

1 NONHUMAN RIGHTS PROJECT, INC.
2 Monica L. Miller, Bar No. 288343
3 448 Ignacio Blvd #284
4 Novato, CA 94949
5 Tel.: 415-302-7364
6 Email: mmiller@nonhumanrights.org

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Superior Court of California
County of Fresno
By: Louana Peterson, Deputy

5 NONHUMAN RIGHTS PROJECT, INC.
6 Steven M. Wise, *pro hac vice*
7 5195 NW 112th Terrace
8 Coral Springs, FL 33076
9 Tel.: 954-648-9864
10 Email: wiseboston@aol.com

10 NONHUMAN RIGHTS PROJECT, INC.
11 Jake Davis, *pro hac vice*
12 1911 W Elk Pl
13 Denver, CO 80211
14 Tel.: 513-833-5165
15 Email: jdavis@nonhumanrights.org

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF FRESNO

17 NONHUMAN RIGHTS PROJECT,
18 INC., on behalf of Amahle, Nolwazi,
19 and Vusmusi, individuals,

20 *Petitioner,*

21 vs.

22 FRESNO'S CHAFFEE ZOO
23 CORPORATION, and JON FORREST
24 DOHLIN, in his official capacity as
25 Chief Executive Officer & Zoo Director
26 of the Fresno Chaffee Zoo,

26 *Respondents.*

Case No. 22CECG02471

**PETITIONER'S REPLY IN SUPPORT OF
MOTION FOR AN ORDER RETURNING
MATTER TO SAN FRANCISCO COUNTY
SUPERIOR COURT; DECLARATION OF
JAKE DAVIS**

Judge: Mark Cullers
Hearing Date: Sept. 14, 2022
Time: 8:30 a.m.
Location: B.F. Sisk Court, 1130 "O" Street,
Fresno, CA 93724-0002
Courtroom: Dept. 404
Date Action Filed: May 3, 2022

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EXHIBIT A - NOTICE OF RECEIPT OF PAPERS AND PLEADINGS, FILED AUGUST 15, 2022

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I. Argument

A. Respondents’ untimely notice argument fails since Respondents do not—and cannot—show prejudice, and service prior to Monday, August 22, 2022, was impossible

Respondents erroneously argue that because the NhRP did not serve its motion eighteen court days before the scheduled September 14, 2022 hearing, but sixteen court days before the hearing, the lack of timely notice is “sufficient reason alone to deny this motion.” Opp’n 4. The NhRP acknowledges it did not serve its motion on Thursday, August 18, 2022, eighteen court days before the scheduled hearing. However, this minor procedural defect is no basis for denial since (a) Respondents do not—and cannot—show they were prejudiced by the lack of timely notice, and (b) service of the NhRP’s motion prior to Monday, August 22, 2022, was impossible.

A party raising the issue of inadequate notice “must demonstrate not only that the notice was defective, but that he or she was *prejudiced*.” *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1289 (hereafter *Reedy*); *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486, 493 (“Even if the issue [of inadequate notice] is preserved for appeal, a party may secure a reversal only upon demonstrating prejudice due to the lack of notice.”); *Southern California Gas Co. v. Flannery* (2014) 232 Cal.App.4th 477, 491 (“Even if Flannery could demonstrate inadequate notice, he does not explain how the lack of notice caused him any prejudice, a requirement for relief on appeal.”). In a case such as this, where a party is opposing a motion both for inadequate notice and on the merits:

The opposition should contain a complete discussion of counsel's position as to why a more complete opposition was not able to be filed (e.g., because the defective notice of motion did not give

1 counsel adequate time to prepare a response). Counsel should then
2 appear at the hearing, object to the hearing taking place because the
3 service was defective and/or inadequate notice of the hearing was
4 received; again explain to the court the prejudice that has been
5 suffered by reason of the defective service and/or inadequate notice;
6 and request a continuance of the hearing so that a proper response
7 to the motion may be filed.

8 *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 698 (emphases added). Not only do
9 Respondents fail “to make any showing of prejudice, an objective review of the facts
10 conclusively negates the idea.” *Reedy*, 148 Cal.App.4th at 1289. In their Opposition,
11 Respondents do not allege prejudice—that is, explain how the lack of timely notice did
12 not give them adequate time to prepare a response. Nor could they. As Respondents point
13 out, the NhRP’s writ of mandate petition filed on July 27, 2022, advances the “same exact
14 arguments” for why this is not a conditions of confinement case, and thus they have been
15 well aware of the NhRP’s arguments long before the instant motion was served.¹ Opp’n.
16 6.

17 Moreover, service prior to Monday, August 22, 2022, was impossible. As explained
18 in the Declaration of Jake Davis, Esq. the NhRP only became aware of this case’s filing
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21 ¹ Respondents cite *Delgado v. Superior Court* (1977) 74 Cal.App.3d 560 in support of
22 their assertion that the NhRP’s “untimely motion invites reversible error.” Opp’n 3.
23 However, *Delgado* does not stand for the proposition that inadequate notice alone, absent
24 a showing of prejudice, would result in reversible error. *Delgado* concerned a party
25 opponent who moved to transfer venue under Cal. Civ. Pro. Code § 394, and then seven
26 days before the hearing, filed a supplemental memorandum seeking for the first time to
27 transfer venue based upon the convenience of witnesses. The Court of Appeals, in
28 reviewing the trial court’s transfer order, indicated that the primary reason why the order
29 could not be upheld based on the convenience of witnesses is “because no answer was
30 filed.” *Id.* at 563. Unlike *Delgado*, the NhRP’s motion is not based on the convenience of
31 witnesses, and it was served sixteen court days before the scheduled hearing (not seven
32 days).

1 in Fresno Superior Court on Saturday, August 20, 2022, when Monica L. Miller, NhRP’s
2 attorney of record, received a copy the Notice of Receipt of Papers and Pleadings
3 (hereafter Notice) in the mail stating that the case had been filed on Monday, August 15,
4 2022. (Davis Decl., ¶ 3). Without the new case number provided in the Notice, the NhRP
5 could not serve and file its motion. Further, it was not possible to notice the motion for a
6 hearing later than September 14, 2022. The August 15, 2022 filing triggered a 30-day
7 deadline by which this Court “must, within 30 days of receipt of the case, order the case
8 returned to the transferring court” should it determine that the “reason for transfer is
9 inapplicable” (30 days from August 15, 2022, is September 14, 2022). Cal. Rules of Court
10 4.552(b)(4). Accordingly, the NhRP could have not done anything differently given the
11 circumstances. See *Iverson v. Superior Court* (1985) 167 Cal.App.3d 544, 549 (hereafter
12 *Iverson*) (“[C]ourts should always ‘exercise their discretion and relieve the attorney from
13 tardy opposition filings when his conduct was reasonable. . . . Judges ... generally prefer
14 to avoid acting as automatons and routinely reject requests by counsel to function solely
15 in a ministerial capacity. Rigid rule following is not always consistent with a court’s
16 function to see that justice is done.”) (internal quotations and citation omitted).

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21 **B. Respondents fail to rebut the NhRP’s argument that the San Francisco
22 Superior Court’s reason for transfer is inapplicable**

23 The sole merits question before this Court is whether the San Francisco Superior
24 Court’s “reason for transfer is inapplicable.” Cal. Rules of Court 4.552(b)(4). This requires
25 determining whether the Petition challenges the conditions of Amahle, Nolwazi, and
26 Vusmusi’s confinement at the Fresno Chaffee Zoo, for the transfer order was based on
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1 Cal. Rules of Court 4.552(b)(2)(B).² The NhRP demonstrated that since the Petition does
2 not make such a challenge, but instead challenges the legality of the elephants'
3 imprisonment itself, the San Francisco Superior Court's reason for transfer is inapplicable.
4 Mot. 6-9. Respondents fail to show otherwise.

5
6 **1. The San Francisco Superior Court's reason for transfer is not**
7 **"applicable" merely because it is based on one of the three**
8 **circumstances described in Cal. Rules of Court 4.552(b)(2)**

9 According to Respondents, the San Francisco Superior Court provided an
10 "applicable" reason for transfer merely because its order was based on "one of the three,
11 applicable reasons for transfer" under Cal. Rules of Court 4.552(b)(2). Opp'n 5. Under
12 this logic, so long as one of the three circumstances described in Cal. Rules of Court
13 4.552(b)(2) is invoked as the reason for transfer, that reason could not be found
14 "inapplicable" within the meaning of Cal. Rules of Court 4.552(b)(4), regardless of
15 whether those circumstances truly applied or not. Respondents' understanding of
16 applicability must be rejected.

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18 For example, had the San Francisco Superior Court ordered the case transferred
19 based on Cal. Rules of Court 4.552(b)(2)(C), because it found that the NhRP's Petition
20 was challenging the elephants' "denial of parole," no reasoned individual could plausibly
21 contend that the court specified an "applicable" reason for transfer. Accordingly, to
22 determine whether the San Francisco Superior Court's "reason for transfer is inapplicable"
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25 ² Respondents effectively concede that Cal. Rules of Court 4.552(b)(2)(B) does not apply
26 when they state: "Here, of course, there are no 'inmates' and no 'confinement' in the sense
27 used by the . . . Rules of Court." Opp'n 7. Notably, every case concerning "inmates" in
28 the context of Rule 4.552 involved individuals confined in penal institutions following
conviction of a crime. The NhRP's description of the Fresno Chafee Zoo as the elephants'
"imprisonment" in no way suggests they are confined in a penal institution.

1 under Cal. Rules of Court 4.552(b)(4), this Court must resolve the question: does the
2 Petition challenge the conditions of the elephants’ confinement or not?

3 **2. There is no conflict between Cal. Civ. Pro. Code § 1008 and Cal.**
4 **Rules of Court 4.552(b)(4), and this Court can determine whether**
5 **the Petition challenges Amahle, Nolwazi, and Vusmusi’s conditions**
6 **of confinement**

7 Respondents contend that this Court cannot undertake an independent review of
8 whether the Petition challenges the conditions of the elephants’ confinement because
9 doing so would “run afoul of Code of Civil Procedure section 1008’s limitation on
10 reconsideration requests” by creating “an impermissible conflict” between the statute and
11 Cal. Rules of Court 4.552(b)(4). Opp’n 5, 6. This is wrong. A conflict occurs when a court
12 rule is inconsistent with a statute. See, e.g., *Iverson*, 167 Cal.App.3d at 548 (finding court
13 rule that requires opposition papers to be filed at least “five court days” before a hearing
14 inconsistent with statute that requires such papers to be filed at least “five days” before a
15 hearing).

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18 There is no inconsistency here because Cal. Civ. Pro. Code § 1008 has no
19 applicability to the NhRP’s motion, which is not a request for reconsideration. A
20 reconsideration request concerns an application made “to the same judge or court that
21 made [an] order, to reconsider the matter and modify, amend, or revoke the prior order,”
22 Cal. Civ. Pro. Code § 1008(a) (emphases added), whereas the instant motion concerns an
23 application made to the “receiving court” regarding an order made by the “transferring
24 court,” to consider, for the first time, whether the latter’s “reason for transfer is
25 inapplicable.” Cal. Rules of Court 4.552(b)(4). The statute and the court rule have nothing
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1 to do with each other, and unsurprisingly, no case has found an inconsistency between
2 them.³

3 Relatedly, Respondents contend that the “principles announced in” *In re Alberto*
4 (2002) 102 Cal.App.4th 421 (hereafter *Alberto*) limit this Court’s power to “nullify Judge
5 Ulmer’s findings and ruling” regarding the transfer order, and therefore this Court’s “task
6 under 4.552(b)(4) is ministerial.” Opp’n 6, 7. This argument that the Court cannot make
7 an independent determination regarding whether the Petition challenges the conditions of
8 the elephants’ confinement also fails. The principle articulated in *Alberto* restricts a
9 judge’s ability to nullify an order made by another judge sitting on the same court, not
10 another judge sitting on a different court. See *id.* at 427-28 (“The Superior Court of Los
11 Angeles County, though comprised of a number of judges, is a single court and one
12 member of that court cannot sit in review on the actions of another member of that same
13 court. . . . Stated slightly differently, because a superior court is but one tribunal, an order
14 made in one department during the progress of a cause can neither be ignored nor
15 overlooked in another department.”) (internal quotations and citations omitted).
16 Accordingly, nothing in *Alberto* prohibits a judge on one superior court from
17 independently reviewing a transfer order made by a judge on a different superior court,
18 where such review is expressly contemplated by a court rule, as in the situation here.
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25 ³ Respondents describe the NhRP’s arguments as having been previously “disregarded”
26 and “rejected” by the First District Court of Appeal’s summary denial of the NhRP’s writ
27 of mandate petition. Opp’n 6, 9. Such denial was not a decision on the merits. See *Bank*
28 *of Am., N.A. v. Superior Ct.* (2013) 212 Cal.App.4th 1076, 1097 (“A summary denial of a
petition for writ of mandate is not a denial on the merits and does not become law of the
case.”).

1 **3. The Petition does not challenge Amahle, Nolwazi, and Vusmusi’s**
2 **conditions of confinement and therefore the San Francisco Superior**
3 **Court’s “reason for transfer is inapplicable” under Cal. Rules of**
4 **Court 4.552(b)(4)**

5 Respondents’ claim that the Petition challenges the elephants’ conditions of
6 confinement disregards the core allegation in the Petition, which states: “Respondents’
7 imprisonment of Amahle, Nolwazi, and Vusmusi violates their common law right to
8 bodily liberty protected by habeas corpus and is therefore unlawful because it deprives the
9 elephants of their ability to meaningfully exercise their autonomy and extraordinary
10 cognitive complexity, including the freedom to choose where to go, what to do, and with
11 whom to be.”⁴ (Pet. ¶ 5). Contrary to Respondents, this allegation—which forms the basis
12 of the NhRP’s prima facie case—is not “belied by the factual allegations” in the Petition
13 but established by them. Opp’n 7. This is because those factual allegations, including the
14 ones Respondents cite (see Opp’n 8), establish that Fresno Chaffe Zoo deprives the
15 elephants of their ability to meaningfully exercise their autonomy and extraordinary
16 cognitive complexity. Mot. 6-7.

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19 Moreover, the Petition’s core allegation cannot be “disregarded” as “nothing more
20 than a legal conclusion.” Opp’n 7. Cal. Rules of Court 4.552(b)(1) makes clear that a
21 transfer decision must be “based on the allegations of the petition,” and the rule does not
22 distinguish between legal allegations and factual allegations. Respondents’ sole authority
23 for their assertion, *Wexler v. California Fair Plan Association* (2021) 63 Cal.App.5th 55,
24 70, is inapposite since it applies in the context of determining whether to sustain a
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27 ⁴ Respondents previously conceded that this allegation does not challenge the conditions
28 of the elephants’ confinement. Mot. 6. Notably, Respondents do not withdraw this
concession.

1 demurrer, where a court must assume the truth of the factual allegations in a complaint but
2 not its legal conclusions. See *Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422, 429
3 (“The reviewing court assumes the truth of allegations in the complaint which have been
4 properly pleaded and gives it a reasonable interpretation by reading it as a whole and with
5 all its parts in their context. . . . However, the assumption of truth does not apply to
6 contentions, deductions, or conclusions of law and fact.”). The procedural posture here is
7 very different since at issue is not the legal sufficiency of the Petition’s allegations, but
8 what it challenges. Cal. Rules of Court 4.552(b)(2)(B), the basis for the San Francisco
9 Superior Court’s transfer order, applies to a habeas corpus petition that “challenges the
10 conditions of an inmate's confinement” (emphasis added), and the only way to properly
11 determine whether the Petition makes such a challenge is to understand the Petition in
12 light of its core allegation.
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15 The core allegation is also directly related to the relief sought, as only the elephants’
16 discharge from the Fresno Chafee Zoo and placement in an appropriate sanctuary can
17 remedy the violation of their common law right to bodily liberty protected by habeas
18 corpus. Mot. 8-9. Respondents misrepresent the Petition as attempting “to convince the
19 Court that the conditions should be improved by moving the elephants to a different
20 location.” Opp’n 8. Nowhere in the Petition does it seek to improve the conditions at
21 Fresno Chaffe Zoo, and the fact that it seeks the elephants’ transfer to a sanctuary
22 demonstrates that this is not a “conditions of confinement” case. See *People v. Romero*
23 (1994) 8 Cal.4th 728, 743 (“[I]n habeas corpus proceedings, relief is granted . . . by an
24 order or judgment directing the petitioner's release from custody or alteration of the
25 conditions of the petitioner's confinement.”) (emphasis added)
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DECLARATION OF JAKE DAVIS

I, Jake Davis, declare the following:

1. I am a staff attorney for the Nonhuman Rights Project, Inc. (hereafter NhRP or Petitioner) and have personal knowledge of the facts contained herein.

2. I submit this declaration in support of Petitioner’s Reply in Support of Motion for an Order Returning Matter to San Francisco County Superior Court, to explain why the NhRP could not have served its Motion for an Order Returning Matter to San Francisco County Superior Court (hereafter Motion) prior to Monday, August 22, 2022.

3. According to the Notice of Receipt of Papers and Pleadings (hereafter Notice), this case was filed in this Court on August 15, 2022, following an order by the San Francisco County Superior Court to transfer the case to Fresno County Superior Court. (Exhibit A). However, the NhRP only learned of this filing on Saturday, August 20, 2022, when Monica L. Miller, the attorney of record, received a copy of the Notice in the mail and then sent a screenshot of it to me in a text message. Moreover, I, Jake Davis, called the Court nearly daily during the week of August 15, 2022, and asked the civil unlimited division clerk if this case had been filed. The clerk repeatedly told me it had not been filed but that she would let me know once the filing occurred. The Court’s website reflected this position when I tried to search for the case manually that same week. Ultimately, I never received notice from the clerk and was first made aware of the filing upon receipt of the Notice by Ms. Miller.

4. The Motion was served on Monday, August 22, 2022, the first possible court day after Ms. Miller received the Notice on Saturday, August 20, 2022.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 7th day of September 2022, in Denver, Colorado.

/s/ Jake Davis

Jake Davis

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(BY E-MAIL OR ELECTRONIC TRANSMISSION) I caused the documents to be sent on the date shown above to the email address(es) of the person(s) listed above. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transaction was unsuccessful.

(BY PERSONAL DELIVERY) I delivered such documents by hand to the office of the addressee.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on September 7, 2022 at Los Angeles, California.

Fernando Mercado
PRINT NAME

/s/ Fernando Mercado
SIGNATURE

EXHIBIT A

<p align="center">SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-1900</p>	<p align="right">FOR COURT USE ONLY</p> <p align="center">FILED</p> <p align="center">8/15/2022</p> <p align="center">FRESNO COUNTY SUPERIOR COURT By <u>aramos</u> DEPUTY</p>
<p>TITLE OF CASE:</p> <p>Nonhuman Rights Project Inc., vs Freno's Chaffee Zoo Corporation</p>	
<p align="center">NOTICE OF RECEIPT OF PAPERS AND PLEADINGS</p>	<p>CASE NUMBER: 22CECG02471</p>

You are notified that the papers and pleadings in the above entitled case were received as follows:

Date filed: May 3, 2022

From Court: **San Francisco Superior Court**

Transferring Court's case number: CPF-22-517751

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the **Notice of Receipt of Papers and Pleadings** was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at **Fresno**, California, on:

Date: **August 15, 2022**

Clerk, by _____, Deputy
A. Ramos

┌
Monica Lynn Miller
448 Ignacio Blvd., #284
Novato, Ca 94949
└

┌
Hanson Bridgett LLP
David Carrillo Casarrubias
425 Market Street, 26th Floor
San Francisco, Ca 94105
└

┌ _____ └

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