S171382

SUPREME COURT COPY

IN THE

SUPREME COURT OF CALIFORNIA

TERRY QUARRY ET AL.

PLAINTIFFS AND APPELLANTS,

vs.

DOE 1,

DEFENDANT AND RESPONDENT.

DEFENDANT'S AND RESPONDENT'S REPLY BRIEF ON THE MERITS

Court Of Appeal, First Appellate District, Division Four
Case No. A120048

Alameda County Superior Court, No. HG07313640
Honorable Kenneth Mark Burr

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I. INTRODUCTION

This Court granted the Petition of the Bishop of Oakland to resolve the direct conflict between the First District's decision in *Quarry* – this matter – and the Second District's three-year-old opinion in *Hightower*. The issue presented by that conflict is clear: In 2002, did the California Legislature intend that the revision to California Code of Civil Procedure 340.1[1] subdivision (a) in SB 1779 be retroactive?

If there is one thing that the parties should be able to agree on, it is that California law does not allow for the retroactive application of a statute without clear legislative intent, and particularly in the case of a statute of limitations, that intent must be express and in the statute. (OB[2], 16); *Krupnick v. Duke Energy* (2004) 115 Cal.App.4th 1026, 1029 [9 Cal.Rptr.3d 767]. As important a concept as this is to the resolution of the issue before this Court, it was ignored in the *Quarry* opinion.

The Plaintiffs have followed in the steps of the First District. They too offer not a word on the requirement that retroactivity must be express and only treat *Hightower* in the most off handed way. It seems that neither the *Quarry* panel nor the Plaintiffs feel able to discuss what this dispute is truly about.

Rather, the Plaintiffs approach this Court in the most curious fashion. They fail to even attempt to support the opinion before the Supreme Court until the second half of their brief – essentially conceding that the *Quarry* reasoning does not stand scrutiny. Instead, the brothers chose to lead off with an argument that was so unpersuasive it was rejected

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[1] All references to "340.1" are to section 340.1 of the California Code of Civil Procedure.

[2] The Opening Brief is cited to herein as "OB." The Answer Brief is cited to as "AB."

even by the *Quarry* panel in its strenuous attempt to eliminate the statute of limitation for child abuse. They later offer another theory rejected by the *Quarry* court, and also improperly propose an internally inconsistent due process analysis for the very first time in their brief to this Court. In so doing, the Plaintiffs manage to submit a brief that ignores the third issue on which review was granted by this Court – that the First District ruled that the timeliness of a complaint is to be measured by the statute in effect at the time the complaint was filed. By their silence the Plaintiffs concede that *Quarry* was wrong.

The thrust of the Plaintiffs' argument is that the Legislature has over time liberalized the statute of limitation on civil child abuse claims – something the Bishop does not dispute. That fact is used by the Quarrys to argue that in 2002 the Senate and Assembly must have meant, in effect, to eliminate the statute completely – after all, statutes of limitation are unfair because they bar potentially valid claims. Such a facile argument apparently worked with the *Quarry* court – it will not be enough here.

By their very definition, statutes of limitation limit claims. Their enforcement disappoints potential plaintiffs. But such statutes are creatures of public policy and they can only be changed (or eliminated) by the clear, express action of the legislative branch. The California Legislature has neither eliminated the civil statute for child abuse nor indicated an intent to do so. *Quarry* must be overruled and *Hightower* reaffirmed.

II. ARGUMENT

A. PLAINTIFFS EITHER IGNORE OR DO NOT ADEQUATELY DISCUSS THE KEY ISSUES IN THIS APPEAL

Three issues central to this case – indeed the issues upon which this Court granted review – are the *Quarry* court's departure from the

established rule that retroactive application of limitations periods must be express in the statute, its contradiction of the three-year-old *Hightower* opinion, and its ignoring of this Court's precedential *Shirk* opinion with respect to accrual of childhood molestation claims.

In their Answer Brief, the Quarrys effectively ignored the first two of these issues, and did not adequately address the third.

1. Retroactivity Must Be Express, and Plaintiffs Ignore this Basic Principle

A fundamental principle of California law is that "an enlargement of limitations operates prospectively ***unless the statute expressly provides otherwise.***" (OB, 16); *Krupnick v. Duke Energy*, *supra*, 115 Cal.App.4th at 759 (emphasis added). There is no such express language in subdivision (a). The historic evolution of section 340.1 demonstrates the Legislature knows how to provide this type of retroactive language for this statute and here it did not.

The *Quarry* court held, without authority, that "the timeliness of the complaint is to be measured by the statute in effect at the time the complaint was filed." *Quarry v. Doe 1* (2009) 170 Cal.App.4th 1574, 1579 [89 Cal.Rptr.3d 640]. This holding is tantamount to the improper retroactive application of a statute of limitations without express language in the statute. The *Quarry* holding completely contradicts the law of retroactivity in California.

It is a dangerous holding, and, indeed, has already been picked up and improperly cited by litigants. *See D.D. v. Roman Catholic Bishop of Stockton* (C057260), September 17, 2009 Petition for Review, p. 14; *L.A. v. Roman Catholic Bishop of Stockton*, (C057895), September 17, 2009 Petition for Review, p. 14 (both petitions for review concerning unpublished opinions).

Rather than discuss the concept of retroactivity, the *Quarry* panel sought to justify its holding only by drawing an analogy to an asbestos statute, and that is a flawed analogy. It is flawed because:

(1) the asbestos statute has an express retroactive provision and section 340.1's delayed discovery provision does not (the Plaintiffs cannot point to any express retroactivity);

(2) the asbestos statute clearly defined a second event for accrual whereas 340.1 does not (the Plaintiffs do not discuss this issue); and

(3) the evidence is different in each context, with the asbestos case relying more on documents, and the molestation case relying more on witnesses who lose their memories and who pass away. (OB, 35-36) Despite the Quarrys' contention that the evidentiary concerns in asbestos and childhood molestation cases are the same, the relevant excerpt from the legislative history – which Plaintiffs quote – actually confirms that they are not. (AB, 40)[3]

Quarry's holding in this case contravenes the requirement of express retroactivity, and the court's asbestos analogy does not save its holding. This is why the brothers entirely ignore the *Quarry* court's pronouncement about measuring the timeliness of the complaint, and have such a hard time defending the flawed analogy to the asbestos statute and the *Nelson* case applying that statute.

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[3] Plaintiffs also somehow contend (at footnote 17) that evidentiary concerns are no worse for retroactive application of the delayed discovery rule, but, clearly, an entity defendant that is aware of the delayed discovery provision going forward is in a better position to preserve relevant documents for potential future claims.

2. Plaintiffs Ignore *Hightower*

The brothers also effectively ignore the case that is in direct conflict with *Quarry*, the case of *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759 [48 Cal.Rptr.3d 420].

In *Hightower*, the Second District interpreted the plain meaning of the statute. It clearly held that subdivision (a)'s delayed discovery provision does not apply to claims previously barred. The decision correctly rested on the basis that "[t]he Legislature . . . drew a clear distinction between claims that were time barred and those that were not. Hightower's interpretation would obliterate that distinction by allowing his time-barred claim to take advantage of the new limitations period." *Hightower v. Roman Catholic Bishop of Sacramento*, *supra*, 142 Cal.App.4th at 767-68.

Hightower spoke loudly, and the Legislature has not revisited the statute in response to that holding three years ago. The Legislature's silence affirms that *Hightower* was correct. A court dealt with a similar phenomenon over ten years ago, noting:

> *Debbie Reynolds* was decided three years ago this month. The Legislature has been very aware of this statute and the court interpretations of its provisions. On two prior occasions where the Legislature did not agree with a decision of the courts, it immediately amended the statute. Its silence in the face of the *Debbie Reynolds* decision strongly suggests that that court's interpretation is correct.

Tietge v. Western Province of the Servites, Inc. (1997) 55 Cal.App.4th 382, 388 [64 Cal.Rptr.2d 5].

The *Quarry* court glaringly contradicted *Hightower*. The panel acknowledged the opinion, but simply stated it "disagree[d]" with it, and then passed it off as being based on a false premise that all causes of action

of persons over age 26 were barred under the prior limitations period. *Quarry*, *supra*, 170 Cal.App.4th at 1584. The *Quarry* panel's attempt to disprove that false pretense, of course, was internally inconsistent, not grounded in any statutory analysis, and necessarily contradicted this Court's holding in *Shirk* by referencing a second accrual event for childhood sexual molestation claims. (OB, 29-36)

Plaintiffs are not as bold as the *Quarry* court so as to disagree with *Hightower* without offering any real explanation. Nevertheless, the brothers seek to minimize *Hightower* – the existence of which was a primary reason this Court granted review – only by referring to it in a ***footnote.***

Plaintiffs' attempt to "distinguish" *Hightower* is insufficient in the extreme. They point out that in that case the plaintiff discovered the cause of his injuries much earlier, in 1982, rather than 2003. (AB, 36, n. 14) Plaintiffs' so-called distinguishing fact is immaterial because the *Hightower* court itself did not recognize the supposed distinguishing fact to be the allegation. The court treated the plaintiff's allegation to be: "he did not discover the cause of his psychological injuries until completing therapy in 2003 . . . ." *Hightower*, *supra*, 142 Cal.App.4th at 759. This is precisely why the court then engaged in a lengthy analysis about why delayed discovery – even if believed – would not save the plaintiff's claim under section 340.1 That the court then held, as an alternative,[4] that Hightower's allegations of delayed discovery were also insufficient, does not diminish

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[4] The court held that "Even if Hightower's interpretation were correct, we ***alternatively*** hold that he has not alleged any delayed discovery.") (Emphasis added). The court was referencing the plaintiff's interpretation that "the delayed discovery rule of section 340.1, subdivisions (a) and (b)(2) applies[.]" *Hightower*, *supra*, 142 Cal.App.4th at 767-68.

Hightower's holding in this regard or make it distinguishable from the instant case.

3. Plaintiffs Cannot Adequately Distinguish *Shirk*

The *Quarry* court failed to acknowledge this Court's binding precedent in *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201 [64 Cal.Rptr.3d 210]. Plaintiffs again do not go so far as to not mention *Shirk* at all, but Plaintiffs do not adequately distinguish that important case.

Shirk was premised on a core assumption and holding, consistent with earlier case law, that "childhood sexual molestation accrues at the time of molestation." *Shirk v. Vista Unified School Dist.*, *supra*, 42 Cal.4th 201.

In direct contradiction to *Shirk*, the Quarrys contend that the delayed discovery creates a second accrual for childhood sexual molestation claims. Plaintiffs briefly attempt to distinguish *Shirk* on the grounds that it involved a government tort claim. But *Shirk*, itself, did not distinguish between civil and government tort claims relative to when ***accrual*** of childhood sexual molestation occurs. The only distinction this Court made in Shirk relative to civil and government tort claims was to find that the ***longer period of limitations*** (not the accrual rule) applicable to private defendants under section 340.1 was not applicable to government tort claims. That distinction does not in any way deviate from or vitiate *Shirk's* basic premise that accrual of childhood sexual molestation claims occurs at the time of the molestation.

The brothers refer to Justice Werdegar's dissent which supports their position on accrual. (AB, 43) That the majority did not adopt Justice Werdegar's opinion confirms that the Court was well aware of the Plaintiffs' argument and that *Shirk* contravenes that argument.

Plaintiffs further contend the recent case of *K.J. v. Arcadia* confirms their narrow reading of *Shirk*. *K.J.* does not detract from *Shirk's*

precedence because *K.J.* involved more recent claims that would not have otherwise been barred had they been covered by 340.1. *K.J. v. Arcadia Unified School District* (2009) 172 Cal.App.4th 1229 [92 Cal.Rptr.3d 1]. Indeed, the KJ court said section 340.1 "guides our understanding of the accrual date applicable to K.J.'s presentation of a tort claim to the District." *K.J. v. Arcadia*, *supra*, 172 Cal.App.4th at 1242.

B. PLAINTIFFS USE THEIR MISCHARACTERIZATION OF THE LEGISLATIVE INTENT TO READ INTO THE STATUTE LANGUAGE THAT IS NOT THERE

The core issue in this appeal is retroactivity. Because section 340.1's delayed discovery provision has no express statutory language of retroactivity, the Quarry brothers resort to mischaracterizing legislative intent. The Plaintiffs note that the Legislature has acted to expand and liberalize the limitations period under section 340.1 (AB, 15-18) The Quarrys devote several pages of their brief to the remedial purpose of the statute and the need to interpret it broadly. (AB, 27-35) They posit that this legislative intent and remedial purpose "demonstrate the Legislature's intent to lift the age 26 limitation retroactively." (AB, 29)

Plaintiffs, as did the *Quarry* court, overstate and mischaracterize the legislative intent. While the Legislature has gradually expanded and liberalized the statute for childhood sexual abuse claims, it has not lifted all limitations. This is evidenced by the 2002 amendment, itself, which deliberately maintained a strict one-year revival for previously barred claims against non-perpetrators, and drew a strict age-26 cutoff for claims under subdivision (b)(1). The Legislature did not do what the brothers are effectively asking this Court to do, namely throw the door wide open – forever – to allow suits against non-perpetrators to be brought indefinitely

into the future for claims reaching indefinitely into the past. That was not the Legislature's intent.

The Plaintiffs claim the underlying legislative concern was really about avoiding an "arbitrary" cutoff, and that this concern supports their claim about the legislative intent. (AB, 28-29) "Arbitrary" connotes randomness, illogicalness, and lack of deliberation. The statute, its deliberate and gradual historic evolution, and the 2002 amendment evince anything but arbitrariness. In response to Defendant's position that the revival window cured any arbitrariness, Plaintiffs argue that the revival window itself is arbitrary. (AB, 31) To the contrary, it is not arbitrary for the Legislature to deliberately tailor two different remedies to two differently situated groups of people: the revival window for people who were older, and the prospective application of the discovery rule for people who were younger.

The statute is not arbitrary. Rather, it simply does what every other statute of limitations does, which is delineate certain claims as inside the statute, and others outside. This is precisely what statutes of limitations must do to ensure their important underlying policies are served. (OB, 26); *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 410 [87 Cal.Rptr.2d 453] ("the statute of limitations necessarily fixes a definite period of time, and hence operates conclusively across-the-board. It does so with respect to *all* causes of action, both those that do not have merit and also those that do. That it may bar meritorious causes of action as well as unmeritorious ones is the price of the orderly and timely processing of litigation – a price that may be high, but one that must nevertheless be paid.") (emphasis original, internal citations and quotations omitted). Indeed, the delayed discovery provision at subdivision (a)(1), itself, operates in this fashion, by imposing a cutoff of three years from discovery.

As an appellate court observed with respect to section 340.1 over ten years ago (then commenting on the Legislature's deliberate decision at that time not to apply it to non-perpetrators):

> Code of Civil Procedure section 340.1 is a special statute of limitations for some sexual molestations, and the Legislature may delimit its scope. Even if it could be shown that the underlying policy considerations create an inequitable result, the courts are not at liberty to rethink that policy decision or rewrite the statute to extend its application to persons excluded by the Legislature. ***In short, this court cannot substitute its policy judgments for those of our Legislature.***

Tietge, *supra*, 55 Cal.App.4th at 382 (emphasis added, internal quotations and citations omitted).

The Legislature's deliberate and gradual expansion of a plaintiff's ability to file time barred suits and the remedial nature of such an expansion does not make subdivision (a)'s delayed discovery rule retroactive in the absence of express retroactive language. The Legislature knows how to make statutory provisions retroactive: it says so in the statute. It is clear that the Legislature did not make subdivision (a)'s delayed discovery rule retroactive because it did not expressly say so.

C. PLAINTIFFS CANNOT AVAIL THEMSELVES OF SUBDIVISION (U)

Plaintiffs devote a significant part of their brief to what amounts to the centerpiece of their case – a discussion of subdivision (u) – as a theory they apparently hope that this Court will substitute for the reasoning in *Quarry*. This is the first of two theories the Plaintiffs reargue after having them previously rejected by the *Quarry* court. The brothers' interpretation of subdivision (u) is meritless.

1. Subdivision (u) Only Relates To Subdivision (a) as Enacted in 1998, Not Its Present Form

Subdivision (u) was enacted in 1999 as then subdivision (s) to the statute, and presently provides in full as follows:

> (u) The ***amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session***, shall apply to any action commenced on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999. Nothing in this subdivision is intended to revive actions or causes of action as to which there has been a final adjudication prior to January 1, 1999.

Code Civ. Proc. § 340.1(u) (emphasis added).

By its own terms, subdivision (u) is expressly limited to "the amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session[.]" The subdivision (a) that was enacted "at the 1998 portion of the 1997-98 Regular Session" most notably ***did not*** contain the broader delayed discovery provision for such claims beyond the clear age-26 cutoff. *Shirk*, *supra*, 42 Cal.4th at 208. Accordingly, subdivision (u)'s retroactive application of that 1998 amendment does not constitute a retroactive application of the current delayed-discovery provision in current subdivision (a).

The fact that the Legislature retained this subdivision in 2002 also does not suggest any legislative intent to retroactively apply the delayed-discovery provision in the current subdivision (a). Had the Legislature actually intended in 2002 to do this, it would have ***changed*** subdivision (u) to provide for this (such as by stating that "subdivision (a) as enacted in the

2002 amendment" applies to any action commenced on or after January 1, 1999). The Legislature did not do this.

2. *Bouley* Undermines Plaintiffs' Argument

In support of the proposition that subdivision (a) in its present form is retroactive, Plaintiffs seek to analogize from *Bouley*, a case that involved whether the 2002 amendment to section 377.60 (d) (giving domestic partners standing to bring wrongful death actions) was retroactive. *Bouley* unpersuasive and actually undermines Plaintiffs' position. The statute in *Bouley* was amended in 1997 to state, at subdivision (d), ***"This section*** applies to any cause of action arising on or after January 1, 1993." *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 607 [25 Cal.Rptr.3d 813] (emphasis added). At the time plaintiff's domestic partner passed away, the statute did not give standing to domestic partners. *Bouley v. Long Beach Memorial Medical Center*, *supra*, 127 Cal.App.4th at 605-06. In 2002, the statute was amended to give standing to domestic partners, and so the plaintiff filed suit. *Id.*, at 606. The Court found that the 2002 amendment (giving domestic partners the right to sue) was retroactive on account of this broad language at subdivision (d), stating "***This section*** applies to any cause of action arising on or after January 1, 1993." *Id.*, at 607 (emphasis added); Code Civ. Proc. § 377.60(d). It is from this broad language, even though it was initially enacted in 1997 but then left in the statute after the 2002 amendment, that the Court of Appeal concluded "[w]ith that language, the Legislature unambiguously provided that the 2002 amendments must be applied to this lawsuit." *Bouley*, *supra*, at 607. The Court also relied on a second, 2005 amendment, that further

unambiguously allowed for the retroactive application of the statute. *Id.* at 607-608.[5]

By contrast here, subdivision (u) does not broadly state "This section" applies or even "subdivision (a)" applies to any action commenced on or after January 1, 1999. It only narrowly states that "the amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session" are what apply going forward from January 1, 1999. *Bouley* and section 377.60 (d) represent a clear counter example of where the persistence of language from an earlier amendment could conceivably affect application of a later amendment. That is not the case here. Also, unlike with section 377.60 (d), there has not been any later, overarching amendment to 340.1 (a) that unambiguously makes it retroactive in its present form.

3. The Bishop's Interpretation of Subdivision (u) Does Not Render it Meaningless

Plaintiffs submit that, but for their stretched interpretation of subdivision (u), the provision would be meaningless and mere surplusage. (AB, 23-25) Even if one gets past the fact that subdivision (u), on its face, does not apply to the delayed discovery provision in the current subdivision (a), the Plaintiffs are plain wrong.

The purpose of subdivision (u) at the time of the 2002 amendment was to ensure that revived claims brought during this 1998-2002 timeframe would be preserved despite the enactment of the 2003 revival window and

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[5] The provision stated: "a person may maintain a cause of action pursuant to this section as a domestic partner of the decedent by establishing the factors listed in paragraphs (1) to (6), inclusive, of subdivision (b) of Section 297 of the Family Code, as it read pursuant to Section 3 of Chapter 893 of the Statutes of 2001, prior to its becoming inoperative on January 1, 2005." *Bouley*, *supra*, at 607-608.

the addition of the delayed discovery rule for prospective actions. Thus, for example, claims by people under age 26 against non-perpetrator defendants that were revived by the 1998 amendment's expansion of the limitations period to age 26 would not have been extinguished by the 2002 amendment's revival window or imposition of the delayed discovery provision prospectively. Subdivision (u), therefore, had to have been left in the statute for a purpose and was not rendered meaningless. But even if the 2002 amendment had rendered subdivision (u) meaningless, that does not allow Plaintiffs to rewrite, add to, or subtract from the plain language of the statute. Cal. Code Civ. Proc. 1858 (in interpreting a statute, the court should not "insert what has been omitted or . . . omit what has been inserted").

4. Plaintiffs' Tortured Interpretation of Subdivision (c) Does Not Support Their Subdivision (u) Argument

Plaintiffs contend that subdivision (c) somehow bolsters their subdivision (u) argument because it "demonstrates the Legislature intended that victims who discovered their injuries after January 1, 2003 may utilize the delayed accrual provision" contained in subdivision (a). (AB, 25-27) But their argument is illogical and almost unintelligible. It consists of the following: the intricate interaction of the first sentence of subdivision (c) with both parts of subdivision (b), read in conjunction with the second sentence of subdivision (c), means that the revival provision only applied to plaintiffs who were ***both*** over the age of 26 ***and*** had not discovered their injuries. (AB, 27) This tortured argument is devoid of any merit. First, had the Legislature really intended for the statute to mean this, it would have simply stated so in compliance with the basic rule that retroactivity must be expressly stated in the statute. It did not. *See e.g. Shirk*, *supra*, 42 Cal.4th

at 213 (similarly observing that "[h]ad the Legislature intended to also revive in subdivision (c) the claim presentation deadline under the government claims statute, it could have easily said so. It did not."). Again Plaintiffs want to ignore the fundamental rule that retroactivity must be expressly stated.

Second, the Quarrys critically omit from their paraphrase of the first sentence of subdivision (c) the broad "has or had" language. When that phrase is included, it is clear that subdivision (c)'s scope of revival really was much broader than just claims of people who were over 26 and had not discovered their injuries. It also included any claim against a non-perpetrator that could have fit under the present language of subdivision (b)(2) but that has or ***had*** expired in the past under previous statutes, for whatever reason. This includes those claims by people over age 26 who had not discovered their injuries.

Third, the brothers fail to acknowledge that the second sentence of subdivision (c) broadly refers to "an action." It does not speak to the narrow set of claims that Plaintiffs contend it speaks to.

Finally, Plaintiffs' "surplusage" argument ignores the fact that extra sentences like this are often included in statutes to ensure clarity, which is precisely what this sentence does. The Plaintiffs' interpretation, on the other hand, would result in the ridiculous and unintended consequence of turning a sentence designed to preserve unaltered certain limitations periods into a sentence that actually alters limitations periods.

D. PLAINTIFFS' CLAIMS ARE NOT VIABLE UNDER A VICARIOUS LIABILITY THEORY

The Quarrys advance vicarious liability as another theory for how the statute's delayed discovery provision purportedly applies to their claims. This is the second theory that the Plaintiffs reargue after having it rejected

by the Court of Appeal. This theory, like the subdivision (u) theory, also does not stand.

1. Under California Law, Employers Cannot Be Held Vicariously Liable For the Sexual Misconduct of Employees

California law is well settled on this issue: an employer may not be held vicariously liable for sexual misconduct of an employee because sexual misconduct does not fall within the scope of employment. *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 451-452 [256 Cal.Rptr. 766] (demurrer sustained to childhood sexual abuse claims brought against school district premised on vicarious liability and respondeat superior).

This Court again affirmed this rule in *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 301-02 [48 Cal.Rptr.2d 510] (hospital not vicariously liable for technician's sexual assault on a patient, explaining "decision to engage in conscious exploitation of the patient did not *arise out of* the performance of the examination, although the circumstances of the examination made it possible[,]" and further holding "a deliberate sexual assault is fairly attributed not to any peculiar aspect of the health care enterprise, but only to 'propinquity and lust.'") (emphasis original).

Numerous other courts have confirmed this rule. *See e.g. Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 394 [97 Cal.Rptr.2d 12] (imposing liability on Boy Scouts for sexual misconduct of volunteer "would be contrary to the guidance provided by a number of cases that have consistently held that under the doctrine of respondeat superior, sexual misconduct falls outside the course and scope of employment and should not be imputed to the employer.") (numerous citations omitted); *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25

Cal.App.4th 222, 226-228 [30 Cal.Rptr.2d 514] (granting writ of mandate and holding entity defendant in a claim under 340.1 simply "cannot, as a matter of law, be held vicariously liable for the tortuous acts of real party's assailant."); *Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133 [176 Cal.Rptr. 287].

Indeed, with respect to sexual misconduct by clergy specifically, California courts have routinely held that the Catholic Church cannot be held liable under vicarious liability. *Mark K. v. Roman Catholic Archbishop of Los Angeles* (1998) 67 Cal.App.4th 603, 609 [79 Cal.Rptr.2d 73] ("because the abuse is committed outside the scope of the cleric's employment, the doctrine of respondeat superior is not available."); *Rita M. v. Roman Catholic Archbishop* (1986) 187 Cal.App.3d 1453, 1461 [232 Cal.Rptr. 685] ("Plaintiffs could not seriously contend that sexual relations with parishioners are either required by or instant to a priest's duties" . . . "[i]t would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic Church."); *Jeffrey E. v. Cent. Baptist Church* (1988) 197 Cal.App.3d 718, 724 [243 Cal.Rptr. 128].

This Court has also agreed on this issue. *See Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1006-1010 [47 Cal.Rptr.2d 478] (refusing to contradict the numerous California decisions that found that sexual molestation by clergy members is **not** an inherent risk of religious institutions).

The brothers do not cite to any case where vicarious liability has been held to apply in cases involving clergy employee sexual misconduct because not a single one exists.[6]

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[6] Contrary to Plaintiffs' position that *Boyer v. Jensen* (2005) 129 Cal.App.4th 62-70 [28 Cal.Rptr.3d 124] shows California courts have

2. Subdivision (a)(1) Does Not Apply to Claims Against an Entity Employer

Plaintiffs also cannot avail themselves of vicarious liability because the Legislature clearly intended only for sections 340.1(a)(2) and (a)(3) – not (a)(1) – to apply to claims against employers.

The language of the statute itself confirms this: ((a)(1) applies to "[a]n action against any ***person*** for committing . . . ." in contrast with (a)(2) and (a)(3) which applies to "[a]n action for liability against any person ***or entity*** . . . .") (Emphasis added). The legislative history materials surrounding the 2002 amendment further confirm this legislative intent. *See e.g.* AA, vol. 3, Tab 18 at 000566-000567, (explaining the 2002 amendment's provision for reviving certain claims under (a)(2) and (a)(3) was necessary because "current law bars any action against a responsible third party entity (such as an employer, sponsoring organization or religious organization)..." and further acknowledging that "an employee's commission of a crime, such as the sexual abuse of a child, obviously lies outside the scope of a person's employment[.]"). Finally, post-2003 case law confirms the legislative intent for subdivisions (a)(2) and (a)(3) to apply to claims against employers. *See e.g. Dutra v. Eagleson* (2006) 146 Cal.App.4th 216, 223-226 [52 Cal.Rptr.3d 788]; *Aaronoff v. Martinez-Senftner* (2006) 136 Cal.App.4th 910, 922-923 [39 Cal.Rptr.3d 137] (plaintiff could not sue her parents under Sections 340.1(b)(2) and (c) because the parental relationship lacked the inherent elements of the

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accepted the "mirror proposition," *Boyer* not only did not involve employee sexual misconduct (but rather an on-the-job car accident), but the Court reached the argument, and rejected it, stating "Appellant cites no authority that supports this novel proposition." Plaintiffs also cite to two out of state cases, neither of which involve sexual molestation claims against religious institutions or under section 340.1.

employer-employee relationship necessary to bring the plaintiff's claims within Sections 340.1(a)(2) and (a)(3)'s vicarious liability).

It would be anathema to this historic interpretation of the statute and to the very existence of (a)(2) and (a)(3) for the Court to now change course and suddenly find that (a)(1) applies to entity employer defendants under a vicarious liability theory rather than only direct perpetrator defendants.[7]

E. THE "EQUITABLE" OR COMMON LAW DELAYED DISCOVERY RULE DOES NOT SAVE PLAINTIFFS' CLAIMS

1. Plaintiffs Have No Support in Law or Fact for Applying a Common Law Delayed Discovery Rule to Their Claims

The Quarrys assert that their allegations are sufficient to avail them of a common law delayed discovery rule. They rely on the *Evans* case, but that case predates 1994 and is therefore inapplicable. (OB, 45) They also rely on two post-1994 cases, *Sellery* and *Curtis T*, but these cases are also not on point.

Sellery does not apply because it involved claims against the direct perpetrators (the victim's parents) under section 340.1 as it existed in 1992. *Sellery v. Cressey* (1996) 48 Cal.App.4th 538, 544 [55 Cal.Rptr.2d 706].

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[7] For this reason, the ratification theory put forward by Plaintiffs in footnote 24 similarly must fail. An employer might be liable for an employee's tortious acts if the employer subsequently ratifies an originally unauthorized tort. *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 169 [49 Cal.Rptr.3d 153]. "The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery." *Id.* In other words, ratification is based on the employer's negligence or misconduct – which is the exact theory covered by subdivisions (a)(2) and (a)(3) of section 340.1.

As in *Evans*, the court applied the delayed discovery rule as mandated by the statute, ***not*** common law.

Curtis T involved a claim brought under Government Code section 911.2 governing limitations periods for government torts. The court there expressly held that "340.1's delayed discovery rule does not yet apply[,]" and thus evaluated whether an equitable delayed discovery doctrine should apply instead, "[g]iven that no statutory rule of delayed discovery applies to this case." *Curtis T. v. County of Los Angeles* (2004) 123 Cal.App.4th 1405, 1420 [21 Cal.Rptr.3d 208] (emphasis original).

None of the cases cited by Plaintiffs provide authority for applying a common law delayed discovery rule to their claims – that is, claims against non-perpetrator entities ***governed by section 340.1 after its 1994 and 1998 amendments***. But even if they did, the allegations in the Quarrys' complaint foreclose the application of the common law delayed discovery to their claims. In their Complaint, Plaintiffs admit that they attempted to avoid the alleged abuser priest when they were children and warned other boys to stay away from him. The complaint also states that one plaintiff filed a police report about this childhood sexual abuse in 1994. (AA, v. 2, pp. 274, 281; OB, 5) The brothers attempt to mischaracterize the allegations of their own complaint by contending that as a result of their Catholic indoctrination and upbringing, "they were unable to contemplate that any act engaged in by a Roman Catholic priest was 'wrong'" until 2006. (AB, 47) This is disingenuous in light of the clear admissions made in their complaint. Most telling is their request in footnote 20 that this Court "revisit" the applicable precedence. (AB, 46)

2. The *Quarry* Court Did Not Properly Formulate the Common Law Delayed Discovery Rule[8]

Plaintiffs admit that the *Quarry* court did not actually apply the common law delayed discovery doctrine to their claims, but rather only discussed whether the doctrine had been abrogated and what that doctrine would require to be satisfied. (AB, 53)

Setting aside the abrogation issue (see *infra*), had the Court applied the rule, it would have applied the wrong standard. Plaintiffs try to deflect this issue by pointing to another pronouncement in the opinion. That pronouncement, however, was neither what the Court actually applied to support its holding, nor was it a correct statement either about the common law rule.[9]

3. Section 340.1 Abrogated Any Common Law Rule for These Claims

(1) Plaintiffs cannot use the same inappropriate standard used by *Quarry*

As set forth in the Defendant's Opening brief, the Legislature specifically deleted from section 340.1, in its 1994 amendment, the provision then at subdivision (d) that allowed for courts to apply equitable

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[8] At the outset, Plaintiffs contend this argument represents a "departure from the position taken by the Defendant at the trial level." (AB, 52) Naturally, the Defendant would not have been able to take a position at the trial level about the correctness of the Court of Appeal's future pronouncements about the common law discovery rule.

[9] Plaintiffs cite to the court's statement that "The [common law doctrine] arises in situations where the plaintiff repressed the memory of the abuse, or did not understand the wrongfulness of the abuse, until within one year of the filing of the action. . . ." (AB, 53) Again, this too is not a proper recitation of the doctrine, which is not a subjective "did not discover" standard, but rather is an objective "has reason to discover" standard. (OB, 41)

exceptions to the running of the statute of limitations, one of which was the delayed discovery rule. (OB, 42-43) The Defendant cited to authority for why this specific deletion – enacted at the same time section 340.1's statutory limitations period was being expanded – constituted a legislative abrogation of these court-created equitable exceptions for actions governed by section 340.1. This is also why the Court of Appeal's application of a different rule of statutory interpretation – that related to implied abrogation from affirmative statutory enactments – simply was not the correct standard to apply in the face of this legislative deletion.

The Quarrys fail to address the alternate standard for interpreting legislative deletions of law and further fail to address why the standard used by the Court of Appeal is more appropriate. Instead, they continue to cite to additional cases applying (in non-analogous circumstances) the same, inappropriate standard used by the Court of Appeal. (AB, 48-50) They cite to *Cal. Ass'n of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284 [65 Cal.Rptr.2d 872] and the cases cited therein. None of these cases involve legislative deletions of law, and, as such, are not on-point.

California Association involved a statute patterned off of another statute which had always been held to be consistent with common law on a particular issue, and this Court simply found the new statute to also be consistent. *California Ass'n of Health Facilities v. Dept. of Health Services*, *supra*, 16 Cal.4th at 297 and 298. This Court took note, in particular, that "[b]ecause the language of section 1424 does not expressly repeal the common law, we presume the Legislature did not intend to delegate to the courts the task of creating a rule . . . alternative to the common law one . . . ." *Id.*, at 300. Here, by contrast, the Legislature *did* affirmatively delete the common law discovery rule by deleting the clause

that expressly allowed for its application to actions covered by section 340.1.

Nor are the other cases cited by Plaintiffs (which were the cases cited by the *California Association* case) applicable. *Goodman* involved the determination of whether an affirmative statutory enactment either tracked, or changed, pre-statute common law (and not whether a legislative deletion changed common law). *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1675-77 [32 Cal.Rptr.2d 419]. The court found that it did track common law, noting a comment in the legislative history that "[t]he purpose of this bill is to codify the standards for determining lack of testamentary capacity contained in *Estate of Perkins* (1995) 195 Cal. 699, and subsequent decisions." *Goodman v. Zimmerman*, *supra*, 25 Cal.App.4th at 1677. Plaintiffs here have not pointed to any similar pronouncement in the legislative history behind the 1994 amendment, as none exist.

Likewise, the issue in *Zikorus* was whether a penal code section that gave victims of crime the right to be heard and considered at sentencing affirmatively changed common law so as to limit other information a sentencing court traditionally had considered even though the statute was silent about such other evidence. *People v. Zikorus* (1983) 150 Cal.App.3d 324, 330-32 [197 Cal.Rptr. 509]. The Court gave short shrift to that argument.

All of the cases cited by Plaintiffs are inapplicable and must therefore be disregarded.

(2) Plaintiffs cannot rely on cases involving claims falling outside of section 340.1

When section 340.1 ***does*** apply to a claim, the provisions of that statute govern, and there is no room for any common law delayed-discovery rule. In other words, any delayed discovery rule may only be supplied by

the statute, not the court. Thus in 1998, when the statute was amended to apply for the first time to non-perpetrator entity defendants, the statute did not contain a delayed-discovery rule for those claims, so no such rule applied. Such claims ***had*** to be brought before the plaintiff's 26th birthday.

Hightower recognized this in 2006. *Hightower, supra*, at 766-67 ("the statute of limitations ran on Hightower's claims in 1977. When the Legislature first applied the delayed discovery rule to entity defendants like the bishop in 1998, those claims were subject to the outer limit of the plaintiff's 26th birthday, meaning that his claims remained time barred."). This Court in *Shirk* also recognized this in 2007. *Shirk*, *supra*, at 208 (similarly categorically stating that, "[c]auses of action against such persons or entities [*i.e.* non-perpetrator defendants under the 1998 amendment] had to be brought before the victim's 26th birthday."). The *Quarry* panel itself recognized this too. *Quarry*, *supra*, at 1582 (categorically stating that "such claims, however, had to be brought before the plaintiff's 26th birthday.").[10]

The Quarrys do not address any of this authority in their Answer Brief, but instead draw from cases and sources interpreting claims ***outside of*** section 340.1[11] Plaintiffs mischaracterize the *Hightower* decision as one

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[10] The court went on to opine that the common law doctrine was not abrogated, but it did not base its holding on that issue, and there is no way the court's opinion on this issue could be reconciled with several statements elsewhere in the opinion about the absolute age-26 cutoff for claims against non-perpetrators.

[11] In the same vein, Plaintiffs also argue that because the 1994 amendment was enacted at a time when section 340.1 did not apply to non-perpetrator defendants, the 1994 amendment's abrogation of the common law delayed discovery rule could not possibly have abrogated that rule with respect to actions against such non-perpetrator defendants. (AB, 50-51) In support of this argument, Plaintiffs point to the *Mark K*, *Tietge*, and *Debbie Reynolds* cases as examples where courts steadfastly refused to apply section 340.1 to non-perpetrator entity defendants before the 1998

that applied a common law discovery rule to section 340.1 claims (AB, 51), when it clearly did not. As noted above, *Hightower* expressly stated that there was a clear age-26 cutoff for claims against non-perpetrator entity defendants for actions under section 340.1. Although the court evaluated in the second-to-last paragraph whether plaintiff's allegations satisfied a delayed discovery rule, it is clear from the court's discussion – because it immediately follows its discussion and interpretation of the statutory framework – that the court was indulging the plaintiff's contention that the language of the ***statute itself*** (not common law) somehow supplied a delayed discovery rule. The Court concluded it did not, but nevertheless engaged in this analysis "Even if Hightower's interpretation [of the statute] were correct . . . ." *Hightower*, *supra*, at 768. This is highlighted by the fact that the Court then ***did*** discuss, in the last paragraph of the opinion, the common law delayed discovery rule to the extent it applied under a ***different*** statute, section 352.1, which governs causes of action that accrue while a prison in-mate is in prison, and which never had a provision allowing for application of a common law delayed discovery rule that was later deleted.

Plaintiffs cite to *Mark K* as another purported example of where courts have recognized the availability of the common law doctrine (AB, 51), but this reliance on *Mark K* is flawed for the same reason. *Mark K* involved a claim against a non-perpetrator entity defendant that the court clearly stated was wholly ***outside*** of the purview of section 340.1 because the statute did not cover such claims at that time. *Mark K*, *supra*, at 609-10 ("the liberalized statute of limitations for victims of childhood sexual abuse

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amendment. (AB, 50) But this argument ignores the fact that when the statute was amended in 1998 to apply to non-perpetrator defendants, it never replaced the savings clause previously deleted.

(Code Civ. Proc. 340.1, subd. (a)) is also unavailable because it applies only to causes of action against an individual perpetrator."). Precisely because the "liberalized" rule under 340.1 was not available, *Mark K's* common law delayed discovery analysis was thus applied in connection with its application of the stricter one-year limitations rule for personal injury (at Code Civ. Proc. § 335.1) and three-year rule for fraud (at Code Civ. Proc. § 338), ***not*** its application of section 340.1 and that statutes' longer limitations period. Unlike 340.1, those other statutes never contained provisions that expressly allowed for courts to apply equitable exceptions to the running of the limitations period (including the delayed discovery rule) which provisions were subsequently deleted from the statutes. Indeed, there was no discussion at all in *Mark K* about the 1994 amendment to 340.1. Opinions are not authority for issues they do not consider. *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 27 [27 Cal.Rptr.2d 249].

The Quarrys ignore the relevant statements in the legislative history surrounding the enactment of the 2002 amendment that confirm there was no common law doctrine under the statute (see OB, 43) and instead cite to the irrelevant statements in the legislative history to the 1998 amendment. (AB, 50-51)

Again, the brothers improperly draw from statements about actions under ***other*** statutes, and not section 340.1. For example, they selectively quote from legislative history that they claim shows the common law doctrine was applied to claims under 340.1 after 1994. The quoted legislative history does not support this conclusion. The discussion about "exceptions" that Plaintiffs quote was in connection with claims under other

statutes (section 3401(3) and 352 (a)). The subsequent discussion – where 340.1 is discussed – contains no such reference to "exceptions."[12]

Plaintiffs' reliance on cases and legislative history involving claims falling outside of section 340.1 is inappropriate and should be rejected.

4. Plaintiffs' Due Process Argument Should Not Be Considered and Is Meritless

(1) The argument should not be considered

The due process argument should not be considered because it was raised for the very first time in Plaintiffs' Answer Brief (AB, 53-56) and falls outside the scope of issues on appeal. *See* CRC 8.516(a)(1); CRC 8.520(b)(3).

(2) Plaintiffs' due process argument is internally inconsistent

The Quarrys' due process argument presumes and requires that the earlier causes of action both (i) had accrued, and (ii) were not yet time-barred. *See Krusesky v. Baugh* (1982) 138 Cal.App.3d 562, 566 [188 Cal.Rptr. 57] (explaining that "a shortened period of limitations cannot be applied retroactively to wipe out an ***accrued*** cause of action ***that is not barred by the then applicable statute of limitations***.") (emphasis added). This argument is inherently contradicted and undermined by the brothers' own contention that their claims did not accrue until they were discovered in 2006. Under their own theory, therefore, there would be no previously accrued cause of action that is suddenly cutoff by the 1998 amendment in violation of due process.

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[12] Plaintiffs also appear to cite to the wrong exhibits. They cite to exhibits 2, 3, and 7 of their request for judicial notice, however the actual language cited appears only in exhibit 2, and not in 3 or 7.

Moreover, because any common law delayed discovery doctrine was abrogated by the 1994 amendment, then the brothers' claims, while previously accrued, would have still run and would have already become time barred as of 1998. No previously non-barred claims would have been cutoff by the 1998 amendment. Plaintiffs' due process argument necessarily falls along with their broader common law argument.

Likewise, the due process problem also does not arise when previously un-accrued claims would still ***never*** have accrued even under the new limitations period. *See Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 185 [183 Cal.Rptr. 881] (finding no due process problem by application of the 10-year construction defect statute to claims that had not accrued because they were still not discovered until after the new, 10-year statute would have run, explaining "here, the damage was not discovered until after the 10-year period had run, so that no cause of action had accrued within the 10-year period. The application of section 337.15 in such a situation has been upheld against constitutional attack.") (citing *Liptak v. Diane Apartments*, Inc. (1980) 109 Cal.App.3d 762, 774 [167 Cal.Rptr. 440]). Again, Plaintiffs' contention that they did not discover their claims until the youngest brother was 42 (well after the age-26 cutoff under the new limitations period in the 1998 amendment), even if believed, still defeats their due process argument because their claims still would have been barred under the new age-26 limitations period.

Other significant flaws exist with the Plaintiffs' due process argument. First, the cases cited by Plaintiffs illustrate that a far shorter time period than eight years – even as short as six months – is a sufficiently reasonable period of time for a plaintiff to be apprised of a new limitations period and bring suit to avoid due process concerns. *See e.g. Coachella Valley Mosquito and Vector Control District v. California Public*

Employment Relations Board (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234] (six months reasonable time); *Aronson v. Superior Court* (1987) 191 Cal.App.3d 294, 300 [236 Cal.Rptr. 347] (four years "clearly reasonable"). Here, the one-year revival window would have supplied a reasonable period of time to cure any due process concerns.

Second, as a remedy, rather than asking this Court to apply the new statute of limitations in subdivision (b) prospectively, Plaintiffs request this Court to rewrite it in a fashion specifically manufactured for the Quarry brothers. The Plaintiffs contend the remedy is to allow eight years from the date of the enactment of the 1998 amendment to subdivision (b). This eight-year period is presumably borrowed from the eight-years-from majority rule in subdivision (a), even though subdivision (b) does not even use the eight-years-from-majority language, but rather succinctly states: "No action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday." Cal. Code Civ. Proc. § 340.1(b)(1)). There is no authority for the Court to simply rewrite the limitations period in this fashion.

III. CONCLUSION

This Court has agreed to resolve the conflict between *Hightower* and the *Quarry* opinion. But both the First District and the Quarrys have declined the debate. Although the *Quarry* panel created, and the plaintiffs benefited by, that conflict, neither has chosen to discuss it. This is a remarkable state of the record for which there can only be one reason – *Hightower* is correct.

And *Hightower* is correct because the Legislature did not intend that its revision to 340.1(a) in 2002 be retroactive and because child abuse occurs once at the time of molestation.

Quarry should overruled and *Hightower* reaffirmed.

DATED: October 20, 2009 FOLEY & LARDNER LLP

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)

The text of this brief consists of 8,390 words, including footnotes, as counted by the word-processing program used to generate the brief.

DATED: October 20, 2009 FOLEY & LARDNER, LLP

By: _____
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PROOF OF SERVICE

I am employed in the **County of Los Angeles, State of California.** I am over the age of 18 and not a party to this action; my current business address is **555 S. Flower Street, Suite 3500, Los Angeles, CA 90071-2411.**

On **October 20, 2009**, I served the foregoing document described as **DEFENDANT'S AND RESPONDENT'S REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

X BY THE FOLLOWING MEANS:

X I placed a true copy thereof enclosed in sealed envelopes addressed as follows:

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x I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service; the firm deposits the collected correspondence with the United States Postal Service that same day, in the ordinary course of business, with postage thereon fully prepaid, at **Los Angeles, California**. I placed the envelope for collection and mailing on the above date following ordinary business practices.

X Executed on **October 20, 2009**, at **Los Angeles, California**.

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

X I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Sandra Franck

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