

[REDACTED]  
Attorney at Law  
[REDACTED]  
[REDACTED]

Attorney for Respondent,  
[REDACTED]

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

[REDACTED]	)	
	)	
Plaintiff, Cross-Defendant	)	
And Respondent	)	Court of Appeal
v.	)	[REDACTED]
	)	
[REDACTED]	)	
	)	Superior Court
Defendant, Cross-Complaint	)	[REDACTED]
And Appellant.	)	
_____	)	

**MOTION FOR THE PRODUCTION OF  
ADDITIONAL EVIDENCE ON APPEAL**

TO: PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES  
OF THE COURT OF APPEAL:

Respondent, [REDACTED] applies through his counsel, pursuant to  
article VI, section 11 of the California Constitution, section 909 of the Code of Civil

Procedure, and Rules 23 and 41 of the California Rules of Court, for the production of additional evidence on appeal. Specifically, respondent requests this court to consider the “Stipulation Re Expert Witness and Admission of Evidence” entered into by the parties in this case on July 25, 2001, which is attached hereto as Exhibit “A.” This motion is based upon this motion, the attached points and authorities, and the Declarations of trial and appellate counsel for respondent, [REDACTED] and [REDACTED], respectively.

Dated: June 14, 2002

Respectfully submitted,

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[REDACTED]  
Attorney for Respondent

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

#### **THIS COURT SHOULD TAKE ADDITIONAL DOCUMENTARY EVIDENCE BEARING UPON THE AGREEMENT OF THE PARTIES IN THIS PARTITION ACTION TO PROCEED BY WAY OF PARTITION BY APPRAISAL.**

One of appellant's contentions on appeal is that the trial court had no authority to order a partition of real property co-owned by appellant and respondent by way of appraisal absent a written agreement filed by the parties setting forth the conditions for partition as specified in Code of Civil Procedure section 873.920. (Appellant's Opening Brief ("AOB") at p. 13 ["There was never any such agreement in writing filed with the Trial Court. . . ."]; p. 24 ["No such agreement was submitted to the Trial Court, nor was any such agreement testified to by any party to the Trial Proceedings."]) The conditions which appellant claims were not met are: (1) the nature and extent of the parties' interests in the property; (2) the date which the interests to be acquired were appraised, and (3) which party was to acquire an interest in the property. (AOB at p. 14.) With respect to condition (2), appellant claims "there was no agreement whether [REDACTED] [the appraiser] appraisal actually established the value of the subject real property. . . ." (AOB at p. 14.)

Appellant also claims on appeal that the trial court erred in admitting evidence of respondent's opinion concerning the value of the property. Appellant raised a

relevancy objection when respondent was asked what his opinion was concerning the value of the subject real property because the “valuation of the subject real property in a partition action only takes place after the Trial Court first establishes an ownership interest in the interlocutory judgment.” (AOB p. 23.)

Contrary to the assertions made by appellant in her opening brief, there was a written agreement that [REDACTED] appraisal established the value of the property, and that the parties could testify at trial concerning their opinions as to the value of the property. In fact, appellant’s attorney authored a stipulation in which it was agreed that “[a]t trial, the parties may offer their opinion testimony regarding the value of the residence; however, the parties shall submit no other expert appraisals into evidence other than those of [REDACTED]” (See Exhibit “A” attached hereto.) The fact that the parties entered into this stipulation to introduce evidence of the value of the property by way of appraisal is strong evidence that the parties intended the property to be partitioned by way of appraisal rather than sale. If the parties had intended a partition by sale, an appraisal would have been unnecessary to establish property value as value would have been determined at the time of sale. This written stipulation was supposed to have been filed with the court by appellant’s attorney but it was not. (See Declaration of [REDACTED] [REDACTED] attached hereto.)

California Constitution, article VI, section 11 states: “The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is

waived or not a matter of right.” The Legislature implemented the constitutional authority by providing that the reviewing court may make “factual determinations . . . in addition to those made by the trial court,” and that such determinations may be based on the evidence at trial “with or without the taking of evidence by the reviewing court.” (Code of Civ. Proc., § 909.) For the purpose of making a factual determination “or for any other purpose in the interests of justice,” the appellate court may take “additional evidence of or concerning facts occurring at any time prior to the decision on appeal.” (Ibid.)

Code of Civil Procedure section 909, by its express terms, is to be liberally construed so that cases may be decided with finality by a single appeal without further proceedings in the trial court or appellate court, if the interests of justice would thus be served. (See *Marriage of Karlin* (1972) 24 Cal.App.3d 25, 34.) The reviewing court is given the authority to take evidence so that the court can terminate litigation by affirmance, or modification and affirmance of the judgment, or by reversal where appropriate. (*People v. Benford* (1959) 53 Cal.2d 1, 6.)

The procedure for requesting additional evidence is set forth in California Rules of Court, rule 23. Rule 23(b) provides in pertinent part:

“Proceedings for the production of additional evidence on appeal shall be in accordance with rule 41. The court may grant or deny the application in whole or in part, and subject to such conditions as it may deem proper. . . . Where documentary evidence is offered, either party may submit the original or a certified or photostatic copy thereof and the court may admit the document in evidence and add it to the record on appeal.”

Here, respondent does not request this court to make any finding of fact. Respondent merely requests this court to consider a piece of documentary evidence of an agreement which is binding on the parties to this litigation.

In the proceedings below, the trial court finally determined the respective interests of the parties in the subject real property following a court trial. The only remaining issue to be determined was how the property was to be divided. There are three methods of partition envisioned by statute: partition by division of the property, partition by sale, or partition by appraisal in which one party acquires the interest of the other. (Code Civ. Proc., §§ 872.010-874.240.) Although the appellant's trial brief reflects that the parties agreed to partition by appraisal (C.T. 34), appellant claims that the judgment should be reversed because the parties never came to terms with respect to a partition by appraisal. In other words, respondent's family home, a property worth \$385,000.00 should be sold in order to satisfy appellant's \$7,000 interest even though there was an agreement for partition by appraisal and respondent has tendered a check for \$7,000.00 to appellant.

Appellant's attorney has refused to relinquish the original of the stipulation so that it can be filed in the trial court and be the subject of a motion to augment the appellate record. It would be unjust to proceed on appeal as though the stipulation were not in existence when the document was supposed to be filed. Further, this court should consider this documentary evidence in order to finally resolve the issues in this case and

to end the financial injustice to respondent by piecemeal resolution of this litigation.

Accordingly, respondent respectfully requests that this court admit the attached

documentary evidence of a stipulation regarding the appraisal of the property by [REDACTED]

[REDACTED]

DATED: June 15, 2002

Respectfully submitted,

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[REDACTED]  
Attorney for Respondent

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

\_\_\_\_\_) )  
) )  
Plaintiff, Cross-Defendant ) )  
And Respondent ) ) Court of Appeal  
v. ) ) \_\_\_\_\_ )  
) )  
\_\_\_\_\_) )  
) ) Superior Court  
Defendant, Cross-Complaint ) )  
And Appellant. ) )  
\_\_\_\_\_ ) )

**DECLARATION OF DAVID D. CARICO**

I \_\_\_\_\_, declare:

1. I am an attorney at law duly admitted to practice my profession before all California courts, and I am the attorney of record in this court for respondent.

2. In reviewing the Appellant’s Opening Brief, I noticed that appellant made the assertion that “there was no agreement whether \_\_\_\_\_ [the appraiser] appraisal actually established the value of the subject real property. . . .” (AOB at p. 14.) I also noticed that Appellant raised a relevancy objection when respondent was asked what his opinion was concerning the value of the subject real property “because the “valuation of the subject real property in a partition action only takes place after the Trial Court first establishes an ownership interest in the interlocutory judgment.” (AOB p. 23.)

3. In reviewing respondent’s trial counsel’s (\_\_\_\_\_) file, I found several copies of a fully executed written “Stipulation re Expert Witness and Admission of Evidence” wherein the parties stipulated that the parties could offer their opinions concerning the value of the property at trial before the interlocutory judgment was entered, and that \_\_\_\_\_ appraisal was the only expert appraisal that could be submitted by the parties into evidence.

4. I conducted a diligent search of the file in this action (Monterey Superior Court No. [REDACTED]) at the Monterey County Superior Court, Monterey Branch, and was unable to locate this stipulation. I contacted [REDACTED] plaintiff's trial counsel, to determine what her expectations were with respect to the filing of the stipulation, and to see if she was provided a duplicate original by [REDACTED] office. I learned that [REDACTED] was not provided with a duplicate original.

5. On June 12, 2002, I contacted counsel for appellant, [REDACTED], and requested that he provide me with the original of the stipulation so that it could be filed in superior court. He refused to provide it.

6. Attached as Exhibit "A" is the copy of the original stipulation which I discovered in respondent's trial counsel's file.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 16, 2002, at Monterey, California.

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[REDACTED]

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

[REDACTED]	)	
	)	
Plaintiff, Cross-Defendant	)	
And Respondent	)	Court of Appeal
v.	)	[REDACTED]
	)	
[REDACTED]	)	
	)	Superior Court
Defendant, Cross-Complaint	)	[REDACTED]
And Appellant.	)	
	)	

**DECLARATION OF KATHERINE DORSET**

I [REDACTED], declare:

1. I am an attorney at law duly admitted to practice my profession before all California courts, and I represented plaintiff [REDACTED] in this case in the trial court.

2. [REDACTED], the attorney for appellant, and I entered into an agreement concerning the admission of evidence respecting the value of the subject real property which is reflected in the "Stipulation re Expert Witness and Admission of Evidence" attached to this motion. When I executed the "Stipulation re Expert Witness and Admission of Evidence," it was my understanding that this was to be a binding agreement on the attorneys and the parties.

3. It was also my expectation that this written stipulation would be filed with the court because it was executed on pleading paper with the case caption. If there had been no intention to file this document with the court, the agreement would have been executed as a letter agreement on letterhead.

4. Following the filing of the court's judgment in this case, plaintiff [REDACTED] [REDACTED] tendered a check to defendant [REDACTED] for \$7,000.00 which represented the amount

the trial court awarded [REDACTED]. [REDACTED] refused the check sending it back, and has also refused to execute the quit claim deed in favor of plaintiff.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 17, 2002, at Monterey, California.

\_\_\_\_\_  
[REDACTED]

EXHIBIT "A"

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Attorney for Defendant/Cross-Complainant  
[REDACTED]

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF MONTEREY

IN RE THE MATTER OF:

[REDACTED],

Plaintiff,

vs.

[REDACTED]

Defendants.

[REDACTED],

Cross-Complainant,

vs.

[REDACTED]

INCLUSIVE,

Cross-Defendants.

[REDACTED]

STIPULATION RE EXPERT  
WITNESS AND  
ADMISSION OF EVIDENCE

The parties hereto, through their respective attorneys, stipulate as follows:

1. Appraiser [REDACTED] shall be retained to determine the reasonable monthly rental from November 1998 through present date and the present value of [REDACTED], [REDACTED].

2. After each party has received a copy of the appraisal, within seven (7) days each party may submit a letter to the other party and to the appraiser requesting corrections, changes and/or revisions by the appraiser. The appraiser may either make the revisions, etc. as requested within

1 Fourteen [14] days or the appraisal becomes final.

2 3. Costs of the appraisals of \$750.00 shall be shared equally by both parties and paid  
3 forthwith to [REDACTED] in the amount of \$375.00 each.

4 4. The appraisals may be submitted into evidence without the testimony of [REDACTED]  
5 or other foundational evidence.

6 5. At trial, the parties may offer their opinion testimony regarding the value of the  
7 residence; however the parties shall submit no other expert appraisals into evidence other than those of  
8 [REDACTED]

9  
10  
11 SO STIPULATED AND AGREED:

12 LAW OFFICES OF [REDACTED]

13  
14 Dated: 7/25/01

15 By: \_\_\_\_\_  
16 [REDACTED]  
17 ATTORNEY FOR DEFENDANT  
18 AND CROSS -COMPLAINANT [REDACTED]

19 Dated: 7/25/01

20 LAW OFFICES OF [REDACTED]

21 By: \_\_\_\_\_  
22 [REDACTED]  
23 ATTORNEY FOR PLAINTIFF AND  
24 CROSS-DEFENDANT [REDACTED]

Case Name: [REDACTED] v. [REDACTED] No. [REDACTED]

I declare that:

I am employed in the County of Monterey, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is [REDACTED], [REDACTED].

On June 17, 2002, I served the attached Motion for the Production of Additional Evidence on Appeal in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Monterey, California, addressed as follows:

Monterey Superior Court  
1200 Aguajito Road  
Monterey, CA 93940

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Monterey, California, on June 17, 2002.  
(Date)

[REDACTED]

\_\_\_\_\_