follow these steps unless your failure to do so would actually harm the litigant against whom the motion is granted."

(13 Cal.3d at p. 423 n.9 [citations omitted]; see also *West Coast Dev. Corp. v. Reed* (1992), 2 Cal. App. 4th 693, 705 ["[A]ll authority militates against [the] use of the harmless error doctrine in review of an order that fails to set forth [a required specification of reasons]."].)[19]

In short, because appellate courts "are not permitted to infer the trial court's reasons [for a new trial order] where we have not been told what

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[19] The Raiders' "harmless error" argument also assumes incorrectly that, under the governing "legally required" standard, the trial court's failure to specify reasons requires *reversal* of the new trial order, rather than merely dictating the standard of review. (See BOM 35-36.)

they are" (*Scala v. Jerry Witt & Sons*, *supra*, 3 Cal.3d at p. 365), because appellate courts may not engage in fact-finding, and because the trial court failed to comply with a statutory requirement that this Court has deemed "mandatory," the new trial order cannot be affirmed on the ground of jury misconduct.

B. Other Grounds Asserted Below But Abandoned In This Court

In their new trial motion, the Raiders challenged several jury instructions, but the trial court never reached those issues; the Court of Appeal, after extensive analysis, found no error. The Raiders have abandoned those grounds in this Court. (See BOM at 7 n.3 ["only the juror misconduct ground is presently at issue"].)

Accordingly, if this Court finds that the new trial order cannot be affirmed on the ground of juror misconduct, it must affirm the Court of Appeal's reversal of the new trial order and direct reinstatement of the verdict. (*Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 906 [refusing to consider ground of "error in law excepted to at trial" where "[n]o attempt has been made to show that the order should be affirmed on [that] ground"].)

CONCLUSION

The Raiders invite this Court to "'open the door' to abuses which section 657 was enacted to foreclose" by effectively reading out of the

statute the requirement that trial courts must specify reasons for new trial orders. (*La Manna* v. *Stewart*, *supra*, 13 Cal.3d at p. 424.)

The Raiders do so having urged in support of a new trial below nearly a dozen potential "reasons," some of which could not, as a matter of law, justify a new trial, some of which they later disavowed, some of which the trial court may have rejected, and all of which turned on disputed and unresolved issues of fact. This Court should reject the Raiders' invitation; in these circumstances, there is no basis upon which this Court can conclude that a new trial "should have been granted" below. (Code Civ. Proc., § 657.)

This Court should affirm the Court of Appeal's determination that the new trial order should be vacated, and direct reinstatement of the judgment based on the jury's verdict.

Respectfully submitted,

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