
(Alameda County Superior Court Case No. HG12615549

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
Division 5**

**RWW PROPERTIES, LLC,
Petitioner,**

vs.

**SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
COUNTY OF ALAMEDA,
Respondent,**

**MEGAN E. ZAVIEH,
Real Party in Interest**

**PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION
AND OTHER EXTRAORDINARY RELIEF**

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COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION 5	COURT OF APPEAL CASE NUMBER:
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 131947 NAME: JOHN T. SCHREIBER FIRM NAME: LAW OFFICES OF JOHN T. SCHREIBER STREET ADDRESS: 1255 Treat Blvd., Suite 300 CITY: Walnut Creek STATE: CA ZIP CODE: 94597 TELEPHONE NO.: (925) 472-6620 FAX NO.: (707) 361-5629 E-MAIL ADDRESS: jschreiber@schreiberappeals.com ATTORNEY FOR (name): RWW PROPERTIES, LLC	SUPERIOR COURT CASE NUMBER: RG12615549
APPELLANT/ PETITIONER: RWW PROPERTIES, LLC RESPONDENT/ REAL PARTY IN INTEREST: ALAMEDA CTY SUP. CT., MEGAN ZAVIEH RPII	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	
(Check one): <input checked="" type="checkbox"/> INITIAL CERTIFICATE <input type="checkbox"/> 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): RWW PROPERTIES, LLC
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)	
(2)	
(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: March 20, 2017

John T. Schreiber
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

Petitioner RWW PROPERTIES, LLC (hereafter “RWW”) has no adequate remedy at law to contest Respondent ALAMEDA COUNTY SUPERIOR COURT’s (hereafter “TRIAL COURT”) February 21, 2017 order denying RWW’s motion for attorney’s fees brought pursuant to California Code of Civil Procedure § 405.38.¹ CCP § 405.39 provides that “No order or other action of the court under this chapter shall be appealable. Any party aggrieved by an order made on a motion under this chapter may petition the proper reviewing court to review the order by writ of mandate.” CCP § 405.39. The Legislature enacted CCP §§ 405.38 and 405.39 as part of the same chapter, regarding notice of pending actions.

Following entry of judgment after trial in RWW’s favor to quiet title, RWW successfully moved to expunge the lis pendens on Real Party in Interest MEGAN E. ZAVIEH’s property under CCP § 405.38 (hereafter “ZAVIEH”) that ZAVIEH had recorded at the outset of the litigation. ZAVIEH unsuccessfully challenged expungement of the lis pendens in this Court in First District Court of Appeal, Div. 5 Case No. A146809, and

¹

All further references to California’s Code of Civil Procedure shall be to “CCP.”

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unsuccessfully challenged the judgment in RWW's favor against her on appeal in Case No. A145977.

California Rule of Court 8.493(b), addressing cost recovery in writ proceedings, provides that Rule 8.278(b)-(d) governs the procedure for recovering costs "under this rule." Rule 8.278(b)(2) requires that the appellate court clerk enter a judgment for costs in the remittitur transferring the matter back to the trial court. Rule 8.278(c)(1) provides for the prevailing party set forth in the remittitur to file a verified memorandum of costs no later than 40 days following issuance of the remittitur pursuant to Rule 3.1700. Rule 8.278(d)(2) provides that an award of costs neither includes nor precludes a party from seeking fees under Rule 3.1702. Rule 3.1702(c)(1) sets the same deadline for filing a motion for attorney's fees as the time for filing and serving a memorandum of costs under Rule 8.278(c)(1): 40 days after the issuance of the remittitur, unless extended.

However, this Court summarily denied ZAVIEH's writ petition in Case No. A146809 and therefore did *not* issue a remittitur under Rule 8.490(b)(1)(A). RWW filed its motion for attorney's fees within 40 days of issuance of the remittitur following affirmance in RWW's favor in Case No. A145977.

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The question becomes: what is the triggering event for filing a motion for fees under CCP § 405.38 for a post-judgment motion to expunge lis pendens when the subsequent writ petition contesting expungement of lis pendens is summarily denied while the underlying appeal of the judgment is pending? The parties here and others similarly situated would benefit from this Court's guidance on that matter or from guidance from a Judicial Council rule on the topic suggested by this Court. See, e.g., *Hughey v. City of Hayward* (1994) 24 Cal.App.4th 206, 209-210 (This Court suggests that Judicial Council adopt a rule clarifying when date of entry of appealable order occurs in the face of an inconsistency between former Rules 2(b) and 391).

The Trial Court held here that the triggering event was the immediate finality of the order denying the writ petition under Rule 8.490(b)(1)(A). However, *nothing* in the plain language of Rule 8.493 nor in Rule 8.278(b)-(d) sets the time limit for seeking fees and costs based on the immediate finality of a summary denial. Nor, considering that under CCP § 405.38 an award for attorneys fees based on a successful motion to expunge lis pendens is mandatory unless the court finds substantial justification for recording the lis pendens, would denial of fees in the

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absence of issuance of a remittitur be consistent with the 1992 amendment to the statutory scheme governing expunging lis pendens.

At the time this Court summarily denied ZAVIEH's writ petition in Case No. A146809, ZAVIEH's appeal from the judgment, in Case No. A145977 was still pending. Under *Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003, a real party contesting a writ petition brought pursuant to CCP § 405.39 after entry of judgment considers the merits of the pending appeal in determining whether the order expunging lis pendens should be upheld. *Amalgamated Bank*, 149 Cal.App.4th at 1016-1017. After this Court upheld the judgment in *RWW*'s favor in the appeal in Case No. A145977, this Court issued a remittitur awarding costs to *RWW*. *RWW* filed its fees motion within 40 days after issuance of the remittitur in Case No. A145977.

Two appellate cases that examine the history of Rule 3.1702 and its predecessor, Rule 870.2, may provide guidance. *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454 and *Crespin v. Shewry* (2004) 125 Cal.App.4th 259, based on their respective analyses of the history of Rule 3.1702, both would conclude that *RWW*'s post-judgment expungement fee motion was timely filed. Both *Carpenter* and *Crespin* were concerned with

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avoiding piecemeal and premature fee litigation. *Carpenter* involved prejudgment motions and whether such motions were timely filed within 40 days after issuance of the remittur of a related appeal. *Carpenter*'s examination the history of former Rule 870.2, the precursor to Rule 3.1702, showed that filing a motion for anti-SLAPP fees brought within 40 days of issuance of remittitur following the opposing party's unsuccessful appeal of its special motion to strike under SLAPP revealed that the fees motion was timely filed. *Carpenter*, 151 Cal.App.4th at 459-460. The Judicial Council adopted the 40 days from issuance of remittitur language to provide for an outer time limit for filing such motions. *Carpenter*, 151 Cal.App.4th at 467-468.

The Court in *Carpenter* construed Rule 3.1702(b)(1), which addressed fees for services rendered before trial and up through rendition of judgment, to mean that the prevailing party could seek fees for all services rendered up to rendition of judgment, including for any prejudgment appellate matters, in one motion filed within 40 days of issuance of remittitur. *Carpenter*, 151 Cal.App.4th at 465-466. While RWW sought fees based on its *post-judgment* expungement motion, construing Rule 3.1702(c)(1), covering fees on appeal, except for those included in

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3.1702(b)(1), in a manner consistent with the *Carpenter* Court's construction of Rule 3.1702(b)(1), would yield a similar result, as by the time RWW filed its expungement motion, ZAVIEH had already filed her appeal in First District Case No. A145977. Just as the interest in avoiding piecemeal and premature fee litigation merited construing Rule 3.1702(b)(1) to allow a party to file a single motion for fees to include all services rendered up to rendition of judgment, including any services for prejudgment appellate matters, within 40 days of issuance of remittitur following a related appeal, construing Rule 3.1702(c)(1) to include any fees covering trial court or other appellate matters while the case was in the appellate court as a part of fees for services rendered while the matter was on appeal, so as to allow that prevailing party to seek those fees within 40 days after issuance of remittitur following the appeal, as an outer time limit, meets the same goal.

In *Crespin*, review of the history of Rule 3.1702 (former Rule 870.2) revealed that a post-judgment motion for CCP § 1021.5 fees to defend issuance of a preliminary injunction was timely filed even though it was filed 2.5 years following issuance of remittitur. *Crespin*, 125 Cal.App.4th at 262-263. Examination of Rule 3.1702's history persuaded Division One

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of this Court that Rule 3.1702 was not intended to govern the time in which to file for fees for post-judgment proceedings. *Crespin*, 125 Cal.App.4th at 265. Instead, under *Crespin* laches are the only time limitation in seeking fees for post-judgment proceedings. *Crespin*, 125 Cal.App.4th at 271. RWW's October 30, 2015 expungement motion was brought after entry of judgment.

Either way, RWW's fees motion was timely. RWW's Petition for Writ of Mandate must therefore be granted, with this Court issuing a writ directing the Trial Court to vacate its February 21, 2017 order denying RWW's fee motion and issuing a new order to consider the amount of the fee award.

**PETITION TO: THE HONORABLE JUSTICES OF THE COURT OF
APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE
DISTRICT**

Petitioner RWW PROPERTIES, LLC respectfully petitions this Court for a Writ of Mandamus, Prohibition, or other extraordinary relief and in support thereof alleges:

A. Factual background

- 1. ZAVIEH purchased the property from Murray, her father.**

In 2000 ZAVIEH purchased real property in Fremont, California,

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from her father, James Murray (Vol. 1 of Exhibits in Support of Writ Petition at p. 50).²

2. ZAVIEH refinanced with a loan from WaMu.

Seven years later ZAVIEH refinanced her home loan with Washington Mutual (“WaMu”) (1 EXH. 50).

3. ZAVIEH sought a loan modification from WaMu, which was then taken over by CHASE.

Two years later ZAVIEH sought a loan modification from WaMu. Shortly afterwards, JP CHASE BANK, NA (hereafter “CHASE”) notified ZAVIEH that it had acquired the loan servicing rights to her WaMu loan (1 EXH 50).

4. During a trial plan period, ZAVIEH made several loan payments but CHASE denied her application for a permanent loan modification.

CHASE put ZAVIEH into a trial plan. During that trial plan ZAVIEH made several payments, each less than her regular loan payments. Later in 2010 CHASE denied ZAVIEH’s application for a permanent loan modification; her income documents and the results of the Net Present

²

All further references to the Exhibits in Support of this Petition shall be to the Volume number and page number of that Exhibit.

Value (“NPV”) calculations to determine the cash flow for a possible loan modification meant that the owner of the loan did not approve modification (1 EXH. 78-79).

5. ZAVIEH appointed Murray as her agent to deal with this situation.

“Plaintiff became frustrated with Chase and appointed her father Mr. Murray as her agent for purposes of dealing with Chase concerning issues related to the loan modification and non-judicial foreclosure process (1 EXH. 155).”

6. ZAVIEH’s property entered foreclosure, as CHASE and CAL RECON filed a notice of default, then later a notice of sale.

In June 2011 ZAVIEH’s property entered foreclosure, as CHASE and CAL RECONVEYANCE CO. (hereafter “CAL RECON”), the trustee on the deed of trust securing the loan, filed a notice of default. A notice of sale was recorded November 28, 2011 and posted November 29, 2011 (2 EXH. 330:5-7, fn.4).³

7. At the Trustee’s sale RWW bought the property and

³

All evidentiary conflicts, whether by oral testimony or written declarations, are resolved in favor of the party who prevailed at trial. *Le v. Pham* (2010) 180 Cal.App.4th 1201, 1205-1206.

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received a Trustee's deed.

At the December 20, 2011 trustee's sale, RWW bought the property and received a trustee's deed. Murray was at the trustee's sale on ZAVIEH's behalf and announced that there were irregularities and an untimely notice of sale (2 EXH. 330, 3d ¶).

8. RWW won an unlawful detainer case under Civil § 1161a against Murray, which later became final.

Two years later, RWW won an unlawful detainer action against Murray, who was staying at the property on behalf of ZAVIEH, pursuant to Civil § 1161a, which held that RWW was a bona fide purchaser for value and without notice, based on the December 20, 2011 trustee's sale (2 EXH. 331, 2d and 3d full ¶¶). Murray appealed the ruling but the appeal was dismissed and the matter is now final. RWW took possession of the property in January 2014 (1 EXH 157).

B. Procedural Background.

9. ZAVIEH filed suit for, *inter alia*, wrongful foreclosure against CHASE and CAL RECON, and for quiet title against RWW.

ZAVIEH filed her original complaint in this action on February 2, 2012. Her operative pleading as of trial was her Fourth Amended

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Complaint (“FAC”) which, for purposes of her lis pendens, alleged a wrongful foreclosure claim against CHASE and CAL RECON and a quiet title claim against RWW (1 EXH 1, 11, 13-20, 32:22-33:16). ZAVIEH filed and recorded a lis pendens in February 2012, days after filing her original complaint (1 EXH. 7-10).

10. RWW filed an initial motion to expunge lis pendens a year before trial.

In May 2014 RWW filed an initial motion to expunge lis pendens (1 EXH 54, 2d ¶).

11. After the Trial Court granted RWW’s motion to expunge, this Court issued a writ in A142768 on the grounds that ZAVIEH had alleged a real property claim for wrongful foreclosure under CCP § 405.31 and that ZAVIEH’s contract claim, as yet untried, meant that the unlawful detainer action did not yet eliminate the quiet title claim against RWW.

The Trial Court granted RWW’s motion to expunge July 25,, 2014 (1 EXH. 54). ZAVIEH then filed a petition for writ of mandate in this Court pursuant to CCP § 405.39 the following month, Case No. A142768 (1 EXH. 49, 55). On April 2, 2015, in Case No. A142768 this Court issued a writ directing the Trial Court to vacate its July 25, 2015 order and enter a new order denying RWW’s motion to expunge (1 EXH. 64). This Court

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determined that ZAVIEH had alleged a real property claim for wrongful foreclosure under CCP § 405.31 and that ZAVIEH's contract issues, as yet untried at that time, meant that RWW's prior unlawful detainer judgment did not completely resolve ZAVIEH's quiet title claim, assuming that privity could be shown against ZAVIEH (1 EXH. 60-63).

This Court cautioned that its rulings were limited to the narrow lis pendens context, that they did not mean to say how the case should be determined on its merits, and limited its rulings to "as matters now stand (1 EXH 64)."

12. After trial began, the Trial Court expressed concerns about the viability of ZAVIEH's non-contract claims and sought briefing and argument on that topic.

On April 3, 2015, trial proceedings began (1 EXH 66). That day the Trial Court examined the FAC and expressed concerns that the non-contract claims were subject to nonsuit, meaning that it questioned the viability of those claims, and sought briefing and argument on that topic (1 EXH. 67:3-68:17, 69:3-70:20, 71:2-72:11, 72:15-20, 72:23). Nothing in the record as provided by ZAVIEH showed ZAVIEH addressing those concerns.

13. After trial the Trial Court found against ZAVIEH on her contract claim, then dismissed the remainder of her claims, based on collateral estoppel following the earlier

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unlawful detainer judgment in RWW’s favor, and entered judgment.

The Trial Court heard trial on April 21, 22, 2015, found against ZAVIEH on her breach of contract claim, then dismissed the remainder of her claims, based on collateral estoppel following the earlier unlawful detainer judgment in RWW’s favor, then entered judgment June 12, 2015 (1 EXH. 76-80, 73-75).

14. ZAVIEH dismissed CHASE and CAL RECON from the action with prejudice.

On August 27, 2015, ZAVIEH dismissed CHASE and CAL RECON with prejudice from her suit (1 EXH. 82-85). This left only RWW as a defendant in the action and ZAVIEH (1 EXH. 13:1-3).

15. ZAVIEH appealed against RWW in First District Case No. A145977.

ZAVIEH filed a notice of appeal from the judgment, “not on the merits on the contract claim but because the Superior Court failed to allow Plaintiff to try the majority of her case and yet dismissed the entire action (1 EXH. 159:1-4).” This was First District Case No. A145977 (1 EXH. 87).

16. RWW moved to expunge lis pendens.

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On October 7, 2015, RWW filed a 2d motion to expunge lis pendens (1 EXH. 92-125). ZAVIEH opposed the motion (1 EXH. 126-134).

17. The Trial Court granted RWW's motion to expunge lis pendens.

The Trial Court granted RWW's motion to expunge, based on the judgment showing that ZAVIEH could not show the probable validity of any real property claims against RWW (1 EXH. 141, 143:3-9).

18. RWW recorded the order expunging lis pendens before the time expired for ZAVIEH to file a writ petition contesting the order.

RWW recorded the order expunging lis pendens that day, October 30, 2015 (1 EXH. 185-189). The deadline for filing a writ petition contesting the expungement did not run until November 19, 2015. CCP § 405.39. Therefore the recording was premature under CCP § 405.35.

19. ZAVIEH filed her writ petition, then an emergency application for a bond, sanctions, osc or other relief based on the premature recording of the order expunging lis pendens and sale of the property in First District Case No. A146809.

On November 19, ZAVIEH filed her writ petition in First District Case No. A146809 (1 EXH. 152-170). On December 16, 2015 she filed an Emergency Application in A146809 for a bond, sanctions, osc, or other

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relief against RWW and its counsel at the time, for prematurely recording the October 30, 2015 order of expungement and then selling the property to a third party (1 EXH. 177).

20. After additional briefing on ZAVIEH’s emergency application, this Court recognized that CCP § 405.35 rendered any prematurely recorded orders expunging lis pendens ineffective pending the outcome of writ proceedings, and ordered RWW to record a copy of this Court’s order.

This Court sought additional briefing from the parties in response to ZAVIEH’s emergency application, “concerned by the issues raised by” ZAVIEH’s application and searching for means of addressing whether and how the October 30, 2015 recording of the order affected the statutory stay set forth in CCP § 405.35 whether this Court’s appellate jurisdiction was affected (1 EXH. 215).

After receiving further briefing from both parties, this Court issued an order December 23, 2015 recognizing that while the October 30, 2015 order expunging lis pendens was filed prematurely, because the time in which to file a writ petition had not yet expired under CCP § 405.39, CCP § 405.35 also provided that orders expunging lis pendens before the time expired in which to file a writ petition under § 405.39, were *ineffective* until

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such writ proceedings had concluded, and directing RWW to record a copy of this Court's December 23, 2015 order the next day (1 EXH. 206-212, 216-217). This Court also deferred further action on ZAVIEH's emergency application (RJN Exh. E). On January 8, 2016, this Court sought further guidance (Exh. E).

21. RWW complied with this order.

The next day RWW complied with this Court's 12/23/15 order (1 EXH. 217).

22. RWW changed counsel.

On December 29, 2015, RWW substituted present counsel in for former counsel (1 EXH. 217).

23. RWW filed opposition in ZAVIEH's writ petition, Case No. A146809.

On January 27, 2016 RWW filed its opposition in Case No. A146809 (1 EXH. 221-280).

24. RWW filed their Respondent's Brief in ZAVIEH's appeal, Case No. A145977.

The following week, RWW filed its Respondent's Brief in Case No. A145977 (2 EXH. 281-323).

25. This Court summarily denied ZAVIEH's writ petition in

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Case No. A146809 and no remittitur is issued.

On March 15, 2016, this Court summarily denied ZAVIEH's writ petition in Case No. A146809, nor did this Court grant ZAVIEH any of the emergency relief she sought (2 EXH. 324-325). As per this Court's order, RWW served a copy of the order on its former counsel Bornstein (2 EXH. 326-327). No remittitur was issued (1 EXH. 219).

26. This Court affirms the judgment in RWW's favor in Case No. A145977 and issues a remittitur.

On August 3, 2016, this Court affirmed the judgment in RWW's favor (2 EXH. 328-339). The remittitur issued October 4, 2016 (2 EXH. 340).

27. RWW filed for attorneys' fees pursuant to CCP § 405.38 within 40 days of issuance of remittitur.

On November 14, 2016, RWW filed its motion for attorneys' fees pursuant to CCP § 405.38, which awards reasonable attorneys' fees for successful motions on expungement of lis pendens (2 EXH. 343, 345:20-24). RWW's trial counsel Bornstein submitted a declaration detailing his fees for obtaining expungement of the lis pendens, as well as for his work on Case No. A146809 (2 EXH. 358-380). RWW's appellate counsel Schreiber submitted a declaration detailing his fees for his work on Case

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No. A146809 and on preparing this motion (2 EXH. 399-504). RWW's general counsel Kate Ryan submitted a declaration detailing her fees for active work on the expungement and A146809 (2 EXH. 381-398).

ZAVIEH filed an opposition based on timeliness, waiver, and the amount of the fees sought (2 EXH. 507-559).

RWW filed reply papers, that addressed, among other issues, timeliness and reasonable of the amount of fees, pointing to ZAVIEH's successful fee motion following A142768 in assessing reasonableness (2 EXH. 560-577, 3 EXH. 578-646).

28. The Trial Court issued a tentative ruling denying RWW's motion based on timeliness, but postpones oral argument on the motion.

Oral argument on RWW's fees motion was originally February 10, 2017. The day before, the Trial Court issued a tentative ruling denying RWW's motion based on timeliness and reset the hearing for February 14, 2017.

29. RWW provides supplemental briefing on timeliness before oral argument.

After reviewing the Trial Court's tentative ruling, and finding additional authorities on the timeliness issue, RWW filed a short, 5-page

supplemental brief citing and attaching two cases, *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454 and *Crespin v. Shewry* (2004) 125 Cal.App.4th 259, which examined timeliness issues of fee motions under Rule of Court 3.1702 and examined the history of that Rule, before oral argument (3 EXH. 647-668).

30. At oral argument on RWW's motion, the Trial Court continues the matter for a week to allow ZAVIEH to file a supplemental response.

At oral argument on RWW's motion the Trial Court stated that it read RWW's supplemental brief and the *Carpenter* case cited therein and invited ZAVIEH to file supplemental briefing to address the points raised in the supplemental memo despite her objections (3 EXH. 675:7-15). The Trial Court gave ZAVIEH a week to file supplemental briefing then stated that the matter would be taken under submission without further oral argument (3 EXH. 677:17-678:4).

31. After receiving ZAVIEH's supplemental response the Trial Court denied RWW's motion.

ZAVIEH filed her supplemental response (3 EXH. 680:-684). On February 21, 2017 the Trial Court denied ZAVIEH's request to strike RWW's supplemental briefing and denied RWW's motion for fees on the

same basis as its tentative ruling, i.e. timeliness (3 EXH. 686-687). The certificate of mailing accompanying the order shows mailing occurred the following day (3 EXH. 689).

32. RWW has no plain, speedy, or adequate remedy in the ordinary course of law, as the Trial Court's denial of RWW's motion is solely reviewable by Petition for Writ of Mandate under CCP § 405.39.

RWW has no plain, speedy, or adequate remedy at law, in that the Trial Court's February 21, 2017 order denying RWW's fees motion under CCP § 405.38 is solely reviewable by Petition for Writ of Mandate under CCP § 405.39.

WHEREFORE PETITIONER prays for relief as follows:

1. That this Court issue a peremptory writ of mandate, prohibition, or other extraordinary relief, either in the first instance or following this Court's issuance of an alternative writ under the seal of this Court ordering RESPONDENT to reverse its February 21, 2017 order denying PETITIONER's November 14, 2016 Motion for Attorney's Fees, and issue a new order setting a hearing on the amount of attorney's fees to award PETITIONER pursuant to CCP § 405.38;
2. To award PETITIONER reasonable fees and costs associated

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with this Writ Petition, whether directly by this Court or by direction to the Trial Court; and

3. That this Court grant such other relief as may be just and proper.

Dated: March 20, 2017

Respectfully submitted,

LAW OFFICES OF JOHN T.
SCHREIBER

By /s/ John T. Schreiber
JOHN T. SCHREIBER, attorney
for Petitioner RWW
PROPERTIES, LLC

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VERIFICATION

I, JOHN T. SCHREIBER, declare:

I am appellate counsel for Petitioner RWW PROPERTIES, LLC in this case. I am an attorney duly licensed to practice before all of the courts of the State of California. I have read the forgoing Petition for Writ of Mandamus, Prohibition, or other appropriate extraordinary relief and know its contents. The facts stated in this Petition are true and within my own personal knowledge. Additionally, because my client is absent from the County in which I have my office, I, rather than Petitioner, verify this Petition.

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct. Executed this 20th day of March, 2017, at Benicia, California.

/s/ John T. Schreiber
JOHN T. SCHREIBER

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
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- A. RWW has no adequate remedy at law since review by writ petition under CCP § 405.39 is her only available appellate remedy.**

The Trial Court's order denying RWW's motion for fees brought under CCP § 405.38 following expungement of *lis pendens* is subject to appellate review solely by petition for writ:

No order or other action of the court under this chapter shall be appealable. Any party aggrieved by an order made on a motion under this chapter may petition the proper reviewing court to review the order by writ of mandate. The petition for writ of mandate shall be filed and served within 20 days of service of written notice of the order by the court or any party. The court which issued the order may, within the initial 20-day period, extend the initial 20-day period for one additional period not to exceed 10 days. A copy of the petition for writ of mandate shall be delivered to the clerk of the court which issued the order with a request that it be placed in the court file. CCP § 405.39.

CCP §§ 405.38 and 405.39 are both part of the same chapter of the CCP.

Shah v. McMahon (2007) 148 Cal.App.4th 526, 529. Accordingly, RWW's only remedy is to seek writ relief by way of CCP § 405.39. *Shah*, 148 Cal.App.4th at 529. Denial of this relief will result in harm or prejudice to RWW that cannot be corrected on appeal. *Omaha Indemn.*, 209 Cal.App.3d

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at 1274 (citation omitted).

A writ must issue in all cases “where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” CCP §§ 1086 (mandate), 1068(a)(certiorari), 1103(a) (prohibition).⁴ A right to an immediate appeal comprises an adequate remedy at law. *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370. Conversely, “[w]hen an extraordinary writ proceeding is the only avenue of appellate review, a reviewing court's discretion is quite restricted. Referring to the writ of mandate, this court has said: ‘ “Its issuance is not necessarily a matter of right, but lies rather in the discretion of the court, but where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy and adequate remedy in the ordinary course of law, he [or she] is entitled as a matter of right to the writ, or perhaps more correctly, in other words, it would be an abuse of discretion to refuse it.” ’ ” *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113-114 (citations omitted).

B. Standard of Review.

4

Justice Gilbert’s Opinion in *Omaha Indem. v. Sup. Court* (1989) 209 Cal.App.3d 1266 provides considerable guidance in pointing out instances in which writ relief is appropriate.

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While a trial court’s determination on the propriety of an attorney’s fee award is usually governed by the abuse of discretion standard, the issue here turns on statutory authority to make such awards and statutory and rule interpretation, which are questions of law subject to de novo review. See *Carpenter*, 151 Cal.App.4th at 460.

Appellate courts independently review lower court statutory interpretation. *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432. Appellate courts “are not bound by evidence on the question presented in the trial court or by the trial court’s interpretation.” Eisenberg, Horvitz, & Wiener, J., *Cal. Prac. Guide: Civil Appeals and Writs* (The Rutter Group 2016), Ch. 8-C, “Standards of Appellate Review,” ¶ 8:111 at 8-77. De novo review likewise governs interpretation of California’s Rules of Court. *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 81. Application of the law to undisputed facts is also subject to de novo review. *Crocker Nat’l Bank v. City and County of San Francisco* (1988) 49 Cal.3d 881, 888.

C. Filing RWW’s fees motion for post-judgment expungement of lis pendens within 40 days after issuance of remittitur of ZAVIEH’s post-trial appeal was timely, consistent with the history of Rule 3.1702.

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RWW filed its motion for attorneys fees as the prevailing party on expungement of ZAVIEH's lis pendens on November 14, 2016, 40 days after issuance of the remittitur in Case No. A145977 (2 EXH. 340, 343). The Trial Court ruled that this was untimely, that the accrual date for seeking fees in this instance was the immediate finality of the order summarily denying ZAVIEH'S writ petition in First District Case No. A146809, since there was no issuance of remittitur for ZAVIEH's writ petition (3 EXH. 686-687). The Trial Court's order on this point erred, as neither the language nor the history of Rule of Court 3.1702 and its predecessor, former Rule 870.2, shows any intent to make immediate finality the accrual date for seeking fees for post-judgment motions for expungement of lis pendens when the related appeal is pending.

[T]he interpretation of a rule of court is governed by the same precepts that apply to statutory interpretation." (*Kahn v. Lasorda's Dugout, Inc.* (2003) 109 Cal.App.4th 1118, 1122.) "Our objective is to determine the drafter's intent using the words of the rule as our starting point. [Citation.] If the language of the rule is clear and unambiguous, it is unnecessary to probe the rule's drafting history in order to ascertain its meaning. [Citation.] If possible, we attribute significance to every word, phrase, sentence and part of a court rule. [Citation.] 'We accord a challenged rule a reasonable and commonsense interpretation consistent with its apparent purpose, practical rather than technical in nature, which upon application will result in wise policy rather than

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mischief or absurdity.' [Citation.]" (*Crespin v. Shewry* (2004) 125 Cal.App.4th 259, 265 (*Crespin*).) *Carpenter*, 151 Cal.App.4th at 462.

Rule of Court 8.493(b), dealing with award of costs for writ petitions, provides that Rule 8.278(b)-(d) governs the procedure for recovering costs on writ proceedings. Rule 8.278(c)(1) points out that a memorandum of costs under Rule 3.1700 is due no later than 40 days from issuance of remittitur. Rule 8.278(d)(2) states that unless the court rules otherwise, an award of costs neither includes attorney's fees nor precludes a party from seeking them under Rule 3.1702. Rule 3.1702(c)(1) provides that the time to file a motion for attorneys' fees on appeal, other than for prejudgment appeal fees sought under 3.1702(b)(1), is the same as the time in which to file a memorandum of costs. Rule 8.278(c)(1).

In denying RWW's fees as untimely, the Trial Court cited Rules 8.278(c)(1) and 3.1702(c)(1) for the proposition that the time began to run to file a fees motion following summary denial of ZAVIEH's writ petition immediately with the denial of the writ petition (3 EXH. 686). Both of those rules speak in terms of the time following issuance of remittitur. Nowhere do they refer to "immediate finality" nor "summary denial." Rules 3.1702(c)(1), 8.278(c)(1). Under Rule 8.493(a)(2) the order or opinion

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resolving the proceeding must specify the award or denial of costs. However, “[u]nless the court orders otherwise, an award of costs neither includes attorney’s fees on appeal nor precludes a party from seeking them under rule 3.1702.” Rule 8.278(d)(2). “A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise [Citations].” *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499. If anything, CCP § 405.38 doubles down on the right to attorneys’ fees for a successful expungement motion, making them mandatory unless the opposing party “acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust.” CCP § 405.38. Denial of fees for lack of issuance of a remittitur as specified in a rule of court cannot override statutory entitlement to fees, especially after summary denial of a writ petition contesting expungement.

Two cases, *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454 and *Crespin v. Shewry* (2004) 125 Cal.App.4th 259, examine the history of Rule of Court 3.1702 (former Rule 870.2), which shows the timeliness of RWW’s fees motion.

1. Under *Carpenter* the history of Rule 3.1702 shows an

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intent to set issuance of a remittitur in a related appeal as the outer time limit to seek fees.

Carpenter reviewed the rule's history in a case involving a post-appeal motion for attorney's fees incurred in connection with a prejudgment order. Fee motions brought pursuant to Rule 3.1702(b), i.e for motions brought for services rendered up to and including rendition of judgment, carry with them the same deadline as a notice of appeal under either Rule of Court 8.104 or 8.108 (the latter extends the appeal deadline for certain post-trial motions). *Carpenter*, 151 Cal.App.4th at 462. In *Carpenter*, the appellate court upheld a trial court ruling that a fees motion for a pre-judgment motion for fees under CCP § 425.16(c) was timely when it was filed within 40 days after issuance of remittitur following the defendant's unsuccessful appeal of denial of its special motion to strike under SLAPP. *Carpenter*, 151 Cal.App.4th at 459-460.

In reviewing the history of Rule 3.1702 (former 870.2), the Court in *Carpenter* relied in significant part on *Crespin, supra*. In 1992 the Supreme Court asked the Judicial Council to review the timing of fee claims under CCP § 1021.5. The Court was concerned that there no time limits for fees under that statute. However, instead of just addressing 1021,5, an

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amendment to Rule 870.2 was proposed setting outer time limits for all claims for fees under statute or contract and sought comments and proposals to avoid any possible implication that such motions could be brought for an unlimited time following entry of judgment or issuance of a remittitur on appeal. *Carpenter*, 151 Cal.App.4th at 466-467. The State Bar, along with other parties, submitted numerous proposals, each lengthening the time period in which a fees motion could be brought, from the 15 days to file a memorandum of costs, to the 60 and 180 days in which to file a notice of appeal, finally adopting issuance of remittitur of a subsequent appeal as the outer time limit. *Carpenter*, 151 Cal.App.4th at 467-468.

The Court in *Carpenter* held that a prejudgment order did not fall within the definition of a motion for fees for services rendered up to and including judgment. Instead, the *Carpenter* Court construed the phrase ““for services up to and including the rendition of judgment in the trial court.”” as allowing a litigant to file a single fee motion for all services rendered, including any pretrial appellate court matters, in litigating a case up to rendering judgment in the trial court. *Carpenter*, 151 Cal.App.4th at 465-466. Requiring a fee motion each time there was a pretrial appealable

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order or need for writ review for such an order would encourage premature and piecemeal fee litigation. *Carpenter*, 151 Cal.App.4th at 465-466.

By contrast, the Trial Court’s approach, using an immediate finality trigger in all instances in which a remittitur was not issued, would encourage the type of piecemeal, premature fee litigation that *Carpenter* sought to avoid. That is especially the case in writ proceedings in the appellate courts, in which the overwhelming majority of writ petitions are resolved without issuance of opinions. In Fiscal Year 2013-2014 all but 141 of the 1,751 original proceedings in civil matters in the Courts of Appeal were disposed of *without* issuance of written opinion. Judicial Council of California, *2016 Court Statistics Report*, “Courts of Appeal, Table 6,” “Disposition of Original Proceedings, Fiscal Years 2013-2014 and 2014-2015,” page 33, <http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf>.

RWW’s successful expungement motion occurred after entry of judgment in October 2015 (1 EXH. 73-74, 92-93, 140-147). Rule 3.1702(c)(1) pertains to notice of motions “to claim attorney's fees on appeal-other than the attorney's fees on appeal claimed under (b).” While, as seen in *Crespin, infra*, one could argue that fees for post-judgment

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activity would seem not to fall within the definition of Rule 3.1702(c)(1), if read consistently with the *Carpenter* Court's interpretation of Rule 3.1702(b)(1) and the goal of avoiding piecemeal fee litigation, RWW's October 2015 expungement motion would fall within the definition of Rule 3.1702(c)(1). If Rule 3.1702(b)(1) included pretrial trips to the appellate courts before the underlying matter reached judgment, then a like reading of Rule 3.1702(c)(1) would include any services rendered in the trial court and appellate court while the underlying matter was on appeal. ZAVIEH filed her appeal in First District Case No. A145977 in August 2015 and the remittitur issued in October 2016 (2 EXH. 328-340). Thus the matter was on appeal while RWW moved to expunge the lis pendens in October 2015 and when ZAVIEH filed for writ relief in First District Case No. A146809 (1 EXH. 140-147, 148-170).

Such an interpretation is also consistent with the standard of review for writ petitions contesting expungement following judgment while the judgment is on appeal. Under *Amalgamated Bank v. Superior Court* (2007) 149 Cal.App.4th 1003, this Court necessarily had to consider the merits of the pending appeal in determining its probable validity in determining whether to reverse expungement while the underlying appeal was pending.

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Amalgamated Bank, 149 Cal.App.4th at 1016-1017 (Order denying writ petition). Accordingly, the fee motion would be timely under Rule 3.1702(c)(1) under *Carpenter*.

The Trial Court's ruling distinguished this case in which RWW's prevailing party status derives its winning the motion to expunge and Zavieh's unsuccessful writ petition following expungement of lis pendens from others in which the prevailing party is based on the litigation as a whole (3 EXH. 686).

However, the Court in *Carpenter* was not concerned with whether the party seeking the fees was the prevailing party on the for the fee motion only or for the underlying litigation as a whole. *Carpenter*, 151 Cal.App.4th at 466-468. The focus of amending the former Rule 870.2 into its current form as Rule 3.1702 was to provide an outer time limit in which to move for fees based on contract or statute of the time following issuance of remittitur. *Carpenter*, 151 Cal.App.4th at 467-468. The Court in *Carpenter* did not specify whether that rule applied or not depending on whether the party moving for fees was prevailing simply on pre-trial motion or on underlying litigation as a whole.

2. Under *Crespin* post-judgment activity such as post-

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judgment motions are not subject to Rule 3.1702's time limits.

In *Crespin* the Court examined the same history behind the 1992 *et seq.* amendments to former Rule 870.2 (current Rule 3.1702), this time with respect to post-judgment fees sought to defend issuance of a preliminary injunction under a private attorney general concept (CCP § 1021.5). The fee motion was granted even though brought 2.5 years after issuance of remittitur. *Crespin*, 125 Cal.App.4th at 262-263. The Court in *Crespin* also examined the history of Rule 3.702 in depth and concluded that nothing in that history showed any intent to impose Rule 3.1702's time limits *on post-judgment motions*. *Crespin*, 125 Cal.App.4th at 265. The Court stated in *Crespin* that:

[O]ur own analysis of the text and drafting history of rule 870.2 fails to support DHS's interpretation. In our view, the rule was not intended to govern the time for bringing motions for fees arising from post-final judgment activities, such as litigation over modifications to a permanent injunction. The rule's drafters either did not consider such postjudgment fee motions or decided not to address them in the rule. *Crespin*, *supra*.

The only time limit the Court in *Crespin* saw that could apply to such post-judgment motions was based on laches, in which the party opposing the fees suffered prejudice from such a long delay in seeking fees. *Crespin*, 125

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Cal.App.4th at 271.

Here, under *Crespin*'s interpretation of Rule 3.1702, all of the services rendered for which fees are sought, i.e. RWW's post-judgment motion to expunge lis pendens, and its successful defense against Zavieh's post-judgment expungement writ petition, as opposed to appeal, would have *no time limit* on filing for fees except for laches. Rule 3.1702(c) by its own terms applies to fees incurred on appeal. The underlying judgment was entered in June 2015 (1 EXH. 112-115). ZAVIEH appealed the judgment in August 2015 (1 EXH. 86). RWW filed its post-judgment motion to expunge lis pendens in October 2015 and the motion was granted October 30, 2015 (1 EXH. 92, 140). ZAVIEH filed her writ petition contesting expungement in November 2015 in Case No. A146809 and this Court summarily denied ZAVIEH's writ petition in March 2016 (1 EXH. 148, 2 EXH. 324-325). This Court affirmed the judgment in RWW's favor in August 2016 (2 EXH. 328-339). ZAVIEH does not and cannot show any prejudice to RWW seeking fees 40 days after issuance of remittitur of the related appeal, especially not when Rule 3.1702(c)(2) also provides for stipulation to an extension of time of 60 additional days beyond issuance of the remittitur.

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In both *Carpenter* and *Crespin* the Courts sought to discourage piecemeal and premature litigation over fees. *Carpenter*, 151 Cal.App.4th at 465-466; *Crespin*, 125 Cal.App.4th at 266-267. Similarly here, allowing for timely filing for fees at the conclusion of the appeal after issuance of remittitur in October 2016, rather than in April 2016, when issuance of remittitur would still be months away, would be consistent with that goal.

3. Rule of Court 8.493 made *Carpenter* and *Crespin* applicable to this case by applying the fee and costs deadline for appeals to writ petitions.

The Trial Court distinguished *Carpenter* and *Crespin* from this case on the grounds that neither case arose in the context of post-trial writ proceedings (3 EXH 686-687). However, Rule of Court 8.493(b) applied the time limits set forth in Rules 8.278(b)-(d), covering deadlines for recovering costs on appeals, to the procedures governing writ petitions. If Rule 8.493(b) made appellate procedures and deadlines applicable to writ proceedings, there is no reason to distinguish *Carpenter* and *Crespin* from this case because a writ proceeding, not an appeal, is involved.

CONCLUSION

For all of the above-described reasons, RWW lacks an adequate remedy at law. Accordingly, this Court must issue a peremptory writ

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directing the Trial Court to vacate its February 21, 2017 order denying RWW's CCP § 405.38 fee motion and issue a new order for further hearing to determine the amount of fees RWW should be awarded in this matter.

Dated: March 20, 2017

Respectfully submitted,

LAW OFFICES OF
JOHN T. SCHREIBER

By /s/ John T. Schreiber
John T. Schreiber, attorney for
Petitioner RWW PROPERTIES,
LLC

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CERTIFICATE OF WORD COUNT

The text of this brief contains 7,233 words as counted by the Corel WordPerfect version X7 word-processing software program used to generate this brief. CRC 8.204(c)(1), 8.486(a)(6).

Dated: March 20, 2017

s/ John T. Schreiber
John T. Schreiber

Re: Zavieh v. Alameda County Superior Court
First District Court of Appeal, Case No. _____
Alameda County Superior Court Case No. HG12615549

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 March 20, 2017, I served the within:

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

Steven J. Alpers
Attorney at Law
39300 Civic Center Drive, Suite 110
Fremont, CA 94538
Tel: (510) 792-5110
Email: S.ALPERS@comcast.net
Real Party in Interest
E-Service

Alameda County Superior Court
The Honorable Michael Markman
Department 302
George McDonald
Hall of Justice
2233 Shoreline Drive
Alameda, CA 94501
(510) 263-4300
Respondent
Mail Service

- [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.
- [xx] (By Electronic Service) I caused each such envelope to be served electronically pursuant to the First District Court of Appeal's Tru-Filing electronic filing system to the email address(es) listed above.
- [] (By Facsimile) I caused the said document to be transmitted by Facsimile machine to the address(es) whose fax number is indicated above.

Executed at Benicia, California on March 20, 2017. I declare under penalty of perjury that the foregoing is true and correct.

/s/ John T. Schreiber
John T. Schreiber