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**Exempt from payment of filing fees
(Government Code § 6103)**

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF CONTRA COSTA**

10 SAM CLEARE, SARAH KINCAID,
11 JEREMIAH ROMM, HILDA CRISTINA
12 HUERTA, AND JETAUN THOMPSON

Case No. N24-1353

**RESPONDENTS' OPPOSITION TO
MOTION FOR NEW TRIAL**

Petitioners,

Judge: Hon. Leonard Marquez
Dept.: 16
Date: March 19, 2025
Time: 9:00 am

v.

13 WEST CONTRA COSTA UNIFIED SCHOOL
14 DISTRICT, KENNETH CHRIS HURST, WEST
15 CONTRA COSTA UNIFIED SCHOOL
16 DISTRICT BOARD OF EDUCATION,
17 JAMELA SMITH-FOLDS, DEMETRIO
18 GONZALEZ HOY, OTHEREE CHRISTIAN,
19 MISTER PHILLIPS, AND LESLIE RECKLER,

Respondents.

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1 **I. INTRODUCTION**

2 The parties appeared before Honorable Terri Mockler on October 11, 2024, for a court trial
3 on Petitioners’ Writ of Mandate. Judge Mockler, in her minute order, denied the Writ of Mandate,
4 noting that there was no basis for the writ. Petitioners now move for a new trial. As an initial
5 matter, pursuant to Code of Civil Procedure section 661, the hearing and decision on this matter
6 must be made by Hon. Terri Mockler, because she was the trial judge on the Petition for Writ of
7 Mandate. Therefore, Respondents request that this Motion be transferred to Department 27 and set
8 for hearing before Judge Mockler.

9 Then, this Motion should be denied as Petitioners have not met their burden of proof for a
10 new trial pursuant to Code of Civil Procedure sections 657 (“Section 657”). Petitioners’ motion for
11 a new trial loosely cites subsections (4), (6), and (7) of Section 657, ostensibly moving on those
12 grounds for a new trial. (Petitioners’ Notice of Motion and Motion, pg.2 ln 15-16.) However,
13 Petitioners’ motion contains no facts or analysis showing their entitlement to a new trial pursuant
14 to these subsections.

15 In support of their claims for a new trial, Petitioners attached four declarations purportedly
16 to, “correct the false record created by Respondents’ misstatements.” (*Id.* at pg.2 ln 20-21.) These
17 declarations, however, do not contain any of the requisite facts necessary to establish Petitioners’
18 entitlement to a new trial pursuant to subsections (4), (6), and (7) of Section 657. Instead,
19 Petitioners’ motion for a new trial improperly attempts to re-litigate the trial by presenting evidence
20 that was presented at trial or should have been discovered prior to the trial and by introducing
21 evidence that did not exist at trial. Petitioners’ motion fails to provide grounds for a new trial and
22 must be denied.

23 **II. PROCEDURAL HISTORY**

24 Petitioners filed a petition for a Writ of Mandate on August 30, 2024, to compel
25 Respondents to take certain actions allegedly required by Education Code section 35186. At issue
26 in this Motion for New Trial is Count Two of Petitioners’ Petition for a Writ of Mandate, in which
27 Petitioners sought sought an order compelling the District to:
28

- 1) Hire a full time single designated certificated teacher for each teacher vacancy at Stege Elementary School (“Stege” or “Stege ES”), Helms Middle School (“Helms” or “Helms MS”), and Kennedy High School (“Kennedy” or “Kennedy HS”);
- 2) Refrain from filling any teacher vacancy at these schools with substitute teachers for longer than authorized or lined up sequentially so that no single teacher is assigned to a class or classroom for the full year or by using other teachers at the school site to cover a class or classroom on a day to day basis in addition to their own classes; and
- 3) Send Petitioners and the Court a written report about how it intends to hire a full time single designated certificated teacher of each teacher vacancy at these three schools.

Respondents filed their Opposition on September 26, 2024. Petitioners filed their Reply on October 4, 2024.

This matter came before the Court on October 11, 2024 for court trial. The Court’s Minute Order states, “As stated on the record, the Court having heard a lot of arguments from both counsels denies the Writ of Mandate. The Writ of Mandate is denied. The teacher vacancies writ of mandate is denied. Further, the Court does not see a basis for the Writ of Mandate.” (Minute Order, October 11, 2024.)

III. HEARING ON THIS MOTION MUST BE TRANSFERRED TO DEPARTMENT 27 PURSUANT TO CODE OF CIVIL PROCEDURE 661.

Under Code of Civil Procedure section 661 (“Section 661”), it is mandatory that a motion for new trial be heard and determined by the judge who presided at the trial, where the conditions constituting the exceptions do not exist. (*Francis v. Superior Court of Los Angeles County* (1935) 3 Cal. 2d 19, 28.) “For it needs no argument, we think, to prove that a judge who has heard the evidence, examined the witnesses, and made a study of the law applicable to the facts in a case is best qualified to rule upon the weight and value of the testimony of such witnesses, as well as upon other questions presented by the motion and which were involved in the trial of the action and to which the trial judge in most instances has given his attention and studious consideration.” (*Id.* at 28-29.)

A court trial was held on October 11, 2024, before the Honorable Terri Mockler in Department 27 of this Court. Judge Mockler heard, decided, and denied Petitioners’ Petition for Writ of Mandate at the court trial. (Minute Order, October 11, 2024.) She is best suited to decide Petitioners’ Motion for a New Trial, as after review of the Parties’ lengthy briefing and oral

1 argument, she made the decision on the Petition for Writ of Mandate that is now being challenged.
2 She will know what evidence and arguments are cumulative or new so as to properly determine
3 whether a new trial is warranted. Then if a new trial is granted, she is the only one who can
4 properly determine if any of the new facts and arguments presented by the parties change her
5 previous decision. Consequently, pursuant to Section 661, she must hear and decide this Motion
6 for New Trial.

7 However, this Motion for New Trial is set for hearing before the Honorable Leonard
8 Marquez in Department 16. Presumably, this is because this matter was reassigned to Department
9 16 on January 6, 2025. (See Case Docket, Amended Notice of Reassignment of Case, dated
10 January 6, 2025). Section 661, however, only allows another judge to decide this Motion for New
11 Trial, if Judge Mockler is absent from the County or unable to hear and determine the motion.
12 (Code of Civil Procedure §661.) Neither of these exceptions apply here. Judge Mockler still sits on
13 the bench of this Court in the same Department where the Petition for Writ of Mandate was
14 originally heard and decided. As such, she is in the County and available to hear and decide this
15 Motion even if she is now assigned to different cases. There is no reason a hearing on this Motion
16 cannot be set on her calendar for a date and time when she is available.

17 Therefore, Respondents request that their mandatory rights under Section 661 be upheld,
18 and that the hearing on this Motion be transferred to Judge Mockler and continued to a date and
19 time when she is available to hear and determine this Motion for New Trial.

20 **IV. LEGAL ARGUMENT AND AUTHORITY**

21 **A. Legal Standard**

22 Section 657 establishes the grounds for which an aggrieved party can apply for a new trial.
23 A new trial cannot be ordered merely because a dissatisfied litigant requests it. (*Cronk v. Cronk*
24 (1962) 210 Cal. App. 2d 683, 692.) The procedural steps prescribed by law for making and
25 determining motions for new trial are mandatory and must be strictly followed, such motions
26 finding both their source and limitations in the statutes. (*Mercer v. Perez* (1968) 68 Cal. 2d 104,
27 118.) Petitioners' motion for a new trial loosely cites subsections (4), (6), and (7) of the Section
28 657, ostensibly moving on those grounds for a new trial. (Petitioner's Notice of Motion and

1 Motion, pg. 2:15-16.) Their motion contains none of the required facts or analysis of how they are
2 entitled to a new trial under any of these subsections. As such, Petitioners fail to meet their burden
3 of proof for granting a new trial in this action, and the Court should deny this Motion.

4 **B. Petitioners Failed to Prove Due Diligence and Present Improper Cumulative and**
5 **After-Trial Evidence.**

6 Petitioners contend they are entitled to a new trial pursuant to Section 657, subsection (4),
7 which permits a new trial where there is newly discovered evidence, which the party seeking a new
8 trial could not, with reasonable diligence, have discovered and produced at the trial. (Code of Civil
9 Procedure §657(4).) Courts look with distrust and disfavor on claims of new discovered evidence
10 as grounds for new trial; therefore, public policy requires that the party seeking a new trial prove
11 that he exhausted every reasonable effort to produce at his trial all existing evidence on his behalf,
12 but despite this due diligence was not able to produce the newly acquired evidence for a credible
13 reason. (*Akopianz v. Board of Medical Examiners* (1961) 190 Cal. App. 2d 81, 93, *cert. denied*,
14 (1961), 368 U.S. 929.) “It has been held repeatedly that if a party knows of an important witness
15 and fails to explain his failure to produce his testimony at the trial or to seek a continuance in order
16 to obtain it, a new trial should not be granted.” (*Page v. Insurance Co. of North America* (1969) 3
17 Cal.App.3d 121, 129; *Broads v. Mead & Cook* (1911) 159 Cal. 765, 768-769; *Estate of Shepard*
18 (1963) 221 Cal.App.2d 70, 77-80.)

19 To be entitled to a new trial based on newly discovered evidence, Petitioners must show
20 that: 1) the evidence, not merely its materiality, is newly discovered; 2) the evidence is not
21 cumulative of evidence already presented to the Court; 3) the evidence leads to a probable different
22 result on retrial; 4) the evidence is such that Petitioner could not, with reasonable diligence, have
23 discovered and produced it at the trial; and 5) these facts must be shown by best evidence that the
24 case admits. (*Philpott v. Mitchell* (1963) 219 Cal. App. 2d 244, 248-249.) Moreover, the new
25 evidence must relate to events and facts that took place prior to the original trial. (*Aron v. WIB*
26 *Holdings* (2018) 21 Cal. App 5th 1069, 1079.) Petitioners have not and cannot meet this required
27 standard.
28

1 Petitioners seek to admit four declarations purporting to contain newly acquired evidence;
2 Declaration of Dr. Mary Vixie Sandy, the Executive Director of the California Commission on
3 Teacher Credentialing; Declaration of Mark Erwin Mitchell, the Executive Director of United
4 Teachers of Richmond (“UTR”), the union representing the District’s certificated staff; and the
5 Declaration and Supplemental Declaration of Karissa A.D. Provenza, counsel for Petitioners.
6 None of these declarations provide any evidence, let alone the best evidence that the case can
7 admit, that Petitioners could have not discovered the “new evidence” despite their due diligence or
8 that the evidence is not cumulative of what was already presented at the original trial on the
9 Petition. Moreover, the Declarations of Mark Erwin Mitchell and Karissa A.D. Provenza contain
10 evidence of events that occurred after the October 11, 2024 trial, which cannot form the basis for
11 granting a motion for a new trial.

12 *1. Petitioners’ Lack of Due Diligence Cannot Be Grounds for a New Trial*

13 Due diligence must be shown to authorize the grant of a new trial upon the ground of newly
14 discovered evidence. (*Olaine v. McGraw* (1913) 164 Cal. 424, 428.) New trial on ground of newly
15 discovered evidence will be granted only where affidavit in support thereof recites facts showing
16 that evidence could not, with reasonable diligence, have been discovered and produced at
17 trial. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal. App. 4th 1171, 1192;
18 *Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal. 2d 162, 165.)

19 Petitioners rely on the Declaration of Dr. Mary Vixie Sandy, the Executive Director of the
20 California Commission on Teacher Credentialing. Dr. Sandy’s declaration includes her opinions
21 and legal conclusions regarding state certification laws, substitute teachers, and waivers.
22 (Declaration of Dr. Mary Vixie Sandy, ¶¶6, 7, 10, 11, and 14.) Petitioners claim that this “new
23 evidence” demonstrates that Respondents made misrepresentations to the Court that the District
24 could not get variable terms waivers or other authorizations and had no choice but to use substitute
25 teachers to fill the vacancies at Helms Middle School. They cite Dr. Sandy’s testimony to argue
26 that the District can obtain waivers to authorize substitutes to be designated as the permanent
27 yearlong teacher, even if the substitutes in question do not want to enroll in a credential program.
28

1 The other “new evidence” relied upon by Petitioners is the Declaration of Mark Erwin
2 Mitchell and the Supplemental Declaration of Karissa Provenza, who testify that the District used
3 involuntary teacher transfers to fill vacancies in the past and then most recently in January 2025 to
4 fill vacancies. Petitioners argue this evidence demonstrates that the District misrepresented the
5 MOU with UTR to the Court by arguing that it could not transfer teachers without their consent.

6 Putting aside for now the accuracy of Petitioners’ arguments, Petitioners first have to
7 demonstrate that this “new evidence” gives them a right to a new trial. They have to prove that this
8 evidence could not have been produced at trial, despite their exercise of due diligence to do so.
9 And they completely fail to do this. Nothing in Dr. Sandy’s Declaration, Mr. Mitchell’s
10 Declaration, or either of the two Declarations by Ms. Provenza establishes why Dr. Sandy’s, Mr.
11 Mitchell’s testimony, or the evidence about the various waivers available or the District’s use of
12 teacher transfers and interpretation of the UTR MOU could not have been obtained prior to trial
13 and introduce at trial. This failure alone requires the Court to deny Petitioners’ Motion for New
14 Trial.¹ (*Wall Street Network, Ltd., supra*, 164 Cal. App. 4th at 1192; *Fomco Inc., supra*, 55 Cal. 2d
15 at 165.)

16 2. *Petitioners’ New Evidence is Not New, But Rather Old Cumulative Evidence*

17 Even more problematic for Petitioners, however, is that their own Petition for Writ of
18 Mandate and briefs and declarations submitted prior to the October 4, 2024 court trial clearly
19 demonstrate that this “new evidence” is not new at all, but rather the same facts and arguments
20 presented to the court trial, but through different witnesses and some different documents. In other
21

22
23 ¹ This failure is especially telling in light of the fact that, as discussed below, Petitioners discuss
24 Variable Term Waivers, teacher transfers/reassignments, and the other options available to school
25 districts to remedy vacancies in their Petition, briefs and declarations presented to the trial court
26 before and at the October 11, 2024 court trial. Moreover, the arguments Petitioners now claim were
27 made by Respondents the day before the October 11, 2024 trial were actually first raised by
28 Respondents in their Opposition Brief and Declarations, and then responded to by Petitioners in
their Reply Brief and Declarations. Therefore, there is no reason why Petitioners could not have
presented declarations from Dr. Sandy and Mr. Mitchell prior to or at trial, other than they did not
think they needed them or did not consider doing so until afterwards. This is not due diligence.
(*Page, supra*, 3 Cal.App.3d at 129.)

1 words, this evidence is merely cumulative of what was already presented to Judge Mockler at the
2 October 4, 2024 court trial.

3 One of the requirements for granting a new trial based on newly acquired evidence is that
4 the new evidence is not cumulative of evidence presented at the original trial. (*Philpott, supra*, 219
5 Cal. App. 2d at 248-249.) The newly discovered evidence must be material in the sense that it is
6 likely to produce a different result. (*Schultz v. Mathias* (1970) 3 Cal. App. 3d 904, 910, *citing Waer*
7 *v. Waer* (1922) 189 Cal. 178, 180-181 (evidence which is merely cumulative or which simply tends
8 to impeach or discredit a witness is insufficient).) Evidence already presented to the trial court
9 cannot produce a different result, because the court has already considered it.

10 Petitioners claim that Mr. Mitchell’s Declaration, the Exhibits attached thereto, and the
11 Supplemental Declaration of Karissa Provenza at ¶¶7-8 & Exhibit E regarding the District’s use of
12 involuntary transfers to fill vacancies is new evidence that shows that Respondents made
13 misstatements to the trial court about the District’s ability to transfer teacher pursuant to the MOU
14 with the teachers’ union, UTR. Similarly, Petitioners argue that the Declaration of Dr. Sandy is
15 new evidence that shows that Respondents also mislead the Court about the availability of Variable
16 Term Waivers for the substitute teachers that did not want to enroll in a credential program.
17 Petitioners then argue that taken together this “new evidence” demonstrates that the trial court
18 erred in denying the Writ based on Respondents’ inability to comply with the Williams Act
19 through its own actions. However, there is nothing new about this evidence and argument as the
20 briefing and procedural history of this litigation demonstrates. Petitioners are merely rearguing
21 facts and law they already presented at the October 4, 2024 court trial.

22 In their Petition and Motion for Writ of Mandate, Petitioners argued that amongst the
23 various alternatives available to fill the vacancies was transferring credentialed teachers from non-
24 instructional positions and obtaining waivers for substitute teachers (Case Docket, Petition, ¶¶ 42-
25 43, 46; Motion for Writ of Mandate, pp. 20.) They also argue that the Court has no discretion but to
26 issue the requested Writ of Mandate in light of Respondents’ use of substitute teachers to fill
27 vacancies. (*Id.*, pp. 19-21.)
28

1 In opposition, Respondents specifically argued, based on the Declaration of Camille
2 Johnson, that the District’s MOU with UTR did not allow the District to force a teacher already
3 assigned to a position to accept a different position. (Case Docket, Opposition to Motion for Writ
4 of Mandate, dated September 26, 2024, p. 13:22-27; Declaration of Camille Johnson filed in
5 support of Respondents’ Opposition to Writ of Mandate, dated September 24, 2024 (“Johnson Writ
6 Opposition Decl.”), ¶12.) Respondents also argued that the District had used every alternative
7 means available to fill the vacancies at issue with authorized permanent teachers, but despite its
8 best efforts it could not do so, because filling vacancies was dependent on the actions of persons
9 outside the District’s control, namely the applicants. (Case Docket, Opposition to Writ of
10 Mandate, pp. 9-14, 18-23; Johnson Writ Opposition Decl., ¶¶ 6-12 & Ex. E.) Respondents also
11 clearly argued in their Opposition that the Court had the authority to deny the Writ when it was
12 impossible or impractical for Respondents to comply with the Williams Act, and that the facts
13 presented by Respondents demonstrated that this was a case where the Court should exercise this
14 authority. (Opposition to Writ of Mandate., pp. 21-23.)

15 Then in response to Respondents’ Opposition and the evidence submitted in support of it,
16 Petitioners’ counsel deposed the District’s Assistant Superintendent of Human Resources, Camille
17 Johnson, on October 4, 2024, before filing their reply brief. At this deposition, Petitioners’ counsel
18 asked Dr. Johnson about Variable Term Waivers, whether the District had applied for waivers for
19 any of the substitutes filling then current vacancies, and whether any of the substitutes qualified for
20 a waiver. (See Case Docket, Supplemental Declaration of Katherine Alberts in support of
21 Opposition to Writ of Mandate, dated October 10, 2024, Ex. E (Transcript of Deposition of
22 Camille Johnson, dated October 4, 2024), pp. 32:16-35:9, 40:22-41:7, 44:17-45:18, 52:7-53:23.)
23 Dr. Johnson testified that the substitutes did not have waivers, but if the substitutes qualified for a
24 waiver, her staff would have applied for one and gotten it. (Id., 32:16-35:9, 40:22-41:7) She also
25 testified that she did not know the specific qualifications of each of the substitutes and why they
26 did not qualify for a waiver, but that she could look such information up. (Id.) Clearly, at this
27 point, Petitioners were aware that it was Respondents’ position that the substitute teachers at issue
28 did not qualify for any waiver or authorization beyond their 30 Day Substitute Permit.

1 Moreover, despite having every opportunity to do so, Petitioners’ counsel did not challenge
2 Dr. Johnson on her interpretation of the MOU regarding transferring teachers as set forth in
3 Respondents’ Opposition and her Declaration in support of that Opposition. Petitioners’ counsel
4 did not show her the MOU and cross examine her on her interpretation, and counsel did not ask
5 about past uses of transferring teachers that they now claim show that Respondents mislead the
6 Court.

7 Also on October 4, 2024, after taking Dr. Johnson’s deposition, Petitioners filed their Reply
8 Brief and a Supplemental Declaration by Ms. Provenza in which they specifically argued that
9 Respondents’ interpretation of the MOU was incorrect and that the District had transferred teachers
10 without their consent in the past. To support these facts, Petitioners relied upon documents relating
11 to an August 2024 reassignment of teachers pursuant to Article 14, Section 3 of the UTR MOU,
12 Involuntary Transfers Due to Declining Enrollment and/or School Closure. (See Case Docket,
13 Reply Brief, dated October 4, 2024, p. 11-12; Supplement Declaration of Karissa Provenza, dated
14 October 4, 2024 (“Supp. Reply Provenza Decl.”), at ¶¶5-12, Exs. 2-5.) Exhibits 2-5 are very
15 similar to the “new evidence” Petitioners submit through Mr. Mitchell in support of this Motion,
16 including an email to UTR informing them of the District’s intention to make the transfers, an
17 example of a Notice of Intent to Transfer sent to teachers, and spreadsheets used by the District and
18 UTR to agree upon and track transfers. (Compare Declaration of Camille Johnson filed in support
19 herewith, ¶¶ 11-15, Exs. 2-6.) And just like in their Reply Brief, Petitioners reargue here that the
20 January 2025 transfer demonstrates that Respondents’ interpretation of the MOU was incorrect and
21 the District could involuntarily transfer teachers, without their consent, to fill the vacancies at issue.
22 Same evidence, same argument, which the trial court already rejected.

23 Similarly, in their Reply Brief, Petitioners presented the trial court with the evidence and
24 arguments about the availability of Variable Term Waivers to fill the vacancies at issue and
25 Respondents’ allegedly improper failure to use them to fill the vacancies. (Reply Brief, pp. 11-13;
26 Supp. Reply Provenza Decl., ¶¶3-4, Exs. 1-8). Petitioners also argued that Respondents’ argument
27 about impossibility was meritless and should be soundly rejected. (Reply Brief, pp. 13.) These are
28 the same arguments Petitioners now attempt to reargue through the Declaration of Dr. Sandy by

1 complaining that Respondents waited until the day before the trial to present evidence that the
2 substitutes at issue did not qualify for Variable Term Waivers, because they did not want to enroll
3 in a credential program, which misled the Court into believing that Variable Term Waivers
4 required the applicant to enroll in a credential program. Petitioners' complaints are completely
5 disingenuous. First, Petitioners' counsel elicited testimony from Dr. Johnson that if the substitutes
6 at issue were qualified for Variable Term Waivers, the District would have applied for them and
7 gotten them, and that she was willing to look up the specific reasons why the substitutes did not
8 qualify for Variable Term Waivers. Respondents' Supplemental Declaration merely provided the
9 information Dr. Johnson discovered when she looked up why the substitutes did not qualify for the
10 waivers. With due diligence, Petitioners could have discovered this evidence at Dr. Johnson's
11 deposition.

12 More importantly, Petitioners themselves argued in their Reply Brief that one of the
13 requirements for a Variable Term Waiver was that "the individual . . . *has "commit[ted] to*
14 *completing requirements for the appropriate credential.*" (Case Docket, Reply Brief, p. 12:10-15
15 & Ex. 1 [emphasis added].) To prove this requirement, Petitioners cite to the very same CTC
16 Waiver Request Guidebook that they and Dr. Sandy now claim proves just the opposite. (Id.) This
17 is not new evidence, but rather old evidence already presented to the trial court. The Court should
18 reject Petitioners' attempt to get another bite at the apple by using evidence already presented to
19 the trial court to make legal arguments that are completely the opposite of the ones they made at
20 trial. (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 169 ("Judicial estoppel, sometimes referred to
21 as the doctrine of preclusion of inconsistent positions, prevents a party from asserting a position in
22 a legal proceeding that is contrary to a position previously taken in the same or some earlier
23 proceeding.") For "[i]t seems patently wrong to allow a person to abuse the judicial process by first
24 advocating one position, and later, if it becomes beneficial, to assert the opposite." (Id.) As such,
25 the Court should denied Petitioners' Motion for New Trial which is entirely predicated on
26 cumulative evidence, already considered, and rejected by the trial court. (*Schultz, supra*, 3 Cal.
27 App. 3d at 910, *citing Waer, supra*, 189 Cal. at 180-181.)

28 *3. Petitioners' Improperly Seek to Admit After-Trial Evidence*

1 Newly discovered evidence must be evidence that existed at the time of trial. (*Aron, supra*,
2 21 Cal. App 5th at 1079.) In *Aron*, the court granted an anti-SLAPP motion and struck a tenant’s
3 harassment complaint. The tenant filed a motion for new trial on the anti-SLAPP motion based on
4 the issuance of a remittitur affirming the underlying unlawful detainer judgment in his favor.
5 However, the court denied the motion for new trial, because evidence of the remittitur, which had
6 not been issued at the time of the anti-SLAPP hearing, could not qualify as newly discovered
7 evidence. (*Id.*) In *Cansdale v. Board of Administration*, the party moving for a new trial included a
8 declaration from a physician who saw him ten months after the final decision was made and the
9 court held, “to support a motion for a new trial on this ground, the court must determine if *the*
10 *evidence was in existence at the time of the trial* and could not have been discovered with
11 reasonable diligence.” (*Cansdale v. Board of Administration* (1976) 59 Cal. App. 3d 656, 667
12 (emphasis added).)

13 In support of their Motion for New Trial, Petitioners present evidence regarding actions
14 taken by the District in December 2024 and January 2025 to transfer teachers to fill vacancies.
15 (Declaration of Mark Erwin Mitchell, ¶6 & Ex. A-F; Supplemental Declaration of Karissa
16 Provenza filed in support of this Motion, dated February 19, 2025, ¶9 & Ex. E). Likewise,
17 Petitioners present evidence of new and different Williams Act complaints about Highlands
18 Elementary School, which are not the subject of the Petition, and the District’s alleged failure to
19 respond to those complaints after the October 11, 2024 trial.² (Declaration of Karissa Provenza
20 filed in support of this Motion, ¶¶6-7 & Ex. B; Supplemental Declaration of Karissa Provenza filed
21 in support of this Motion, ¶8.) Both the December/January transfers and the District’s alleged
22 failure to respond to the Highland Williams Act complaints occurred after the October 11, 2024
23 court trial, and as such, the evidence of these events did not exist at the time of trial. Such
24 evidence is not newly acquired evidence and cannot be grounds for a new trial.

25 **C. Petitioners’ Fail to Show Insufficiency of Evidence**

26 _____
27 ² The District did respond to these Highland Elementary School Williams Complaints. See
28 Declaration of Camille Johnson filed in support herewith, ¶22 & Ex. 6.

1 Code of Civil Procedure section 657 subsection (6) establishes grounds for a new trial on
2 the basis of insufficiency of the evidence to justify the verdict or other decision, or the verdict or
3 other decision is against law. When a party claims insufficiency of the evidence, he must show not
4 only that no finding was made upon a material issue, but also that the evidence would justify a
5 finding in his favor." (*Capaldi v. Levy* (1969) 1 Cal. App. 3d 274, 284; *citing Furlong v. White*
6 (1921) 51 Cal.App. 265, 272.) Where a party claims that some particular issue of fact is not
7 sustained by the evidence, he is required to set forth all of the material evidence on the point and
8 not merely his own evidence. (*Capaldi, supra*, 1 Cal. App. 3d at 284; *citing Routh v. Palm Oil*
9 *Co.*(1958) 160 Cal.App.2d 359, 360-361.)

10 Petitioners' motion throws in the citation to Subsection 6 of the Code of Civil Procedure
11 section 657 without clear identification of which, if any, material issues they are challenging from
12 Judge Mockler's decision to deny their Writ of Mandamus. This alone is grounds for denial of a
13 new trial based on Subsection 6. (*Patent Brick Co. v. Moore* (1888) 75 Cal. 205, 207.)

14 If one were to give Petitioners a hand and read their Motion broadly, one could infer that
15 they contend that Judge Mockler's statements about the inability of the District to transfer teachers
16 under the MOU and to obtain a Variable Term Waiver for the substitutes at issue given that they do
17 not want to enroll in a credential program are based on insufficient evidence. Such an inference,
18 however, does not save Petitioners' Motion, because Petitioners fail to set forth *all material*
19 *evidence* related to these issues that was presented at the trial. (*Capaldi, supra*, 1 Cal. App. 3d at
20 284; *citing Routh, supra*, 160 Cal.App.2d at 360-361.) Instead, Petitioners cherry-pick parts of the
21 transcript from the hearing and attempt to introduce new declarations to relitigate arguments the
22 parties addressed in briefing for the trial. For example, Petitioners did not submit with their
23 Motion for New Trial the entire transcript of the hearing before Judge Mockler, Article 14 of the
24 UTR MOU which sets forth the transfer provisions, the CTC's Waiver Request Guidebook, the
25 excerpts from Dr. Johnson's deposition transcript, and all the testimony and exhibits submitted by
26 the parties regarding transfers, variable term waivers, internship permits, and other alternatives for
27 remedying a teaching vacancy. All of these documents were before the trial court, but none of
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1 them have been submitted in support of this Motion. Thus, Petitioner have not met their burden to
2 prove that insufficiency of evidence entitles them to a new trial.

3 Moreover, the question the Court must answer in granting a new trial based on
4 insufficiency of the evidence is – whether there is any "substantial basis in the record" to support
5 the trial court's determination of the challenged conclusions. (*Schultz, supra*, 3 Cal.App.3d at 911.)
6 Here, again Petitioners do not present a fair picture of the evidence and law before the trial court.
7 Rather, they reargue points already raised at trial using “new evidence,” that really is not new, and
8 ignoring the evidence and law that supports Judge Mockler’s conclusions.

9 For example, Petitioners argue that Respondents mislead the Court into its conclusion that
10 waivers are only available for applicants who want to enroll in a credentialing program. They cite
11 Dr. Sandy’s unsupported opinion that a waiver can be issued to waive the Education Code
12 requirement that an applicant for a variable term waiver has to enroll in a credential program. Dr.
13 Sandy relies upon broad introductory language in the CTC Waiver Guidebook on p. 3, when the
14 rest of the Guidebook and the Code of Regulations for Variable Term Waivers specifically
15 contradict this opinion. In fact, so overwhelming is the evidence and law supporting the credential
16 program requirement that even Petitioners in their Reply Brief argued and admitted that the
17 requirements for obtaining a variable term waiver include that “the individual . . . *has*
18 ***“commit[ted] to completing requirements for the appropriate credential.”*** (Case Docket, Reply
19 Brief, p. 12:10-15 [emphasis added].) To support this statement, Petitioners rely on the CTC’s
20 Waiver Request Guidebook, which they submitted to the Court as Exhibit 1 to the Supplemental
21 Declaration of Karissa Provenza in support of their Reply Brief. The CTC Guidebook clearly
22 states that to obtain a variable term waiver, the teacher applicant has to either be enrolled in or
23 commit to enrolling in a credentialing program. (Supp. Declaration of Provenza, dated October 4,
24 2024, Ex. 1, pp. 4, 17, 25-26, 39 (5 CCR §80122(g)), 42 (5 CCR §80125((c)(3))). Thus, the record
25 contains sufficient evidence and legal support for Respondents’ contention and the Court’s
26 determination that the District could not obtain Variable Term Waivers for the substitutes at issue
27 given that they did not want to enroll in a credential program. (See also Declaration of Camille
28 Johnson filed in support herewith, at ¶¶9-10, Ex. 1.)

1 The record also contains sufficient evidence to support the Court’s interpretation of the
2 transfer provisions of the MOU.³ For example, Article 14, Section 5 regarding Involuntary
3 Transfers for Cause allows the transferred teacher to apply for any subsequent vacancy. Thus,
4 when the District has many vacancies the transferred teacher, similar to those transferred under
5 Sections 3 and 4, will be able to pick from any vacancies for which they are qualified. The District
6 cannot assign them to a particular school without their consent given the many vacancies at the
7 District. Moreover, a reasonable reading of Article 14, Section 5 is that it only applies in cases of
8 discipline. (See Case Docket, Supplemental Declaration of Katherine Alberts filed in support of
9 Opposition to Motion for Writ of Mandate, dated October 10, 2024, Exhibit J, p. 31; see also
10 Johnson Declaration filed in support herewith, ¶11.)

11 Given that Petitioners have failed to specify what conclusions they are challenging based on
12 insufficient evidence, failed to provide the Court with all material evidence on the issues they
13 might be challenging, and cannot prove that substantial evidence in the record does not exist as to
14 those issues, this Motion for New Trial based on insufficient evidence should be denied.

15 **D. Petitioners’ Fail to Show Error in Law**

16 The final theory upon which Petitioners rely on for a new trial is Subsection (7) of the Code
17 of Civil Procedure section 657, an “error in law, occurring at the trial and excepted to by the party
18 making the application.” Petitioners argue that the Court improperly ruled that it could deny the
19 Petition for Writ of Mandate based on Respondents’ inability to comply with the Williams Act by
20 remedying the vacancies because Respondents have done everything in their power to comply but
21 have been prevented from doing so by people and forces beyond their control. (Petitioner’s Notice
22 of Motion and Motion, pg. 9:17-10:5.) Where no error appears in the determination of any fact, a
23 new trial should not be granted on the ground that the decision is “against law.” (*Renfer v. Skaggs*
24 (1950) 96 Cal. App. 2d 380, 384.) Petitioners have not shown any errors as to determinations of

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27 ³ Moreover, once again, Petitioners are telling the Court selective parts of the events presented and
28 omitting the parts that support Respondents’ interpretation of the MOU. See Johnson Declaration
filed in support herewith, ¶¶11-21 & Ex. 2-6.

1 any fact. Therefore, Petitioners request for a new trial on the grounds of error of law must be
2 denied.

3 Moreover, Petitioners completely ignore that Judge Mockler’s decision is supported by the
4 equitable maxim codified in Civil Code section 3531 that “The law never requires impossibilities”
5 as argued by Respondents in their Opposition to the Writ of Mandate. “Impossibility means not
6 only strict impossibility but also impracticability because of extreme and unreasonable difficulty,
7 expense, injury or loss involved. [Citation] Consistent with this maxim, the law recognizes
8 exceptions to statutory requirements for impossibility of performance.” (*People v. Lake County*
9 (1867) 33 Cal. 487, 492 [impossibility of performance makes mandatory statutory duty directory];
10 *County of San Diego v. Milotz* (1953) 119 Cal.App.2d Supp. 871, 883-884 [“[W]here strict
11 compliance with the terms of a statute is impossible, compliance as near as can be has been
12 permitted on the principle that the law does not require impossibilities.”].) *Bd. of Supervisors v.*
13 *McMahon*, 219 Cal. App. 3d 286, 299-300 (1990).) A writ of mandate is an action in equity that is
14 subject to equitable maxims such as this one. For as the California Supreme Court long ago
15 concluded:

16 Our conclusion, therefore, as to the second proposition stated above, is that the defendant
17 district recognizes the duty imposed upon it by the statute and is endeavoring to comply
18 with the requirements of said statute. While it has not succeeded in discharging this duty
19 to its fullest extent, it has done all that could reasonably be required of it with the money
20 available for that purpose, and which the resources of the district will permit. Under such
21 a state of facts, the writ of mandate will not lie. The writ is an equitable remedy and will
22 not always issue as a matter of right. As was said in *Gammon v. McKeivitt*, 50 Cal. App.
23 656, 665 [195 Pac. 726], " The writ of *mandamus* is not wholly a writ of right, but lies to
24 a considerable extent within the sound judicial discretion of the court where the
25 application is made; and no court should allow a writ of mandate to compel a technical
26 compliance with the letter of the law, where such compliance will violate the spirit of the
27 law".


28 (*Sutro Heights Land Co. v. Merced Irrigation Dist.* (1931) 211 Cal. 670, 704-705.)

V. CONCLUSION

For the foregoing reasons, Petitioners’ Motion for a New Trial should be denied.

Dated: March 8, 2025

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