H042023
(Santa Clara County Superior Court Case No. 114CV265265)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

SURIYA SYSTEMS, INC., KAIZEN TECH SERVICES, LLC,
Plaintiffs/Appellants,
vs.

QUADRANT 4 SYSTEMS CORPORATION, QUADRANT 4 CLOUD, INC.,
Defendants/Respondents.

Appeal from a Judgment of the Santa Clara County Superior Court
Hon. Patricia Lucas, Judge, presiding

RESPONDENTS' BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

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APPELLANT/PETITIONER: Suriya Systems, Inc., Kaizen Tech Services LLC RESPONDENT/REAL PARTY IN INTEREST: Quadrant 4 Syst.Corp,Quadrant 4 Cloud	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Quadrant 4 System Corp., Quadrant 4 Cloud, Inc.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)	Quadrant 4 System Corp.,	100% ownership of subsidiary Quadrant 4 Cloud, Inc.
(2)	Quadrant 4 System Corp.,	publicly-traded corporation
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 30, 2015

John T. Schreiber
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

INTRODUCTION

Appellants SURIYA SYSTEMS, INC. and KAIZEN TECH SERVICES, LLC, (hereafter individually referred to as "SURIYA" and "KAIZEN," respectively, and "Appellants" collectively) by their appeal seek to invalidate a forum selection clause contained in their contracts with Respondent QUADRANT 4 CLOUD, INC (hereafter referred to as "Q4 CLOUD"). The Trial Court upheld the clause when it granted Q4 CLOUD's motion to stay or dismiss based on the forum selection clause and denied Appellants' subsequent motion for reconsideration. These clauses were agreed to as part of arms' length transactions entered into between corporations. Appellants' claim comprises a collections case that should be tried in New Jersey, as the parties contracted to. The forum selection clauses in these agreements provided that:

> This agreement and any disputes arising out of or in connection with this agreement shall be governed by and construed in accordance with the laws of the State of New Jersey excluding its rules governing conflicts of laws. The federal and state courts within the State of New Jersey shall have exclusive jurisdiction to adjudicate any disputes arising out of or in connection with this Agreement (Volume 1, Appellants' Appendix 36, ¶ 13.1, 1 AA 69, ¶ 13.1).[1]

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[1] All further references to Appellants' Appendix shall be to "1 AA" or "2 AA," depending on which of the two (2) volumes of Appellants' Appendices" contains that particular document.

California and federal law routinely uphold such forum selection clauses. Appellants, as the parties opposing enforcement of this clause, bore the burden of proof to demonstrate that enforcement of the clause would be unreasonable under the circumstances of the case. Nothing in the record in this appeal shows that the Trial Court erred in upholding this clause.

Appellants accuse Respondents (and their trial counsel) of misrepresenting the law to the Trial Court. However, when confronted with that accusation in Appellants' Motion for Reconsideration, the Trial Court properly denied Appellants' motion to reconsider. The accusation was unfounded. Appellants provided no adequate explanation for why they did not present their arguments for reconsideration earlier, at the time Q4 CLOUD filed their motion to enforce the forum selection clause.

There is simply no basis for this Court to reverse the Trial Court. For all of these reasons, the Trial Court's orders upholding the forum selection clause in Q4 CLOUD' motion to dismiss and the subsequent order denying Appellants' motion for reconsideration for denial must be affirmed.

STATEMENT OF THE CASE

A. Combined Factual and Procedural History

1. Appellants contracted to supply IT assistance to TTS's end user.

In fall 2010, SURIYA SYSTEMS signed a contract to provide consultants to TTS and/or TTS' client to provide software development and related specialized services (1 AA 57, Art. I, Art. II.1, 61). The next year KAIZEN TECH signed an identical contract with TTS to provide the same services to TTS and/or TTS' client (1 AA 79, Art. I, Art. I.1, 84).

2. Appellants' contracts with TTS provided for a California forum selection clause.

Both contracts contained identical forum selection clauses specifying California law to govern and California as the forum for any disputes (1 AA 61, 84).

3. Q4 purchased TTS' assets.

In late February 2013 Q4 purchased TTS' assets (Respondent's Appendix 8, Item 1.01).[2]

4. Appellants signed contracts with Q4 CLOUD to provide the same services for Q4 CLOUD containing the New Jersey forum selection clause.

On March 8, 2013, SURIYA SYSTEMS signed a contract with Q4 CLOUD to provide the latter with software development, engineering, or programming services for its client (1 AA 27, ¶ 1.1, 31). A week later, KAIZEN TECH signed an identical contract with Q4 CLOUD to provide

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[2] All further references to Respondents' Appendix shall be to "RA."

the same services (1 AA 32, ¶ 1.1, 36). Both contracts contained the identical mandatory forum selection clauses:

> This agreement and any disputes arising out of or in connection with this agreement shall be governed by and construed in accordance with the laws of the State of New Jersey excluding its rules governing conflicts of laws. The federal and state courts within the State of New Jersey shall have exclusive jurisdiction to adjudicate any disputes arising out of or in connection with this Agreement (1 AA 31, ¶ 13.1, 36, ¶ 13.1).

5. Appellants sued Q4, Q4 CLOUD, and TTS in California in 2014 for unpaid services.

On May 13, 2014, Appellants, California corporations, along with Plaintiffs below PROTEAM LLC, a Delaware limited liability company, and GRACE INFORMATION TECHNOLOGIES, a Texas corporation, sued the Q4 CLOUD companies and TTS to collect on what Appellants and the other plaintiffs alleged were unpaid bills for services provided to TTS and Q4 CLOUD (2 AA 197-198, 1 AA 11:12-14, 12:24-27). The complaint did not specify whether the contracts were oral or written and did not include the contracts (2 AA 103:12-14).

6. The parties stipulate to, and the Trial Court orders, a continuance of the hearing on Q4 CLOUD's demurrer, and to changes in the pleading deadlines.

Q4 CLOUD demurrered (1 AA 1-10). Approximately a week later, the parties stipulated to a continuance of the hearing on the demurrer, and to

change the opposing and responsive pleading dates to correspond to the new September 18, 2014 hearing date, to accommodate Appellants' counsel's schedule (RA 24:21-25:18).

7. Appellants filed a first amended complaint before the continued hearing on the demurrer.

As was their right under CCP § 472, instead of opposing the demurrer Appellants filed a first amended complaint ("FAC") on September 5, 2014, prior to the September 18, 2014 hearing date (1 AA 12, 18, 2 AA 197, RA 25:12-15). Again, the FAC did not specify whether the contracts were oral or written and did not attach contracts to the pleading (2 AA 103:12-14).

8. Q4 CLOUD filed their motion to stay or dismiss, based on the forum selection clause within the time allowed to respond to Appellants' FAC.

Q4 CLOUD filed their motion to stay or dismiss, based on their forum selection clause, less than thirty (30) days after the FAC's September 5, 2014 filing date, on October 2, 2014, within the deadline for filing a responsive pleading, including a demurrer (AOB at p. 6, 1 AA 19, 23, 2 AA 196). Appellants opposed the motion but did not argue timeliness (1 AA 38-87).

9. The Trial Court granted Q4 CLOUD's motion enforcing the forum selection clause.

The Trial Court granted Q4 CLOUD's motion, holding that Appellants failed to meet their burden of showing that enforcement of the parties' forum selection clause was not reasonable (2 AA 105:11-14).

10. The Trial Court denied Appellants' motion for reconsideration for failure to show reasonable diligence in not bringing their "different" law to the Trial Court's attention as of the time of Q4 CLOUD's motion.

Appellants then moved to reconsider under CCP § 1008, arguing that they discovered that New Jersey law prevented that state from being a suitable forum (2 AA 118-145). Q4 CLOUD opposed the motion (2 AA 146-154). Appellants filed a reply (2 AA 155-159). Then Appellants filed a declaration of Kishore Akkina, the "Principal" of PROTEAM, which attached a memorandum of points and authorities signed by Q4 CLOUD's New Jersey counsel September 10, 2013 (2 AA 161-170). Q4 CLOUD objected to the Akkina declaration and its attachment (2 AA 171-172).

The Trial Court denied Appellants' motion to reconsider (2 AA 182-183). The Trial Court declined to consider the Akkina declaration and the September 10, 2013 document in ruling on the motion, on the grounds that Appellants provided no excuse belatedly submitting this information, that the document existed when Appellants opposed Q4 CLOUD's motion, and as a matter of due process should have presented the document in

opposition to Q4 CLOUD's motion (2 AA 183:5-9). Even if the late-filed document.were considered as part of the motion to reconsider, it would not have made any difference, since Appellants failed to provide any adequate explanation for not presenting its information in opposition to Q4 CLOUD's motion (2 AA 183:9-12).

Appellants then filed their notice of appeal (2 AA 184).

ARGUMENT

A. Standard of Review

"The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*. 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" Eisenberg, Horvitz, and Wiener, J. (Ret.), *Cal. Prac. Guide: Civil Appeals and Writs* (The Rutter Group 2015), Ch. 8-B, "Presumptions of Correctness," ¶ 8:15 (emphasis original)(Citations omitted). "Any ambiguity in the record is resolved *in favor* of the appealed judgment or order." *Civ. Appeals*, *supra*, ¶ 8:16 (emphasis original). The appealed judgment will be affirmed if it is correct on any theory, even if different from that asserted by the trial court, even if it was not raised in the trial court. *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329-330. "The rationale for this principle is twofold: (a) an

appellate court reviews the action of the lower court and not the reasons given for its action; and (b) there can be no prejudicial error from erroneous logic or reasoning if the decision itself is correct." *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597,610.

Appellants, as the parties opposing enforcement of the forum selection clauses, also bear the burden of proof of showing that enforcement of those clauses would be unreasonable in the circumstances of the case. *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1680.

Appellants' own authorities real a split in authority regarding the applicable standard of review governing cases involving enforcement of forum selection clauses. Affirmance is justified under either line of authority. One line of cases states that such cases are governed by the substantial evidence rule. *Cal-State*, 12 Cal.App.4th at 1680-81.

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination ... " *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874. "[W]hen two or more inferences can reasonably

be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" *Bowers*, *supra*, 150 Cal.App.3d at 874(emphasis original)(citations omitted). The testimony of a single witness, even if he or she is a party to the action, can comprise substantial evidence. *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.

Two corollaries to the substantial evidence rule also apply: The appellate court will resolve all evidentiary conflicts, whether by oral testimony or written declarations, and all reasonable inferences in favor of Respondents *Le v. Pham* (2010) 180 Cal.App.4th 1201, 1205-1206.

The substantial evidence rule derives from two rationales: First, appellate courts defer to trial court's determinations of factual disputes because the trier of fact, whether judge or jury, is in a better position than the appellate court to observe the demeanor of the witness and therefore in a better position than the appellate court to assess witness credibility. *Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243, *overruled on other grounds*, *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 287. Second, the differing roles of appellate and trial courts merits appellate court deference to trial

court factual determinations. Trial courts decide issues of fact while appellate courts decide questions of law. *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263. "The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." *In re Michael G.* (2012) 203 Cal.App.4th 580, 589.

Appellants failed to designate a Reporters' Transcript of any of the hearings in this matter in this appeal (2 AA 186, Item 2.a). That failure may be fatal to Appellants' chances on appeal, considering the standard of review:

> [A]bsent error apparent on the face of the record, the judgment is *conclusively presumed correct* as to all *evidentiary* matters—i.e., it is presumed that the unreported oral proceedings *would have shown* the *absence of error*. [*Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 153–154—appellate court will not review "evidence" purportedly contained in trial briefs; see *Construction Fin'l, LLC v. Perlite Plastering Co., Inc.* (1997) 53 Cal.App. 4th 170, 179 (appeal on joint appendix). *Civ. Appeals*, *supra*, ¶ 8:30 (emphasis original, parallel, additional citations omitted).

Appellants argue that the governing standard of review is *de novo*, based on undisputed facts (AOB at pp. 7-8).[3] Yet their own authority asserts that if

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[3] The facts in this case are hardly undisputed. Appellants argued that Q4 CLOUD "assumed TTS's role with respect to TTS's contracts with Plaintiffs" (1 AA 43:13-14). However, as the Trial Court pointed out,

anything, the abuse of discretion standard applies in these instances. *Verdugo v. Alliantgroup, L.P.* (2015) 237 Cal.App.4th 141, cited by Appellants, holds that the majority view is that the abuse of discretion standard applies in such instances, based on language in *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496 ("we conclude that forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable"). *Verdugo*, 237 Cal.App.4th at 148. The abuse of discretion standard also applies on appellate review of motions for reconsideration. *Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1027.

"'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and

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Appellants did not prove that fact (2 AA 105:4-6). Appellants failed to include in the record both their stipulation regarding Q4 CLOUD's demurrer, which relates to their argument re timeliness (see *infra*), and their concession that there was no merger between TTS and Q4 CLOUD (RA 12:12-14, 24-25).

thereby divest the trial court of its discretionary power.'" *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566. "'[T]he showing on appeal is wholly insufficient if it presents a state of facts ...which...merely affords an opportunity for a difference in opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" *Marriage of Varner* (1997) 55 Cal.App.4th 128, 138 (citation omitted).

B. The Trial Court properly upheld the forum selection clause.

1. Respondents timely filed their motion.

Appellants' first argue that Respondents waived their right to move for stay or dismissal on grounds of inconvenient forum because Respondents' motion was untimely under CCP § 418.10. That statute requires that such a motion be brought within the time that a defendant has in which to file a responsive pleading, including a demurrer, and that failure to so move within the time to file a demurrer waives the right to so move. CCP § 418.10(a),(e)(3). Appellants are mistaken for several reasons: First, Appellants failed to assert this argument until February 11, 2015, *after* the February 5, 2015 hearing on Appellants' motion to reconsider, even after Appellants' counsel approved the order denying their motion to reconsider as to form, let alone Q4 CLOUD's motion (2 AA 179-180, 182-183). As a

result, Appellants waived the objection and are estopped from raising this issue on appeal. See *Doers. v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn.1 ("In effect, appellants invited the trial court to rule on the basis that no such amendment existed."); *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410 & fn. 6 (Petitioner arguably estopped from raising timeliness issue on discovery motion if he had not raised it at the hearing).[4]

Second, Q4 CLOUD filed its motion pursuant to CCP § 410.30(a), which provides that:

> When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just (1 AA 20:24-21:2).

CCP § 410.30(b) states that:

> The provisions of Section 418.10 do not apply to a motion to stay or dismiss the action by a defendant who has made a general appearance.

A demurrer is a general appearance. CCP § 1014. Jurisdiction over the person was not at issue. *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th

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Since Appellants failed to designate a reporter's transcript for this appeal, they have no way of showing whether they orally raised the issue at the hearing on Q4 CLOUD's motion (2 AA 186, Item 2.a). *Ehrler*, *supra*.

1127, 1147. Appellants concede that Q4 CLOUD demurred July 7, 2014(AOB 19:5)(See 1 AA 1, 2 AA 196, 197).

The principles governing enforcement of a forum selection clause are different from those applicable to motions based on forum non conveniens. *Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal.App.4th 147, 153. The factors involved in traditional forum non conveniens analysis do not control where forum selection clauses are at issue. *Trident Labs*, 200 Cal.App.4th at 154. *Trident Labs* distinguished the case before it, involving a forum selection clause, from *Britton v. Dallas Airmotive, Inc*. (2007) 153 Cal.App.4th 127, involving traditional forum non conveniens, cited by Appellants, on that basis. *Trident Labs*, 200 Cal.App.4th at 155-156 (See *Britton*, 153 Cal.App.4th at 130).

Q4 CLOUD's motion was also timely filed based on the parties' stipulation and ensuing court order under CCP § 418.10(a). In *Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, the Court held that the defendant's time to file a motion for *foreign non conveniens* was timely filed when the parties stipulated to an extension of time in which to respond *Olinick*, 138 Cal.App.4th at 1295. Just over a week after Q4 CLOUD demurred, before Appellants' response was due and any hearing held on the demurrer, the parties stipulated, and the Trial Court ordered, the

continuance of the hearing on Q4 CLOUD's demurrer to September 18, 2014, and to change the opposing and responsive pleading dates to correspond to the extended September 18, 2014 hearing date, to accommodate Appellants' counsel's schedule (RA 24:21-25:18).

Instead of responding to the demurrer, Appellants filed a FAC pursuant to CCP § 472, which allows a plaintiff to amend their complaint once as a matter of course after a demurrer is filed but before the matter is heard. Appellants' choice of filing under § 472 pursuant to the terms of the stipulation and order *re-set the dates for Q4 CLOUD to respond*. In that instance the other party's time (in this case Q4 CLOUD) to respond runs is computed from the date of notice of the amendment. CCP § 472. Appellants filed their FAC on or about September 5, 2014, prior to the September 18, 2014 hearing date (AOB at p. 6, fn.4, 1 AA 12, 18, 2 AA 197, RA 25:12-15). Respondents filed their motion less than thirty (30) days after the FAC's September 5, 2014 filing date, on October 2, 2014, within the deadline for filing a responsive pleading, including a demurrer (AOB at p. 6, 1 AA 19, 23, 2 AA 196). CCP §§ 430.40(a), 472. Q4 CLOUD therefore timely filed their motion.[5]

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[5] While the Court in *Trident Labs* reversed the trial court order granting defendants' motion to dismiss, it did so by finding that CCP§

2. **The Trial Court properly upheld the forum selection clause signed by the parties.**

This State's Supreme Court has long honored the modern trend favoring enforcement of forum selection clauses. See *Smith, Valentino*, 17 Cal.3d at 495 (relying on *The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 12, 32 L.Ed.2d 513, 521, 92 S.Ct. 1907):

> No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily parties who have negotiated at arm's length. For the forgoing reasons, we conclude that forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable. *Smith, Valentine*, 17 Cal.3d at 495-496.

"Unreasonable" in this context means that ""the party assailing the clause [must] establish[] that ...the forum selected would be unavailable or unable to accomplish substantial justice." *Cal.-State*, 12 Cal.App.4th at 1679 (citing *Smith, Valentine*, 17 Cal.3d at 494). "Reasonable" also requires that

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410.30 carried a "reasonableness" time limit in which to file the motion and that extensively litigating the matter in California for 19-20 months, filing a cross-complaint, conducting extensive discovery, and filing motions seeking relief from the forum court during that time made enforcement of the forum selection clause unreasonable. *Trident Labs*, 200 Cal.App.4th at 157.

As shown *supra*, Q4 CLOUD filed their motion to enforce the forum selection clause far more quickly, without having engaged in the extensive litigation conducted by the defendant in *Trident Labs*.

there be a rational basis to the choice of forum in light of the facts of the transaction. *Cal.-State*, *supra*. "[N]either inconvenience nor additional expense in litigating in the selected forum is part of the test of unreasonability." *Cal.-State*, *supra*.

The record shows that Appellants failed to meet their burden. First, the argument portion of Appellants' brief contains *no* argument whatsoever about whether the Trial Court properly ruled that Appellants failed to meet their burden of showing, in response to Q4 CLOUD's motion, that enforcement of the forum selection clause would be unreasonable. (AOB at pp. 19-24, 1 AA 19, 23, 2 AA 196). Instead, the entirety of their argument on this topic focuses either on arguments made in Appellants' motion for reconsideration or on arguments raised after all papers were due to be filed on reconsideration (AOB at pp. 19-24, 2 AA 118-145, 155-170, 174-178).

As a result, Appellants *waived* whatever arguments they may have had on appeal regarding the Trial Court's order granting Q4 CLOUD's motion. *Doers, supra*. *v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn.1. "Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." *JRS Products, Inc. v. Matsushita Elec. Corp. of Am.* (2004) 115 Cal. App. 4th 168, 178.

Even assuming *arguendo* that this Court reaches the merits regarding the Trial Court's grant of Q4 CLOUD's motion, the record supports affirmance of the Trial Court's order. Appellants' contracts with TTS (who Appellants assert was Q4 CLOUD' predecessor in interest) contained a forum selection clause naming California as the governing law and appropriate forum (1 AA 61, Art. XV, 1 AA 84, Art. XV). Appellants argued that Q4 CLOUD "assumed TTS's role with respect to TTS's contracts with Plaintiffs" (1 AA 43:13-14). However, as the Trial Court pointed out, Appellants did not prove that fact (2 AA 105:4-6). Appellants conceded that there was no merger between TTS and Q4 CLOUD (2 AA 104:6-7, RA 12:14-16). Appellants also provided "*no* authority holding that, in the absence of an actual merger, such circumstances would be sufficient to make Q4 CLOUD responsible for TTS's contracts, much less invalidate the forum selection clause in separate contracts that Defendants had directly with Plaintiffs SURIYA SYSTEMS INC. and KAIZEN TECH SERVICE LLC (2 AA 104:17-21)(emphasis added)." Nothing in Appellants' contracts with Q4 CLOUD even intimated as much, let alone provided that California was the governing law and appropriate forum for any disputes between Appellants and Q4 CLOUD (1 AA 36, ¶ 13.1, 1 AA 69, ¶ 13.1).

Nor did Appellants make any argument in opposing Q4 CLOUD's motion showing that the contracts were anything but arms' length agreements between two companies (1 AA 41:2-43:22, 47-87). Even if, assuming *arguendo* that "the forum selection clause may have been a 'take it or leave it' proposition, and not vigorously 'bargained for'..does not make the clause unenforceable." *Net2Phone v. Superior Court* (2003) 109 Cal.App.4th 583, 588-589 (citing *Carnival Cruise Lines, Inc. v. Shute*, (1991), 499 U.S. 485, 593, 601, 111 S.Ct. 1522, 1527, 1531, 113 L.Ed.2d 622).

Moreover, Q4 CLOUD Director of Human Resources Falguni Bhatt's declaration shows that while she was temporarily in California as of October 2014 for work, she was based in New Jersey and had worked in New Jersey since 2009 (1 AA 24:23-24). As of March 2013, when Appellants and Q4 CLOUD negotiated the contracts at issue, all Q4 CLOUD contracts were issued out of that company's New Jersey office where Bhatt was located, and specified New Jersey as the governing law and forum (1 AA 25:3-10). Plaintiffs' own opposing papers show Q4 CLOUD doing business in seven (7) different locations internationally and domestically, one of which is New Jersey (1 AA 49). PROTEAM and GRACE, two (2) non-appealing parties below, are Delaware and Texas

entities, respectively, while Appellants are based in California, making for three additional possible forums, not counting the multiple locations where Q4 CLOUD does business (1 AA 11:11-14). Having one location serve as the basis for governing law and choice of forum provides uniformity, a rational basis for making New Jersey the governing law and forum. *CQL Original Products, Inc. v. National Hockey League Players' Ass'n* (1995) 39 Cal.App.4th 1347, 1355. The Trial Court properly granted Q4's motion.

C. The Trial Court properly denied Appellants' motion for reconsideration.

Appellants next sought reconsideration of the Trial Court's order granting Q4 CLOUD's motion pursuant to CCP § 1008 (2 AA 118-119). In so moving Appellants argued that they discovered that New Jersey law prevented them from obtaining relief in that forum, thereby making enforcement of the forum selection clause unreasonable (2 AA 119:1-6). CCP § 1008 states in pertinent part that:

> (a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter an modify,

amend, or revoke the prior order. The party making the application shall stat
e by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.

> ....(e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.

The Trial Court acted well within its discretion in denying Appellants'

motion for reconsideration

1. Appellants could have, but failed, to raise these arguments in opposition to Respondents' Motion to stay or dismiss.

In denying Appellants' motion to reconsider, the Trial Court found

that:

> Three court days before the hearing and after the time when a reply was due, Plaintiff filed the Declaration of Kishore Akkina which lacks a proper jurat and attaches a document dated September 10, 2013. No excuse is given for this tardy presentation. The document existed when Plaintiffs opposed Defendants' motion, and in any event as a matter of due process should have been presented with the moving papers. In any event, even if the Declaration were considered, Plaintiffs have not established "new law" or an adequate justification for not presenting information in connection with Defendants' motion (2 AA 183:5-11).

Appellants complain that the Trial Court overlooked that they brought their motion for reconsideration by invoking "different," not "new" law (AOB at pp. 17-18). Appellants, however, still had to show reasonable diligence for not bringing this "different law" to the Trial Court's attention sooner. They failed to do so.

CCP § 1008 was amended in 1992 to allow reconsideration of "new or different... circumstances or law." *Baldwin v. Home Savs. of America* (1997) 59 Cal.App.4th 1192, 1198. However, the intent was to:

> reduce the number of motions to reconsider and renewals of previous motions heard by judges in this state.' " (Citation omitted) Analyzing the legislative history, we were unwilling to conclude that the 1992 amendment-specifically, introduction of the phrase "new or different"-"dispensed with the court-declared need to show a satisfactory explanation for failing to provide the evidence earlier, which can only be described as a strict requirement of diligence." (Citation omitted) Abandoning the diligence requirement, we said, would be a "miserable result" that would "defeat the Legislature's stated goal of reducing the number of reconsideration motions and would remove all incentive for parties to efficiently marshall their evidence." (Citation omitted, italics omitted.)
>
> So too would that view of the statute remove all incentive for parties to expeditiously marshall the law in support of their case. If counsel need not explain the failure to earlier produce pertinent legal authority that was available, the ability of a party to obtain reconsideration would expand in inverse relationship to the competence of counsel. Without a diligence requirement the number of times a court could be required to reconsider its prior orders would be limited only

> by the ability of counsel to belatedly conjure a legal theory different from those previously rejected, which is not much of a limitation. *Baldwin*, 59 Cal.App.4th at 1199.

The burden under § 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence; the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." *New York Times Co. v. Sup. Ct.* (2005) 135 Cal.App.4th 206, 212-213.

Nowhere in the argument portion of Appellants' Opening Brief do Appellants provide any explanation for why they did not bring this New Jersey law to the Trial Court's attention in opposing Q4 CLOUD's motion to dismiss (AOB, pp.18-24). Nor do Appellants say why they waited until three days before the hearing on Appellants' motion for reconsideration, *after* reply papers were due, to submit the September 10, 2013 document to the Trial Court's attention (AOB, pp.18-24). Appellants' failure to provide any argument in their brief on these points is itself fatal to Appellants' chances on appeal. *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116 (Review is limited to issues which have been adequately raised and briefed.).

The lack of justification for not bringing New Jersey law to the Trial Court's attention when the time came to oppose Q4 CLOUD's motion is not

surprising: There was no valid justification. Appellants argued below that their counsel was unaware of any New Jersey law that they argue would bar Appellants from pursuing their claims in New Jersey (2 AA 123:6-15). However, ignorance of the law is *not* a proper basis for reconsideration. *Pazaderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670.

Additionally, the record belies Appellants' counsel's claims of lack of knowledge. Two of the plaintiffs in this case at the trial court level, PROTEAM L.L.C. and GRACE INFORMATION TECHNOLOGY, INC. (hereafter respectively referred to as "PROTEAM" and "GRACE"), are also represented by Appellants' counsel (1 AA 38:1-6, 2 AA 116:17-26). Both these parties knew of the New Jersey requirements Appellants refer to even before they filed this action in California. PROTEAM filed an action in New Jersey, though it did not have a contract specifying New Jersey law. Q4 CLOUD Director of Human Resources Falguni Bhatt's declaration in support of Q4 CLOUD's motion shows contracts with New Jersey forum selection clauses only with Appellants, not PROTEAM (1 AA 24:21-37, 2 AA 151:21-52:3, 154). The suit was dismissed *without prejudice* in November 2013 and rather than continue to pursue the matter in New Jersey, PROTEAM filed as part of this action in California in May 2014 (1

AA 12, 2 AA 154, 197-198).

Counsel for GRACE President, Director, and Registered Agent for Service of Process Gugssa Fulassa also contacted Q4 CLOUD's New Jersey counsel Gary Roth in summer-fall 2013 about this matter. GRACE did not file in New Jersey, instead filing with Appellants and PROTEAM below in May 2014 (2 AA 151:21-52:3, 197-198, RA 19-21). GRACE's, and PROTEAM's knowledge of the New Jersey statute would certainly be imputed to Appellants' counsel, since he represents all plaintiffs below (1 AA 38:1-6, 2 AA 116:17-26). Nowhere in Appellants' counsel's declaration in support of reconsideration does it state that he was unaware of the contracts or that they specified New Jersey law (2 AA 127:18-130).

A motion for reconsideration is properly denied when it is based on information that could have been presented in connection with the original motion. *Hennigan v. White* (2011) 199 Cal.App.4th 395, 405-406. Appellants signed the contracts with Q4 CLOUD in February/March 2013, *over a year before the instant suit was filed* (1 AA 27, 31, 32, 36, 2 AA 197-198). The September 10, 2013 document was filed many months before Appellants filed suit, let alone the later, October 17, 2014 date they opposed Q4 CLOUD's motion (1 AA 22:22, 45, 2 AA 169, 197-198). It would be logical to infer that during that time Appellants would have

looked at the issue of what court to sue in, since the contracts gave them notice that Q4 CLOUD would try to move the case to New Jersey. Appellants had plenty of time and opportunity to consider this issue by the time Q4 CLOUD filed its motion and provided no legitimate reason for failing to address this issue when Q4 CLOUD filed its motion.

2. There was far less to Appellants' claim of Q4 CLOUD's misrepresentation of the law than meets the eye.

Appellants repeatedly accuse Q4's trial counsel of misrepresenting the law to the Trial Court. A look at the asserted source of this "misrepresentation" shows that this accusation is illusory at best. Appellants refer to 1 AA 88:25 as containing a representation by Q4's trial counsel that New Jersey provided a "suitable" forum for this case. There Q4 CLOUD was referring to *Net2Phone, Inc. v. Superior Court* (2001) 109 Cal.App.4th 583, which Q4 CLOUD had cited for the proposition that "[t]he party seeking to avoid application of a mandatory forum selection clause bears a burden to prove unreasonableness (1 AA 88:22-27)[citing *Net2Phone*, 109 Cal.App.4th at 588)]." Q4 CLOUD was describing the holding in *Net2Phone*, *not* necessarily stating that New Jersey was a suitable forum. Descriptions of that passage as a "misrepresentation of the law" and a violation of ABA ethical rules are desperate stretches of the

imagination at best and do not merit further response.

3. Assuming *arguendo* that Appellants can even raise their argument regarding judicial estoppel, the concept does not apply in this case.

As shown above, Appellants failed to raise the issue of whether Appellants' case would be barred in New Jersey until their motion to reconsideration, without any explanation, let alone valid explanation, for their delay in doing so when the information was available to them as of the time they were to oppose Q4 CLOUD's motion. Appellants did not try to bring the September 10, 2013 document to the Trial Court's attention, as an exhibit to the late-submitted declaration of Kishore Akkina until *after* their reply memo in support of their motion for reconsideration was due (2 AA 171:21-24, 183:5-9). Appellants did not even broach the subject of promissory estoppel until *later*, when they responded to Q4 CLOUD's objections to the Akkina declaration and its exhibit (2 AA 175:13-16). The Trial Court was well within its discretion to decline to address those arguments in denying Appellants' motion for reconsideration and this Court therefore need not address those issues in this appeal.

Assuming *arguendo*, however, that this Court decides to consider the issue of judicial estoppel in this appeal, the concept does not apply in this instance.

Judicial estoppel arises where:

1. The same party has taken two positions;

2. The positions were taken in judicial or quasi-judicial administrative proceedings;

3. The party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true);

4. The two positions are totally inconsistent; and

5. The first position was not taken as a result of ignorance, fraud, or mistake.

Jackson v. County of Los Angeles (1998) 60 Cal.App.4th 171, 181.

Appellants cite the "misrepresentation" above as one of the two inconsistent positions (AOB at 23:1-5). However, as shown above, there is far less, if anything, to the asserted misrepresentation than meets the eye. On this basis alone there are no inconsistent positions and as a result, judicial estoppel cannot apply. See *RSL Funding, LLC v. Alford* (2015) 239 Cal.App.4th 741, p. 9 of slip op'n (no judicial estoppel because positions not entirely inconsistent).

Even, simply for the sake of argument, that one could find that Q4 CLOUD was asserting inconsistent positions regarding New Jersey as an available forum for Appellants, Appellants still cannot show that judicial

estoppel applies. Nothing in the record shows that the Trial Court here adopted that position or accepted it as true, just that Appellants, as the parties opposing the motion, failed to meet their burden (2 AA 101-105). The Trial Court would not address the issue on reconsideration for failure to explain why the question was not raised sooner (2 AA 183:5-11).

Nor have Appellants shown that the New Jersey courts adopted Q4 CLOUD's position in that forum regarding the applicability of New Jersey's Private Employment Agency Act (N.J.S.A. § 34:8-45b) to Appellants. First, as shown above, PROTEAM did not have a written contract with Appellants, let alone a forum selection clause (1 AA 24:21-37, 2 AA 151:21-52:3, 154). Second, the 2013 order dismissing PROTEAM's New Jersey action did *not* specify the reasons the New Jersey trial court gave for dismissal, so it is not possible to determine whether or not the New Jersey adopted or accepted Q4 CLOUD's arguments on that point (2 AA 154). Third, the New Jersey order was for dismissal *without* prejudice (2 AA 154). The dismissal without prejudice leaves open some basis or possibility that PROTEAM and/or Appellants could assert their claim against Q4 CLOUD in New Jersey at some point. By contrast, Q4 CLOUD sought dismissal *with* prejudice (2 AA 169). Nothing in the record shows that a New Jersey court applying New Jersey law definitively and

forever prevents Appellants from pursuing the remedy they would seek in New Jersey.

CONCLUSION

The record supports the Trial Court's order granting Q4 CLOUD's motion enforcing the forum selection clause and denying Appellants' motion for reconsideration. Appellants failed to meet their burden regarding the former. With respect to their motion for reconsideration, Appellants failed to adequately explain why they did not raise the New Jersey law issue when they opposed Q4 CLOUD's motion, when they had that information well before that time. Nor is there any basis on which Appellants can assert judicial estoppel. They failed to timely raise the issue below, and assuming *arguendo* that this Court even addresses that issue, the record shows that it has no bearing in this case. For all of these reasons the Trial Court's orders enforcing the forum selection clause and denying Appellants' motion for reconsideration must be affirmed.

Dated: October 30, 2015 Respectfully submitted,

LAW OFFICES OF
DAVID S. PEARSON

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By______________________
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CERTIFICATE OF WORD COUNT

The text of this brief contains 6,755 words as counted by the Corel WordPerfect version X6 word-processing software program used to generate this brief. CRC 8.204(c)(1).

Dated: October 30, 2015

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John T. Schreiber

Re: Suriya Systems, Inc. v. Quadrant 4 System Corp.
Sixth District Court of Appeal, Case No. H042023
Santa Clara County Superior Court Case No. 114CV265265

PROOF OF SERVICE

I, John T. Schreiber, declare:

I declare that I am a citizen of the United States and employed in Contra Costa County, State of California, over the age of eighteen years, and not a party to the within action. My business address is 1255 Treat Blvd., Suite 300, Walnut Creek, California 94597. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. On October 30, 2015, I served the within:

RESPONDENT'S BRIEF

on the parties in this action by placing a true copy thereof in a sealed envelope, and each envelope addressed as follows:

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California Supreme Court
Service on under CRC 8.212(c)(2)
pursuant to electronic submission

[xx] (By Mail) I caused each such envelope to be served by depositing same, with postage thereon fully prepaid, to be placed in the United States Postal Service in the ordinary course of business at Walnut Creek, California. Said envelope was placed for collection and mailing on that date following ordinary business practices.

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Executed at San Ramon, California on October 30, 2015. I declare under penalty of perjury that the foregoing is true and correct.

John T. Schreiber