# *SWEETWATER UNION HIGH SCH. DIST. v. GILBANE BLDG. CO.*

S233526

Supreme Court of California

April 4, 2016

**Reporter**
2016 CA S. Ct. Briefs LEXIS 271

SWEETWATER UNION HIGH SCHOOL DISTRICT, Plaintiff and Respondent, v. GILBANE BUILDING COMPANY et al., Defendants and Appellants.

**Type:** Petition for Appeal

**Prior History:** On Petition for Review from a Decision of the Court of Appeal, Fourth Appellate District, Division One, No. D067383, on Appeal from an Order of the Superior Court, County of San Diego, No. 37-2014-00025070-CU-MC-CTL. Hon. Eddie C. Sturgeon, Judge.

## Counsel

**[*1]** *Charles A. Bird (SBN 056566), Christian D. Humphreys (SBN 174802), Gary K. Brucker, Jr. (SBN 238644), DENTONS US LLP, San Diego, California, Attorneys for Gilbane Building Company et al.

## Title

Petition for Review

## Text

**Petition**

Gilbane Building Company (Gilbane) and Gilbane/SGI a joint venture (the joint venture) petition for review from the decision of the Court of Appeal, Fourth Appellate District, Division One, *Sweetwater Union High School District v. Gilbane Building Co. (2016) 245 Cal.App.4th 19.* Citations are to the typed opinion, attached (Opn.). The decision affirmed an order denying petitioners' special motion to strike the causes of action against petitioners in the complaint of the Sweetwater Union High School District (District) under *Code of Civil Procedure section 425.16* (section 425.16 or the anti-SLAPP law).

**1. Issue Presented**

Opposing petitioners' anti-SLAPP motion, the District proffered documents from a criminal prosecution of its former officials and citizens who allegedly bribed the officials with meals, entertainment, and political and charity contributions.

These documents-indispensable to the District's opposition-consisted **[*2]** of narratives signed under penalty of perjury explaining guilty pleas, testimony to the grand jury, and records authenticated only by grand jury testimony. The superior court overruled petitioners' objections to the proffered materials. The Court of Appeal affirmed, treating the proffered materials as if they were declarations under oath made in the District's civil action against petitioners. (Opn., pp. 15-30.) Is testimony given in a criminal case by nonparties to a later civil case subject to *Evidence Code section 1290* et. seq. setting conditions for receiving former testimony in evidence?

**2. Reasons Review Should Be Granted.**

**2. 1. The decision revives a conflict in decisions of the Court of Appeal.**

In *Williams v. Saga Enterprises, Inc. (1990) 225 Cal.App.3d 142,* a panel of the Second Appellate District reversed a summary judgment by treating testimony from a prior criminal trial as admissible evidence. (*Id. at pp. 148-149.)* Without analysis, the court explained that ″[w]hile the reporter's transcript is from another case, the effect of the examination made of Mr. Nolan is the same as would be a declaration supplied by him in **[*3]** this case.″ (*Id. at p. 149.)* In a footnote appended to that sentence, the court acknowledged the transcript could not be received over an objection that it did not meet the conditions of *Evidence Code section 1292* as former testimony. (*Id. at p. 149, fn. 3.)* But ″inasmuch as the recorded testimony was offered in support of the opposition to a summary judgment motion and serves effectively as a declaration by Mr. Nolan, we treat it here as such.″ (*Ibid.*)

Here, the Court of Appeal relied entirely on *Williams v. Saga Enterprises, Inc., supra, 225 Cal.App.3d at pp. 148-149,* to affirm the superior court. (Opn., pp. 23-25.)

In *Gatton v. A.P. Green Services, Inc. (1998) 64 Cal.App.4th 688, 690, 693-697,* Division Two of the First Appellate District disagreed with *Williams v. Saga Enterprises, Inc., supra, 225 Cal.App.3d 142.* The *Gatton* court required the proponent of former testimony proffered in opposition to a summary judgment motion to comply with *Evidence Code section 1292*. (*Gatton, 64 Cal.App.4th at p. 693.)* It analyzed and sharply criticized *Williams*, commenting among other **[*4]** things: ″We cannot abide *Williams's* disregard of the statute.″ (*Id. at p. 694.)* Anticipating a petition for rehearing asking for prospective operation of its rejection of *Williams*, the court stated: ″*Williams* is a single, aberrant and unnoticed decision, not a well-rooted line of authority on which litigants could have placed reasonable reliance.″ (*Id. at p. 696.)* The First Appellate District concluded by reiterating ″[w]e reject *Williams*″ and affirming summary judgment because the only opposing evidence-the former testimony-was inadmissible. (*Id. at p. 697.)*

Division Two of the Second Appellate District rejected its own district's *Williams v. Saga Enterprises, Inc., supra, 225 Cal.App.3d 142* opinion and followed *Gatton v. A.P. Green Services, Inc., supra, 64 Cal.App.4th 688.* (*L&B Real Estate v. Superior Court (1998) 67 Cal.App.4th 1342, 1347-1348.)*

Here, the Court of Appeal acknowledged the conflict of decisions and reached back to *Williams v. Saga Enterprises, Inc., supra, 225 Cal.App.3d 142* to affirm the superior court. (Opn., pp. 25-30.) The **[*5]** court did not address *Williams v. Hartford Ins. Co. (1983) 147 Cal.App.3d 893, 899,* which holds specifically that former testimony to a grand jury is inadmissible hearsay unless an exception applies.

This case presents a direct conflict of holdings based on a direct conflict of analyses. This is not a case of mere tension, nor will percolation do any good. Only review by the California Supreme Court will resolve this conflict. (*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 456;Cal. Rules of Court, rule 8.500(b).*)

**2. 2. The importance of making all former testimony admissible as the equivalent of a declaration merits review, even if there were no conflict.**

For motion practice, the Court of Appeal eradicated the former testimony statutes, principally *Evidence Code section 1290*, et seq. If this were a case of first impression, review would be necessary because of the consequences of allowing all former testimony to be admissible in motion hearings. Also, the Court of Appeal violated the Legislature's prerogative to regulate exceptions to the hearsay rule, a function recognized by the California Supreme Court and vital because **[*6]** of the need for nuanced drafting.

**2. 2.1. Former testimony, carte blanche, will now be thrust on superior courts deciding motions.**

The Opinion requires superior courts to receive any former statement under oath as the equivalent of a declaration. (Opn., 15-30.) It specifically compels receiving plea narratives and grand jury testimony in a civil case, although the criminal defendants and grand jury witnesses are not parties to the civil case, and the parties to the civil case were not prosecuted. (Opn., pp. 7-8, 17, 19.)

*Williams v. Saga Enterprises, Inc., supra, 225 Cal.App.3d 142,* revived by the Fourth District, requires superior courts specifically to receive testimony given in a civil trial by a person who is not a party to the action in which the former testimony is proffered. This is so regardless of whether the former testimony was impeached, contested, or disbelieved by the trier of fact.

*Gatton v. A.P. Green Services, Inc., supra, 64 Cal.App.4th at p. 690* involved an excerpt from a 10-year-old civil-case deposition. A party opposing a motion or replying to an opposition no longer can rely on *Gatton* to exclude such proffered former **[*7]** testimony.

*L&B Real Estate v. Superior Court, supra, (1998) 67 Cal.App.4th at p. 1347,* also no longer reliable, involved testimony in a criminal trial given by a nonparty to the civil action.

When CLE seminars spread the word of this case amongst the trial bar, lawyers will thrust upon superior courts every imaginable form of former testimony. They will correctly cite the Opinion and *Williams v. Saga Enterprises, Inc., supra, 225 Cal.App.3d 142* for the proposition that, having been declared in those cases to be the equivalent of a declaration, all former testimony is admissible to support or oppose a motion despite *Evidence Code section 1290* et seq.

Neither the party making the proffer nor the party's lawyer need have had any contact with the declarant of the former testimony.

No showing need be made that the declarant is available or unavailable, alive or dead, competent or demented.

The former testimony may be an exculpation of civil or criminal liability that the judge or jury rejected. Objections to it may have been sustained. It may have been struck entirely. No matter, the Fourth District and *Williams* make it the equivalent of a declaration. **[*8]** The burden shifts to the other party to find the records of the case in which the testimony was given and show the court that the ersatz declaration is filled with sawdust.

The decision imposes an unworkable process on superior courts. It will do more injustice than justice, including by increasing the expense and delay of litigation.

**2. 2.2. The decision violates a principle of deference declared by the California Supreme Court.**

The Court of Appeal used *Code of Civil Procedure section 2009* to create a motions-only exception to the hearsay rule for documents that are not declarations. Section 2009 provides that ″[a]n affidavit may be used . . . upon a motion. . . ″ [1] The statute does not allow former testimony-in the form of affidavits, declarations, or other-to be received in evidence over objection on motions or otherwise.
**[*9]**

Using Code of Civil Procedure section 2009 to the Evidence Code is counter-textual. *Evidence Code sections 1291* and *1292* both govern use of former testimony at any ″hearing,″ not just at a trial. (*Evid. Code, § 1291*, subd. (a)(2), (b); *Evid. Code, § 1292*, subd. (a)(3), (b).)

A declaration is an unsworn affidavit signed under penalty of perjury. (*Code Civ. Proc, § 2015.5*.) ″Affidavits being hearsay may not be used in evidence except where permitted by statute. . . .″ (*Rowan v. City & County of San Francisco (1966) 244 Cal.App.2d 308, 314, fn. 3;* accord, *Estate of Fraysher (1956) 47 Cal.2d 131, 135.)* The District was required to oppose the anti-SLAPP motion with declarations or affidavits (§ 425.16, subd. (b)(2)) containing admissible evidence (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist. (2003) 106 Cal.App.4th 1219, 1236).* But the District was not allowed to proffer declarations from another case, let alone records of prior testimony that are not declarations. An affidavit is a form of testimony. (*Code Civ. Proc, § 2002*.) When an affidavit is proffered in an action other than the action

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[1] In full: ″An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by statute.″

in which it **[*10]** was originally given as testimony, it is former testimony: ″As used in this article, 'former testimony' means testimony given under oath in: [P] (a) Another action. . . .″ (*Evid. Code, § 1290*.)

Innovating a motions-only exception to the hearsay rule is not a proper function of the Court of Appeal. The Federal Rules of Evidence contain a residual exception to the hearsay rule (*Fed. Rules Evid., rule 807*), but the Evidence Code does not (*In re Cindy L. (1997) 17 Cal.4th 15, 27-28;* see *Evid. Code, § 1201*). Given the Legislature's extensive regulation of exceptions for prior testimony (see, e.g., *Evid. Code, §§ 1290*, *1291*, *1292*, *1293*, *1294*; *Code Civ. Proc, § 2025.620*), courts should resist making any exceptions and ″may not create evidentiary exceptions in conflict with statute″ (*In re Cindy L., 17 Cal.4th at p. 28).*

If former testimony should be available as evidence on motions when it would not be admissible at trial, the Legislature should write a new statute to achieve that result under appropriate conditions. To illustrate, the federal residual exception has standards that the Court of Appeal could not adopt, having tied its innovation to the **[*11]** ancient ″upon a motion″ of *Code of Civil Procedure section 2009*. The federal proponent must establish a foundation that the statement has guarantees of trustworthiness equivalent to those that undergird specific exceptions to the hearsay rule. (*Fed. Rules Evid, rule 807(a)(1)*.) Merely being under oath provides no such guarantee unless the foundation establishes facts including that the testimony was received, was not struck, and was not rejected by the trier of fact.

The federal proponent must show the proffered statement ″is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.″ (*Fed. Rules Evid, rule 807(a)(3)*.) An available witness's current testimony given in the context of the specific case is usually more probative than former testimony given in another matter. Receiving the hearsay must ″best serve . . . the interests of justice.″ (*Id.*, rule 807(a)(4).) And the proponent must give the ″adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.″ This will almost never **[*12]** be so when former testimony is offered in opposition to a motion. (See *Code Civ. Proc, § 1005*, subd. (b) [opposing papers filed nine court days before hearing, reply papers filed four court days later].)

The Court of Appeal ignored the wisdom of *In re Cindy L., supra, 17 Cal.4th at p. 28,* and bungled into a field that, if in need of changing, requires nuanced statutory drafting. The importance of this error requires review and correction by the California Supreme Court.

**3. Statement of the Case.**

**3. 1. Procedural history and grounds for the Court of Appeal's decision.**

Relying on *Government Code section 1090* (section 1090), the District's complaint seeks to void completed construction management contracts it had with petitioners. (Opn., p. 7.) It claims four of its former officials were ″interested″ in the contacts because petitioners' representatives gave the officials lavish dinners, entertainment, travel, and ″'[m]onetary contributions to beauty pageants, charities, and campaigns on behalf of District officials.'″ (*Ibid.*)

Petitioners filed an anti-SLAPP motion. (Opn., pp. 7-8.) The District proffered the contested documents in opposition **[*13]** to the motion. (Opn., p. 8.) Petitioners objected to the proffered materials. (Opn., p. 9.) The superior court denied the motion and later overruled the objections. (*Ibid.*) Petitioners timely appealed. (*Ibid.*)

The Court of Appeal affirmed. (Opn.) First, it affirmed the superior court's evidentiary rulings. (Opn., pp. 15-30.) Based on all the proffered documents, the court determined that the complaint arises from petitioners' protected petitioning activity, activity that is not illegal as a matter of law under *Flatley v. Mauro (2006) 39 Cal.4th 299.* (Opn., pp. 30-38.) The District therefore had the burden to establish the requisite probability of prevailing under section 425.16, subdivision (b)(1), as elucidated in *Navellier v. Sletten (2002) 29 Cal.4th 82, 88-89.* (Opn., p. 38.) The court held the District met its burden. (Opn. pp. 38-46.) It reasoned that ″[o]ne could reasonably infer″ from the chronology of gifts and the District's board's actions that officials were influenced by the gifts to award contracts to petitioners (Opn., pp. 45-46), and this was sufficient to create a reasonable inference of a ″quid pro arrangement″ (Opn., p. **[*14]** 43). The court therefore affirmed the order denying the motion. (Opn., p. 46.) Petitioners did not petition for rehearing.

**3. 2. The decision could not stand if the former testimony is excluded.**

The Opinion expressly relies on plea forms and grand jury testimony. [2] (Opn., p. 43.) To emphasize that resolving the presented issue is important both in the law and in this case, petitioners provide a statement of the facts that would remain if the former testimony were excluded. Many of these facts are in the Opinion, but the Opinion does not identify their source. In no way do petitioners contradict the Opinion.
**[*15]**

**3. 2.1. The District engaged the joint venture to manage projects funded by voter-approved bonds.**

In November 2006, District voters approved Proposition O. (1 AA 52.) The proposition authorized up to $ 644 million in bond sales with proceeds to be used to renovate and build schools. (1 AA 52, 248; 3 AA 607-620.)

With wide publication, the District requested proposals to manage construction of projects authorized under Proposition O.

(1 AA 52, 248.) At the direction of Dr, Jesus Gandara, District superintendent, no bidder was forbidden to have contact with District officials. (5 AA 1235, 1246.)

The District received seven timely proposals. (1 AA 248.) The joint venture authored one of them. (*Ibid.*) The District appointed a screening committee consisting of Ramon Leyba, chief operating officer; Katy Wright, director of planning; and Iva Butler, facilities accounting supervisor. (*Ibid.*) That panel concluded that all seven packages met the District's requirements. (*Ibid.*) Next, the District appointed an initial interview committee consisting of Leyba; Dianne Russo, chief financial officer; Wes Braddock, high school principal; Aerobel Banuelos, outside counsel; and **[*16]** Lou Smith, outside consultant. (*Ibid.*) That committee interviewed each team, rated them against a common set of requirements and objectives, and determined that three firms should return for final interviews. (*Ibid.*) The joint venture was one of the finalists. (*Ibid.*)

The District appointed a final interview committee consisting of Gandara, superintendent; Leyba; Banuelos; and Ralph Munoz, capital project manager. (1 AA 248.) The committees determined that the joint venture was the ″top applicant.″ (*Ibid.*) On that basis, Gandara sought Board authority to negotiate a contract with the joint venture. (*Ibid.;* see 1 AA 52; 3 AA 621, 625; 5 AA 1235.) Gandara is the only person connected with the competitive bidding process who is alleged to have been financially interested in the contracts at issue. (1 AA 55-59.) Despite the exacting process, Leyba and a former acting District superintendent criticized it in hindsight. (5 AA 1231-1232; see 1235-1236.)

In May 2007, the Board approved an Interim Program Management Agreement for the joint venture to provide management services for Proposition O projects. (1 AA 53, 66-85; 3 AA 627-628, 648, 652-671.) Trustees Pearl Quinones, **[*17]** Arlie Ricasa, and Greg Sandoval participated in the decision. (*Ibid.*) In January 2008, the Board approved the Program Management Agreement for Proposition ″O″ Modernization Program for the joint venture to provide services for Proposition O work. (1 AA 53, 87-147, 163-223 [misplaced duplicate, as filed with superior court]; 3 AA 700, 711; 4 AA 717-777.) Quinones, Ricasa, and Sandoval participated in the decision. (1 AA 53; 3 AA 700, 711.) The joint venture and the District amended the agreement in May 2008, with Quinones, Ricasa, and Sandoval participating in the decision. (4 AA 778, 787-788, 792-794.)

Related to the Proposition O services, in May 2007 the District contracted for the joint venture to take over and finish management services on projects funded under Proposition BB. (1 AA 54; 3 AA 648, 672-699.) Quinones, Ricasa, and Sandoval participated in the decision. (*Ibid.*)

In April 2010, the District terminated for convenience the joint venture's Program Management Agreement for Proposition ″O″ and contracted solely with Seville Group, Inc. (Seville), formerly a member of the joint venture, for the remaining services. (1 AA 55; 4 AA 795-796, 806, 813-817, 822-869.) **[*18]**

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[2] In full: ″The evidence of the plea forms detailing the guilty and no contest pleas by various former Sweetwater officials and former employees of defendants, as well as the grand jury testimony of a number of the individuals involved, is circumstantial evidence from which one could reasonably conclude that the gifts and contributions were made in order to sway the board members to vote in favor of awarding contracts to Gilbane and the Joint Venture.″ (Opn., p. 43.)

**3. 2.2. The joint venture performed under the contracts.**

The joint venture successfully performed the contracts. So concluded an independent performance audit in March 2011. (2 AA 255-319.) The auditors stated the joint venture ″demonstrated efficiencies in using state of the art accounting and document control systems″ (2 AA 283) and ″used innovative techniques and many best practices in school facility programming, design, preconstruction, construction, recordkeeping and technology to manage complex systems and construct state of the art facilities″ (2 AA 319). Although the audit was not forensic (5 AA 1226-1230), contemporary financial auditing raised no concern about financial reporting integrity (see 2 AA 322, 330). The District received awards for its Proposition O projects. (2 AA 329, 333.)

The District paid the joint venture approximately $ 14.9 million for management services under the Proposition O contracts. (1 AA 54, 149-161, 227-228 PP 18-20; see 4 AA 879-896; 5 AA 1238-1240.) The District paid the joint venture approximately $ 2 million under the Proposition BB contract. (1 AA 55, 227-228 PP 18-20; see 4 AA 879-896; 5 AA 1238-1240.)

**3. 2.3. The pleas do not [*19] help the District show a probability of prevailing.**

The Court of Appeal's decision does not rely on the pleas by District officials. (See Opn., p. 43.) The pleas provide the District no succor.

Pearl Quihones (see Opn., pp. 5-7) pled to count 1 of the indictment, civil conspiracy violating *Penal Code section 182*, subdivision (a)(1) (2 AA 406). The conspiracy consisted of collectively violating *Education Code section 35230*, which prohibits offering valuable things to a member of a school board. (2 AA 345.) Each of the overt acts involved receiving meals or entertainment from Gary Cabello. (2 AA 345-346.) Cabello represented ″Alta Vista and UBS,″ not petitioners. (2 AA 346.) Greg Sandoval and Jesus Gandara (see Opn., pp. 5-7) pled to the same count (2 AA 411, 416).

Gandara pled to count 30 of the indictment, violating *Government Code section 89503* by accepting more than the maximum gifts from one source in a year. (2 AA 416.) Count 30 dates the crime as March 11, 2008. (2 AA 354.) It does not identify the source of the gifts. [3] (*Ibid.*) Quinones pled to count 85 of the indictment, the same crime as count 30 but dated April 1, 2008. (2 AA 365, 406.) The text of the count is **[*20]** identical to Gandara's except for the date. (2 AA 354, 365.) Arlie Ricasa (see Opn., pp. 5-7) pled to count 120, the same crime as count 30 but dated March 27, 2009 (2 AA 373, 400). The text of the count is identical to Gandara's except for the date. (2 AA 354, 373.) Sandoval pled to count 142 of the indictment, the same crime as count 30 but dated March 28, 2008. (2 AA 377, 411.) The text of the count is identical to Gandara's except for the date. (2 AA 354, 377.)

Henry Amigable (see Opn., pp. 6, 18) pled to ″Count 17,″ violation of *Education Code section 35230*, offering a thing **[*21]** of value to a member of a governing board of a school district, (2 AA 388-391; 5 AA 1174-1177.) Amigable was not charged in the indictment. (2 AA 344.) The complaint against him neither contained a count 17 nor charged this crime. (2 AA 335-341, 344.) The indictment charged a count 17 for violation of *Education Code section 35230* against Rene Flores (see Opn., p. 6), not Amigable. [4] (2 AA 351.) Assuming Amigable pled to the charge against Flores, the crime could have occurred any time between January 1, 2009 and December 31, 2011, could have involved any member of a governing body of any school district, and could have involved any contract with any party. (*Ibid.*) Amigable's employment with Gilbane ended in March 2009. (3 AA 477.) Nothing in the record suggests that the District was engaged in any contracting process with Gilbane or the joint venture between January 1, 2009 and March 2009.
**[*22]**

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[3] The full text of the count states: ″On or about March 11, 2008, Jesus Gandara, being an officer of a local government agency did unlawfully, knowingly, and willingly, accept gifts from any single source in any calendar year with a total value of more than $ 250, said amount being adjusted each year pursuant to Government Code section 89503(f), in violation of Government Code section 89503(a).″ (2 AA 354, capitalization adjusted.)

[4] The full text of count 17 states: ″On or about and between January 1, 2009 and December 31, 2011, Jeffrey Steven Flores did unlawfully offer a valuable thing to a member of a governing board of a school district with the intent to influence his/her action in regard to the making of a contract to which the board of which he/she is a member is a party, in violation of Education Code section 35230.″ (2 AA 351, capitalization adjusted.)

Flores pleaded no contest to one misdemeanor count of aiding in a misdemeanor (*Pen. Code, § 659*), the misdemeanor being a violation of a disclosure requirement (*Gov. Code, § 87203*) in the Political Reform Act, *Government Code section 87100* et seq. (2 AA 394-398; 5 AA 1179-1182.) That plea is categorically inadmissible. (*Pen. Code, § 1016*, subd, (3).)

The Quihones, Sandoval, Ricasa, and Gandara pleas are irrelevant. Count 1 charges a conspiracy not involving petitioners. The alleged private sector wrongdoers are ″Alta Vista and UBS″ and their representative Cabello. (2 AA 346.) The counts charging violation of *Government Code section 89503* cannot be connected to petitioners or even Amigable.

Amigable's plea does not support a reasoned inference that a District official had an interest in a contract to which Gilbane or the joint venture was a party. During the short time within the charge that Gilbane employed Amigable, no relevant contracting process occurred. Neither Gilbane nor the joint venture is mentioned in the plea; one must admit the plea narratives in evidence to make that connection.

**3. 2.4. The District did not satisfy the conditions for receiving former testimony. [*23]**

The former testimony could not be admitted under *Evidence Code section 1291*, which governs testimony offered against a party to the action in which it was given. The District failed to show-and could not show-that either ″[t]he former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; (*id.*, subd. (a)(1)) or ″[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing″ (*id.*, subd. (a)(2)). Petitioners neither offered any of the declarations on a former occasion nor were parties to any of the criminal proceedings with a right or opportunity to cross-examine any declarant.

The former testimony could not be admitted under *Evidence Code section 1292*, which governs testimony offered against a stranger to the action in which it was given. The District failed to show that any of the declarants was unavailable as a witness. (*Id.*, subd. (a)(1).)

**4. Conclusion**

Reviving a conflict in appellate decisions, the Opinion requires the superior court to receive all former testimony proffered to support or oppose motions. This rule unnecessarily burdens trial judges, breeds expense and delay, and portends more injustice than justice. Review is essential to resolve the conflict and correct this important mistake.

The California Supreme Court should:

(i) grant this petition;

(ii) reverse the Opinion with a clear holding that *Code of Civil Procedure section 2009* does not authorize receiving in evidence documents that are not declarations in the matter before the court but instead contain former testimony from other cases; and

(iii) remand the case to the Court of Appeal to perform the second-prong anti-SLAPP analysis under the evidence principles elucidated in the California Supreme Court's opinion.

Respectfully submitted,

/s/ [Signature]

DENTONS US LLP

By Charles A. Bird

Attorneys for Gilbane Building Company and Gilbane/SGI a joint venture

**Certificate of Compliance**

I, Charles A. Bird, appellate counsel to Gilbane Building Company and Gilbane/SGI a joint venture, certify that the foregoing petition for review **[*25]** is prepared in proportionally spaced Century Schoolbook 13 point type and, based on the word count of the word processing system used to prepare the petition, the petition is 4,451 words long.

/s/ [Signature]
Charles A. Bird

**PROOF OF SERVICE**

I, Renee Evans, declare as follows: I am employed with the law firm of Dentons US LLP, whose address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am over the age of eighteen years, and am not a party to this action. On April 4, 2016, I served the foregoing document described as:

PETITION FOR REVIEW

**[X] U.S. MAIL:** I placed a copy in a separate envelope, with postage fully prepaid, for each addressee named below for collection and mailing on the below indicated day following the ordinary business practices at Dentons US LLP. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.

I declare under **[*26]** penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed at San Diego, California on April 4, 2016.

/s/ [Signature]
Renee Evans

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