S269456

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE ex rel. LILIA GARCIA-BROWER, as Labor Commissioner, etc.,
Plaintiff and Appellant,

v.

KOLLA'S INC.,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE
CASE NO. G057831

SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY

HORVITZ & LEVY LLP
BRADLEY S. PAULEY (BAR NO. 187298)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
bpauley@horvitzlevy.com

HORVITZ & LEVY LLP
BETH J. JAY (BAR NO. 53820)
*CHRISTOPHER D. HU (BAR NO. 293052)
505 SANSOME STREET, SUITE 375
SAN FRANCISCO, CALIFORNIA 94111-3175
(415) 462-5600 • FAX: (844) 497-6592
bjay@horvitzlevy.com
chu@horvitzlevy.com

APPOINTED PRO BONO COUNSEL

SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY

INTRODUCTION

Pursuant to California Rules of Court, rule 8.520(d), appointed pro bono counsel respectfully submit this supplemental brief addressing two authorities that were not available in time to be included in the answer brief on the merits: *Rodriguez v. Laboratory Corporation of America* (C.D.Cal., Aug. 25, 2022, No. CV 21-00399-MWF (JCx)) __ F.Supp.3d __ [2022 WL 4597420] (*Rodriguez*) and *Killgore v. SpecPro Professional Services, LLC* (9th Cir., Oct. 20, 2022, No. 21-15897) __ F.4th __ [2022 WL 11530092] (*Killgore*).

LEGAL ARGUMENT

I. *Rodriguez* supports the decision below and shows the limits of the Labor Commissioner's public policy arguments.

The plaintiff in *Rodriguez* worked as a phlebotomist for a laboratory testing company. (*Rodriguez*, *supra*, __ F.Supp.3d __ [2022 WL 4597420, at p. *1].) She alleged that she was fired in retaliation for " 'blowing the whistle' " on purported wrongdoing related to biohazard bags, disinfection logs, COVID-19 protocol, and other matters. (*Id.* at pp. *1, *4.) She sued her former employer and asserted (among other causes of action) a claim under Labor Code section 1102.5 (section 1102.5). (*Rodriguez*, at pp. *3–*4.)

The district court granted the employer's motion for summary judgment on plaintiff's section 1102.5 claim.

(*Rodriguez*, *supra*, __ F.Supp.3d __ [2022 WL 4597420, at p. *1].) The court agreed with *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 (*Mize-Kurzman*) that " '[T]he term "disclosure" means to reveal something that was hidden and not known,' " such that a report of publicly known or already known information is not a protected disclosure under section 1102.5. (*Rodriguez*, at p. *4.) It then applied that rule to several of plaintiff's internal complaints and held that none of them were protected disclosures. Plaintiff complained to her supervisor about overfilled biohazard bags, but the supervisor was already aware of the issue. (*Ibid.*) Her complaint about disinfection logs pertained to a problem already "publicly known" within the company. (*Id.* at p. *5.) As for COVID-19 protocol, plaintiff's complaint was not protected because she complained to her supervisor "about his own failure to follow CDC guidelines." (*Ibid.*)

Rodriguez thus highlights distinct but related aspects of the issue presented in this case: information *already known to the recipient*, which may include matters *publicly known* as well as those in which *the recipient is the wrongdoer*. None of these scenarios involve "disclosing information" under section 1102.5, subdivision (b).

Rodriguez also showcases why the Labor Commissioner is wrong to suggest that affirming the decision below "would leave a wide variety of whistleblowers to suffer irremediable retaliation." (RBOM 22, original formatting omitted.) As the answer brief explained, workers in California enjoy other antiretaliation

protections that do not hinge on disclosure of new information. (ABOM 46–48.) These protections include Labor Code section 6310—which protects complaints about workplace health and safety—and *Tameny* claims for wrongful termination in violation of public policy.

In *Rodriguez*, the district court denied summary judgment as to plaintiff's retaliation claim under Labor Code section 6310 and her related *Tameny* claim, allowing those claims to proceed. (*Rodriguez*, *supra*, __ F.Supp.3d __ [2022 WL 4597420, at p. *1].) Unlike section 1102.5, the court explained, "section 6310 makes no mention of an 'information disclosure,' " so the latter statute protected plaintiff's complaints even though they were about matters already known to the recipients. (*Rodriguez*, at p. *7.) Because that claim survived, so did plaintiff's *Tameny* claim. (*Id.* at p. *8.)

II. *Killgore* misinterprets California precedent and the plain language of the statute.

In *Killgore*, the Ninth Circuit implicitly disapproved *Rodriguez*. It did so by rejecting the argument that the plaintiff's "communications with [a government official] were unprotected because the information was already known to [the recipient]," who "was assertedly involved in the wrongful conduct." (*Killgore*, *supra*, __ F.4th __ [2022 WL 11530092, at p. *11].) The Ninth Circuit was wrong for two reasons.

First, the Ninth Circuit declined to follow *Mize-Kurzman*, *supra*, 202 Cal.App.4th 832, which it asserted "was based on" a Federal Circuit decision, *Huffman v. Office of Personnel*

Management (Fed.Cir. 2001) 263 F.3d 1341, 1350. (*Killgore*, *supra*, __ F.4th __ [2022 WL 11530092, at p. *11].) The Ninth Circuit appeared to discount *Mize-Kurzman* in part because "*Huffman* has itself been superseded by amendments to the federal Whistleblower Protection Act." (*Killgore*, at p. *11.) Contrary to the Ninth Circuit's implication, however, *Mize-Kurzman* did not rely solely on *Huffman*: the Court of Appeal also based its analysis on the plain language of section 1102.5. (See ABOM 36.) Moreover, the divergence between federal and state law only bolsters *Mize-Kurzman*'s holding. Congress abrogated *Huffman*, yet California's Legislature has left in place *Mize-Kurzman*'s interpretation of section 1102.5's disclosure requirement. (See ABOM 37–39.)

Second, the Ninth Circuit looked to California decisions that it claimed "have held that disclosures to wrongdoers *are* protected under section 1102.5(b)." (*Killgore*, *supra*, __ F.4th __ [2022 WL 11530092, at p. *11], citing *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, and *Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236.) These decisions do not support the Ninth Circuit's approach. To begin with, only one of them—*Jaramillo*—arose from a complaint to the wrongdoer. Moreover, *Hager* and *Jaramillo* involved internal reports by public employees, an activity that is governed by section 1102.5, subdivision (e). (See ABOM 27–28, 35–36.) *Gardenhire* was also a public employee case; it prompted the Legislature to enact subdivision (e) in the first place. (See ABOM 13–14, 38.) Even if

these decisions could be read to hold that a private-sector employee's complaint to the wrongdoer is protected under section 1102.5, subdivision (b), such a holding cannot be squared with the plain language of the statute. (See ABOM 21–32.)

CONCLUSION

For all these reasons, as well as those set forth in the answer brief on the merits, this Court should affirm the decision of the Court of Appeal.

November 8, 2022

HORVITZ & LEVY LLP
BETH J. JAY
BRADLEY S. PAULEY
CHRISTOPHER D. HU

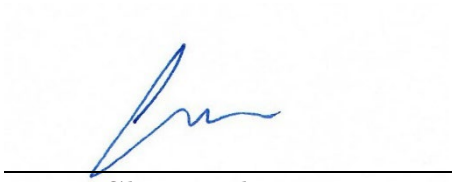
By: _____
Christopher D. Hu

APPOINTED PRO BONO COUNSEL

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(d)(2).)

The text of this brief consists of 986 words as counted by the program used to generate the brief.

Dated: November 8, 2022



Christopher D. Hu

PROOF OF SERVICE

Garcia-Brower v. Kolla's Inc.
Case No. S269456

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On November 8, 2022, I served true copies of the following document(s) described as **SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

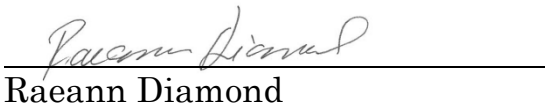
BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on November 8, 2022, at Burbank, California.



Raeann Diamond

SERVICE LIST
Garcia-Brower v. Kolla's Inc.
Case No. S269456

Individual / Counsel	Party Represented
Nicholas Patrick Seitz State of California Department of Industrial Relations Division of Labor Standards Enforcement 464 W. 4th Street, Suite 348 San Bernardino, CA 92401 Phone: (909) 521-3853 • FAX: (415) 703-4807 Email: nseitz@dir.ca.gov	Plaintiff and Appellant **LILIA GARCIA-BROWER** *(Via TrueFiling)*
Kolla's Inc. c/o Gonzalo Sanalla Estrada 23716 Marlin CV Laguna Niguel, CA 92677	Defendant and Respondent **IN PRO PER** *(Via Overnight Mail)*
Clerk Fourth District Court of Appeal Division Three 601 West Santa Ana Boulevard Santa Ana, CA 92701	Case No. G057831 *(Via TrueFiling)*
Clerk, Orange County Superior Court - Main Hon. Martha K. Gooding, Dept. C31 Central Justice Center 700 Civic Center Drive Santa Ana, CA 92701 (657) 622-5231	Trial Court Judge Case No. 30-2017-00950004 *(Via U.S. Mail)*

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **GARCIA-BROWER v. KOLLA'S**
Case Number: **S269456**
Lower Court Case Number: **G057831**

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: **chu@horvitzlevy.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S269456_SuppBrief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Nicholas Seitz Division of Labor Standards Enforcement 287568	nseitz@dir.ca.gov	e-Serve	11/8/2022 11:18:29 AM
Christopher Hu Horvitz & Levy LLP 176008	chu@horvitzlevy.com	e-Serve	11/8/2022 11:18:29 AM
Cristina Schrum-Herrera Division of Labor Standards Enforcement 315319	cschrum-herrera@dir.ca.gov	e-Serve	11/8/2022 11:18:29 AM
Beth Jay Horvitz & Levy LLP 53820	bjay@horvitzlevy.com	e-Serve	11/8/2022 11:18:29 AM
Bradley Pauley Horvitz & Levy LLP 187298	bpauley@horvitzlevy.com	e-Serve	11/8/2022 11:18:29 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

11/8/2022
Date

/s/Christopher Hu
Signature

Hu, Christopher (176008)
Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm