IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HOSSAIN SAHLOLBEI,

Real Party in Interest.

S232639

Court of Appeal Case No. E062380
Riverside County Superior Court No. INF1302523
The Honorable Michael Naughton, Judge

REPLY BRIEF ON THE MERITS

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ISSUE PRESENTED

If an individual performing work for and on behalf of a public entity qualifies as an "independent contractor" for purposes of the common law of tort liability, is that individual immune from the criminal provisions of Government Code section 1090?

INTRODUCTION

Real party performed public functions for the Palo Verde Hospital District ("PVHD") in Blythe, exercising considerable influence over its Board of Directors regarding the hiring and compensation of doctors. In that capacity, he recruited a doctor to serve as the hospital's anesthesiologist and influenced the Board into hiring the doctor. At the same time, real party had a secret side-agreement with the anesthologist in which he would be paid large sums of money every month from the anestheologist's compensation. Real party claims that his self-dealing is immune from criminal proscution under Government Code[1] section 1090 because his employment contracts with the hospital qualified his employment as an independent contractor for tort law purposes. Real party is wrong.

Real party asks this Court to adopt the flawed reasoning of *People v. Christiansen* (2013) 216 Cal.App.4th 1181 (*Christiansen*), and reject the reasoning of the majority of district courts of appeal that have concluded an independent contractor that performs a public function can violate section 1090, including *Hub City Solid Waste Services Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114 (*Hub City*), *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682 (*Hanover*), *People v. Gnass* (2002) 101 Cal.App.4th 1271 (*Gnass*), *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278 (*Schaefer*), and *Terry v. Bender* (1956) 143 Cal.App.2d 198 (*Terry*). But *Christiansen* was wrongly decided. The decision relies on the incorrect assumption that section 1090 must be interpreted in accordance with the common law of tort. Contrary to real party's claims, the legislature has not indicated a desire to adopt tort law into section 1090. Rather, the legislative history indicates an intent to broadly interpret section 1090's provisions in order to serve its prophylactic purpose to guard against self-dealing at the public's expense. The interpretation adopted by real party grafting the employee/independent contractor distinction onto section 1090

[1] All further statutory references are to the Government Code unless otherwise indicated.

is not required by the plain language of the statute or its legislative history, undermines the statutory purpose, and allows an end-run around the statute's prohibition against self-dealing. The Court of Appeal erred in finding real party is immune from the provisions of section 1090 and the People should have been permitted to proceed to trial on this charge.

ARGUMENT
I
REAL PARTY IS NOT IMMUNE FROM THE CRIMINAL PROVISIONS OF GOVERNMENT CODE SECTION 1090

Like the Court of Appeal below, real party contends that the outward label of "independent contractor" placed on his status at the public hospital means that he was permitted to negotiate contracts on behalf of the public entity in which he secretly awarded himself hundreds of thousands of dollars. Real party's attempt to immunize his conduct from section 1090 fails. The legislature did not intend to restrict section 1090 by the technicalities of tort law, including the technical distinction between an employee and an independent contractor. Because section 1090 does not codify any common law tort principals relating to employer/employee relations, there is no requirement that its terms be interpreted according to common law tort principles. Rather than codifying a distinction between master/servant responsibility and liability, section 1090 codifies the age old truism that a man cannot serve two masters. Contrary to real party's arguments, the legislature did not intend his interpretation of the statute, the legislature has not endorsed his interpretation of the statute, and the Constitution does not demand his interpretation of the statute.

A. The Legislature Did Not Intend to Restrict Section 1090 By Common Law Tort Principles

Real party contends that the plain language of section 1090 conclusively establishes that independent contractors are immune from the criminal provisions of section 1090. (ABM at p. 11.) Not so. "Employee" has no defined meaning within section 1090 and certainly does not plainly exclude from its definition independent contractors. Real party attempts to create a plain meaning for the term employee, one that excludes independent contractors, only by imposing the irrelevant tort law definition of employee onto section 1090, a conflicts of interest statute.

Contrary to real party's arguments, the use of the term "employee" in section 1090 does not mandate that the court impose the common-law tort definition of that term. None of the cases cited by real party demand that result. Rather, the cases cited by real party and the court below all recognize the truism that when a statute codifies the common law, the provisions of the statute should be interpreted consistent with the common law rule and construed in a manner that does not overrule the common law rule. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 (*California Assn. of Health Facilities*).) Real party makes much of the rule that a statute will be construed in light of the common law unless the legislature "clearly and unequivocally" indicates otherwise. (ABM at p. 16.) But real party fails to quote the origin of that rule. In 1920, this Court held,

> The common law of England is declared to be the rule of decision in all the courts of this state so far as not repugnant to or inconsistent with our constitution and statutes. (Pol. Code, sec. 4468.) The Civil Code was not designed to embody the whole law of private and civil relations, rights, and duties; it is incomplete and partial; and except in those instances where its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule **concerning a particular subject matter, a section of the code purporting to embody such doctrine or rule will be construed in the light of common-law decisions on the same subject.**

(*In re Estate of Elizalde* (1920) 182 Cal. 427, 433, emphasis added.) This Court has not held, as real party urges, that common law concepts from disparate subject matters must be imported into a statute. When the statute at issue does not codify the common law regarding that particular subject, there is no requirement that unrelated common law definitions be imposed. (See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351-353 (*S.G. Borello & Sons*) [compensation statutes do not embody respondeat superior common law concepts].)

Each of the cases relied upon by real party involved the codification of the common law distinctions regarding employment, and thus the court used the common law employment test to interpret the meaning of the provisions. (See *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal.4th 491, 496, 509 [public retirement law requirements]; *California Assn. of Health Facilities*, *supra*, 16 Cal.4th at p. 297 [reasonable licensee defense]; *People v. Palma* (1995) 40 Cal.App.4th 1559 (*Palma*) [employment exemption to a Medi-Cal kickback statute].) For example, in *California Assn. of Health Facilities*, the statute at issue, Health and Safety Code section 1424, codified the common law rule regarding the nondelegable duties of licensees. (*California Assn. of Health Facilities*, *supra*, at p. 295.) This Court found that "[t]he rule of nondelegable duties for licensees is of common law derivation" and "akin to the rule of respondeat superior in tort law." (*Id.* at pp. 295-296.) Because the statute at issue in *California Assn. of Health Facilities* codified the common law concept of nondelegable duties of licensees, this Court found that the statute must be interpreted to avoid a conflict with that common law concept. (*Id.* at pp. 295-297.)

Likewise, in *Palma*, the court of appeal determined that Welfare and Institutions Code section 14107.2 (criminalizing kickbacks relating to Medi-Cal), was meant to adopt the common law distinction between employees and independent contractors. That statute included a provision exempting from the anti-kickback law any amount "paid by an employer to an employee, who has a bona fide employment relationship with that

employer, for employment with provision of covered items or services." (*Palma*, *supra*, 40 Cal.App.4th at p. 1565.) This law, including its exemption, was the state codification of an existing federal statute, and that federal regulation expressly adopted the common law definition of employee. (*Id.* at p. 1566.) Further, the court noted that the distinction between employees and independent contractors under the common law of tort—concerning the amount of control the employer can exercise—was significant to the Welfare and Institutions Code section as well. (*Ibid.*)

None of the cases cited by real party involved conflict of interest statutes. As this Court has recognized previously, section 1090 is the codification of the common law of conflicts of interest. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1073 (*Lexin*); accord *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1361; *People v. Honig* (1996) 48 Cal.App.4th 289, 317 (*Honig*).) Conflicts of interest statutes do not codify common law tort distinctions and do not serve the same underlying purposes as tort. Conflicts of interest laws are designed to ensure fidelity to the public and guard against temptation to act in one's own self-interest. (*Lexin*, *supra*, at p. 1073; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 570 (*Stigall*); *Honig*, *supra*, at p. 314.) These prophylactic statues have nothing to do with assigning financial responsibility and liability on the master for the actions of those he has the power to control, the basis for the tort law distinction between employees and independent contractors. (*Hanover*, *supra*, 148 Cal.App.4th at p. 690; see *Boswell v. Laird* (1857) 8 Cal. 469, 489.) It would undermine the purpose of the law to hold that the terms used in section 1090 must be restricted to the technicalities of tort law. (See, e.g., *Stigall*, *supra*, at p. 569 [use of the phrase making of a contract does not mandate importing technicalities of contract law]; *Lexin*, *supra*, at pp. 1076-1077 [same].)

The only conflict of interest law cited by real party is the Political Reform Act of 1974, section 81000 et seq. ("PRA"). Although real party contends that the PRA demonstrates the legislature would have defined employee to include independent

contractors if it so desired (ABM at pp. 15-16), these provisions of the Government Code actually support a broad definition of the persons liable under section 1090. This Court has recognized that the PRA and section 1090 are in pari materia. (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424; *Lexin*, *supra*, 47 Cal.4th at pp. 1090-1091.) "Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object." (*Lexin*, *supra*, at pp. 1090-1091, quoting *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4.) Statutes that are considered in pari materia should be construed together and given consistent meaning. (*Id.* at p. 1091.)

> Section 1090 is the principal California statute governing conflicts of interest in the making of government contracts. In turn, the Political Reform Act is the principal California law governing conflicts of interest in the making of all government decisions. It is well established that these two acts are in pari materia: "Section 1090 and section 87100 of the [Political Reform Act] are two of the most important statutes in California addressing the problem of conflict of interest by public officials and employees. They both deal with a relatively small class of people, public officers and employees, and share the same purpose or objective, the prevention of conflicts of interests, and hence can fairly be said to be in pari materia."

(*Ibid.*, quoting *Honig*, *supra*, 48 Cal.App.4th at p. 327; see also 65 Ops.Cal.Atty.Gen. 41, 57 (1982) [interpretation of what constitutes a financial interest under § 1090 and the Political Reform Act should be consistent].)

Section 87100 of the PRA provides that "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Section 82048 defines "public official" as used within the Act to include "every member, officer, employee or consultant of a state or local government agency." At the time that the PRA was adopted by voter initiative in 1974, courts had already construed section 1090's reference to "officers" to include a consultant performing a public function on behalf of the city (*Schaefer*, *supra*, 40 Cal.App.2d at p.

291; *Terry*, *supra*, 143 Cal.App.2d at pp. 209-211); the legislature had chosen to expand the coverage of section 1090 in response by adding the word "employee" (Stats. 1963, ch. 2172, § 1); and the Attorney General had opined that this amendment was meant to codify the broad application of section 1090 the *Schaefer* and *Terry* courts had used to determine that "those who serve the public temporarily [owe] the same fealty expected from permanent officers and employees" (46 Ops.Cal.Atty.Gen. 74, 79 (1965)). It was against this backdrop that the PRA was adopted and codified the same individuals subject to its conflict of interest provisions—officers, employees, and consultants.

The PRA thus mirrors the individuals covered under section 1090 as that statute has been historically interpreted. The PRA does not limit or restrict the individuals subject to conflict of interest provisions using rigid tort principles. Considering the history and purpose of the PRA and section 1090, this Court has previously determined that the two statutes are in pari materia and has construed their provisions to be consistent. The same should be done here. Just as with the PRA, section 1090 should not be limited by common law tort distinctions.

Contrary to real party's claims, this Court must look to the legislative history of section 1090, and not to unrelated tort concepts, to determine the meaning of the term employee in section 1090. As explained in the Opening Brief on the Merits, the legislative history of section 1090 supports a broad interpretation that does not categorically exclude certain individuals based on their status under the common law of tort. In fact, court after court has found that conflict of interest statutes must be "strictly enforced" and liberally construed in order to serve their prophylactic purpose. (*Schaefer*, *supra*, 140 Cal.App.2d at p. 291; *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1335; accord 46 Ops.Cal.Atty.Gen. at p. 79.)

Real party insists that this history of liberal construction is limited solely to the types of transactions covered by the statute. (ABM at p. 19.) This is inaccurate. The liberal construction of section 1090 is based on the underlying purpose of the common

law doctrine and its statutory codification—protection of the public fisc by ensuring those who perform public functions serve but one master. (*Lexin*, *supra*, 47 Cal.4th at p. 1073, quoting *Thomson v. Call* (1985) 38 Cal.3d 633, 637.) In line with this legislative purpose, courts have historically broadly interpreted section 1090, including with regard to the types of individuals covered by its provisions. (See, e.g., *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 273-274 [finding corporate entities liable under section 1090]; *Hanover*, *supra*, 148 Cal.App.4th at p. 690 [outside counsel]; *Hub City Solid Waste Services Inc. v. City of Compton*, *supra*, 186 Cal.App.4th at p. 1125 [consultant director of in-house waste division]; *Terry*, *supra*, 143 Ca.App.2d at pp. 209-211 [outside special city attorney hired for a limited purpose]; *Schaefer*, *supra*, 140 Cal.App.2d at p. 291 [same].)[2]

Restricting section 1090 by the niceties of tort law leads to the very manipulation that section 1090 is designed to avoid. (See *Lexin*, *supra*, 47 Cal.4th at p. 1077 [must interpret section 1090 to avoid "subterfuge"].) Under real party's rationale, an individual can perform a public function and control the contracting decisions of a public entity, but an outward label of "independent contractor" will immunize his or her self-dealing and render section 1090 inapplicable. The creation of this safe harbor undermines the purpose behind section 1090 and conflict of interest laws in general. Liability must follow the defendant's actual actions; not what the defendant calls himself or herself. Real party's attempt to create a loophole in section 1090 by importing irrelevant tort law concepts should be rejected.

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[2] Although real party contends that several California courts have adopted the tort definition of employee in section 1090 (ABM at p. 11), only *Christiansen* has actually reached the issue. (See *People v. Lofchie* (2014) 229 Cal.App.4th 240, 251 [holding University of California is not a public entity]; *Davis*, *supra*, 237 Cal.App.4th at p. 300 [rejecting applicability of tort definition of employee to civil section 1090 action against corporate consultants].)

B. The Legislature Has Not Endorsed *Christiansen*

Real party also claims the legislature has acquiesced in the *Christiansen* court's decision to exclude independent contractors from the definition of the term employee because section 1090 has been amended to include aider and abettor liability (Senate Bill ("SB") 952), but not to expressly delineate coverage over independent contractors (Assembly Bill ("AB") 1059[3]). (ABM at p. 12.) Contrary to real party's argument, nothing about the legislature's actions constitutes an endorsement of *Christiansen*. Real party's argument is based on a mischaracterization of the legal principles discussed by this Court in *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 (*Marina Point*).)

In *Marina Point*, this Court discussed the significance of the legislature amending a discrimination statute after the ***Supreme Court*** had interpreted the meaning of that statute's terms. Following this Court's determination in *In re Cox* (1970) 3 Cal.3d 205 (*Cox*), that identification of particular bases of discrimination (color, race, religion, ancestry and national origin) within the Unruh Civil Rights Act was illustrative but not restrictive, the legislature amended the Act to add the word "sex," but otherwise left the language unchanged. (*Marina Point, supra*, at pp. 724-725, 732-733.) The defendant in *Marina Point* was sued under the Unruh Act and argued that the *Cox* interpretation of the statute was erroneous and should be overruled. (*Id.* at p. 733.) In rejecting the defendant's argument that *Cox* was wrongly decided, this Court stated, "[m]oreover, subsequent to our decision in *Cox* the Legislature effectively confirmed our interpretation of the act as barring all forms of arbitrary discrimination" by amending the Unruh Act while maintaining the language that had been subject to the Court's interpretation. The legislative history of that amendment proved that the legislature was choosing to maintain the Supreme Court's interpretation. In a statement from the legislature to the governor, the legislature wrote that the inclusion of the word sex effected no change to the statue

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[3] AB 1059 was not subject to a vote as the bill was never even heard by committee and died due to age pursuant to art. IV, section 10(c) of the California Constitution.

and was "merely illustrative" because the Act has already been interpreted to make all arbitrary discrimination illegal. (*Id.* at p. 734.)

Unlike the situation analyzed in *Marina Point*, this Court has not interpreted section 1090 to exclude independent contractors. Rather, the Second District Court of Appeal interpreted the statute in direct conflict with other Divisions of the Second District as well as with the Fourth and Fifth Appellate Districts. Because *Christiansen* is in direct conflict with other Courts of Appeal decisions, the legislature's failure to adopt AB 1059 and adoption of SB 952 could just as easily be interpreted as a determination that no amendment is necessary because independent contractors are already covered as held by *Schaefer*, *Terry*, *Gnass*, *Hanover*, and *Hub City*. Considering the split of authority, the legislature cannot possibly be considered to have adopted any particular view by their non-action.

As this Court has previously recognized, "[u]npassed bills, as evidences of legislative intent, have little value." (*People v. Mendoza* (2000) 23 Cal.4th 896, 921.) "[T]he Legislature's failure to enact a proposed statutory amendment may indicate many things other than approval of a statute's judicial construction, including the pressure of other business, political considerations, or a tendency to trust the courts to correct its own errors." (*Ibid.*) Rather than read the tea leaves of unpassed legislation as urged by real party, this Court should look to the legislative history of section 1090. As explained in the Opening Brief on the Merits, the legislative history of section 1090 demonstrates an intent to broadly include independent contractors as employees.

C. Due Process Does Not Require Inconsistent Interpretations of Section 1090 in the Civil and Criminal Contexts

Real party claims that the standard adopted by the Courts of Appeal in *Hanover* and *Hub City* would provide insufficient clarity to individuals regarding what is prohibited under section 1090's criminal provisions. (ABM at pp. 24-26.) He asks that this Court perpetuate *Christiansen's* inconsistent interpretations of a single statutory text

and conclude that for purposes of criminal liability, employee does not include independent contractors.

Real party's due process argument demands a mathematical precision that is not required by the Constitution. (See *In re M.S.* (1995) 10 Cal.4th 698, 718 ["Inasmuch as '[w]ords inevitably contain germs of uncertainty,' mathematical precision in the language of a penal statute is not a sine qua non of constitutionality"].) The interpretation of the term employee in *Hanover* and *Hub City* which includes independent contractors who perform a public function and exercise considerable influence over the contracting decisions of the public entity is not imprecise. The standard is not, as real party claims, simply "influence" in a vacuum. It is a particular type of influence; influence over the contracting decisions of the public entity. The fact that the standard includes a subjective determination does not make it imprecise or unconstitutional. (*Ibid.*) Furthermore, case law and the legislative history of section 1090 are a part of the law for purposes of notice. Citizens must apprise themselves "not only of statutory language, but also of legislative history, subsequent judicial construction, and underlying legislative purposes." (*People v. Heitzman* (1994) 9 Cal.4th 189, 200.) The term employee need not be expressly defined in the statute in order to provide constitutional notice. (*Ibid.*)[4]

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[4] Real party posits a series of examples meant to illustrate his claims of ambiguity. (ABM at pp. 124-125.) But these scenarios are devoid of any facts or context and illustrate nothing. His hypothetical architect may have violated section 1090. If she was hired solely to design a new city square, this isolated, temporary position is likely not in a position to exercise considerable influence over the contracting decisions of the city or participate in the making of a city contract in an official, rather than a personal, capacity. But if she was hired as the City's consultant architect and performed city functions and exercised considerable influence over the City's decisions to enter into new public contracts, then her use of that influence to secure a different city contract for her landscape design business would constitute the making of a contract in her official capacity in which she had a financial interest. Real party's scenario regarding doctors providing additional services to the hospital overlooks the fact that section 1090 is limited to contracts made in one's official capacity and does not bar one from negotiating in a personal capacity for one's own employment and salary. (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 539-540.) Real party's scenarios attempt to

Real party claims that his case demonstrates the ambiguity of including independent contractors within the definition of employee. But he manufactures this ambiguity only by distorting the facts of his case. Real party seeks to portray his only role at the hospital as a member of the Medical Executive Committee ("MEC"), which he claims is legally distinct from the public entity. But real party's considerable influence over the hospital's contracting decisions was not limited to his role on the MEC, as he claims. Real party simply ignores that he had multiple contracts with the hospital, including to serve as the co-Medical Director of Surgical Services and to provide on-call surgical services at the public hospital. (Exh. 3 at p. 157.) Contrary to real party's distortion of the evidence presented at the preliminary hearing, his influence over the hospital was not limited to the MEC. He appeared before the Hospital Board in his capacity as a director of the surgery department and contracted-on call surgeon as well. (Exh. 3 at pp. 135-137, 267-268.) Real party exercised considerable influence over the contracting decisions of the hospital in all his many roles there. As the evidence presented established, he was the most influential doctor at the hospital, recruiting doctors on behalf of the hospital and negotiating their employment. (Exh. 3 at pp. 43-55, 145, 315.) He even forced the Board to hire a doctor on the financial terms he wanted by the threat of a strike. (Exh. 3 at pp. 148-151.) His contention that he could not possibly know that he performed public functions and exercised considerable influence over the hospital are false.

II
THERE WAS SUFFICIENT EVIDENCE PRESENTED AT THE PRELIMINARY HEARING THAT REAL PARTY WAS AN EMPLOYEE AND ACTED IN HIS OFFICIAL CAPACITY

Finally, real party contends that he was not acting in an official capacity or performing a public function when he negotiated the contract between the hospital and Dr. Barth. (ABM at pp. 26-28.) Not so. Real party appeared before the Board as an

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manufacture ambiguity by omitting any facts and ignoring the elements of section 1090.

advisor based on his many roles at the hospital, including as a member of the MEC *and* as the director of the surgical department. (Exh. 3 at pp. 135-137, 267-268.) Real party's argument completely ignores his department-director roles at the hospital. Like the Court of Appeal below, real party is improperly elevating "[l]abels and titles and fictional divides" above the facts. (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1451.) As multiple courts have recognized, when interpreting section 1090, the court must "disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts." (*Honig*, *supra*, 48 Cal.App.4th at p. 315.) The fact that real party's contract with the hospital did not delegate him the power to recruit and hire doctors is irrelevant, because that is what real party did for the hospital. On multiple occasions, real party recruited doctors on behalf of the hospital. He then appeared before the Board and exercised the considerable power he had to influence the Board to hire the doctors he had recruited, all the while secretly receiving kick-back payments from those doctors.

Real party argues that although he acted as an advisor to the Board (a public function), he was permitted to remove that hat for purposes of negotiating Dr. Barth's contract and appear solely as Dr. Barth's representative. The law does not allow real party to so easily deceive the public and skirt section 1090 simply by pretending to "change hats" while he influenced the contracting decision that lead to him receiving hundreds of thousands of dollars. (See *Gnass*, *supra*, 101 Cal.App.4th at p. 1290.) Real party was not negotiating his own employment and salary, which would be exempt from section 1090. (See *Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th at pp. 539-540.) The Board had already denied real party the lucrative anesthesia contract he wanted. (Exh. 3 at pp. 151-152, 225-226.) Instead, real party was appearing before the Board where he was an advisor, influencing the Board to enter into a contract with another doctor, and hiding the secret kick-back payments he would receive from that contract. Section 1090 prohibits this.

Real party also claims his self-dealing should go unpunished because although he was an independent contractor of the public entity hospital at various times, he was not so employed during the time he entered into the self-dealing contracts with Dr. Barth. He contends that his contract with the hospital for on-call services expired in April 2009 and his contract with the hospital for co-directorship of surgical services began in December 2009. Because Dr. Barth signed the contract with real party in June 2009 and with PVHD in October 2009, real party claims he cannot be accountable for his self-dealing. (ABM at p. 30.) But the law is clear that the making of a contract under section 1090 encompasses more than the mere signing of the agreement. (*Stigall*, *supra*, 58 Cal.2d at p. 571; *People v. Wong*, *supra*, 186 Cal.App.4th at p. 1450; *Gnass*, *supra*, 101 Cal.App.4th at p. 1291; *Honig*, *supra*, 48 Cal.App.4th at p. 315.) The word "made" in section 1090 encompasses "the planning, preliminary discussion, compromises, drawing of plans and specifications and solicitation of bids" leading up to the making of a contract." (*Honig*, *supra*, at p. 315.) Thus, real party's attempt to limit the section 1090 violation to June and October 2009 is unfounded. Those were merely the dates listed on the contracts. The evidence presented at preliminary hearing established that real party participated in the process of negotiating for the Dr. Barth contract for months prior to its ultimate signing in June. (Exh. 3 at p. 223-224, 261, 269-271.) The evidence also established that Dr. Barth's contracts were not all signed in June and October. He testified that he signed the contract for directorship in late November or early December and the contract was backdated to October. (Exh. 3 at pp. 70, 105, 117.)

Like the Court of Appeal below, real party's argument ignores the procedural posture of the case. At this stage of the proceedings, the Penal Code section 995 motion to set aside the information, the only question before the court is whether a reasonable person could harbor a "strong suspicion" that real party was an employee of the hospital district. (*Lexin*, *supra*, 47 Cal.4th at pp. 1077-1078.) This "exceedingly low" standard was met here. (*Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846.) While

serving in multiple positions of influence at the hospital, real party recruited Dr. Barth, offered him a salary on behalf of the hospital, and used his considerable power over the Board to ensure Dr. Barth was hired, even threatening a work shut down. (Exh. 3 at pp. 148-151.) All the while, real party had a secret side-agreement with Dr. Barth to be paid huge sums from the contract he negotiated. (Exh. 3 at p. 152.) There was sufficient evidence presented at the preliminary hearing that real party was an employee exercising public functions and considerable influence over the contracting decisions of the public hospital and the court should have allowed the section 1090 charge to proceed to trial.

CONCLUSION

For the reasons stated above, the People respectfully request that this Court reverse the judgment of the Court of Appeal.

Dated: September 1, 2016

Respectfully submitted,

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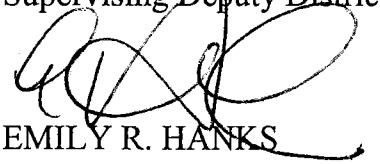
KELLI M. CATLETT
Supervising Deputy District Attorney



EMILY R. HANKS
Deputy District Attorney
County of Riverside

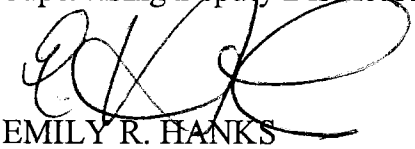
CERTIFICATE OF WORD COUNT
Case No. S232639

The text of the **REPLY BRIEF ON THE MERITS** in the instant case consists of 5,112 words as counted by the Microsoft Word program used to generate the said **REPLY BRIEF ON THE MERITS.**

Executed on September 1, 2016.

Respectfully submitted,

MICHAEL A. HESTRIN
District Attorney
County of Riverside
ELAINA GAMBERA BENTLEY
Assistant District Attorney
KELLI M. CATLETT
Supervising Deputy District Attorney



EMILY R. HANKS
Deputy District Attorney
County of Riverside

DECLARATION OF SERVICE BY MAIL
Case No. S232639

I, the undersigned, declare:

I am a resident of or employed in the County of Riverside; I am over the age of 18 years and not a party to the within action. My business address is 3960 Orange Street, Riverside, California. That on September 1, 2016, I served a copy of the within, **REPLY BRIEF ON THE MERITS**, on the following, by placing a copy of same in postage prepaid envelopes addressed as follows:

KENNETH WHITE
Attorney for Real Party
333 South Hope Street, 40th Floor
Los Angeles, CA 90071

HON. MICHAEL NAUGHTON
Riverside Superior Court
Hall of Justice
4100 Main Street
Riverside, CA 92501

ATTORNEY GENERAL'S OFFICE
P.O. Box 85266
San Diego CA 92186-5266

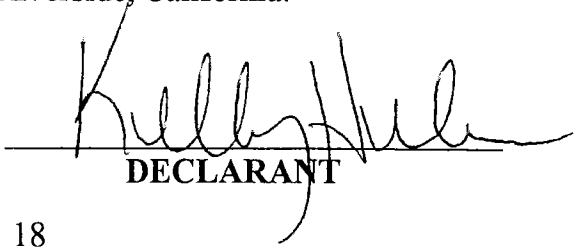
APPELLATE DEFENDER'S, INC.
555 W. Beech St. Suite 300
San Diego, CA 92101

COURT OF APPEAL
Fourth District, Division Two
3389 Twelfth Street
Riverside, CA 92501

Each envelope on September 1, 2016, was sealed and deposited in a United States mailbox in the City of Riverside, State of California, with postage thereon fully prepaid.

I declare the foregoing to be true and correct under penalty of perjury.

Executed on September 1, 2016, at Riverside, California.



DECLARANT