Indian Wells
(760) 568-2611
Irvine
(949) 263-2600
Los Angeles
(213) 617-8100
Ontario
(909) 989-8584

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300 | Fax: (619) 233-6118 | www.bbklaw.com

Riverside
(951) 686-1450
Sacramento
(916) 325-4000
Walnut Creek
(925) 977-3300
Washington, DC
(202) 785-0600

James B. Gilpin
(619) 525-1341
james.gilpin@bbklaw.com
File No. 09998.00058

November 2, 2012

VIA FEDERAL EXPRESS

The Honorable Tani Gorre Cantil-Sakauye
and the Associate Supreme Court Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: Amicus Curiae Letter Supporting Petition for Review (Cal. Rules of Court, rule 8.500(g)) -- *Santa Ana Watershed Project Authority v. Castle & Cooke Lake Elsinore West, Inc.*, California Supreme Court Case No. S205617

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g), the League of California Cities ("League") and the Association of California Water Agencies ("ACWA") respectfully submit this letter as *amicus curiae* in support of the Petition for Review in *Santa Ana Watershed Project Authority v. Castle & Cooke Lake Elsinore West, Inc.* (Cal.App.4th Dist., Div. 2, 2012), Supreme Court Case No. S205617 ("*SAWPA* Opinion") filed by Santa Ana Watershed Project Authority ("SAWPA").

1. Interest of *Amicus Curiae*.

The League of California Cities is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified the *SAWPA* Opinion as having such significance.

ACWA is a statewide coalition of nearly 450 public water agencies who are collectively responsible for 90% of the water delivered to cities, farms and businesses in California. ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally balanced manner. In fulfilling its role, ACWA identifies issues of concern to the water industry and the public it serves. ACWA has identified the *SAWPA* Opinion as raising issues of concern as member agencies are responsible for building and maintaining an elaborate network of water

delivery systems which are vital to meet the needs of over 30 million people and irrigate over 5,680,000 acres of farmland.

Eminent domain is a vital tool for municipalities and water agencies throughout California to acquire property necessary for the public projects which are essential to the public. Severance damages have become the focal point of these cases. Since this Court's decision in *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954 ("*Campus Crusade*"), approximately 22 court of appeal decisions have dealt with the issue of severance damages in eminent domain proceedings. The *Campus Crusade* decision has been cited by four published decisions (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460 ("*Baca*"); *Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189; *City of Fremont v. Fisher* (2008) 160 Cal. App. 4th 666 ("*Fisher*"); and *Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 Cal. App. 4th 1111) and in eight unpublished decisions (*Elsinore Valley Mun. Water Dist. v. O'Doherty* (August 29, 2012, E050909) [nonpub. opn.]); *Santa Ana Watershed Project Auth. v. Castle & Cooke Lake Elsinore W.* (August 24, 2012, E052217) [nonpub. opn.]); *S. Cal. Edison Co. v. Minn* (Nov. 21, 2011, F061227) [nonpub. opn.]); *People ex rel. DOT v. 927 Muerto* (Nov. 16, 2011, B219227) [nonpub. opn.]); *People ex rel. DOT v. Hashim* (April 28, 2011, G043046) [nonpub. opn.]); *County of San Diego v. Crystal Lakeside Vill. Ctr.* (Aug. 13, 2008, D050232) [nonpub. opn.]); *Santa Clara Valley Transp. Auth. v. Shoreline* (Apr. 24, 2008, H030248) [nonpub. opn.]); and *City of L.A. v. Hensler* (Mar. 7, 2008, B199045) [nonpub. opn.]).) These decisions reflect the continued confusion which exists in applying the standard set forth in *Campus Crusade*, for example in *Baca* the court of appeal held the trial court erred in not permitting the jury to consider evidence, while in *Fisher* the court of appeal held the trial court erred by permitting the jury to consider evidence.

The appellate cases are just the tip of the ice berg of eminent domain proceedings in which the issue arises. The issue is not going away but will be amplified as public agencies move forward to replace aging infrastructure in California. Accordingly, this Court should take this opportunity to clarify the applicable evidentiary standard and the role of the trial court in such proceedings.

2. Review Should Be Granted to Restore the Proper Standard of Review and Settle Important Questions of Law Pursuant to Rule 8.500(b)(1).

There has historically been a long-standing antipathy for speculative damages as an improper element of severance damages. (See, *City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 747-749 ("*Neumann*").) Nonetheless, the *SAWPA* Opinion is the latest and a further example of the confusion which has arisen over the application of this Court's precedence in *Campus Crusade*. The *SAWPA* Opinion effectively strips the trial courts of their longstanding authority to exclude opinion testimony that is based in whole or in significant part on matter that is not a proper basis for such an opinion. (See Evid. Code, § 803.) Instead of applying the abuse of discretion standard of review applicable to rulings on the admissibility of evidence such as

motions in limine, the court applied an independent standard of review. Review is necessary to correct the Opinion's erroneous departure from *Campus Crusade* and application of the appropriate deferential standard of review applicable to evidentiary rulings.

The League and ACWA believe that review of the *SAWPA* Opinion is of vital importance to maintain the balance between the economic interests of the public and those of landowners. The League and ACWA recognize the obligation of public entities to pay just compensation for private property taken for public use, but the concept of just compensation should be balanced as it is not only for the benefit of the landowner, but also for the benefit of the public. (*City of Fresno v. Cloud* (1972) 26 Cal.App.3d 113, 123.) As one court put it: "Just as the landowner should not be shortchanged, the public should not be burdened with paying a king's ransom for a squire." (*San Diego County Water Authority v. Mireiter* (1993) 18 Cal.App.4th 1808.)

Under these principles, public agencies should not be required to pay amounts in excess of the just compensation that are based upon speculative, conjectural and non-compensable items. The *SAWPA* Opinion opens the door for such claims and divests the trial court of the discretion to control the introduction of speculative or conjectural evidence.

A. Review Is Necessary to Resolve Confusion and Misapplication of the Burden of Production Established by this Court in *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954.

When a public agency condemns only a portion of a larger parcel, the property owner is entitled to damages for any injury to the property owner's remaining property caused by the severance of the remainder from the part taken or the construction and use of the project for which the property is taken in the manner proposed. (Code Civ. Proc., § 1263.410.) These damages for the injury to the property owner's remainder are severance damages. This Court clarified in *Campus Crusade* that a property owner claiming entitlement to severance damages, not the condemning agency, bears the burden of producing evidence showing entitlement to compensation for the alleged severance damages. (*Id.* at 973.) Once the property owner satisfies this burden of production, the jury weighs the effect of the asserted damages and the resulting compensation owed to the property owner. (*Id.*)

Campus Crusade adopted a burden of production requiring the proponent to produce evidence which tends to show that some aspect of the taking "naturally tends to and actually does decrease the market value" of the remaining property before it is given to the jury to weigh its effect on the value of the property. (*Campus Crusade, supra*, 41 Cal.4th at p. 973 [emphasis added].) Nonetheless, the *Campus Crusade* decision left the trial court vested with discretion to exclude evidence of factors whose effect on market value was conjectural, speculative, or remote. (*Id.* at 972.) Thus, the trial court's role is to determine whether there is evidence tending to show that "some ... aspect of the taking ... 'naturally tends to and actually does decrease the market value' of the remaining property ...." (*Id.*) Only upon such showing to the

trial court does the severance damage claim go to "the jury to weigh its effect on the value of the property." (*Id.*)

The *SAWPA* Opinion misapplies the principles this Court set forth in *Campus Crusade* in determining whether property owners have satisfied their burden of production and instead adopts an even lower burden that allows property owners to go to a jury with any severance damages that the court determines in its own opinion are "fairly obvious" as having an effect on market value. (*Campus Crusade, supra*, 41 Cal.4th at p. 973.) The *SAWPA* Opinion appears to have derived its "fairly obvious" standard from the following language in this Court's *Campus Crusade* decision:

> The factors Campus Crusade identified below – e.g., fear that the pipeline will rupture in an earthquake, negative visual and aesthetic impacts on the landscaping, and limitations on potential development caused by grading restrictions and placement of the pipeline – at least arguably have the potential of affecting the market value of the remaining property. [Footnote 4 omitted.] As long as the effect of these factors on market value is not conjectural, speculative, or remote, it is for the jury to decide the extent to which they may affect the value of the property. (*Campus Crusade, supra,* 41 Cal.4th at pp. 972-973 [emphasis added].)

This language from *Campus Crusade*, however, must be read in conjunction with this Court's clarification that property owners must still meet their burden of production to "produce[] evidence tending to show that the alleged damages 'naturally tends to and actually does decrease the market value' of the remaining property." (*Id.* at p. 973.) Accordingly, the trial court's role is to evaluate the evidence the property owner has produced to see whether it meets this market support standard and whether the proffered evidence is conjectural, speculative, or remote.

Campus Crusade did not hold, as the *SAWPA* Opinion implies, that severance damages such as fear of a pipeline rupture or development limitations necessarily get to go to a jury. Indeed, this Court specifically noted in Footnote 4 that it was not reaching that issue: "We need not decide whether *Campus Crusade* satisfied its burden of production with respect to these factors inasmuch as that issue was not included in our grant of review." (*Campus Crusade, supra,* 41 Cal.4th at p. 973.) In other words, there is a two-step process: (1) first, the property owner must produce evidence for the trial court's evaluation that the asserted severance damages "at least arguably" have the potential to impact market value; and (2) the trial court must then determine whether the property owners have satisfied their burden of production by producing reliable, non-speculative, evidence tending to show that the proffered damage naturally tends to and actually does decrease the property's fair market value. Only after these two steps are followed does evidence clearing these two hurdles go to the jury for consideration.

The *SAWPA* Opinion confuses this process, limiting the trial court's review simply to whether it is "fairly obvious" to the reviewing court that the damages might impact the remaining property's market value, regardless of the speculative value of any such evidence. For instance, the *SAWPA* Opinion notes that the property owner's experts testified during an evidentiary hearing that the pipeline would damage the remainder by causing, among other things, a "development constraint," but the *SAWPA* Opinion ignores the trial court's finding that this expert evidence was based on unsubstantiated opinion and speculative and unapproved development plans. (See, e.g., *SAWPA* Opinion, at p. 11; Pet. for Review at pp. 7-8.) In short, the property owner's evidence lacked the necessary evidentiary foundation to satisfy the burden of production that this Court established in *Campus Crusade*. The *SAWPA* trial court, thus, excluded a portion of the property owner's evidence of severance damages following the second step of the analysis that the Campus Crusade court expressly did not reach. Yet the *SAWPA* Opinion mistakenly reads *Campus Crusade* as holding that installation of a pipeline underneath a property is not conjectural or speculative as a matter of law, and thus the evidence of damages was admissible, without giving any deference to the trial court's evidentiary findings as to whether that evidence satisfied the burden of production. This is not what *Campus Crusade* held as this Court expressly did not reach the issue of whether the evidence supporting the purported damages satisfied the burden of production in that opinion. *Campus Crusade* held concerns of a pipeline burst could be a measure of damages, but the property owner still had to satisfy its burden of production, a burden the *SAWPA* trial court determined after several days of evidentiary hearings had not been met.

The recent appellate opinion in *City of Livermore v. Baca, supra*, 205 Cal.App.4th 1460, 1468, further reflects the need for review and clarification by this Court as to the trial court's role in determining whether a property owner has satisfied the burden of production to present evidence of severance damages to a jury. In *Baca*, the court adopted a similar "arguably possible" standard relying on this same passage in *Campus Crusade*. The *Baca* court reversed a finding by the trial court excluding evidence of the property owner's claim for permanent severance damages based upon an alleged decrease in the property's value due to view changes, effects on drainage, changes in the depth of utility lines, and increased traffic hazards as a result of the City's project. The trial court excluded evidence of these effects following a 10-day evidentiary hearing on the basis that such evidence was conjectural and speculative. The *Baca* court, however, reversed because such evidence "at least arguably" would have "the potential of affecting the market value of the remaining property," and thus was admissible under *Campus Crusade*. As in the *SAWPA* Opinion, *Baca* effectively eliminates the burden of production, prohibiting the trial court from analyzing whether the evidence produced is non-speculative and based on proper assumptions as long as the claimed damage could "at least arguably" have an impact on the property's value and remoteness in time and improbability of occurrence are inconsequential considerations. But again, this approach improperly collapses the two-step process.

Pursuant to *Campus Crusade*, whether the burden of production is satisfied should be left to the sound discretion of the trial court reviewing the evidence. The *SAWPA* Opinion and *Baca*, however, reflect a continued confusion on the application of the burden of production, to the detriment of condemning agencies. As such, review is necessary to settle these important questions of law.

B. The Opinion Effectively Eliminates the Trial Court's Gatekeeper Function in Deciding Evidentiary Motions, Resulting in the Admission of Speculative Damages in Eminent Domain Proceedings to the Detriment of Condemning Agencies and the Public Paying for the Project.

The Petition for Review should be granted so this Court can clarify the trial court's role and discretion in evaluating whether a property owner's evidence of severance damages is conjectural, speculative, or remote. (See *Campus Crusade, supra,* 41 Cal.4th at p. 973.) Before the Opinion and *Baca* called into question the trial court's authority and discretion in ruling on evidentiary motions, the courts had long recognized the trial court's gatekeeper role in resolving evidentiary disputes. "To expedite testimony before a jury, [trial] courts routinely conduct hearings in limine to determine the admissibility of evidence." Norman E. Matteoni and Henry Veit, *Condemnation Practice in California,* §9.48 (3d ed. Oct. 2012). "In condemnation proceedings, the trial court is vested with considerable judicial discretion in admitting or rejecting evidence of value." (*City of San Diego v. Sobke* (1998) 65 Cal.App.4th 379, 396; *see also Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 358 ("*Red Mountain*").) The trial court determines the admissibility of the evidence and excludes any evidence that is purely speculative or conjectural. (See *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 868; *Redevelopment Agency v. Contra Costa Theatre, Inc.* (1982) 135 Cal.App.3d 73, 86.)

The trial court's broad discretion in ruling on evidentiary matters extends to foundational matters on which expert testimony is based. (*Korsak v. Atlas Hotels, Inc.,* 2 Cal. App. 4th 1516, 1523 (1992).) "[T]he courts have the obligation to contain expert testimony within the area of the professed experts, and to require adequate foundation for the opinion." (*Id.*) The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-36.) Opinion testimony based upon a foundation that is pure speculation, guesswork, or conjecture has no evidentiary value. (*Id.* at 1136; see also Evid. Code, §803.) And where an expert opinion on a measure of damages lacks a reliable or nonspeculative foundation, the trial court must exclude such testimony because:

> There is a limit to imaginative claims . . . . To say that only the witness' valuation opinion has probative value, that his 'reasons' have none, ignores reality. His reasons may influence the verdict more than his figures. To say that all objections to his reasons go to weight, not

> admissibility is to minimize judicial responsibility for limiting the permissible arena in condemnation trials. The responsibility for defining the extent of compensable rights is that of the courts. (*Sobke,* 65 Cal.App.4th at p. 396, citing *Reed, supra*, 215 Cal.App.2d at p. 69.)

"A trial court has a special obligation to oversee the admission of expert testimony and, where an objection has been made, 'shall' exclude 'testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion.'" (Evid. Code § 803; *Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111, 1129-30, quoting Evid. Code, § 803; see also *Reed, supra,* 215 Cal.App.2d at 70, recognizing error in admitting evidence that consisted of "postulating a figurative buyer whose 'fears' were substituted for a realistic statement of actual losses and impairments.")

The *SAWPA* Opinion effectively strips trial courts of their broad discretion to exclude speculative damages, creating conflict with the foregoing authorities and the Evidence Code. The *SAWPA* trial court determined after a multi-day evidentiary hearing held pursuant to Evidence Code Section 402 that the opinions of the property owner's expert appraiser were speculative and lacked foundation. Such a determination has previously been left to the trial court's discretion to determine whether an expert's opinion "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which the testimony relates." (Evid. Code § 802.) But the *SAWPA* Opinion permits the speculative evidence to go forward to the jury based on its new "fairly obvious" standard, despite the fact that the trial court, which heard the evidence and observed the expert giving the opinion, concluded it did not satisfy the minimal evidentiary requirements necessary to proceed to a jury.

Such misapplication of this Court's precedent in *Campus Crusade* will sideline trial courts in eminent domain proceedings from dealing with evidentiary issues and excluding speculative damages. In *Sacramento & San Joaquin Drainage Dist. ex rel. State Reclamation Board v. Reed* (1963) 215 Cal.App.2d 60, 69, the court noted the problems with a prospective buyer approach whereby a valuation witness may state as a "reason" for his opinion any detrimental factor which the witness might choose to attribute to a prospective purchaser, so long as the detriment in some way arises from the project. "The approach ignores the fact that the 'prospective purchaser' is an abstraction, a ventriloquist's dummy who speaks only with the voice of the flesh-and-blood valuation witness. In feeding words to the fictional buyer, the witness -- be he appraiser or landowner -- is confined only by his own imagination and by such narrower limits as the law may impose on him." (*Id.*) The court concluded that there should be a limit to imaginative claims even when described in terms of a prospective buyer's mental reactions, noting that allowing all objections to an opinion witness' reasons go to weight, not admissibility, minimizes the judicial responsibility for limiting the permissible arena in condemnation trials. (*Id.*)

This Court has had a historical and well-founded antipathy to speculative damages like those now admissible under the *SAWPA* Opinion. (*Neumann, supra,* 6 Cal.4th at pp. 748-749.) Damages which were "merely possible" were not sufficient to support a severance damage claim. (*Id.* [quoting from *Arnerich v. Almaden Vineyards Corp.* (1942) 52 Cal.App.2d 265, 272].) The rationale for precluding such evidence is that "taxpayers should not be required to pay more than reasonably necessary for public works projects. Stated another way, compensation for taking or damage to property must be just to the public as well as to the landowner." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 716.)

As early as 1866, this Court warned "that the measure of damages should not include "conjectural or speculative estimations of consequential damages or benefits." (Id. at p. 375.) This rule has been eroded over time leading to an ever-broadening spectrum of what is or is not "speculation." For a stretch of time, this Court followed a standard tied to a determination whether there was "reasonable probability" or "reasonable possibility" of an anticipated event occurring. The latest round of Court of Appeal decisions, including the *SAWPA* Opinion, have stretched the boundaries to now allow events that "might" happen or which are "arguably possible." These recent decisions emphasize the need for this Court to impose some standard/limit on the realm of possibility to be considered in eminent domain proceedings -- similar to the foreseeability limits adopted by Justice Benjamin Cardozo in the classic tort causation case -- *Palsgraf v. Long Island Railroad Co.,* to the concept of proximate cause.

C. The *SAWPA* Opinion Opens the Door to Allow Damages Based Upon Frustration of Future Development Plans, which have Long Been Excluded in Eminent Domain Actions.

In eminent domain valuation, it has long been the rule that damages cannot be based upon frustration of a specific plan of development. (See *People ex rel. Dept. Pub. Wks. v. Princess Park Estates, Inc.* (1969) 270 Cal.App.2d 876, 884.) Proffered development plans do not represent the current condition of the land, but rather possible future uses which are not certain to come to fruition. (*People v. Ocean Shore Railroad, supra,* 32 Cal.2d at pp. 425-426.) Mere frustration of an owner's plans has not generally been compensable. (*County of San Diego v. Rancho Vista Del Mar* (1993) 16 Cal.App. 1046, 1065; *City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 404.) Thus, evidence of the owner's plan of development is not admissible where its purpose is to show enhanced damages which would be suffered by being prevented from carrying out a particular scheme of improvement. (*County of San Diego, supra,* 16 Cal.App. at p. 1065 quoting *San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 Cal.App.2d 889, 899.)

The measure of damages which the condemnee is entitled to recover is the value of the land taken plus the depreciation in the market value of the remainder due to the use made of the part taken, not any damages it may suffer through frustration of its future plans. (*City of Pleasant*

Hill, supra, 1 Cal.App.3d at p. 404.) In *Sacramento Southern R.R. Co. v. Heilbron* (1909) 156 Cal. 408, 414-415, the California Supreme Court drew a distinction between awarding damages in a condemnation proceeding based on the market value of property in view of all the purposes to which it is naturally adaptable versus valuing property in terms of the price which would be paid as a result of a projected plan of development. The Supreme Court warned that allowing evidence as to the latter "opens wide the door to unlimited vagaries and speculation concerning problematical prices which might under possible contingencies be paid for the land, and distract[s] the mind of the jury ...." (*Id.* at 412.) Indeed, in *Oakland v. Pacific Coast Lumber Company* (1915) 171 Cal. 392, 400, the court cautioned in colorful terms against permitting damages based upon the value of a proposed development:

> If the exception to the exclusion of this kind of evidence is well taken, then it would be quite permissible for the witnesses to say, "if oil were discovered upon the land it would be worth twenty thousand dollars an acre," ... "if a man wanted to buy it and establish a town site it would be worth three thousand dollars an acre," and so on, until such inquiry in a condemnation suit would bear a close affinity to Lord Dundreary's famous question, "If you had a brother would he like cheese?"

Since *Pacific Coast Lumber Company*, other California decisions have followed the rule against permitting severance damages to be awarded based on a prospective plan of development. (See e.g. *People v. Ocean Shore Railroad* (1948) 32 Cal.2d 406, 425-426 (finding that proof of what property is worth in the market is limited to showing the present condition of the property and the uses to which it is adapted and may not extend to speculative inquiries into possible future uses under altered conditions, which may or may not arise); *City of Los Angeles v. Retlaw Enterprises, Inc.* (1976) 16 Cal.3d 473, 488 (finding evidence of value based upon an owner's projected plan of development is not admissible); *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 359 (finding as a general rule, "a property owner may not value his property based upon its use for a projected special purpose or for a hypothetical business.").) Nonetheless, the *SAWPA* Opinion allows consideration of such things as a pipeline's effect on the placement of future structures, the fact that the presence of the pipeline could make it more difficult to connect utilities, that it might affect future grading plans, and that the condemnor might insist on approving future development of the property. These all seem to be in the realm of speculative impacts to a future plan of development.

D. Review is Necessary to Restore the Proper Abuse of Discretion Standard of Review to Evidentiary Rulings Regarding Severance Damages.

Review is also necessary to clarify the trial court's proper role in evaluating motions in limine to ensure consistency with the Evidence Code that the proper balance of interests required by the law of eminent domain will not be disturbed and the government, i.e. taxpayers, will not

be required to pay compensation for speculative claims. (See, *Neumann, supra,* 6 Cal.4th at p. 758. Exclusion of expert testimony in eminent domain actions has long been reviewed for an abuse of discretion where, as in *SAWPA*, the trial court concluded the testimony failed to satisfy minimum evidentiary standards, such as the evidence or testimony lacked foundation or was purely speculative or conjectural. (See *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 677 ("*City of Fremont*"); *Red Mountain, supra,* 143 Cal.App. 4th at p. 358, "[W]e review evidentiary rulings for an abuse of discretion"; *City of Stockton v. Albert Brocchini Farms, Inc.* (2001) 92 Cal.App.4th 193, 198; *Sobke, supra,* 65 Cal.App.4th at p. 395 ("In reviewing [owner's] claim that the court erred in excluding [expert] testimony, we apply an abuse of discretion standard.") Stated another way, a reviewing court "will not reverse a trial court's ruling if it was based on a 'reasoned judgment' and complies with 'legal principles and policies appropriate to the particular matter at issue.'" (*City of Fremont, supra,* 160 Cal.App.4th at p. 677, quoting *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1027.) Rather, the trial court's decision will only be overturned "if it 'exceeds the bounds of reason, all of the circumstances before it being considered.'" (*Id.*)

This is the same discretionary standard of review employed generally in civil litigation pursuant to Evidence Code Section 801(b), which allows the trial court to determine the admissibility of an expert opinion and whether it "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." A trial court exercises discretion when ruling on the admissibility of expert testimony under Section 801(b). (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) If the trial court excluded an expert's testimony on the ground that there was no reasonable basis for the opinion, the exclusion of evidence is reviewed under the abuse of discretion standard. (*Id.*)

In condemnation proceedings, the trial court has historically been vested with judicial discretion in admitting or rejecting evidence as to value. (*People ex rel. Dept. of Public Works v. Arthofer* (1966) 245 Cal.App.2d 454, 463.) Pursuant to Evidence Code section 803, the "court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion." (Evid. Code, § 803 (emphasis added). When a valuation expert in a condemnation case employs an unsanctioned methodology, the opinion may be excluded in part or in whole in the discretion of the trial court. (*City of Stockton v. Albert Brocchini Farms, Inc.* (2001) 92 Cal.App.4th 193, 198; *Contra Costa Water Dist. v. Bar-C Props.* (1992) 5 Cal.App.4th, 652, 660.)

The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. As rulings on the admissibility of evidence, motions in limine are subject to review on appeal for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 255–269; *People v. Mincey* (1992) 2 Cal.4th 408, 439; *People v. Alvarez* (1996) 14 Cal.4th 155, 203.) In *People v. Alvarez*, this Court stated "An appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion."

This is especially so when, as here, the evidence comprises expert opinion testimony. (See *People v. McDonald* (1984) 37 Cal.3d 351, 373; *People v. Rowland,* 4 Cal.4th at p. 266.) Only when all evidence on a particular claim is excluded based on a motion in limine, is the ruling subject to independent review as though the trial court had granted a motion for judgment on the pleadings or, if evidence was offered, a motion for nonsuit. (*Aas v. Superior Court* (2000) 24 Cal.4th 627, 634–635, superseded by statute on other grounds as stated in *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1202; *Stein-Brief Group, Inc. v. Home Indemnity Co.* (1998) 65 Cal.App.4th 364, 369 (Stein-Brief); *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal. App. 4th 1396, 1402-1403.)

Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1419.)

The *SAWPA* Opinion departs from this long standing precedent. Instead, the *SAWPA* Opinion converts the trial court's evidentiary rulings on motions following an Evidence Code Section 402 hearing into a "summary adjudication motion in favor of SAWPA and against [the property owner] on the severance damage issue." (*SAWPA* Opinion, p. 5.) The *SAWPA* Opinion then concludes such a ruling did not involve exercise of the trial court's discretion, but involved "an issue of law, namely whether the evidence presented in the trial court created a factual issue regarding severance damages," and reviewed the purported summary adjudication order *de novo.* (*Id.*)

The trial court held a multi-day evidentiary hearing pursuant to Evidence Code Section 402, involving extensive examination of the parties' experts on the foundation for their respective opinions. With respect to the opinion of the property owner's expert regarding alleged severance damages, the trial court concluded the expert's opinion lacked foundation.

The fundamental issue is whether the effect "naturally tends to and actually does decrease the market value" of the remaining property. These are factual findings a trial court is required to make following an Evidence Code section 402 hearing, or in deciding motions in limine, when an objection is asserted that an expert opinion employs an incorrect methodology or fails to satisfy minimum evidentiary standards. (See, e.g., *Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1386-87 (recognizing that trial court may properly address the admissibility of evidence in a motion in limine hearing and that evidentiary rulings are subject to an abuse of discretion standard of review). Such factual findings do not convert a ruling on such matters into a summary adjudication ruling subject to de novo review. Indeed, the trial court did not grant judgment to the condemning agency or set the market value of the property, it simply made an evidentiary ruling regarding the admissibility of certain portions of the expert's testimony.

Simply stated, the trial court excluded speculative evidence lacking foundation in accordance with *Campus Crusade*.

The *SAWPA* Opinion conflicts with long recognized "judicial responsibility for limiting the permissible arena in condemnation trials," which could in turn lead to jury confusion and an inflated damage award at public expense. (*Sobke, supra,* 65 Cal.App.4th at p. 396.) It instead permits imaginative claims the trial court found lacked adequate foundation to go forward as disputed factual issues, rather than discretionary evidentiary rulings, under an inappropriate de novo standard of review. Review should be granted to restore the appropriate deference to the trial court's evidentiary findings.

CONCLUSION

Under the law, the constitutional requirement for the payment of just compensation is not only for the landowner's benefit, but also for the public's benefit. (*City of Fresno v. Cloud* (1972) 26 Cal.App.3d 113, 123.) Review of the Opinion is necessary to maintain the appropriate balance as established in *Campus Crusade* between the interests of the public and that of the individual land owner – securing uniformity with prior decisions and settling important questions of law regarding the appropriate function of the trial court in reviewing evidence in eminent domain actions and the appropriate standard of review employed by the reviewing courts to ensure that evidence of severance damages is not speculative and "naturally tends to and actually does decrease (or increase) the market value" of the remaining property before it is given to the jury.

For all of the foregoing reasons and for all of the reasons set forth in the Petition for Review, the League and ACWA respectfully request that Santa Ana Watershed Project Authority's Petition for Review be granted. Thank you for your consideration.

Sincerely,

James B. Gilpin
of BEST BEST & KRIEGER LLP

JBG:lmg

PROOF OF SERVICE

(Santa Ana Watershed Project Authority v. Castle & Cooke Lake Elsinore West)
Supreme Court Case No. S205617
Court of Appeal, Fourth Appellate District Case No. E055217
Riverside Superior Court Case No. RIC495874

I, Lisa Grennon, declare:

I am a citizen of the United States and employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 655 West Broadway, 15th Floor, San Diego, California 92101. On November 2, 2012, I served a copy of the within document(s):

AMICUS CURIAE LETTER SUPPORTING PETITION FOR REVIEW

XX **BY U.S. MAIL**

By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below **(as indicated).**

XX **OVERNIGHT COURIER**

By placing the document(s) listed above in a sealed overnight courier envelope with an affixed pre-paid air bill, and caused the envelope to be delivered to an overnight courier agent for delivery to the addressees as indicated.

VIA OVERNIGHT COURIER
Joseph S. Aklufi, Esq.
Aklufi & Wysocki
3403 Tenth St., Ste. 610
Riverside, CA 92501
Attorneys for Plaintiff and Respondent
Santa Ana Watershed Project Authority

VIA OVERNIGHT COURIER
Robert A. Olson, Esq.
Greines, Martin, Stein & Richland, LLP
5900 Wilshire Blvd., 12th Flr.
Los Angeles, CA 90036
Attorneys for Plaintiff and Respondent
Santa Ana Watershed Project Authority and
Depublication Requestor
Greines, Martin, Stein & Richland, LLP

VIA OVERNIGHT COURIER
Edward C. Dygert, Esq.
Cox, Castle & Nicholson LLP
19800 MacArthur Blvd., Ste. 500
Irvine, CA 92612
Attorneys for Defendant and Appellant
Castle & Cooke Lake Elsinore West, Inc. and
Castle & Cooke Alberhill Ranch, LLC

VIA OVERNIGHT COURIER
Edward G. Burg, Esq.
Manatt, Phelps & Phillips, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064
Attorneys for Depublication Requestor,
Manatt, Phelps & Phillips, LLP

VIA U.S. MAIL
Clerk, Court of Appeal
Fourth Appellate District, Div. 2
3389 12th Street
Riverside, CA 92501

VIA U.S. MAIL
The Honorable Gloria Trask
Riverside County Superior Court
4050 Main Street
Riverside, CA 92501

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on November 2, 2012, at San Diego, California.

Lisa Grennon

Lisa Grennon