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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NAPA

11 PEOPLE OF THE STATE OF CALIFORNIA,
12 Plaintiff,
13 v.
14 JOHN TUTEUR, Assessor of Napa County,
15 Defendant.

Case No. 18CR000972

OBJECTIONS TO ACCUSATION

Date: August 9, 2019
Time: 8:30 a.m.
Dept: G
Judge: Honorable Marc Boessenecker

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ATTORNEYS AT LAW

I

INTRODUCTION

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3 The Napa County Grand Jury 2017-18 ("grand jury") consisted of one experienced
4 appellate lawyer, Mr. Charles Allan Dell'Ario, and the rest of the members were lay persons
5 intent on performing their duty for the County. Mr. Dell'Ario apparently moved to Napa after
6 practicing for years in Oakland. He was appointed the foreperson of the grand jury, and for some
7 reason, he became enchanted with the complaint by a disgruntled employee of the Napa County
8 Assessor Division. He proceeded to convince his fellow jurors that they should appoint him and
9 several of their number to investigate this complaint, interview the employee and one or two of
10 her sympathizers, and convene a formal session of the grand jury to seek an accusation against
11 Mr. John Tuteur ("Tuteur"), the elected Assessor, Recorder, County Clerk and Registrar of Voters
12 for the County of Napa. During that session of the grand jury, Mr. Dell'Ario called and
13 questioned all witnesses, presented documents he selected as evidence, and instructed the grand
14 jury on the purported legal test for removal of Mr. Tuteur as the Assessor. The District Attorney
15 recused herself from this investigation, and Mr. Dell'Ario literally "ran with the ball."
16 Unfortunately, in his zeal to "take down" Mr. Tuteur, a long-serving public employee with vast
17 knowledge and experience, who is very highly regarded among his constituents and the broader
18 community of Assessors throughout the state, Mr. Dell'Ario stumbled into legal and factual
19 minefields. He called a senior appraiser employed in the Assessor Division, Mr. Dan Woods, as a
20 witness—Mr. Woods apparently sympathizes with the complaining employee, Ms. Lisa Carlile,
21 and Mr. Woods is the sole employee of the Assessor Division who, over about the past eight
22 years, had the responsibility of reaching an opinion of value for particular property owned by the
23 family of Mr. Tuteur. Yet, in the foreperson's rush to impugn Mr. Tuteur, he failed, or perhaps
24 chose not to question Mr. Woods about his knowledge concerning the assessment of Tuteur
25 property – this failure is made more significant by the fact that one of the counts of the accusation
26 specifically alleges that Mr. Tuteur personally assessed his own property and implicitly
27 introduced an error in the formula, which caused an under-assessment. If Mr. Dell'Ario were
28 truly interested in exposing the facts, he would have asked Mr. Woods in detail about the

1 calculations for assessment of Tuteur property, and he would have asked the Chief Appraiser,
2 Richard Anderson, to confirm whether Mr. Tuteur had anything to do with the assessment. As
3 revealed herein, if Mr. Dell'Ario had bothered to seek the truth, he and his fellow grand jurors
4 would have learned that the appraiser using the spreadsheet for calculating the value of Tuteur
5 property, Mr. Woods, carried forward consistent errors in the formula, not understanding the
6 problem in the first place. And this is just one example of the shortsighted approach to this entire
7 investigation and accusation at the hands of Mr. Dell'Ario.

8 Defendant John Tuteur objects to the four counts of the accusation presented by the grand
9 jury on legal and factual grounds, as stated herein. Mr. Tuteur respectfully requests that the Court
10 dismiss the entire accusation, because it fails on its face, and in light of relevant facts and law, to
11 state a claim of willful or corrupt misconduct in office.

12 II

13 LEGAL STANDARDS

14 Government Code section 3065 allows that defendant Tuteur "may answer the accusation
15 either by objecting to its sufficiency or any article therein, or by denying the truth of the
16 accusation." Government Code section 3066 states, in part, "If he objects to the legal sufficiency
17 of the accusation, the objection shall be in writing." If an objection is not sustained, "the
18 defendant shall answer thereto forthwith." Gov. Code § 3068.

19 An objection may be a "demurrer" in form or substance, raising an issue of law as to the
20 sufficiency of the accusation. *People v. Hale* (1965) 232 Cal.App.2d 112, 119-120. An objection
21 may also be based on grounds other than those available in a demurrer itself. *Ibid.* The
22 sufficiency of supporting evidence is one such ground for objection, if an accusation has been
23 presented without any admissible evidence in support of its allegations. *Id.* at 121-122. The
24 grand jury "shall receive no other evidence than what is: (1) Given by witnesses produced and
25 sworn before the grand jury; (2) Furnished by writings, material objects, or other things presented
26 to the senses; or (3) Contained in a deposition that is admissible.... The grand jury shall not
27 receive any evidence except that which would be admissible over objection at the trial of a
28 criminal action...." Penal Code § 939.6, subds (a) and (b); see also *Mott v. Superior Court* (1964)

1 226 Cal.App.2d 617, 618. Accordingly, testimony or other evidence received by the grand jury,
2 which would be inadmissible at trial, may not form the basis of supporting evidence for the
3 allegations of an accusation.

4 Issues of law, which can be the basis for objections to an accusation in the same manner
5 as a demurrer, are implicated in the first instance by a determination of what constitutes "willful
6 or corrupt misconduct in office." If the substance of an accusation does not state a violation of
7 that standard, as a matter of law, then the accusation must be dismissed. Acts which can be
8 punished under Government Code section 3060 are broader than behavior subject to criminal
9 charges. *Coffey v. Superior Court* (1905) 147 Cal. 525, 529 ("misconduct in office" is broad
10 enough to include any willful malfeasance, misfeasance, or nonfeasance in office, even without
11 any criminal intention). Official misconduct requires a direct relationship between the alleged
12 wrongdoing and the office held, and is usually based on a specific statutory violation. *Mazzola v.*
13 *San Francisco* (1980) 112 Cal.App.3d 141, 151.

14 The precise contours of the legal definition of "willful or corrupt misconduct in office,"
15 including the requisite mental state, were discussed in the case of *Steiner v. Superior Court*
16 (1996) 50 Cal.App.4th 1771. The case concerned grand jury proceedings to unseat two Orange
17 County supervisors for their alleged role in events leading to the County's bankruptcy. *Id.* at
18 1774-1777 ("in a nutshell, the accusations assert Steiner and Stanton did a shoddy job of minding
19 the store while Citron committed acts which plunge the County into bankruptcy"). The Steiner
20 court found that the accusations did not state facts constituting willful misconduct, and that the
21 accusations violated the constitutional principles of separation of powers and legislative
22 immunity; on that basis, the court reversed the trial court decision denying objections to the
23 accusations. *Id.* at 1777. After review of numerous cases, the *Steiner* court observed, "Taken as a
24 whole, these cases affirm that something more than neglect is necessary to constitute willful
25 conduct. Virtually all of them involve conduct that was otherwise criminal conduct which was
26 corrupt and malum in se ... none of them involved a failure to act where the duty to act is
27 premised on something the official *should have known.*" *Id.* at 1781 (emphasis in original). The
28 court concluded that the accusation procedure "must be reserved for serious misconduct such as

1 that found in the cases we have reviewed, misconduct that involves criminal behavior or, at least,
2 a *purposeful* failure to carry out *mandatory* duties of office." *Id.* at 1782.

3 The discussion by the court in the *Steiner* decision about separation of powers is
4 instructive in the broader sense for this case. A central theory of the instant accusation,
5 particularly with respect to Counts One and Three, are an alleged failure to "enforce" the
6 obligations of Williamson Act (WA) contract holders to respond to questionnaires about the
7 income and expenses of their agricultural use of the land, as well as a challenge to the continued
8 use of "minimum imputed incomes" for WA grazing lands. As will be explained herein, the
9 "enforcement" of WA contracts and the decisions pertaining to potential revisions of "minimum
10 imputed incomes" are substantially vested within the authority of the Napa County Board of
11 Supervisors. Decisions by the Board of Supervisors on policy grounds about issues relating to
12 enforcement or the appropriate use of minimum imputed incomes are discretionary, legislative
13 acts particularly within the province of the Board of Supervisors as a policy-making body.

14 The *Steiner* court recognized that the separation of powers doctrine manifests itself in
15 various ways, including the legal principles that "courts may not compel a legislative body to act
16 ... [and] courts cannot inquire into the impetus or motive behind legislative action." *Id.* at 1782-
17 1784. In that case, the court determined that the accusations against the two supervisors
18 challenged matters relating to investment strategy, which is an integral part of the legislative
19 budgetary process, which is not subject to an accusatory pleading under the separation of powers
20 doctrine. *Id.* at 1788-1790. In the instant case, the accusation cannot hold defendant Tuteur
21 responsible for duties within the discretionary authority of the Board of Supervisors or other
22 County divisions, and to the extent the accusation challenges the "enforcement" of WA contracts
23 and legislative decisions regarding "minimum imputed incomes" of grazing lands, the accusation
24 violates the separation of powers doctrine.

25 In light of these authorities and the specific statutory duties of the Assessor discussed
26 hereinafter, the legal instructions given to the grand jury by the foreperson were incomplete and
27 superficial, to the point of substantially prejudicing the legal rights of defendant Tuteur. The
28 foreperson's instructions were just an introduction to the legal issues being considered by the

1 other members of the grand jury, and it is entirely predictable that they would be misled to
2 believe that the foreperson's simplistic overview of the law was the entire test of Mr. Tuteur's
3 performance of duties. For instance, the foreperson's instruction on conflict of interest consists of
4 one sentence taken from part of Government Code section 18700, subdivision (a), without any
5 reference to the applicable test under the circumstances of this case, about whether the effect on
6 Mr. Tuteur's financial interest is indistinguishable from the effect on the public generally, which
7 is also set forth in subdivision (a), and defined in more detail in Government Code section 18703.
8 The incomplete instructions by Mr. Dell'Ario served the sole purpose of leading his fellow grand
9 jurors, who had no knowledge of the law otherwise, like lemmings to the sea.

10 **III**

11 **ARGUMENT**

12 **A. Count One: Tuteur Has Fully Informed the County About Non-**
13 **Responding Owners; the County Has the Authority to Enforce the Contracts**

14 In Count One, the grand jury alleges that not all WA contract property owners returned
15 the questionnaires from the Assessor Division, or returned incomplete questionnaires; on that
16 basis, the accusation alleges that Tuteur took no action to "require the non-responding owners to
17 comply with their obligations" and "failed to transmit [this non-compliance information] to the
18 Planning Department or the Board of Supervisors or the District Attorney for consideration."
19 Accusation, Count One.

20 Tuteur objects to Count One on the following grounds: (1) there is no evidence to support
21 the factual allegation that Tuteur failed to transmit non-compliance information to other divisions
22 of the County; and (2) there is no statutory duty for Tuteur, as the Assessor, to enforce WA
23 contracts.

24 Multiple witnesses testified before the grand jury to the knowledge of personnel within the
25 Planning Department about the issue of property owners not responding to questionnaires sent by
26 the Assessor Division and the consideration of whether actions should be taken to enforce the
27 WA contracts.

28 ///

1 Mr. Barrella, the administrator of the WA program in the Planning Department, testified
2 that the Planning Department was aware of non-responding owners. See Reporter's Transcripts of
3 Proceedings Had at Time of Investigation (Transcript) attached as **Exhibit B** (2/21/18),
4 **Exhibit C** (2/28/18) and **Exhibit D** (3/7/18) to Request for Judicial Notice Re Objections to
5 Accusation filed concurrently herewith, Exhibit C at 93:8-13. He was familiar with an email
6 from Mr. Tuteur in August 2015, saying that nonrenewal is a Planning matter, and he agreed with
7 Mr. Tuteur's statement that Planning is not interested as of August 2015 in taking action for
8 nonrenewal of WA contracts held by non-responding owners. *Id.* at 94:17-27. He testified that
9 the Planning Department is in charge of enforcing the WA contracts, but he has not been directed
10 by his supervisor, the director of the department to actively go and non-renew parcels that may no
11 longer qualify for the contracts. *Id.* at 88:6-24, 89:21-27, 93:20-22, 95:5-11. He testified "I have
12 never expected the assessor's office to send me this information about nonqualifying parcels." *Id.*
13 at 88:6-24. With respect to Type H contracts for grazing land, Mr. Barrella testified that there is
14 not anything in the rules that requires continuing agricultural income, but just a provision in each
15 contract that the contract holder provides evidence of agricultural income as part of being
16 enrolled in the program, and it is only his opinion that there is an ongoing requirement for
17 agricultural income to remain qualified. *Id.* at 90:11-24.

18 Mr. Anderson, the Chief Appraiser in the Assessor Division testified that the Board of
19 Equalization teaches, and as a policy within the Assessor's Division, that the appraiser's job is to
20 value property for assessments, not to act for purposes of enforcement of WA contracts.
21 Transcript, Exhibit B, at 97:1-10, 98:15-99:9.

22 Mr. Tuteur confirmed the testimony of Messrs. Barrella and Anderson, that Assessor staff
23 only values the property subject to a WA contract, and the Planning Department is the agency that
24 enforces the contracts. Transcript, Exhibit D, at 15:3-18, 16:22-28. As he testified, "I have
25 discussed over the years with the Planning Department whether they felt it was worthwhile for
26 them in their workload to pursue any kind of remedy under the non-reporting. The response has
27 been no." *Ibid.* As Mr. Tuteur further explained to the grand jury, the low response rate is a
28 problem across California with all assessors, and there is a California Land Conservation Act

1 committee that has been formed by the California Assessors Association trying to get legislation
2 to improve the response rate. *Id.* at 15:20-16:21. Mr. Tuteur stated that the question of whether
3 WA contracts are required to have agricultural income as a condition to their continuing to remain
4 in agricultural status is a question for the Board of Supervisors and the Ag Commissioner—the
5 Assessor does not police whether they have agricultural income or not, especially in the grazing
6 lands because the Assessor uses minimum imputed income. *Id.* at 28:17-25.

7 Even Mr. Woods, the lead appraiser in the Assessor Division for WA contracts testified to
8 his knowledge of email correspondence among Mr. Tuteur and employees of the County Counsel,
9 Ag Commissioner, and Planning Department, specifically discussing the low rates of return of
10 questionnaires by WA contract holders. Transcript, Exhibit C at 34:15-35:22. Mr. Woods also
11 stated that he was aware of an email communication by Mr. Tuteur, stating in part, "in terms
12 of non-renewal, Lisa, that is a Planning matter and to date they are not interested in undertaking
13 that process." *Id.* at 40:4-7.

14 All of this testimony, taken together, proves that other divisions of the County, and most
15 importantly, the Planning Department, is fully aware of non-reporting by WA contract property
16 owners and the related issue of whether other divisions of the County should take enforcement
17 action. So, the allegation of the accusation that Tuteur has not informed the other County
18 divisions about non-reporting is directly contrary to the evidence.

19 Moreover, the law is clear that the assessor does not have a statutory duty of enforcement.
20 See *Domenghini v. County of San Luis Obispo* (1974) 40 Cal.App.3d 689, 695 ("the assessor's
21 functions are inquisitorial not adversary.") The *Domenghini* court stated that conclusion after
22 reviewing these statutory provisions which only require the assessor to estimate the value of
23 property based upon information in his/her possession, and based on that estimate, properly assess
24 the property, despite the fact that a taxpayer may have failed to comply with a request for
25 information under Revenue and Taxation Code section 441, *et seq.* *Ibid.* Similarly, in an opinion
26 by the Attorney General, an assessor does not have authority to inspect property involuntarily to
27 see if its condition meets specific standards and does not have the right to issue an administrative
28 inspection warrant. 61 Ops.Cal.Atty.Gen. 524 (1978) ("As distinguished from public officials

1 concerned with violations of law, a county assessor performs functions that are 'inquisitorial not
2 adversary.'"') For these reasons, Mr. Tuteur does not have any statutory duty to enforce the WA
3 contracts, which the grand jury implicitly alleges in Count One, and the count fails to state a
4 claim against defendant.

5 **B. Count Two: Tuteur Had No Involvement in the Assessment of**
6 **His Own Property and Has Not Failed to Issue an Escape Assessment**

7 In Count Two, the grand jury alleges that Tuteur performed an assessment of his income
8 stream from the "TANC cell-tower lease" on his family's property in 2008, that his assessment
9 was in error, resulting in an under-assessment of the value of the cell-tower lease, and that Tuteur
10 has failed to discharge his duty to cause an escape assessment to be made in the alleged
11 approximate tax amount of \$20,000.

12 Tuteur objects to Count Two on the following grounds: (1) there is no admissible
13 evidence to support the claim that he performed an assessment of his own property; and (2) the
14 evidence shows that he had no involvement in the error regarding the assessment of the cell
15 tower, there was an error caused by the user of the spreadsheet for such assessment, which has
16 been corrected, and the necessary changes have been made, including roll corrections and escape
17 assessments.

18 The only evidence obtained in the formal grand jury proceedings was the testimony by
19 Lisa Carlile that "John Tuteur created the spreadsheet [Exhibit 22, page 294, entitled "Information
20 about 2008 Tanc Calculation for Rod Gomas"]. He was the author on September 11, 2008."
21 Transcript, Exhibit C at 67:11-18. The foreperson questioning Ms. Carlile laid no foundation
22 regarding the document itself; nor did he establish by the testimony of Ms. Carlile or any witness
23 whether Ms. Carlile had any basis for personal knowledge about the document she referenced,
24 and whether any reference on the face of the document to Mr. Tuteur was any indication of any
25 involvement by him in the performance of the calculations for evaluation and assessment of the
26 cell tower. Accordingly, defendant Tuteur objects to the testimony of Ms. Carlile in this respect,
27 on the grounds that her testimony lacks foundation, is not based on her personal knowledge, but
28 instead, is entirely based on her speculation about the meaning and effect of a reference to

1 Mr. Tuteur on the face of the document. The failure of the foreperson to lay a foundation for the
2 document is particularly egregious for his failure to inquire of Ms. Carlile whether she had any
3 knowledge about why the documents is entitled "Information about 2008 Tanc Calculation for
4 Rod Gomas."

5 But, Mr. Tuteur answered that question when he testified before the grand jury. When he
6 was shown Exhibit 22, page 294, the same document which prompted Ms. Carlile to speculate
7 that Mr. Tuteur had performed his own calculations of value pertaining to his property,
8 Mr. Tuteur explained, "our vendor is Megabyte Systems, and Megabyte Systems wanted to build
9 a compatible use component because we've been doing them individually with spreadsheets. And
10 so we supplied our spreadsheet to Rod Dolmas [*sic*], who was the vendor person assigned. He's
11 one of the managers at Megabyte Systems, so they could see what we used as a formula to build
12 into the system for all counties, not just Napa County. We used the spreadsheet for my property
13 as an example. I have not ever touched the spreadsheet for our property." Transcript, Exhibit D
14 at 75:14-76:8. Otherwise Mr. Tuteur confirmed that he is not an expert in the calculations for the
15 value of the cell tower, he would assume the Chief Appraiser was in charge of reviewing the
16 work on his properties in 2008, and that if there had been a mistake and it had been under
17 assessed, his obligation was to do a roll correction and an escape assessment. *Id.* at 77:1-17. He
18 did not know why the assessed valuation on the cell tower went up by approximately \$170,000
19 effective 2016; he did not think about it or ask about it. *Id.* at 77:27-78:12.

20 Mr. Anderson, the Chief Appraiser, testified that he was reviewing the correction that had
21 been made for 2016, and he had not yet determined at the time of his testimony whether there was
22 an error, or what caused the error. Transcript, Exhibit B at 109:15-22.

23 Since the time of his testimony, Mr. Anderson has completed his review of the
24 calculations pertaining to the valuation and assessment of the TANC cell tower on the Tuteur
25 property. See Declaration of Richard Anderson ("Anderson Declaration"), filed concurrently
26 herewith. He first became aware of a potential error in the spreadsheet used to calculate the value
27 of the cell tower, when Ms. Tydingco, the Supervising Appraiser, brought it to his attention in
28 2016. Anderson Declaration, ¶4. At that time, neither Mr. Anderson, Ms. Tydingco, nor

1 Mr. Woods could determine what caused the errors in this spreadsheet, and Ms. Tydingco
2 performed a recalculation on a different valuation spreadsheet, which was given to Mr. Anderson
3 for review. *Ibid.* The recalculation by Ms. Tydingco resulted in an increase in value of the cell
4 tower by approximately \$170,000, which would generally be an increase of approximately \$1,800
5 in property taxes for that tax year. *Ibid.* Ms. Tydingco and he agreed that the recalculation would
6 be subject to later review and possible adjustment, given the limited information available at that
7 time and other pressing business. *Ibid.*

8 Both before and after Mr. Anderson's testimony to the grand jury, he consulted with
9 numerous senior appraisers and other counties and performed his own research to determine the
10 most appropriate calculation of valuation for cell tower leases, as improvements on WA
11 contracted lands within Napa County. *Id.*, ¶6. As a result of his work, Mr. Anderson determined
12 that there was an error in the calculation of the TANC cell tower values for the 2007 through
13 2015 tax years, which consisted of an incorrect formula in the Excel spreadsheet, caused by the
14 user of the spreadsheet not knowing how to use it, or failing to use it correctly. *Id.*, ¶7. From
15 approximately 2008 until now, Mr. Woods has been using the spreadsheet to determine taxable
16 value of the TANC cell tower.

17 The first error in the spreadsheet was apparently intended as a temporary "fix" in the
18 formula, written by former Supervising Appraiser John Hamilton; that fix caused additional
19 miscalculations for the 2007 through 2011 tax years. *Id.*, ¶9(a). Mr. Anderson confirms that
20 Mr. Tuteur would not have had any involvement in the development or formatting of the
21 spreadsheet. *Ibid.* He also believes that the form of the calculation sheets in the spreadsheet was
22 originally developed by former Appraiser III, Lance Bonds. *Id.*, ¶9(b). Mr. Anderson is
23 confident that Mr. Tuteur has had no involvement with the calculations of the assessed value of
24 the cell tower at any time. *Id.*, ¶9(c). He bases that conclusion on his close review of the entire
25 history of the spreadsheet and calculation sheets for each year, which showed him that the
26 appraiser responsible for the calculations actually performed all calculations, and the same user
27 error was being done consistently for each successive year, without any other substantive changes
28 to the format or calculations performed in the calculation sheets. *Ibid.* He also knows that

1 Mr. Tuteur does not even understand how the spreadsheet calculations are performed. *Ibid.*
2 Mr. Tuteur has consistently stated his position to Mr. Anderson that he will not have any
3 involvement in the appraisal and valuation of the cell tower or any other property in which he has
4 an ownership interest, and Mr. Tuteur has had no involvement with Mr. Anderson's review and
5 determination of the appropriate methodology and calculations for valuation of the TANC cell
6 tower. *Ibid.*

7 As a result of Mr. Anderson's review and determination of the appropriate valuation of the
8 cell tower and other radio repeater sites on Tuteur property, he made roll corrections for tax years
9 starting in 2014, through 2017. *Id.*, ¶10. The cell tower was subject to an escape assessment for
10 2014 and 2015, and the cell tower was over-assessed, prompting a value reduction for 2016 and
11 2017. *Ibid.* The net result of the four years of roll corrections was total net additional taxes of
12 \$1,453.03. *Ibid.* Mr. Anderson did not add penalties or interest to the escape assessments,
13 because the errors were caused by the appraiser, not by the taxpayer. *Ibid.* Mr. Anderson
14 consulted with the subject matter expert at the State Board of Equalization for valuation of
15 Williamson Act properties, Mr. Paul Lane; Mr. Lane reviewed Mr. Anderson's corrections of the
16 valuation method in the spreadsheet, and he told Mr. Anderson that the new calculations are
17 reasonable and appear to be accurate. Anderson Declaration, ¶6.

18 All of this evidence proves several key points which require dismissal of Count Two:
19 (1) Ms. Carlile's testimony was inadmissible, and should not have been accepted by the grand
20 jury; and (2) the admissible evidence before the grand jury and before this Court conclusively
21 shows that Mr. Tuteur had no involvement in the valuation or assessments of the TANC cell
22 tower, the error in the calculations of the spreadsheet for valuing the property was caused by an
23 appraiser not knowing how to use the spreadsheet and therefore using an erroneous formula,
24 Mr. Anderson has completed the detailed review to correct the formula and recalculate the
25 assessed valuation, on which he has entered roll corrections and issued escape assessments in the
26 amount of \$1,453.03, not the \$20,000 speculated by the grand jury accusation. On top of all that,
27 Mr. Anderson's corrections of the valuation of the cell tower have been approved by the subject
28 matter expert on these matters at the State Board of Equalization.

1 The reliance by the grand jury on the flimsy and unsupported testimony of Ms. Carlile,
2 accusing Mr. Tuteur of performing his own valuation and assessment of his property, is
3 particularly egregious for several reasons. Several witnesses testified that Ms. Carlile was a
4 disgruntled employee, angry at Mr. Tuteur for passing her over for promotion in approximately
5 2015. See Transcript, Exhibit B at 14:18-15:26 (testimony of Jon Cretarolo), 89:22-90:6
6 (testimony of Richard Anderson). Even Ms. Carlile testified that she filed multiple complaints
7 with her union and with human resources, including challenges against Mr. Tuteur, and she
8 contacted a couple of attorneys and the Attorney General. Transcript, Exhibit C at 47:2-48:2.
9 Besides the obvious bias and animosity by Ms. Carlile against Mr. Tuteur, a glaring deficiency in
10 the investigation of this issue during formal grand jury proceedings was the complete failure by
11 the foreperson to ask Mr. Woods any questions about his involvement in the calculations for
12 valuation of the TANC cell tower on Tuteur property.¹ The investigation of the issues concerning
13 Count Two was incomplete and yielded no credible evidence to support the outrageous allegation
14 that Mr. Tuteur violated his obligation not to value and assess his own property.

15 For all of the foregoing reasons, defendant Tuteur respectfully requests that Count Two be
16 dismissed.

17 **C. Count Three: Tuteur Properly Assessed**
18 **Type-H Williamson Act Contracts on Grazing Land**

19 Count Three alleges that defendant Tuteur has committed willful misconduct in the
20 discharge of his duties by his knowing failure to attempt to determine actual or fair-rental
21 agricultural income of the Type-H contract properties. The accusation alleges that Tuteur used
22 minimum imputed values exclusively, failed to determine actual or fair rental value, failed to send
23 questionnaires to grazing property owners triennially (only sending them in 2010 and 2016),
24 failed to analyze questionnaires actually returned, and is subject to conflict of interest because of

25 ¹ This particular, egregious failure to question Mr. Woods about his calculation of cell tower values is a substantial
26 issue raised by defendant in seeking the discovery ordered by the trial court, which is currently the subject of
27 appellate review. It may be entirely possible that the pre-testimony investigation by the grand jury foreperson and
28 the investigation committee learned from Mr. Woods that he had performed all of the relevant calculations pertaining
to the value of the cell tower, and that he had no basis to conclude that Mr. Tuteur had any involvement in those
calculations. If that is true, then significant additional exculpatory evidence will exist, confirming that there is no
evidentiary basis for Count Two of the accusation.

1 his ownership of property subject to such a contract.

2 Tuteur objects to Count Three on the following grounds: (1) there is no evidence to
3 support the necessary (and missing) allegation of the Count, that there actually is an actual or fair
4 rental value of Type-H contracted grazing land, which is higher than the minimum imputed
5 values inserted as part of each Type-H contract; (2) the evidence received by the grand jury does
6 not support any claim of a violation of statutory duties by Mr. Tuteur; and (3) the evidence
7 received by the grand jury actually shows that Mr. Tuteur is complying with his statutory duties.

8 There was substantial testimony received by the grand jury regarding the use of minimum
9 imputed values for the assessment of Type-H WA contracts pertaining to grazing land in Napa
10 County. The consistent testimony by the Supervising Appraiser (Ms. Tydingco), the Chief
11 Appraiser (Mr. Anderson), and Mr. Tuteur proves that the minimum imputed income results in
12 the fair assessment of grazing lands subject to the Type-H contracts. None of the "complaining
13 witnesses" called by the grand jury contradicted this evidence; in fact, Mr. Barrella in the
14 Planning Department confirmed that the Type-H contracts specifically include terms informing
15 the property owners that the land will be assessed using minimum imputed values for every acre
16 subject to contract, regardless of actual use for grazing. See Transcript, Exhibit C at 92:5-12.

17 Mr. Tuteur gave the grand jury a great deal of useful information about the taxation of
18 Type-H WA contracted grazing lands, which was overlooked or ignored in their rush to accuse
19 him of wrongdoing. He served as a member of a committee in 1969, convened by Napa County
20 and including the Ag Commissioner as one of its members, to determine the best method for
21 assessing grazing lands, and one of the suggestions by the committee to avoid under-assessing
22 owners of grazing lands was to use a minimum imputed income, which has been used from the
23 beginning of the Type-H contracts. Transcript, Exhibit D at 19:25-20:4. The source of the
24 information regarding minimum imputed income was discussions with the Ag Commissioner in
25 1969. *Id.* at 20:7-20.

26 Based on his own knowledge about rents received for grazing land, Mr. Tuteur testified in
27 detail about why rental numbers have not changed for 20 to 30 years. *Id.* at 22:8-24, 23:11-21.
28 As he explained, a variety of factors have contributed to the grazing rents remaining stable,

1 without any appreciable changes for numerous years. *Ibid.* His family owns 200 acres of grazing
2 land that extends into Solano County, for which he reports the actual rental amounts they receive
3 on an annual basis, and the rental numbers have not changed for 20 to 30 years. *Ibid.*

4 The fairness of using minimum imputed income, from the perspective of the taxing
5 authority, includes at least two significant considerations. Minimum imputed income is applied
6 for valuation of all acreage of Type-H WA contracted grazing lands, even if many of those acres
7 are not actually grazed, according to the rental agreements. *Id.* at 24:7-12. For instance, on his
8 own land, Mr. Tuteur testified that there are probably 600 acres which are not grazeable, but they
9 are still valued based on minimum imputed income as a fair formula for assessment of the land.
10 *Ibid.* And, the minimum imputed income valuation is also applied to valuation of property, for
11 which the owners report no income for particular years. *Id.* at 29:10-13. The Assessor Division
12 also has a series of grazing land categories, each one tied to a different minimum imputed
13 income; smaller parcels get a much higher minimum imputed income on a per-acre basis, to avoid
14 unfairness compared to larger parcels. *Id.* at 39:8-19.

15 For many of these reasons, which are not contradicted by the record of testimony before
16 the grand jury, Mr. Tuteur testified that "given the minimum imputed income portion of the
17 [Type-H] contract for grazing contracts, we believe we're fairly assessing those people and that
18 no one is escaping assessment for failure to respond ... [Minimum imputed incomes] have not
19 changed ... but it still, in my view, represents a reasonable figure." *Id.* at 18:8-19:2, 20:7-20.
20 Based on his considered opinion, he has not proposed to the Board of Supervisors that there be an
21 adjustment of minimum imputed income. *Id.* at 20:24-21:2. The Board of Supervisors, as the
22 holders of the contracts on behalf of the County, would have the ability to talk with the Ag
23 Commissioner to determine whether the rental values of grazing land have changed in any
24 substantial way, and the Board has chosen not to make any adjustment of the minimum imputed
25 income values. *Id.* at 26:17-28.

26 The testimony of senior appraisal staff in the Assessor Division is consistent with that of
27 Mr. Tuteur. Ms. Tydingco testified to the grand jury that grazing contracts don't change too much
28 from year to year. Transcript, Exhibit B at 34:25-28. Mr. Anderson informed the grand jury that

1 income from grazing is "very, very low ... You don't get a lot of money for letting cows or sheep
2 graze on your property ... The carrying capacity is typically one cow per nine and a half acres for
3 a five-month grazing period ... Probably bringing four animals for a twenty acre property. So
4 this income is going to be very low." *Id.* at 93:11-94:28.

5 A fundamental flaw in the theory of Count Three, as alleged by the grand jury, is the
6 failure of the pleading, on its face, to allege that the appropriate assessed values of grazing land
7 would be higher than the values calculated using the minimum imputed income numbers, whether
8 for individual parcels subject to Type-H WA contracts, or collectively for all such parcels in Napa
9 County. The grand jury obtained no evidence that assessed values of Type-H contracted grazing
10 lands, individually or collectively, would actually be higher than the values obtained using
11 minimum imputed incomes; the exact opposite conclusion may actually be more compelling,
12 when one considers the multiple circumstances which might cause a substantial decrease in
13 property valuation from year to year, if particular parcels were not rented for any income or had
14 substantial areas not subject to a grazing lease. It may be implicit by the very nature of Count
15 Three that the grand jury speculates about higher assessed values of grazing land, if the Assessor
16 Division might use actual rents, because the accusation surmises that Tuteur would have a
17 conflict of interest if minimum imputed values and his taxes might rise—but, there is no allegation
18 of an actual error in the use of current minimum imputed income. The legal defect therefore in
19 Count Three is its failure to allege a necessary element for a claim of "willful and corrupt
20 misconduct," as defined by the *Steiner* decision, that an accusation "must be reserved for serious
21 misconduct such as that found in the cases we have reviewed, misconduct that involves criminal
22 behavior or, at least, a *purposeful* failure to carry out *mandatory* duties of office." *Steiner v.*
23 *Superior Court, supra*, 50 Cal.App.4th, at 1782. Similarly, since any decision about whether to
24 change minimum imputed income amounts is strictly within the legislative province of the Board
25 of Supervisors, the accusation against Mr. Tuteur is premised on a theory, which violates
26 principles of separation of powers, as between the legislative and judicial branches of Napa
27 County government.

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1 Other legal principles underscore the legal defects of Count Three. The use of minimum
2 imputed income values in capitalizing the value of WA-contract restricted land is specifically
3 recognized as the appropriate methodology under the provisions of Revenue and Taxation Code
4 section 423. See Rev. & Tax. Code § 423(a)(3). That methodology is applicable in Napa
5 County, because the Type-H contracts include the stipulated minimum income values. *Ibid.*

6 Moreover, the grand jury obtained no evidence to contradict the strong presumption that
7 Mr. Tuteur is "regularly performing his official duties" with respect to the assessment of Type-H
8 WA contracted lands in Napa County, by the use of minimum imputed incomes. See Evidence
9 Code § 664 ("It is presumed that official duty has been regularly performed.") California courts
10 have applied this presumption in finding that proffered evidence satisfies the foundational
11 requirements of the official records exception. *People v. Martinez* (2000) 22 Cal.4th 106, 125.
12 Count Three alleged by the grand jury, based entirely on pure speculation by the grand jury about
13 whether Mr. Tuteur might have reached a different assessment of Type-H WA contracted grazing
14 lands, if he and his office had not used minimum imputed incomes, cannot overcome the strong
15 presumption, supported by the consistent testimony of Mr. Tuteur, Mr. Anderson, and
16 Ms. Tydingco, that Mr. Tuteur has regularly and correctly performed his official duties. Again,
17 there is no evidence to support the legal requirements for the extreme sanction of removing
18 Mr. Tuteur from his office, that there was at least, a *purposeful* failure to carry out *mandatory*
19 duties of office. The accusation by the grand jury in Count Three fails for the same reasons as the
20 other counts, because the grand jury, apparently misled by the myopic opinions of its foreperson,
21 failed to understand the relevant legal test for the proper assessment of restricted grazing lands in
22 Napa County.

23 For these reasons, Mr. Tuteur respectfully requests that the Court dismiss Count Three of
24 the accusation.

25 **D. Count Four: Tuteur Did Not Violate Conflict of Interest Rules**

26 Count Four alleges that Mr. Tuteur committed a violation of conflict of interest rules
27 under the provisions of Government Code section 87100, when he used "his official position to
28 influence a governmental decision" on January 25, 2011, when he appeared, together with the

1 Planning Director at the time Hillary Gitelman, before the Board of Supervisors and urged the
2 Board not to adopt changes to WA contracts in Napa County, which were then authorized by
3 SB 863. The Count alleges Tuteur has failed to advise the Board of Supervisors of its "obligation
4 to consider shortening the Williamson Act contracts," allegedly causing forgone revenue to the
5 County exceeding \$3 million.

6 Mr. Tuteur objects to Count Four on the grounds that his actions, as a matter of law, do
7 not violate any conflict of interest code provisions, including Government Code section 18700,
8 and the decision by the Board of Supervisors, whether to shorten WA contracts is entirely within
9 their legislative discretion, beyond the authority of the grand jury to direct any particular action.

10 Government Code section 18700 prohibits, inter alia, a public official at any level of state
11 or local government "in any way [to] use his or her official position to influence a governmental
12 decision when he or she knows or has reason to know he or she has a disqualifying financial
13 interest." Gov. Code § 18700(a). "A public official has a disqualifying financial interest if the
14 decision will have a reasonably foreseeable material financial effect, distinguishable from the
15 effect on the public generally, directly on the official, or his or her immediate family." *Ibid.* "A
16 governmental decision's financial effect on a public official's financial interest is indistinguishable
17 from its effect on the public generally if the official establishes that a significant segment of the
18 public is affected and the effect on his or her financial interest is not unique compared to the
19 effect on the significant segment." Gov. Code § 18703(a). "A significant segment of the public
20 is at least 25% of ... [a]ll real property, commercial real property, or residential real property
21 within the official's jurisdiction." Gov. Code § 18703(b)(2).

22 Based on these statutory provisions, when Mr. Tuteur appeared before the Board of
23 Supervisors on January 25, 2011, with Ms. Gitelman, he was not violating the conflict of interest
24 provisions of Government Code section 87100, *et seq.* As a threshold matter, the Board set an
25 agenda item for that meeting, calling on input by Mr. Tuteur and Ms. Gitelman about the terms
26 and effect of any changes allowed by SB 863. See Declaration of Sheryl Pereda, filed
27 concurrently herewith, at ¶3 and Exhibit 2, thereto. As contained in the transcript of the Board's
28 consideration of that agenda item, Mr. Tuteur plainly advised the Board that he was a holder of a

1 WA contract at that time. *Id.* at ¶2, and Exhibit 1, thereto. The Board not only obtained the
2 comments by Ms. Gitelman and Mr. Tuteur, but it also considered separate documents about the
3 issues, including the effect and purposes of the changes allowed by SB 863. *Id.* at ¶¶4 and 5 and
4 Exhibits 3 and 4, thereto.

5 At a minimum, and even assuming Government Code section 18700 might apply to
6 Mr. Tuteur's comments before the Board of Supervisors on January 25, 2011, his financial
7 interest in being a WA contract holder is indistinguishable from its effects on the interest of the
8 public generally. The agenda item considered by the Board on that day concerned the effects on
9 Williamson Act contracted lands in Napa County of the possible adoption by the Board of the
10 provisions of SB 863. The total acres of land within Napa County which has been officially
11 categorized as "Agricultural Land," as reported by the Watershed Information and Conservation
12 Council (WICC) of Napa County, is 259,697 acres. See RJN at ¶1, and Exhibit A attached
13 thereto and incorporated therein, the "Napa County Baseline Data Report, Chapter 10,
14 Agricultural Resources," (BDR) at p. 10-13, Table 10-7. Of the total existing farmland and
15 grazing land in Napa County, which together amount to approximately 104,000 acres, the data
16 reported by WICC shows a total of approximately 69,000 acres of land under Williamson Act
17 Contracts. RJN, at BDR, pp. 10-2 and 10-8 (Tables 10-1 and 10-2). A simple division of 69,000
18 acres of land under WA contracts, by the total of all agricultural land in the county (259,697
19 acres), yields a factor of approximately 27%. The land area potentially affected by the Board's
20 consideration of whether to adopt the provisions of SB 863 on January 25, 2011, is more than
21 25% of the total of all agricultural land in the County. Therefore, as a matter of law, the potential
22 financial effect of any Board decision on Mr. Tuteur's financial interest in Williamson Act land is
23 indistinguishable from the potential effects of the Board's decision on the interest of the public
24 generally.

25 For these reasons, Mr. Tuteur respectfully requests that the Court dismiss Count Four of
26 the accusation.

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IV

CONCLUSION

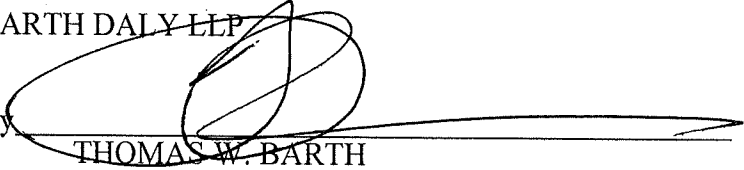
For all of the foregoing bases, Mr. Tuteur respectfully requests that the Court dismiss the entire accusation. It does not state a legal claim for removal of Mr. Tuteur from his elected position as the Napa County Assessor, and the accusation is unsupported by relevant, admissible evidence. This entire misadventure, at the hands of an overzealous foreperson of the grand jury, has been a waste of judicial and public resources, to satisfy the whim of one person.

Dated: July 6, 2018.

Respectfully submitted,

BARTH DALY LLP

By



THOMAS W. BARTH

Attorneys for Defendant
JOHN TUTEUR Napa County Assessor

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PROOF OF SERVICE

I, Sheryl A. Pereda, declare:

I am a resident of the State of California, over the age of 18 years, and not a party to the within action; my business address is 2810 Fifth Street, Davis, California 95618. On July 6, 2018, I served the within document:

OBJECTIONS TO ACCUSATION

- by transmitting via facsimile from (916) 440-8600 the above-listed document without error to the facsimile numbers set forth below on this date.
- by transmitting via electronic mail the above-listed document to the email addresses set forth below –AND–
- by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as set forth below.
- by causing the document listed above to be delivered via FEDERAL EXPRESS OVERNIGHT DELIVERY to the persons at the addresses set forth below.

Via Electronic and U.S. Mail:
 Xavier Becerra, Attorney General
 Richard J. Cutler, Deputy Attorney General
 State of California Department of Justice
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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 United States 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 under penalty of perjury under the laws of the State of California that the above is true and correct and that this was executed on July 6, 2018, at Davis, California



 SHERYL A. PEREDA