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A152692

IN THE

SUPREME COURT OF CALIFORNIA

FRANK C. HART AND CYNTHIA HART,

Plaintiffs and Petitioners,

v.

KEENAN PROPERTIES, INC.,

Defendant and Respondent.

ON PETITION FOR REVIEW OF THE FIRST DISTRICT COURT OF APPEAL, DIVISION FIVE, FOLLOWING APPEAL FROM A JUDGMENT OF THE ALAMEDA COUNTY SUPERIOR COURT, THE HONORABLE BRAD SELIGMAN, CASE NO. RG16838191

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This case involves whether hearsay testimony from a witness based on a non-existent, unauthenticated "invoice" can be admitted to prove that defendant and answering party, Keenan Properties, Inc., ("Keenan") supplied pipe to Mr. Hart's job. There is no other evidence that Keenan supplied any asbestos-containing materials to plaintiff Frank Hart's work. The Harts attempt to confuse witness testimony with the contents of a document that never existed. There is no document showing that Keenan supplied any asbestos-cement pipe to Christeve, Mr. Hart's employer.

The witness testimony concerning the disputed invoice came from the deposition of Mr. Hart's coworker, John Glamuzina, regarding a job that was more than 40 years ago. The evidence regarding the invoice is plainly "offered to prove the truth of the matter asserted: namely, that Keenan supplied pipes." (Opinion at 11.)

In their Petition, Plaintiffs use several flawed premises to argue that the Court of Appeal wrongly determined that the invoice was hearsay. First, Plaintiffs fail to properly categorize the purpose of the disputed documents. Second, Plaintiffs fixate on the logo or the name "Keenan" that appeared on the disputed invoices, ignoring the other alleged content of those documents that was equally essential to Plaintiffs case at trial. Third, Plaintiffs fail to appreciate that the Opinion expressly limits the issue presented—i.e., "we

are not called upon to determine the proper basis for admitting testimony regarding a witness's observation of a company's name or logo on a product." (Opinion at 10.) This combination allows the Harts to cast an illusory parade of horribles regarding the state of the hearsay rule in California. The Opinion, however, would not change the outcome of any of the cases cited by the Harts.

Regarding the hearsay exception of party admissions embodied in Evidence Code section 1220, there is no evidence that Keenan made the statements proffered by the witness, John Glamuzina. Keenan vehemently denied that it supplied the pipe at issue in this case and attempted to introduce documents showing the actual supplier—which were excluded as hearsay. In accordance with established precedent, the Court of Appeal properly found that the party admission hearsay exception cannot apply because Mr. Glamuzina's testimony is insufficient to establish that Keenan made the statements at issue.

The Opinion is squarely within this Court's precedent and no grounds for review exist under California Rules of Court, Rule 8.500.

DISCUSSION

I. Built on this Court's precedent, the *Hart* opinion does not modify or expand California hearsay law.

As the Petition suggests (and was still true on the day Keenan searched), Westlaw returns the *Hart* case as the first result when searching

"Is a logo or name hearsay?" Some defendants making that search in the future may be disappointed to read in the Opinion, "we are not called upon to determine the proper basis for admitting testimony regarding a witness's observation of a company's name or logo on a product." (Opinion at 10.) Those defendants will also be disappointed by the narrow holding of *Hart*, limited to out-of-court statements regarding unauthenticated invoices offered to prove a supplier furnished materials to a specific jobsite. Moreover, the unique facts of *Hart* were that the "invoice or delivery ticket" does not exist (it never did).[1] Rather, the evidence of the existence of the disputed "invoice or delivery ticket" came from witness John Glamuzina, Mr. Hart's coworker.

/ / /

[1] The Harts repeatedly attempt to malign Keenan in their Petittion by saying the documents do not exist because Keenan destroyed them. The record does not support this contention. (*See*, *e.g.*, "When a defendant destroys its invoices showing…" (Petition at 8); "Notably, the defendant company in this case destroyed its invoices…" (Petition at 10); "It is undisputed that defendant Keenan destroyed the invoices it delivered with its asbestos-cement pipe." (Petition at 13).) In ruling on Keenan's objection regarding the introduction of Mr. Glamuzina's testimony about the disputed invoices, the trial court noted, "Keenan's records of invoices were apparently destroyed by its successor." (1 AA 118.) The Court of Appeal wrote, "Keenan either disposed of all its documents or transferred them to its successor in 1983. Its successor testified that if documents were transferred to it, they were destroyed." (Opinion at 9.) Keenan believes the documents in question never existed because the pipe was purchased directly by Mr. Hart's employer from the manufacturer, Johns-Manville, as evidenced by actual sales documents from Johns-Manville. Only one of the invoices reflecting these direct sales was admitted at trial because of hearsay concerns.

A. The Opinion directly follows this Court's ruling in *Pacific Gas & Electric Company v. G.W. Thomas Drayage & Rigging Company*.

The Court of Appeal applied the Supreme Court's precedent from *Pacific Gas & Electric Company v. G.W. Thomas Drayage & Rigging Company, Inc*. (1968) 69 Cal.2d 33, 42–43, which found that invoices, bills, and receipts are hearsay. (Opinion at 8.) The Harts' attempts to distinguish *Pacific Gas* are unavailing. *Pacific Gas* instructs that invoices, bills, and receipts for repairs are hearsay and therefore "inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable." (*Pacific Gas*, *supra*, 69 Cal.2d at 42–43.) These documents may be admitted for the "limited purpose of corroborating" testimony, *though when offered for the purpose of proving that certain acts were actually done, they are inadmissible under the hearsay rule*. (*Pacific Gas*, *supra*, 69 Cal.2d at 43 (italics added).)

In *Pacific Gas*, the trial court admitted the invoices for both purposes. (*Pacific Gas*, *supra*, 69 Cal.2d at 43 ("Since there was testimony in the present case that the invoices had been paid, the trial court did not err in admitting them. . . . The individual items on the invoices, however, were read, not to corroborate payment or the reasonableness of the charges, but to prove that these specific repairs had actually been made. . . . This use of the invoices was error.") Here, as the Opinion notes, if one were to strip away Mr. Glamuzina's testimony, there is no other evidence on which a fact finder

could find Keenan supplied the pipe at issue. (Opinion at 16.) The invoices, offered for no other purpose than to show that Keenan supplied the pipe, are hearsay.

The Harts assert that *Pacific Gas* is limited to "third party" invoices (Petition at 24–25), but this observation is irrelevant to the discussion of whether the invoices are hearsay. Whether the invoices were from the defendant or from a third party, the hearsay analysis is exactly the same. Although authorship may play a part in a subsequent analysis of whether an exception to the hearsay rule applies, whether a defendant like Keenan or a third party wrote the invoice does not change the fact that Mr. Glamuzina's testimony regarding alleged invoices from Keenan was offered as direct evidence to prove that Keenan supplied pipe to Mr. Hart's work.

In sum, the Court of Appeal appropriately followed the precedent of *Pacific Gas*. The Opinion's holding does not create a conflict among lower courts.

B. The Harts misconstrue the purpose of Mr. Glamuzina's testimony in arguing for their own novel redefinition of nonhearsay statements.

The Harts make the spurious contention that Mr. Glamuzina's testimony is not hearsay but, "circumstantial evidence that 'a person with the same name as the defendant' delivered the pipe," citing *People v. Williams* (1992) 3 Cal.App.4th 1535, 1541–1543, and *People v. Freeman* (1971) 20 Cal.App.3d 488, 492. (Petition at 25.) The Harts are either ignoring or

mischaracterizing the manifest purpose Mr. Glamuzina's testimony. There is nothing tangential or inferential about the testimony regarding disputed invoices. Mr. Glamuzina's testimony is not being offered as nonhearsay "circumstantial evidence of identification," as the Harts suggest. (Petition at 25.)

Mr. Glamuzina's testimony regarding the invoices, including the contents of the invoices, is offered as direct evidence that Keenan supplied the pipe. This testimony is identical to the testimony at issue in *Osborne v. Todd Farm Services* (2016) 247 Cal.App.4th 43, 52–53, which held that "testimony regarding supplier of hay bales [based on receipts] was properly excluded as hearsay because it was offered to prove the truth of the matter asserted." Mr. Glamuzina's "testimony regarding the content of the invoices was used to prove that Keenan was the vendor. Therefore, the content of the invoices was being offered for the truth of the matter asserted in them." (Opinion at 11; *see also*, *Pacific Gas*, *supra*, 69 Cal.2d at 52–53.)

The Harts contend that Glamuzina's testimony regarding the disputed invoices was not hearsay because it was not offered to prove the truth of the matter asserted. As was made clear at trial and throughout the appellate process, if one strips away Mr. Glamuzina's testimony, there is no evidence that Keenan supplied any product to any of Mr. Hart's jobs. Mr. Glamuzina's testimony regarding the contents of the invoices serves no other purpose but

to prove whether it is true or false that Keenan supplied pipe to the McKinleyville jobsite.

The Harts assert that Glumizina's testimony comes within a departure from the hearsay rule applying to cases, "Where 'the very fact in controversy is whether certain things were said or done and not . . . whether these things were true or false, . . . in these cases the words or acts are admissible not as hearsay[,] but as original evidence.'" (Opinion at p. 21, *citing* 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 31, p. 714.)

The Harts ignore the operative side of the equation: "*and not as to whether these things were true or false*." In this case, the controversy encompasses not just "whether certain things were said or done," but also "whether these things are true or false." In *Pacific Gas*, the Court held that invoices were inadmissible to prove that certain acts had been done. (*Pacific Gas*, *supra*, 69 Cal.2d at 42.) So too is the case here where testimony from a third-party witness regarding a document (that does not exist) is being used to prove that Keenan supplied materials to one of Mr. Hart's jobsites.

The Harts rely heavily on the opinion of *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324–325, to argue that admissibility of an invoice is an exception to the hearsay rule. If applicable at all, *Jazayeri* does not allow Mr. Glamuzina to describe the hearsay content of the invoices disputed invoices, which is exactly how Plaintiffs were permitted to use Mr.

Glamuzina's testimony at trial. In *Jazayeri*, chicken suppliers sued a processor and its owners, including Susan Mao, for fraud and breach of contract. (*Id*. at 305–306.) The suppliers claimed the defendants altered the food safety inspectors' "poultry condemnation certificates" (PCCs) to increase the number of chickens deemed dead on arrival (DOA) to lower their payments for chicken deliveries. (*Id*. at 306.) The chicken suppliers "offered the altered PCC's given them by Susan Mao not for the truth of the matter asserted—that the inscribed number of chickens were DOA or condemned by the USDA inspectors—but as direct evidence of the fraudulent statements" made by the processor defendants to the chicken supplier plaintiffs. (*Id*. at 316.) The Court of Appeal in *Jazayeri* reasoned that this was an "example of the nonhearsay use of an extrajudicial statement 'to prove, as relevant to a disputed fact in an action, that the . . . hearer . . . obtained certain information by hearing . . . the statement and, believing such information to be true, acted in conformity with such belief.' [Citations.] Here, appellants accepted inadequate payment for the chickens sold to Mao Foods in reliance on the allegedly false representations of Susan Mao." (*Id*. at 316–317.)

Mr. Glamuzina's testimony regarding the content of the purported Keenan invoices is not an operative fact offered to demonstrate its effect on Mr. Glamuzina or any other "hearer." Rather, Mr. Glamuzina's testimony

regarding the disputed invoices was offered at trial as direct evidence—indeed, the only evidence—to prove that Keenan supplied asbestos-cement pipe to the McKinleyville project. When used for this purpose, the invoices are inadmissible hearsay. (*Osborne*, *supra*, 247 Cal.App.4th 43 at 52–53.) Plaintiffs do not provide the Court with any authority that allows a witness to testify as to the contents of an unavailable document in order to prove the truth of the matter asserted, much less a conflict among lower courts necessitating the Supreme Court's attention.

C. Petitioners omit facts to mischaracterize Mr. Glamuzina's testimony as corroborating evidence under *Pacific Gas*.

The Harts argue that the Court of Appeal misapplied the law regarding corroborating evidence under *Pacific Gas*. This Court has held that invoices, bills, and receipts are hearsay to independently prove that certain acts were done or that charges were reasonable, but they may be admitted for the limited purpose of corroborating testimony. (*Pac. Gas & Elec. Co.*, *supra*, 69 Cal. 2d at 43; *see* Opinion at 8.) In their Petition, the Harts attempt to offer new evidence that they claim corroborates Mr. Glamuzina's testimony while omitting the exculpatory evidence Keenan offered at trial and presented on appeal.

The "evidence" offered by the Harts in their Petition is misleading and illusory. Contrary to the Harts' assertions, there is no evidence demonstrating that Keenan was the "likely" supplier of the McKinleyville

project. (Petition at 14.) The Harts omit portions of the record (that the Harts themselves designated at trial) which indicate other suppliers were active in the McKinleyville area. For example, Keenan had to bid on water works projects in the nearby town of Eureka (13 miles from McKinleyville). Keenan won those contracts just one-third of the time in the 1970s. (8 RT 2209:12-2210:3.) The Harts further omit the testimony of Fred Keenan explaining that the sale of asbestos-cement pipe was historically sold by the manufacturer to the end user. (8 RT 2228:2-2228:14.) The Harts omit that Keenan offered authenticated documents from Johns-Manville demonstrating that Johns-Manville sold pipe directly to Mr. Hart's employer for the McKinleyville project. The Harts objected that the Johns-Manville invoices were hearsay and, not without irony, Keenan was prevented on that basis from presenting those invoices to the jury. (7 RT 1828:16-1835:23.) The trial court reasoned that the business records exception did not apply because there was insufficient evidence regarding the mode of preparation and use of the documents. (7 RT 1832:3-9.) As this is a "preference case" under Code of Civil Procedure section 36, and given the strictures placed on discovery given the expedited proceedings, Keenan was unable to develop that evidence.

Within the framework of *Osborne* and this Court's precedent in *Pacific Gas*, the *Hart* Opinion correctly found that the use of Mr.

Glamuzina's testimony regarding a disputed invoice to prove that Keenan supplied pipe was hearsay. The Opinion does not create a new definition of a hearsay statement.

II. The Opinion makes no new finding regarding the party admission hearsay exception—the proponent of the evidence must first show the party made the statement.

Plaintiffs cite to no authority holding that the contents of an unavailable document can be admitted as an admission against interest when the document is not authenticated and the parties dispute that the document ever existed.

Under the party admission exception, "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." (Evid. Code, § 1220.) As the Opinion noted, "in order to bring a statement or declaration within the operation of the [party admission] rule contended for it must be shown that the statement or declaration was signed or made by the party against whose interest it is sought to have it apply; and that is not the situation here presented." (Opinion at 13, quoting *Pansini v. Weber* (1942) 53 Cal.App.2d 1, 5.) As discussed below, there is insufficient evidence to authenticate the disputed invoices—that is, there is no evidence that Keenan authored the specific invoices allegedly seen by Mr. Glamuzina at McKinleyville. The Opinion does not

set forth any new rule at all on the party admission issue, but merely adheres to the principle that there must be foundational evidence that the documents are what Mr. Glamuzina purports them to be. Failing that, there can be no conclusion that Keenan made the statements reported by Mr. Glamuzina.

In this Court's opinion in *People v. Lewis* (2008) 43 Cal.4th 415, the admissibility of certain drawings was at issue as "truth of the assertion that the defendant committed robberies with a sawed-off shotgun." (*Id.* at 498.) Although the prosecutor had theorized that a codefendant made the drawings, the prosecutor nonetheless "argued that the drawings were an 'admission' by defendant." (*Id.*) The Court found that "there was no evidence that the defendant made the drawings," and the party admission exception did not apply. (*Id*.) Such is the case here, where there is no evidence that Keenan made the documents described by Glamuzina.

Petitioners' theory that Keenan authored the disputed documents does not make it so. As the *Hart* Opinion points out, "Keenan's corporate representative had no information regarding whether Keenan sold pipes used in McKinleyville, and the Harts did not produce any invoices showing it did." (Opinion at 13.) Moreover, Olga Mitrovich, who was responsible for bookkeeping for Christeve during the relevant timeframe, testified that, although she recalled a K with a circle around it for the Keenan logo, she did not know if Christeve ever ordered asbestos-cement pipe from Keenan and

did not know if Keenan was a supplier to the McKinleyville job. (9 RT 2462:5–11, 2463:10–22.) Meanwhile, Mr. Glamuzina's testimony regarding this "admission" was vague; testifying that he recalled the Keenan invoices because of "their K and stuff is all – I don't know. Maybe it's through the years, maybe it's worked into my head, I don't know." (12 RT 3415:17–20.)

The Court of Appeal properly focused on the admissibility of the disputed document in analyzing whether the trial court erred in its assessment of the party admission exception. "Without a document showing Keenan supplied the pipes to the McKinleyville jobsite, Glamuzina's testimony was not admissible as an admission by Keenan, and the Harts do not contend any other hearsay exception applies." (Opinion at 13.)

The Harts contend that the Court of Appeal opinion conflicts with *Jazayeri v. Mao* with respect to the party admission exception to the hearsay rule embodied by Evidence Code section 1220. (Petition at 27–28, citing *Jazayeri*, *supra*, 174 Cal.App.4th at 324–325.) As explained above, the documents at issue in *Jazayeri* were alleged to be falsified by the defendants. The question was not whether the documents were literally true, but the "operative documents" necessary for the fact-finder to determine whether a fraud had been perpetrated. Further, in *Jazayeri*, the documents existed. The Maos could be cross-examined regarding truth or falsity of the documents. "Several witnesses," including Susan Mao herself, established that she was

responsible for preparing the documents and the documents were properly authenticated. The facts and the prosecutorial purpose of the documents in *Jazayeri* are completely different from those of *Hart*.

Plaintiffs cite to a number of cases finding records made during the course of business to be party admissions: "Poultry Condemnation Certificates" accountings (*Jazayeri, supra*, 174 Cal.App.4th at 324–325), financial documents (*Horton v. Remillard Brick Co.* (1915) 170 Cal. 384, 400), balance sheets (*StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 244), income tax returns (*Shenson v. Shenson* (1954) 124 Cal.App.2d 747, 752), board meeting minutes (*Sill Properties, Inc. v. CMAG, Inc.* (1963) 219 Cal.App.2d 42, 54–55), and sales records (*Keith v. Electrical Engineering Co.* (1902) 136 Cal. 178, 181). (Petition at 27–28.)

In every case cited by the Harts, the documents deemed admissible under Section 1220 *actually existed*. (*Jazayeri, supra*, 174 Cal.App.4th at 320–21 ["the PCCs provided in response to Jazayeri's FOIA request were properly authenticated"]; *Horton v. Remillard Brick Co.* (1915) 170 Cal. 384, 400 ["trial court, rightly, as we think, admitted these exhibits (which showed the profits as just stated) on the theory that they constituted at least prima facie admissions"]; *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 244 ["the balance sheets were authenticated"]; *Shenson v. Shenson* (1954) 124 Cal.App.2d 747, 751–52 [the admitted

income tax returns were signed by the defendant]; *Sill Properties, Inc. v. CMAG, Inc.* (1963) 219 Cal.App.2d 42, 54–55 [board of directors minutes regarding statement of the value of certain assets made pursuant to Corporations Code section 1112 admitted into evidence]; *Keith v. Electrical Engineering Co.* (1902) 136 Cal. 178, 181 ["no error in the admission of the paper containing a statement of sales made by defendant"].)

The Opinion creates no conflict of law, nor does this case present a novel issue regarding Section 1220's party admission exception to the hearsay rule. The Harts lack the requisite ability to show that Keenan actually made the specific statements offered via the testimony of Mr. Glamuzina. As there is no proof that Keenan actually made these statements, there can be no finding that the statements were a party admission under Section 1220. (*Pansini v. Weber* (1942) 53 Cal.App.2d 1, 5.)

III. Petitioners advocate for the abolishment of the requirement of authentication of a document for any business that is known to issue an invoice.

Evidence Code section 1401 requires authentication of a writing before it, or secondary evidence of its content may be received in evidence. The *Hart* Opinion is in line with the statute. Even if Mr. Glamuzina's testimony regarding the disputed documents were found to not be hearsay, or that the party admission exception applies, Plaintiffs must still satisfy the threshold showing of authenticity as the proponent of secondary evidence of a writing.

In their Petition for Review, the Harts do not contend that the Opinion creates a split among lower courts regarding authentication of documents or that there is some novel, important question of law regarding authentication that requires Supreme Court review. (*See* Petition at 30-33.) Instead, the Harts argue that the Court of Appeal wrongly decided the issue and themselves advocate for a new, unprecedented means of authentication.

Under the Hart's formulation, if a business's customary practice is to create sales receipts, and a witness provides secondary evidence of a receipt allegedly from that business, the document must be authentic. (Petition at 30.) There is no authority for a rule that would effectively make the authentication requirement pointless. As the Opinion correctly notes, "courts do not assume 'documents are what they purport to be . . . . Generally speaking, documents must be authenticated in some fashion before they are admissible in evidence.'" (Opinion at 15; quoting *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525.)

As in *Osborne v. Todd Farm Services* (2016) 247 Cal.App.4th 43, 53, there are circumstances that cast the very existence of the invoice into doubt. In *Osborne*, the plaintiff did not possess the physical document and no witness other than the plaintiff claimed to have ever seen the receipt. (*Id*. at 53.) Here, the disputed document does not exist and Mr. Glamuzina is the only source of evidence regarding the document. In *Osborne*, the defendant

claimed that no such receipt ever existed. (*Ibid.*) Here, Keenan's corporate representative had "no information whatsoever that Keenan ever sold anything that was used in the McKinleyville work while Mr. Hart was working there." (Opinion at 15.) Further, Keenan produced authenticated invoices from Johns-Manville showing that Johns-Manville sold pipe directly to Christeve and shipped that pipe directly to Christeve at McKinleyville. (7 RT 1828:16–1835:23.) The Harts contend that Olga Mitrovich, Christeve's bookkeeper in the 1970s, recalled seeing Keenan invoices. (Petition at 32.) The Harts fail to note that Mitrovich also testified that she did not know if Christeve ever ordered asbestos-cement pipe from Keenan and did not know if Keenan was a supplier to the McKinleyville job. (9 RT 2462:5–11.) The Opinion's reasoning is sound. There is no sufficient evidence to authenticate the disputed invoices.

The Harts cite *People ex Rel. Harris v. Sarpas* (2014) 225 Cal.App.4th 1539, 1571 to support their proposition that "custom and practice" is sufficient to authenticate a writing. In *Sarpas*, the California Attorney General was litigating claims for unfair competition and false advertising against defendants who were accused of operating a business that promised loan modification services, but there was no evidence that the defendants ever "obtained a single loan modification, or provided anything of value, for its customers." (*Id*. at 1543.) The trial court received in evidence an exhibit

consisting of the front and back sides of over 1,900 checks from over 1,200 customers. (*Id.* at 1570.) The exhibit was "received into evidence for the limited purpose" of showing that the defendants' bank had deposited into the defendants' account the amount of money that appeared on the face of the check. (*Id.* at 1570.) "The Attorney General authenticated the checks with testimony from a representative of Bank of America about how the checks were processed and the bank's custom and practice in accepting and negotiating the checks. The trial court accepted this testimony as sufficient to authenticate the checks for the purpose for which they were received in evidence. Sarpas and Fasela[, the defendants,] do not challenge this testimony." (*Id*. at 1571.)

Certainly, it was more expeditious to use the bank to authenticate the more than 1,900 checks than to track down the 1,259 customers who had written those checks. *Sarpas* hardly stands for the creation of a new means of authentication as suggested by the Harts. *Sarpas* provides no illustrative facts to explain what is meant by "custom and practice" other than what is stated above. Moreover, "custom and practice in accepting and negotiating the checks" does not stand alone. The bank representative also testified about how the checks were processed. Notably, the documents at issue in *Sarpas* actually existed and, presumably, the provenance of the checks could be traced. As the proponents of the evidence here, the Harts have provided no

such evidence. On this threshold issue, the documents described by Mr. Glamuzina are not authenticated and are independently inadmissible on that basis alone.

As the Harts observed in their Response Brief to the Court of Appeal, "Evidence Code section 1521(c) explicitly provides that the proponent of secondary must still satisfy the threshold of authenticity." (RB at 58.) While Section 1521 permits the introduction of "otherwise admissible secondary evidence" to prove the contents of a writing, "it does not excuse the proponent from complying with other rules of evidence, most notably, the hearsay rule." (*Pajaro Valley Water Mgmt. Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1108.) Proponents of secondary evidence must still satisfy all the rules of governing admissibility of evidence, including the hearsay rule. (*Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059, 1070, fn. 2.) Under Section 1521, the Harts can only introduce secondary evidence to establish the contents of the disputed invoices if (1) the contents themselves were admissible, and (2) the secondary evidence was "otherwise admissible." (*See Pajaro Valley Water Mgmt. Agency v. McGrath* (2005) 128 Cal. App. 4th 1093, 1108.) The contents of the disputed invoices were hearsay. "In the absence of a showing that they came within an exception, secondary evidence of their contents was no more admissible than the bills themselves, which is to say, not at all." (*Id.*)

The Court of Appeal appropriately followed precedent. Citing no convincing authority, the Harts argue for a new, unprecedented means of authentication. The Harts cite to no conflict of law on the issue of authentication and do not identify a novel question of law in need of the Supreme Court's review.

IV. There is no novel question of law emanating from the facts of this case necessitating Supreme Court review.

The Harts complain that the Opinion left open the question of whether testimony regarding the name on product packaging will now be excluded as hearsay, citing *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1439 (which included discussion of whether a defendant must show a product exemplar logo for burden shifting on a summary judgment motion), and *McGonnell v. Kaiser Gypsum Company, Inc*. (2002) 1098, 1101 (plaintiff testified he had seen bags of cement bearing defendant's name). The Harts are attempting to manufacture an issue not arising from their case. *The Opinion explicitly leaves the issue identified by the Harts as untouched*: "Here, we are not called upon to determine the proper basis for admitting testimony regarding a witness's observation of a company's name or logo on a product." (Opinion at 10.) Nothing has changed about how a plaintiff will identify the manufacturer of a bag of cement or a name on a truck that drove into a crowd. The Opinion serves to apply the *Pacific Gas* and *Osborne* holdings to asbestos-related cases where the liability of a supplier turns on

the contents of disputed documents that are not before the fact-finder and trial courts (and plaintiff counsel) may believe a different set of rules apply.

The scenarios posed by Petitioners that supposedly wreak havoc actually do not apply to the facts of this case. None of the scenarios address whether hearsay testimony based on an unauthenticated document can be admitted.

CONCLUSION

This case presents no issue worthy of review. The Opinion is consistent with *Pacific Gas* and *Osborne*. The Court of Appeal correctly found that the disputed invoices were not properly authenticated as there was no evidence that supported the Harts' contention that the documents were what the Harts purported them to be. Further, when the secondary evidence of the contents of those disputed invoices were used as the Harts' sole basis to prove that Keenan supplied the pipe in question, the Court of Appeal appropriately found the disputed invoices to be hearsay. The petition for review should be denied.

Dated: January 21, 2019

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief consists of 4,993 words in Times New Roman 13-point font as counted by the Microsoft Word 2016 program used to generate the text of this brief.

Dated: January 22, 2019

W. Joseph Gunter

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ANSWER TO PETITION FOR REVIEW

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Executed on January 22, 2019, at San Francisco, California.

W. Joseph Gunter

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **HART v. KEENAN PROPERTIES**
Case Number: **S253295**
Lower Court Case Number: **A152692**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **jgunter@cmbg3.com**

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

1/22/2019

Date

/s/Joseph Gunter

Signature

Gunter, Joseph (170810)

Last Name, First Name (PNum)

CMBG3 Law LLC

Law Firm