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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SYBASE, INC.,
Petitioner,

v.

SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;
ANTS SOFTWARE, INC.,
Real Party in Interest.

A132541

(Alameda County
Super. Ct. No. RG08397591)

Petitioner Sybase, Inc. (Sybase), challenges a trial court order compelling production of the source code for its Aries software product in litigation against real party in interest, ANTs software inc. (ANTs). ANTs concedes this source code is a trade secret, and Sybase contends the trial court erred in ordering its disclosure because ANTs failed to make the requisite showing. (Evid. Code, § 1060.) We agree with Sybase and grant the petition.

BACKGROUND

Sybase is a developer of data management software whose flagship database product is its Adaptive Server Enterprise (ASE) software. In April 2008, Sybase entered into a licensing agreement for the ANTs Data Server (ADS) software, seeking to develop an ASE product, code named “Pegasus,” that would incorporate the in-memory database technology of ADS. Sybase later filed a civil action against ANTs for alleged violations of this licensing agreement and a related nondisclosure agreement.

Sybase's Claims

The operative complaint includes the following allegations:

In 2007, the parties signed a nondisclosure agreement to facilitate negotiations for Sybase to license ADS. Patrick Moore, ANTs's vice-president of global alliances and government sector, participated in these negotiations. While negotiating with Sybase, ANTs was also negotiating with Sybase's competitor, Four J's Development Tools, Inc. (Four J's), for the sale of ADS. Moore passed confidential information about ANTs's negotiations with Sybase to Four J's and, in February 2008, joined Four J's as a vice-president.

In April 2008, the parties signed a license agreement under which Sybase paid \$1.4 million for a license to use, modify, and distribute ADS, and the right to sublicense it (license agreement). The license agreement provided for Sybase to hire four key ANTs employees, who had specialized knowledge necessary to use ADS (key employees). ANTs agreed that for a period of five years, neither it, nor any of its successors or assigns, would solicit the key employees for employment.

A week later, ANTs e-mailed Four J's a copy of the license agreement, which contained the key employees' names. Shortly thereafter, ANTs and Four J's entered into an asset purchase agreement for ADS, but ANTs did not assign the license agreement to Four J's. Four J's immediately solicited two of the key employees, including Jacob Mathew (Mathew), who resigned his employment with Sybase and began working for Four J's in August 2008.

The complaint includes causes of action against ANTs for fraud in the inducement, negligent misrepresentation, breach of written contract, unfair competition (Bus. & Prof. Code, § 17200 et seq.), breach of the implied covenant of good faith and fair dealing, and negligence.¹

¹ Sybase later dismissed other causes of action for common law unfair business practices and fraud-concealment.

Sybase's Alleged Damages

In late 2008, Sybase initially sought damages based on the reduction in value of the ADS license and its sublicensing rights, “including the possible complete loss of value to the software” due to Mathew’s departure. Sybase also claimed “[c]osts and expenses incurred to cover work completed by . . . Mathew” and “to retain other employees,” as well as the “[c]osts of lost market opportunity from delay to the project due to the loss of . . . Mathew as an employee.” Sybase maintained that, as a result of Mathew’s departure, “the release schedule of the ASE [in-memory database] option (product which contains the ANTs technology),” had been delayed approximately six months.

In January 2011, Sybase expanded its theory of damages and sought damages “based on the reduced functionality of its product due to the departure of its key engineer.” Sybase explained that it initially expected only a delay in the release of Pegasus, but later realized it could “never” bring Pegasus to market without Mathew. Sybase said it developed a different ASE product, code named “Aries” and marketed as ASE 15.5, which was much less functional and drew less customer interest.² Sybase sought damages resulting from “the less robust, less functionality of the Aries product versus the Pegasus product that was intended to be released.”

Discovery

Request No. 11 of ANTs’s fourth request for production of documents sought “All source code for ‘Project Aries.’ ” Sybase objected and indicated it would not produce documents responsive to this request. ANTs moved to compel further responses to its requests for production, including request No. 11.

On February 10, 2011, the trial court granted the motion as to request No. 11 and request No. 17, which is not at issue in this petition.³ The trial court ordered: “[Sybase]

² We refer to the ASE 15.5 product as “Aries.”

³ Request No. 17 seeks production of: “All Documents created by those Persons identified in Your response to Propounding Party’s Special Interrogatory Number 7, Set Four, in connection with their work on ‘Project Aries.’ ”

shall fully respond to Request 11, but shall respond to Request 17 as narrowed herein: “[¶] [Sybase] is to produce all documents related to reasons why [Sybase] faced delay and/or problems integrating the ANTs source code into ASE for the Pegasus project.” The trial court ordered Sybase to prepare a detailed privilege log to the extent it contended “said documents” were privileged or private. Sybase subsequently identified the source code for Aries in a privilege log and asserted a privilege for “[c]onfidential/proprietary business information, trade secret.”⁴

In April 2011, ANTs moved to reopen discovery, contending it needed to conduct discovery regarding the new theories of damages Sybase asserted after the July 2010 discovery cut-off date and to file a motion to compel “the ASE Source Code and Other Court-Ordered Documents.” ANTs maintained that, in addition to the January 2011 claim for damages based on an alleged loss of product functionality, Sybase had recently indicated it was seeking rescission of the licensing agreement. The trial court reopened discovery and allowed ANTs to file a motion to compel production of materials that Sybase had identified as privileged, including the Aries source code.

ANTs then moved to compel production of the Aries source code, Sybase’s benchmark testing and performance analysis results between ADS and ASE, and other related documents. ANTs conceded that the Aries source code is a trade secret, but contended it needed the source code to defend against Sybase’s claims. ANTs maintained it could not evaluate “whether or not . . . ADS source code was usable with [the] ASE code without the benefit of [Mathew]” unless it could review the ADS code and the ASE code into which it was supposed to be incorporated. In support of its motion, ANTs attached a declaration of counsel with excerpts from the deposition transcripts of two of Sybase’s engineers, Sheshadri Ranganath and Sudipto Chowdhuri,

⁴ Notwithstanding the trial court’s order, which expressly requires Sybase to fully respond to request No. 11, Sybase construed the trial court’s tentative ruling on the motion and comments at the hearing to allow assertion of a privilege as to the Aries source code. ANTs did not challenge Sybase’s inclusion of the Aries source code in the privilege log on this basis.

who testified that the ADS code differed so fundamentally from the ASE code that significant modifications to ASE would be necessary to integrate the two; and that Sybase had opted to “organically develop” an in-memory database product because ADS did not offer anything more than ASE did, and it was easier to expand the ASE code than to integrate ADS into ASE. ANTs also included pages from a due diligence summary package that Sybase prepared before entering the licensing agreement, which discussed weaknesses in ADS. ANTs argued: “As Sybase witness testimony indicates that Sybase’s reasons for not using the ADS code are unrelated to . . . Mathew’s departure, ANTs needs to review the source code to (i) determine why the ADS code could not be integrated, (ii) determine whether or not the failure to integrate had anything to do with the loss of . . . Mathew[,] (iii) determine what portions of ADS were incorporated into ASE, [and] (iv) determine how ASE technically differs from ADS making the integration of four of five technologies difficult” To the extent Sybase asserted a claim for rescission, ANTs maintained the source code was necessary to determine whether Sybase had received the benefit of its bargain.

Sybase argued that there were “other, better ways for ANTs to obtain such information,” including depositions and written discovery, and attached a declaration from Chowdhuri indicating that the source code for Aries was the result of years of engineering efforts; that the software industry is highly competitive; that Sybase vies to engineer databases that either offer new or superior functionality in the marketplace; and that if the source code were disclosed, Sybase’s competitors could unfairly leverage its efforts to enhance their own offerings or to competitively position their products.

The Trial Court’s Order

On May 27, 2011, the trial court entered an order granting ANTs’s motion, concluding that ANTs had made the showing required for the disclosure of trade secrets under *Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384 (*Bridgestone*), and stating “access to the ASE source code and related documents is both relevant and necessary. [ANTs] cannot among other things, adequately defend the case without such access, given [Sybase’s] claims that [ANTs’s] source code was defective

when delivered or alternatively that [ANTs's] source code could not be successfully integrated into [Sybase's] source code. Thus, these documents appear to be directly relevant to [ANTs's] defense, and [ANTs] would be unfairly disadvantaged in defending this lawsuit absent production of the source code.” The trial court ordered Sybase “to produce its ASE source code as well as the documents related to the source code, including any benchmark testing results, performance analysis results or any related documents comparing ADS and ASE programs.”

On June 22, 2011, the trial court entered a protective order for information designated “ ‘HIGHLY CONFIDENTIAL—OUTSIDE ATTORNEYS’ EYES ONLY,’ ” limiting the persons with access to this information, setting forth specific procedures to protect the Aries source code during ANTs’s inspection, and putting other safeguards in place to prevent and punish disclosure of confidential information both during and after the litigation, including the imposition of civil penalties.

On July 8, 2011, Sybase filed the instant petition for writ of mandate, contending the trial court erred in ordering disclosure of the Aries source code. After reviewing preliminary briefing from the parties, we issued an order to show cause and granted a temporary stay of the trial court’s order to the extent it compels production of the Aries source code.

DISCUSSION

I. *Writ Review of the Trial Court’s Order*

“Despite the general rule disfavoring writ review of discovery matters, writ review is appropriate when petitioner seeks relief from an order which may undermine a privilege. [Citations.] . . . [I]nterlocutory review by writ is the only adequate remedy in such cases, since once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure. [Citation.]” (*Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 686 [attorney-client privilege]; accord, *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071.) Writ review of an order compelling disclosure of a trade secret is therefore proper. (Evid. Code, § 1060 [trade secret privilege].)

We review a trial court’s determination of a motion to compel discovery for abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) “An abuse of discretion is shown when the trial court applies the wrong legal standard. [Citation.] However, when the facts asserted in support of and in opposition to the motion are in conflict, the trial court’s factual findings will be upheld if they are supported by substantial evidence. [Citations.]” (*Ibid.*) “ ‘The scope of discretion always resides in the particular law being applied, i.e., in the “legal principles governing the subject of [the] action” Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an “abuse” of discretion.’ [Citation.]” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393.)

II. *The Standard for Obtaining Discovery of a Trade Secret*

“[T]he owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” (Evid. Code, § 1060.) *Bridgestone* sets forth the standard for determining whether a trade secret must be disclosed in litigation: Once a party claiming the trade secret privilege has shown that it applies, the party seeking discovery must make “a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defense against, a material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit. It is then up to the holder of the privilege to demonstrate any claimed disadvantages of a protective order. Either party may propose or oppose less intrusive alternatives to disclosure of the trade secret, but the burden is upon the trade secret claimant to demonstrate that an alternative to disclosure will not be unduly burdensome to the opposing side and that it will maintain the same fair balance in the litigation that would have been achieved by disclosure.” (*Bridgestone, supra*, 7 Cal.App.4th at p. 1393.)

Bridgestone involved a wrongful death suit against a tire manufacturer for negligent design and manufacture, strict liability, breach of warranty, and failure to warn

in connection with a tire failure that caused a car accident. (*Bridgestone, supra*, 7 Cal.App.4th at p. 1388.) The plaintiffs sought the manufacturing specifications for the tire at issue, which included formulas necessary to translate and describe the rubber compound components in the tire. (*Id.* at pp. 1388-1389.) The court found the declaration of the plaintiffs' expert insufficient because it did not show "the necessity of the formula information to [the plaintiffs'] ability to carry their burden of proof." (*Id.* at p. 1397.) The declaration plainly established that the trade secret formulas would be helpful to the analysis of the case and to the expert's ability to reach conclusions and render opinions regarding the tire's failure and the defendant's knowledge of problems with it. Nonetheless, the expert did not "describe with any precision how or why the formulas were a predicate to his ability to reach conclusions in the case" and did not "explain why the formulas themselves (in addition to the specification information) were necessary." (*Id.* at pp. 1396-1397.) Significantly, the expert acknowledged that he was able to draw conclusions about a design defect in another case based on the specifications alone, without the formulas. (*Id.* at p. 1397.)

III. *ANTs Failed to Make the Requisite Showing in This Case*

Sybase's primary contention is that ANTs "failed to make a prima facie, particularized showing of how or why the production of Sybase's trade secret information is not simply relevant, but necessary to its defense." In evaluating ANTs's claim of necessity, we begin by clarifying the trade secret at issue—the source code for Aries. Contrary to ANTs's assertions below, Aries is not "the product on which the lost engineer was working" or the version of ASE into which ADS "was supposed to be incorporated." The undisputed evidence establishes that Aries is the engineering code name for the product that Sybase brought to market after abandoning its efforts to develop an integrated product, Pegasus. According to Sybase, Aries is "a completely different [ASE] product." The question is whether ANTs has shown that the source code for the *Aries* version of ASE is necessary to its defense and a fair resolution of the proceedings. ANTs presents several arguments to establish necessity.

A. *Purported Necessity to Determine Why ADS Was Not Integrated*

ANTs contends it needs the Aries source code to evaluate Sybase's claims that Mathew's departure prevented integration of the ADS code, causing delay in the release of "ASE 15.5" and resulting in a product with less robust features. Specifically, ANTs seeks to determine whether Sybase's product was delayed by Mathew's departure, whether ADS could be integrated without him, and why the ADS code could not be integrated. ANTs maintains that "the source code will unequivocally show how the ASE product operates in comparison to ADS," and "[its] experts will be able to tell if indeed the decreased functionality and product delay were caused by some issues other than the lost engineer." ANTs contends the Aries source code also will allow it to evaluate the engineers' deposition testimony regarding the differences between ADS and ASE that precluded integration.

The fundamental flaw in these contentions is ANTs's failure to demonstrate that the source code for Aries will provide the information it seeks. In its motion below, and in opposing Sybase's petition, ANTs identifies the source code it seeks only vaguely as "the ASE product," and "the ASE source code," without distinguishing Aries from other versions of ASE. Nothing in the record clarifies how the Aries version of ASE is relevant, let alone necessary, to why ADS was not integrated into an earlier version of ASE. To the extent a comparison of ADS with an ASE product's source code would reveal differences precluding integration, the relevant version of the ASE code is the earlier version into which ADS was to be incorporated.

This argument also fails because ANTs's own evidence shows that it was able to obtain testimony at a deposition regarding the decision not to incorporate the ADS code into ASE. ANTs contends, without citation to the record, that the key employees were not extensively involved in integration of ADS or related decisions and that none of the deponents recalled being told that Mathew's departure would affect product development. ANTs acknowledges, however, that it deposed Chowdhuri and Ranganath, who were responsible for making decisions regarding integration, and Chowdhuri testified: "We could not follow our original intent, which was to do the integration of

[ADS] into . . . ASE, and that integration was not possible because . . . we didn't have . . . Mathew, who was really the key component for us to move forward with this strategy[, in-memory database functionality].” ANTs also claims that Mathew could not provide the information it seeks because he only worked for Sybase a short time and had no input regarding integration. We are unpersuaded by this contention, as ANTs fails to support it with citation to the record, and, although the record demonstrates that Mathew may have information relevant to whether the ADS code could be integrated, ANTs has not shown it could not obtain this information, either by contacting him directly or by deposing him.

Finally, the trial court ordered Sybase to produce documents regarding the reasons for the decision not to integrate the ADS code, and ANTs acknowledges that it does not know whether these documents are an “adequate substitute” for the Aries source code because Sybase has not produced them. ANTs argues: “Certainly ANTs cannot be expected to rely solely on documents it does not have?” Sybase claims it has not produced the documents as ordered by the trial court because proceedings have been stayed pending resolution of Sybase’s petition. Presumably, Sybase will produce these documents promptly upon issuance of this court’s decision, and, if it fails to do so, ANTs’s remedy lies in the trial court.

B. Purported Necessity to Determine Whether Sybase Used ADS

ANTs also contends it needs to review the Aries source code to determine which aspects of ADS were incorporated into ASE. ANTs presented deposition testimony below from Sybase’s engineer, Chowdhuri, who stated: “[T]here were interesting IPs that ANTs had that we were definitely influenced by, and that is on the actual storage strategies, indexing strategies, query compilation strategies, locking strategies, recovery strategies.” He said “[a] very, very preliminary version of [the storage strategy]” was incorporated into ASE, but to adopt that strategy would have required too great a change in the ASE store code; and that the indexing, query compilation, and locking strategies were not incorporated because they would require “[t]oo big of a modification” to the ASE code, “[t]oo great of an architectural change.” Chowdhuri testified, however: “[T]here was one form of recovery that we partially were able to adopt into the ASE

code”—a “little bit” of the recovery strategy was incorporated. He agreed that the in-memory database functionality that was included with Aries did not include anything from ADS other than “maybe some high level storage strategy and maybe a little bit of the recovery strategy[.]”

Sybase characterizes this argument as a contention “that [ANTs] needs [the Aries] source code to determine whether [Sybase] is lying when it says it did not use the ADS source code in this later version of its software.” Sybase contends that ANTs did not assert this argument below and, relying on certain deposition testimony, maintains it would easily have overcome the argument if ANTs had raised it. The record demonstrates, however, that ANTs asserted this argument below, and that Sybase did not refute it.⁵ As the deposition testimony on which Sybase relies was not before the trial court, we do not consider it. (See *Butler v. Superior Court* (2000) 78 Cal.App.4th 1171, 1181.)

Nevertheless, ANTs’s argument and evidence on this point falls short of the *Bridgestone* showing. Sybase’s use of ADS in developing Aries is directly relevant to the extent of Sybase’s damages, which stem from its alleged inability to incorporate the ADS technology into its product. ANTs’s evidence indicates that Sybase was influenced by the ADS code and incorporated “a little bit” of one ADS strategy. ANTs is not required to rely on the testimony of Sybase’s own engineers and is entitled to test Sybase’s alleged inability to incorporate ADS. But, although ANTs has established its need to determine the extent to which Sybase used ADS in developing Aries, ANTs has failed to demonstrate that review of the Aries source code would permit such a determination. Indeed, ANTs has not presented any evidence showing that it is *possible*

⁵ ANTs asserted in its briefing that the source code was necessary to “determine what portions of ADS were incorporated into ASE” and noted Chowdhuri’s testimony that a portion of a fifth ADS technology, recovery strategy, was incorporated into ASE, asking: “How can ANTs evaluate the inclusion of the fifth technology into ASE . . . without the benefit of reviewing the ASE code?” At the hearing, ANTs contended review of the Aries source code is necessary because ANTs “need[s] to know exactly what was integrated, how, and why” in order to defend against Sybase’s claims.

to determine from a review of the Aries source code whether the ADS source code, IPs, and strategies were incorporated into the Aries product and the extent to which Sybase was influenced by it.⁶ We conclude that, without such evidence, the record does not permit a finding of necessity.

ANTs contends no expert declaration was necessary, noting: “Software coding language is no different than French or Spanish; it is simply another form of language which can be read by someone who has . . . learn[ed] its grammar and syntax. ANTs will have experts proficient in software development who will be able to read and understand the ASE source code.” The question here, however, is not whether an expert will be able to understand the Aries source code, but rather, what information would be obtained by an expert’s review of this code and what conclusions might reasonably be drawn from it. The record contains nothing showing that an expert examining the Aries source code could determine the extent to which it was influenced by ADS.

ANTs maintains: “No ANTs expert could yet opine concerning *what* the ASE code might reveal because neither it nor any related documents have been produced,” so an expert declaration would have offered only speculation. (Italics added.) An expert could explain, however, *whether* the source code for a software product such as Aries would reflect the extent to which it incorporates or was influenced by another software product and how that determination would be made. (*Bridgestone, supra*, 7 Cal.App.4th at p. 1397 [noting expert’s failure to describe with precision how or why the trade secret was a predicate to his ability to reach conclusions].) ANTs has not provided evidence addressing this threshold question. In addition, an expert could explain Chowdhuri’s testimony regarding the aspects of ADS that were incorporated into Aries, specifically, the terms “IP” and “strategy” and whether they are distinct from the source code itself.

Finally, for the first time in its return to the petition, ANTs contends it could not retain an expert to provide this information because it does not know in what computer

⁶ Indeed, ANTs has not provided evidence that defines Chowdhuri’s terms, “IP” and “strategy,” and clarifies whether they are distinct from the source code itself.

language the Aries source code is written. We observe that ANTs had an opportunity in the discovery process to seek the information necessary to justify its request for Sybase's trade secret. We are not aware of any exception to the *Bridgestone* requirement based on a party's failure to use the discovery process to obtain the evidence necessary to make the requisite showing.⁷

C. *Purported Necessity to Determine If Aries Is Less Functional and Robust*

For the first time in the proceedings before this court, ANTs contends that the Aries source code is necessary to evaluate Sybase's claims that the product it ultimately brought to market lacks robust features and is less functional than an integrated product would have been. ANTs claims Aries is the "very item Sybase claims was damaged." On first glance, this argument seems compelling: How can one defend against a claim that a product is less functional without being allowed to examine the product? In this analysis, however, it is important to distinguish the product from the product's *source code*. ANTs has not shown whether and how the Aries source code would show that Aries itself is a less robust and functional product than Pegasus would have been, and, in any case, that the source code is necessary to such a determination. Indeed, it would seem that an expert could reach any necessary conclusions about the Aries product's functionality and feature set by examining the Aries product itself.⁸

⁷ We do not decide whether evidence, from experts or other sources, is required in every case to compel disclosure of a trade secret under *Bridgestone*. We conclude only that, without such evidence, ANTs failed to meet the *Bridgestone* standard here.

⁸ For the same reasons, ANTs fails in its contention below that the Aries source code is necessary to evaluate whether Sybase received the benefit of its bargain, in defending against a rescission claim. Moreover, ANTs has not shown, in any event, that the complaint includes a claim for rescission, and it is unclear whether Sybase asserts one. Sybase disavowed such a claim at the May 2011 hearing, contending it simply asked for its money back during settlement discussions. We note, however, that Sybase's July 2011 discovery responses indicate that it "seeks restitution of the \$1.4 million license fee" Although the trial court relied in part on ANTs's need to defend against the contention that the ADS source code was defective when delivered, the record does not indicate that Sybase makes this assertion.

Accordingly, ANTs has failed to demonstrate the source code for the Aries version of ASE is necessary to its defense against Sybase's claims. For the same reasons, ANTs's showing does not reasonably permit a finding that the Aries source code is essential to a fair resolution of this action.⁹ The trial court therefore abused its discretion in compelling disclosure of the Aries source code, and writ relief setting aside this portion of its order is appropriate.

In granting Sybase's petition, we decline ANTs's request to "remand to the trial court with directions to allow ANTs to present specific declaration evidence from software programming experts as to how the ASE source code is necessary to [its] defense of Sybase's causes of action against [it] and how the ASE source code will be used." Existing law reasonably identified the standard ANTs was required to meet to obtain discovery of a trade secret, and we are not inclined to grant a second bite at the apple in these circumstances. Nonetheless, to the extent the related documents the trial court ordered Sybase to produce in May 2011 provide evidence that satisfies the *Bridgestone* standard, our holding should not be construed to preclude ANTs from renewing its motion based on that evidence. We leave such matters to the discretion of the trial court.

DISPOSITION

The order to show cause, having served its purpose, is discharged. Let a peremptory writ of mandate issue directing respondent court to vacate the portion of its May 27, 2011 order granting ANTs's motion to compel disclosure of the Aries source code and to issue a new and different order denying this portion of ANTs's motion. The stay previously issued will dissolve upon issuance of the remittitur. (Cal. Rules of

⁹ As we conclude that ANTs failed to make the prima facie particularized showing required by *Bridgestone*, we need not decide whether the trial court considered the disadvantages of a protective order and whether the protective order was sufficient.

Court, rules 8.490(c), 8.272.) Each party shall bear its own costs incurred in litigating this petition. (Cal. Rules of Court, rule 8.493(a)(1)(B).)

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.