Supreme Court Copy

No. S181627

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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

SUPREME COURT
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DAWN RENAE DIAZ,

Plaintiff and Respondent,

v.

JOSE CARCAMO and
SUGAR TRANSPORT OF THE NORTHWEST, LLC,

Defendants and Appellants.

After a Decision by the Court of Appeal,
Second Appellate District, Division Six, No. B211127

Appeal from a Judgment of the Superior Court of Ventura County,
No. CIV 241085, Hon. Frederick Bysshe

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

LEGAL DISCUSSION 5

I. THE PARTIES AGREE THAT THE COURT OF APPEAL'S FIRST BASIS FOR DISTINGUISHING *ARMENTA* AND *JELD-WEN* IS WITHOUT MERIT. 5

II. PROPOSITION 51 DOES NOT PROVIDE A BASIS TO DISREGARD THIS COURT'S RULE IN *ARMENTA*. 8

- A. Proposition 51 Has Not Superseded the *Armenta* Rule. 9
- B. Respondent's Purported Distinction Between Fault and Causation Does Not Change the Analysis. 13
- C. "Balancing" Does Not Work in this Context, Which is Why the *Armenta* Rule Is Necessary. 19

III. RESPONDENT'S FORFEITURE AND PREJUDICE ARGUMENTS ARE REFUTED BY THE RECORD. 21

- A. Respondent Simply Declines to Address the Evidence of Prejudice. 21
- B. Respondent Repeats its Claims of Forfeiture Without Addressing the Facts. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Alabama Power Co. v. Schotz
(Ala. 1968) 215 So.2d 447 13

Arena v. Owens Corning Fiberglas Corp.
(1998) 63 Cal.App.4th 1178 15

Armenta v. Churchill
(1954) 42 Cal.2d 448 .... passim

Auto Equity Sales, Inc. v. Superior Court
(1962) 57 Cal.2d 450 20

Campa v. Gordon
(N.D.Ill., Aug. 14, 2002, No. 01-C-50441) 2002 U.S. Dist. LEXIS 15032 .... 11, 13

Carmargo v. Tjaarda Dairy
(2001) 25 Cal.4th 1235 7

Clooney v. Geeting
(Fla.Ct.App. 1977) 352 So.2d 1216 18

Dafonte v. Up-Right, Inc.
(1992) 2 Cal.4th 593 14

Downing v. Barrett Mobile Home Transport, Inc.
(1974) 38 Cal.App.3d 519 22

Far West Financial Corp. v. D&S Co.
(1988) 46 Cal.3d 796 7

Fernelius v. Pierce
(1943) 22 Cal.2d 226 7

Gant v. L.U. Transportation, Inc.
(Ill.Ct.App. 2002) 770 N.E.2d 1155 .... 11, 12, 13

Grappo v. Coventry Financial Corp.
(1991) 235 Cal.App.3d 496 25

TABLE OF AUTHORITIES
(continued)

Page

Henderson v. Harnischfeger Corp.
(1974) 12 Cal.3d 663 22

Hicks v. Vulcan Engineering Co.
(Ala. 1999) 749 So.2d 417........ 13

Jeld-Wen, Inc. v. Superior Court
(2005) 131 Cal.App.4th 853 .... passim

King v. Petefish
(Ill.App. 1989) 541 N.E.2d 847........ 13

Kitzig v. Nordquist
(2000) 81 Cal.App.4th 1384 16

Las Palmas Associates v. Las Palmas Center Associates
(1991) 235 Cal.App.3d 1220 25

Lee ex rel. Estate of Lee v. J.B. Hunt Transport, Inc.
(S.D.N.Y. 2004) 308 F.Supp.2d 310 12

Lorio v. Cartwright
(N.D.Ill. 1991) 768 F.Supp. 658........ 13

McHaffie v. Bunch
(Mo. 1995) 891 S.W.2d 822 11

People v. Morris
(1991) 53 Cal.3d 152 25

People v. Stansbury
(1995) 9 Cal.4th 824 25

Poplin v. Bestway Express
(M.D. Ala. 2003) 286 F.Supp.2d 1316........ 13

Richards v. Owens-Illinois, Inc.
(1997) 14 Cal.4th 985 .... 14, 15

Roberts v. Ford Aerospace & Communications Corp.
(1990) 224 Cal.App.3d 793 7

TABLE OF AUTHORITIES
(continued)

Page

Scott v. County of Los Angeles
(1994) 27 Cal.App.4th 125 14

Syah v. Johnson
(1966) 247 Cal.App.2d 534 17

Vons Companies, Inc. v. Seabest Foods, Inc.
(1996) 14 Cal.4th 434 26

Walker v. Smitty's Supply, Inc.
(S.D.Miss., May 8, 2008, No. 5:06CV30) 2008 WL 2487793 12

Watson v. Strack
(N.Y.App.Div. 2004) 5 A.D.3d 1067 18

Wilson v. John Crane, Inc.
(2000) 81 Cal.App.4th 847 15

Wise v. Fiberglass Systems, Inc.
(Idaho 1986) 718 P.2d 1178 12

STATUTES

Civ. Code, § 1431.1 .... 10, 11

Civ. Code, § 1431.2 10

Civ. Code, § 3295 25

Evid. Code, § 352 .... 3, 20

Evid. Code, § 353 25

Evid. Code, § 1104 .... 9, 19

OTHER AUTHORITIES

CACI 406 15

Haning, et al., Cal. Practice Guide: Personal Injury
(The Rutter Group 2009) 8

INTRODUCTION

Respondent asserts that Sugar Transport is trying to use the *Armenta* rule to shift 35% of its fault for noneconomic damages onto the 100% fault-free victim, and this is inconsistent with Proposition 51. The issue in this case, however, is not who should bear responsibility for 35% of the $5 million award of noneconomic damages—the issue is whether appellants received a fair trial and whether the $22.5 million verdict may stand. The purpose of the *Armenta* rule is to prevent plaintiffs from accomplishing what respondent's counsel accomplished here: using alternative theories of liability like negligent hiring and retention to circumvent the prohibition on character evidence and thereby skew the jury's determination of liability and damages. Proposition 51 is not inconsistent with the *Armenta* rule. To the contrary, the very purpose of Proposition 51 is to prevent "deep pocket" defendants from being liable for a disproportionate share of noneconomic damages, exactly what happened here.

In the opening brief on the merits, appellants explained how the rule the Court announced in *Armenta v. Churchill* (1954) 42 Cal.2d 448 (*Armenta*) has long governed in California, and how the Fourth District in *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853 (*Jeld-Wen*) held that the rule was fully consistent with Proposition 51. Appellants also explained how the *Armenta* rule has been adopted by a large majority of jurisdictions that have addressed the issue, and that these courts have not held that the rule is inconsistent with principles of comparative fault. Appellants also explained the legal and policy bases for the rule, and that the trial in this case is a prime example of what can happen when the rule is disregarded. Indeed, the evidence of what actually happened in the accident at issue was dwarfed by the mountain of prejudicial evidence plaintiff introduced into the record to show appellant Jose Carcamo's

previous accidents, poor performance reviews, status as an illegal alien, and bad character.

In her answering brief on the merits, respondent attempts to defend the rationale of the Court of Appeal below for failing to follow *Armenta*. With regard to Court of Appeal's first reason—a purported distinction between the negligent entrustment theory at issue in *Armenta* and *Jeld-Wen* and the negligent hiring and retention theories at issue here—respondent admits that there is no meaningful difference between them. Instead, respondent denies that the Court of Appeal relied on any such distinction. Yet the Court of Appeal clearly held: "We conclude that neither *Armenta* nor *Jeld-Wen* is controlling or persuasive. Both cases involve negligent entrustment but do not discuss negligent hiring and retention. A case is not authority for an issue not considered." (Opn. at p. 5.) Thus, the parties agree that this distinction is without merit.

With regard to the Court of Appeal's second reason for not following *Armenta*—that "neither case purports to deal with the allocation of fault required by Proposition 51" (Opn. at pp. 5-6)—Respondent denies that the Court of Appeal below overruled or abandoned *Armenta*. At a minimum, however, the Court of Appeal's decision means that *Armenta* has somehow been superseded by statute. Although respondent no longer denies that *Jeld-Wen* did deal with the allocation of fault required under Proposition 51, she fails to address *Jeld-Wen's* reasoning or its holding that "[t]here is nothing in *Armenta* that is adversely affected by the development of . . . comparative negligence principles . . . ." (*Jeld-Wen*, *supra*, 131 Cal.App.4th at p. 871.) Instead, respondent now relegates this holding to a footnote, incorrectly asserting that *Jeld-Wen* "never got to the meat of the matter." (Respondent's Answering Brief (RAB) at p. 8, fn. 2.) Equally dismissive is respondent's discussion of the many jurisdictions that follow

Armenta and continue to apply it in cases involving comparative fault. And Respondent does not discuss the purpose of Proposition 51 at all.

Instead of addressing contrary authority, respondent contends that the court below correctly held that the apportionment of noneconomic damages under Proposition 51 would have been "impossible" without evidence of negligent retention. This rationale erroneously assumes that noneconomic damages should have been allocated between Carcamo and his employer, Sugar Transport. In the opening brief, appellants explained how negligent hiring and retention are *alternatives* to theories of liability under the doctrine of respondeat superior, as all serve to make the employer liable for the acts of its employees. Appellants also explained how, as a matter of logic, an employer's liability for negligent hiring or retention cannot exceed that of its allegedly negligent employee. Respondent retorts that this would be true only if Proposition 51 required apportionment of *causation*, but in fact Proposition 51 requires apportionment of *fault.* This is nothing more than a play on words. Proposition 51 requires an apportionment of fault, but it is not fault in the abstract, untethered from the acts or omissions that caused the plaintiff's injuries. Rather, it is *responsibility for the plaintiff's damages.* Sugar Transport's alleged fault was in allowing Carcamo to drive. Whatever percentage of fault the jury assigned to Carcamo for causing the accident, any fault by Sugar Transport cannot have caused a greater percentage of respondent's damages.

Respondent also argues that the trial court *properly balanced* the evidentiary concerns underlying the *Armenta* rule against the requirement that non-economic damages be apportioned by fault. The trial court had no discretion to balance these concerns, however, because it was bound by *Armenta* and by *Jeld-Wen.* Indeed, the very reason the *Armenta* rule is necessary is that balancing does not work in these circumstances. Evidence

Code section 352 will rarely if ever result in the exclusion of evidence regarding an employee's driving record and character because it will *always* be the most probative evidence of negligent hiring. The trial of this action graphically demonstrates that balancing does not work. Despite the trial court's best efforts to balance the competing concerns, the focus of the trial was not the accident in which respondent was injured but rather Carcamo's character and Sugar Transport's hiring practices, and how the jury needed to "send a message" to them. Although juries are presumed to follow limiting instructions, the prejudicial nature of the evidence of Carcamo's character made that more difficult and the evidence had no legitimate purpose given Sugar Transport admission of respondeat superior liability.

Respondent also argues that this Court need not reverse because any error was harmless, but respondent declines to address the steady stream of prejudicial evidence and argument the jury heard regarding Carcamo's immigration status, employment history, and prior accidents. Absent the mountain of inflammatory character evidence, the jury likely would have found Carcamo not negligent or less at fault and likely would have been less receptive to respondent's large damages requests. At a minimum, the verdict would not have contained an apportionment of fault for Sugar Transport, as under *Armenta* and *Jeld-Wen* its liability would have been in respondeat superior only. Finally, respondent argues that appellants did not preserve the *Armenta* issue. With regard to this argument too, however, respondent's counsel simply closes his eyes to the extensive evidence of preservation in the record.

LEGAL DISCUSSION

I. THE PARTIES AGREE THAT THE COURT OF APPEAL'S FIRST BASIS FOR DISTINGUISHING *ARMENTA* AND *JELD-WEN* IS WITHOUT MERIT.

As discussed in appellants' opening brief on the merits, the Court of Appeal's first reason for declining to follow *Armenta* and *Jeld-Wen* was that those cases addressed claims of negligent entrustment whereas this case involves claims of negligent hiring and retention. (Appellants' Opening Brief on the Merits (OBM) at p. 23.) Appellants explained how negligent entrustment, hiring, and retention are substantively identical in the context of a motor vehicle accident, and why the holding of *Armenta* applies equally to all three theories. (*Id.* at pp. 24-26.) Appellants also explained that all three theories are "direct" in that they require some fault on the part of the employer to trigger liability, but are essentially vicarious because they make the employer liable for the torts of an employee. (*Id.* at pp. 26-31.)

Rather than defending the Court of Appeal's distinction, respondent concedes that negligent entrustment and negligent hiring/retention are functionally identical but flatly denies that the Court of Appeal relied on any such distinction. (RAB at pp. 38-39.) Respondent's denial is refuted by the Court of Appeal's opinion:

> We conclude that neither *Armenta* nor *Jeld-Wen* is controlling or persuasive. Both cases involve negligent entrustment but do not discuss negligent hiring and retention. A case is not authority for an issue not considered. [Citation.] Moreover, a recent case from the Second District holds, contrary to *Jeld-Wen,* that negligent entrustment is an independent tort imposing direct liability. [Citations.]

(Opn. at p. 5.) The Court of Appeal then used three-and-a-half pages of its opinion discussing negligent hiring cases to establish that negligent hiring is a direct theory of liability. (*Id.* at pp. 6-9.)[1] As this demonstrates, the Court of Appeal concluded it was not bound by *Armenta* and *Jeld-Wen* because they dealt with negligent entrustment rather than negligent hiring. If, as respondent asserts, the Court of Appeal had *agreed* that all three theories were functionally identical (RAB at p. 39), the Court of Appeal's distinction would have served no purpose.

Equally counterfactual is respondent's suggestion that the Court of Appeal and the parties all agree that negligent hiring is a direct theory of liability. (RAB at pp. 31-37.) As appellants discussed at length in their opening brief on the merits, negligent hiring and retention are alternatives to liability under the doctrine of respondeat superior. (OBM at pp. 26-32.) Respondeat superior makes the employer strictly liable for torts of employees committed *in the course and scope of their employment.* Negligent hiring and retention extend an employer's liability to include employees' acts committed *outside the course and scope of their employment* if the employer was negligent in hiring or retaining them. Negligent hiring and retention are therefore "direct" theories in that they require some fault on the part of the employer to trigger liability. Once triggered, however, the employer's liability is coextensive with the liability arising from its employees' conduct. Once an employer admits it is strictly liable for an employee's conduct under respondeat superior, the separate showing of employer fault in hiring the employee is unnecessary and often prejudicial. (*Ibid.*)

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[1] Indeed, this discussion is found in the opinion under a heading entitled "Negligent Hiring and Retention is a Theory of Direct Liability." (*Id.* at p. 3.)

Respondent ignores the authorities appellants cite on pages 26 to 32 of their opening brief. Instead, respondent simply repeats the Court of Appeal's discussion of *Carmargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235 (*Carmargo*), *Fernelius v. Pierce* (1943) 22 Cal.2d 226 (*Fernelius*), and *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793 (*Roberts*). (RAB at pp. 34-36.) In *Carmargo*, however, the Court held that negligent hiring is in essence vicarious or derivative because it derives from the act or omission of the person hired even though, technically speaking, "the [owner] is *directly* negligent in the sense of having failed to take precautions" to prevent the injury. (25 Cal.4th at pp. 1243-1244.) *Fernelius* is not to the contrary; there, a city's *direct fault* in retaining police officers knowing they had vicious propensities made the city liable *for the officer's torts*. (22 Cal.2d at pp. 233-234; *see also id.* at p. 239 ["[P]ermitting an act, where one has knowledge that it is impending and has the power and duty to prevent it, is the equivalent of directing it, so far as legal responsibility therefor is concerned."].) Finally, *Roberts* did not involve claims of negligent hiring. (224 Cal.App.3d at pp. 800-801.) Instead, the plaintiff alleged, and the jury found, that the employer *directly participated* in discriminatory conduct in violation of FEHA. (*Ibid.*)

Respondent also quotes this Court's statement in *Far West Financial Corp. v. D&S Co.* (1988) 46 Cal.3d 796, 812, that "there are many instances in which a defendant who is *vicariously liable* for another's acts may also bear some *direct responsibility* for an accident," including the negligent hiring of an agent. (RAB at p. 32, italics added.) *Far West* addressed principles of equitable indemnity and does not suggest that a defendant's liability for negligent hiring can exceed its liability under respondeat superior. To the contrary, *Far West* stands for the proposition

that, although respondeat superior liability subsumes direct liability for negligent hiring, that does not mean the employer is free of fault.

Finally, respondent points to a personal injury practice guide whose authors state that "there may be cases" in which it is advantageous for plaintiffs to sue under respondeat superior as well as under theories like negligent entrustment and negligent hiring, because the employer may be held liable for the employee's fault under respondeat superior as well as for its own independent fault. (RAB at p. 23, fn. 5, citing Haning, et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2009) ¶ 2:261.) The authors offer no authority for this statement. Moreover, in the very same chapter, the authors explain that an employer's "admission of respondeat superior liability bars plaintiff from pursuing a negligent entrustment claim against the employer; i.e., the negligent entrustment claim is subsumed within the pretrial assumption of vicarious liability because, 'at bottom,' the employer (though possibly guilty of a separate tort) is still only liable for the employee's negligence, which has already been established. [Citation.]" (*Id.* at ¶ 2:415.) The practice guide merely stands for the proposition that *absent an admission of respondeat superior*, separate evidence of the employer's fault may be admitted and, as a practical matter, this can affect the jury's apportionment of fault.

II. PROPOSITION 51 DOES NOT PROVIDE A BASIS TO DISREGARD THIS COURT'S RULE IN *ARMENTA*.

The Court of Appeal's second basis for distinguishing *Armenta* and *Jeld-Wen* was that "neither case purports to deal with the allocation of fault required by Proposition 51." (Opn. at pp. 5-6.) After noting that Proposition 51 required the jury to apportion fault among the defendants for purposes of determining their respective shares of noneconomic damages, the Court of Appeal concluded that "[a]bsent proof of negligent hiring and

retention, the required apportionment of fault would have been impossible. (*Id.* at p. 12.) The Court of Appeal noted that "[u]nlike *Armenta*, while Sugar Transport's concession of liability for Carcamo's driving established the fact of its liability, it did not establish the degree of its liability for noneconomic damages." (*Ibid.*)

In the opening brief on the merits, appellants explained how *Jeld-Wen did* deal with the allocation of fault required by Proposition 51 and properly held that it has no effect on the *Armenta* rule: "There is nothing in *Armenta* that is adversely affected by the development of . . . comparative negligence principles, because *Armenta* represents a different and still viable policy rule that is based upon evidentiary concerns about the vicarious liability of an employer for employee negligence." (*Jeld-Wen, supra*, 131 Cal.App.4th at p. 871.) Appellants also explained that nothing in the text or purposes behind Proposition 51 suggests the voters intended to overturn the *Armenta* rule, that an employer has no separate fault to apportion once it admits respondeat superior liability, and that the important purposes behind the *Armenta* rule and Evidence Code section 1104 are just as compelling after the enactment of Proposition 51 as before. (OBM at pp. 32-40.) Respondent offers several defenses of the Court of Appeal's holding, but none have merit.

A. Proposition 51 Has Not Superseded the *Armenta* Rule.

Respondent argues that "*Armenta* is distinguishable because it was decided 32 years before the enactment of Proposition 51 and accordingly did not involve a defendant employer *seeking to reduce its percentage of liability by asserting a Prop. 51 defense based on the comparative fault of another negligent driver* . . . ." (RAB at p. 3; *see also id.* at pp. 8, 21-22.) *Armenta* definitely preceded the enactment of Proposition 51; there is no

dispute about that. But the relevant question is whether the enactment of Proposition 51 had any effect on the *Armenta* rule, and the answer is "no."

Respondent chooses not to address the reasoning of *Jeld-Wen*, the only other published decision to examine the effect of Proposition 51 on the *Armenta* rule. Instead, respondent relegates *Jeld-Wen* to a footnote in the answering brief, baldly asserting that *Jeld-Wen* "never got to the meat of the matter." (RAB at p. 8, fn. 2.) This is demonstrably untrue. In *Jeld-Wen*, the Fourth District acknowledged that *Armenta* was controlling precedent, discussed the policy bases for the rule at length, and analyzed in detail whether Proposition 51 had undermined the bases of the rule. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 866-871.)[2] Indeed, the *Jeld-Wen* court specifically asked for supplemental briefing on the impact of Proposition 51 before it issued its opinion. (*Id.* at p. 860.) In its opinion, the court held that once an employer admits liability under the doctrine of respondeat superior, the damages attributable to the employer's and employee's fault will be coextensive. (*Id.* at p. 871.) Simply stated, the apportionment of fault required by Proposition 51 does not impact the *Armenta* rule or the evidentiary concerns upon which it is based. (*Ibid.*)

Respondent also declines to address the text and purposes of Proposition 51, as codified in Civil Code sections 1431.1 and 1431.2. (*See* OBM at pp. 33-34.) The purpose of Proposition 51 was to address the perceived unfairness of "deep pocket" defendants being financially liable for all the damages in a lawsuit when they bear only a small fraction of the fault. (Civ. Code, § 1431.1.) Proposition 51 accomplishes this goal by requiring that noneconomic damages be apportioned between the

[2] In stark contrast, the Court of Appeal below *denied* that *Armenta* is controlling or even persuasive. (Opn. at p. 5.) As a result, the court went no further in its analysis than to decide that negligent hiring is a "direct" form of liability.

responsible parties according to their proportional fault in causing those damages. (*Id.*, § 1431.2.) Proposition 51 nowhere suggests that it revives duplicative negligent hiring and entrustment claims, which are barred under *Armenta* because proving separate employer fault injects prejudicial character evidence into trials and is unnecessary to make the plaintiff whole. (*Armenta*, 42 Cal.2d at p. 457 [once the employer admitted respondeat superior, "the only proper purpose of the [negligence or negligent entrustment allegations] was to impose on [the employer] *the same legal liability as might be imposed upon [the employee]* in the event the latter was found to be liable."].)

Respondent has no meaningful response to the decisions from other jurisdictions in which courts have held that the enactment of comparative liability principles has not affected the *Armenta* rule. (*See, e.g.*, *Campa v. Gordon* (N.D.Ill., Aug. 14, 2002, No. 01-C-50441) 2002 U.S. Dist. LEXIS 15032, *3-*4 ["The fault of the employer for negligent entrustment, in a comparative negligence jurisdiction, is still derived from the negligence of the employee, therefore, additional liability cannot be imposed on the employer where the employer has already admitted it is liable for 100% of the fault attributable to the negligent employee."]; *Gant v. L.U. Transportation, Inc.* (Ill.Ct.App. 2002) 770 N.E.2d 1155, 1160 (*Gant*) ["We hold that Illinois' adoption of comparative negligence did not affect the rule that once an employer admits responsibility under respondeat superior, a plaintiff may not proceed against the employer on a theory of negligent hiring, negligent retention or negligent entrustment."][3]; *McHaffie*

[3] Respondent asserts that *Gant* did not involve an employer trying to reduce its propositional liability based on the fault of a second negligent driver. (RAB at pp. 51-52.) The appeal was of a motion to dismiss, and the court did not state whether the employer raised a comparative negligence defense. The employer's reliance on comparative negligence principles seems very likely, however, given the plaintiff's argument that the *Armenta*

v. Bunch (Mo. 1995) 891 S.W.2d 822, 826 [holding that once liability under respondeat superior is admitted, "[t]he liability of the employer is fixed by the amount of liability of the employee. [Citation.] This is true regardless of the 'percentage of fault' as between the party whose negligence directly caused the injury and the one whose liability for negligence is derivative."].)

Nor does respondent address the comparative liability jurisdictions that continue to apply the *Armenta* rule in cases involving multiple allegedly negligent drivers. (See, e.g., *Wise v. Fiberglass Systems, Inc.* (Idaho 1986) 718 P.2d 1178, 1180, 1182 [adopting and applying the *Armenta* rule in a case in which the jury found the plaintiff was 45% at fault and the employee driver 55% at fault]; *Lee ex rel. Estate of Lee v. J.B. Hunt Transport, Inc.* (S.D.N.Y. 2004) 308 F.Supp.2d 310, 315 [in a case involving two allegedly negligent drivers, holding that "like New York and the majority of jurisdictions that have considered this issue, New Jersey would not permit Plaintiff to proceed on her claim of negligent hiring, training, supervision, and retention in light of Defendants' admission that Jackson was acting within the course and scope of his employment at the time of the accident."]; *Walker v. Smitty's Supply, Inc.* (S.D.Miss., May 8, 2008, No. 5:06CV30) 2008 WL 2487793, *2, *5 [applying *Armenta* rule to dismiss a negligent entrustment claim where the alleged negligence of two drivers was at issue].)

Instead of addressing the reasoning of these authorities, respondent asserts that each state's laws are *sui generis* and points to two federal decisions that she believes are better reasoned. (RAB at pp. 49-52.) The

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(continued...)

rule was incompatible with these principles. (See *Gant v. L.U. Transportation, Inc.* (Ill.Ct.App. 2002) 770 N.E.2d 1155, 1158.)

first, *Poplin v. Bestway Express* (M.D. Ala. 2003) 286 F.Supp.2d 1316, predicts that the Alabama Supreme Court would not follow *Armenta* in a case *not* involving comparative negligence or apportionment of fault.[4] Needless to say, this Court came to a different conclusion in *Armenta*. The second decision, *Lorio v. Cartwright* (N.D.Ill. 1991) 768 F.Supp. 658 (*Lorio*), predicted that Illinois would not continue to apply *Armenta* given the adoption of comparative negligence. (*Id.* at p. 661.) This prediction was later rejected, however, by the Illinois courts. (*Gant*, *supra*, 770 N.E.2d at pp. 1159-1160; see also *Campa v. Gordon*, *supra*, 2002 U.S. Dist. LEXIS 15032 at *4-*5 [following *Gant* rather than *Lorio*].) Moreover, *Lorio* relied exclusively on *King v. Petefish* (Ill.App. 1989) 541 N.E.2d 847, a case in which the estate of an entrustee sued an entrustor for negligent entrustment. (*Id.* at p. 848.) The court held that the negligence of the plaintiff-entrustee in driving a vehicle while intoxicated did not cut off the liability of the defendant-entrustor. (*Id.* at p. 853.) The decision never addressed whether a negligent entrustor's fault in causing harm to *third parties* can exceed the fault of its negligent entrustee.

B. Respondent's Purported Distinction Between Fault and Causation Does Not Change the Analysis.

Respondent concedes that the jury's apportionment of 20% of responsibility for the accident to Carcamo and an *additional* 35% to Sugar Transport would be plainly illogical "if what is apportioned *is* relative, comparative causation." (RAB at p. 6.) Respondent argues, however, that what juries must apportion under Proposition 51 is not comparative causation but comparative fault. (*Id.* at pp. 5-6, 25-30.) This argument

[4] Indeed, Alabama is one of the few states that has retained a pure contributory negligence system. (*Alabama Power Co. v. Schotz* (Ala. 1968) 215 So.2d 447, 452 see also *Hicks v. Vulcan Engineering Co.* (Ala. 1999) 749 So.2d 417, 424-425 [approving pattern jury instruction on contributory negligence].)

forms the basis for many of the assertions respondent makes in the answering brief, such as that Sugar Transport is seeking to avoid liability for its own fault in causing the accident, or that appellants are failing to balance the competing policies reflected in *Armenta* and Proposition 51. (E.g., RAB at pp. 1-2, 4-5, 7, 15-21.)

Respondent's distinction between causation and fault is a red herring. Proposition 51 requires the apportionment of fault, to be sure, but it is fault in *causing the plaintiff's injuries*. As the Court explained in *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, section 1431.2 "shields every 'defendant' from any share of noneconomic damages beyond that ***attributable to*** his or her own comparative fault" and "contains no hint that a 'defendant' escapes joint liability only for noneconomic damages ***attributable to*** fellow 'defendants' while remaining jointly liable for noneconomic damage ***caused by*** others." (*Id.* at p. 602, emphasis added; see also *id.* at 601 ["Section 1431.2 declares plainly and clearly that . . . '[e]ach defendant' shall be liable 'only' for those 'non-economic' damages ***directly attributable to*** his or her own 'percentage of fault.'" (emphasis added)].) The cases respondent cites are not to the contrary. (See, e.g., *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 151 ["[T]he jury should be instructed that, assuming 100 percent represents the *total causes* of the plaintiff's injury, liability must be apportioned to each actor who caused the harm in direct proportion to such actor's respective fault, . . ."].)

Moreover, Proposition 51 only permits the allocation of substantive, legally actionable fault—i.e., legal liability. No matter how blameworthy in the abstract a civil defendant may be, what juries allocate under Proposition 51 is "proportionate *responsibility* for [an] injury—i.e., [the defendants'] comparative 'fault.'" (*Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, 997, italics added.) This is "legal 'fault' or tortious

responsibility" for causing the plaintiff's injuries. (*Id.* at p. 998; see also *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 854 ["The doctrine [of comparative liability] allocates liability not simply on the relative blameworthiness of the parties' conduct, *but on the proportion to which their conduct contributed to the plaintiffs' harm.* A more accurate label might well have been something like 'comparative responsibility.'" (italics added)]; *cf. Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1197 ["[I]t is appropriate to determine the percentage of respondent's injury that is attributable to each asbestos product and allocate that percentage of fault to the entire chain of defendants in that product's distribution system."].) Indeed, the trial court instructed the jury that it must allocate each defendant's comparative *responsibility* in causing respondent's harm:

> More than one person's faults may have been a substantial factor in causing Dawn Diaz' harm. If so, you must decide how much respon[sibility] each person has by assigning percentages of responsibility to any person listed on the verdict form . . . whose negligence or other faults was a substantial factor in causing Dawn Diaz' harm. The percentages with other responsibility must total 100 percent.

(10 RT 1669:25–1670:4; see also CACI 406.)[5]

Under *Armenta*, Sugar Transport's admission of respondeat superior made any fault it had for the accident in which respondent was injured coextensive with that of Carcamo. By employing Carcamo and allowing him to operate a truck in the course and scope of his employment, Sugar

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[5] Respondent concedes that in seat-belt defense cases and crash-worthiness cases do California courts follow an apportioned causation approach, but fails to explain why the definition of "fault" would vary with the theory of negligence at issue. (RAB at p. 31, fn. 6)

Transport was *strictly liable* for any and all negligence of Carcamo in causing the accident. According to respondent, however, by employing Carcamo and allowing him to operate a truck in the course and scope of his employment, Sugar Transport was *also* separately liable for its *own* negligence in causing the accident. Yet any negligence by an employer in hiring a negligent driver is necessarily indirect—it can only cause harm if the employee *is* negligent and only *to the extent* the driver's negligence causes harm. If Carcamo were not negligent, Sugar Transport could have no legal fault. Likewise, if Carcamo were 1% at fault for the accident, any negligence by Sugar Transport in employing Carcamo could not exceed his 1% of fault. To conclude that Sugar Transport could be, for example, 35% at fault for negligently hiring Carcamo even though he were only 1% at fault would mean that under Proposition 51, "fault" bears no relation to the facts of how the plaintiff was injured.[6]

Respondent argues that, regardless of causation, Sugar Transport had more fault than Carcamo because his negligence was "simple, everyday negligence" whereas Sugar Transport's was "reckless, dangerous, callous, and shocking." (RAB at p. 27.) In addition to the legal and logical flaws discussed above, respondent's assertions do not match its theory of the case or the evidence. According to respondent, Carcamo caused the accident by *becoming angry* and *accelerating* to prevent Tagliaferri from passing him. (E.g., RAB at pp. 11-12, 14.) And although respondent asserts that Sugar Transport "knowingly hired an unsafe driver" (RAB at p. 14), the undisputed evidence at trial showed that Sugar Transport did not have

[6] Indeed, allowing a direct tortfeasor like Tagliaferri to reduce her liability for noneconomic damages based on previous hiring or retention decisions that do not change the respective fault of the drivers involved in the accident in question "would turn Proposition 51 on its head and achieve precisely the opposite from the electorate's intent." (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1400.)

information on Carcamo's previous accidents or performance at the time it hired him. (6 RT 1009:25-28, 1012:26-1013:19; 1038:25-1039:4; 1044:1-10.) The deposition testimony regarding Sugar Transport "need[ing] bodies to work" (RAB at p. 14) was in response to a *hypothetical* question regarding why Sugar Transport might hire driver who had a clean DMV record but had been involved in previous accidents and had received poor performance reviews. (6 RT 1010:1-1012:5.)

Respondent also gives several strained, theoretical examples of situations in which an employer and employee may both be negligent, but where the employer could be considered more blameworthy than its employee. Notably, none of these hypotheticals involve motor vehicle accidents or circumstances in which the employer's fault was in allowing the employee to drive. More importantly, none involve alternate theories of liability that would be subject to the *Armenta* rule.

First, respondent points to a hypothetical situation in which an employer required its employees to drink large quantities of alcohol at work and an intoxicated employee committed an act of negligence. (RAB at p. 6.) Even if the plaintiff in this situation chose to sue the employer for negligent entrustment rather than for its direct negligence in requiring employees to drink alcohol while on the job, California courts have noted an exception to the *Armenta* rule for entrusting a vehicle to an incapacitated employee, whether that incapacity be illness, intoxication, or underage status. (*Jeld-Wen*, *supra*, 131 Cal.App.4th at pp. 859, 862-863, 870 [twice distinguishing cases involving potentially non-negligent drivers, and noted that there was no evidence that the employee driver was "incompetent, ill, or otherwise unfit to drive" on the day of the accident]; *Syah v. Johnson* (1966) 247 Cal.App.2d 534, 543 [*Armenta* does not apply in a situation involving an accident caused by an employee's physical incapacity].)

Unlike the situation here, proving the employer's negligence would not involve the introduction of character evidence about the intoxicated employee.

Next, Respondent describes a hypothetical situation in which an employer negligently creates an unguarded hole on its property, and an employee discovers the hole but forgets to guard it. (RAB at p. 6.) In this situation, the two acts of negligence are independent and both cause the plaintiff's injuries. Similarly, one can imagine a situation in which an employer sends a driver out in a vehicle with bad brakes, the driver exceeds the speed limit, and both acts of negligence combine to cause an accident. That is fundamentally different from the situation here, where an employer's alleged negligence is solely in allowing a negligent employee to drive. In negligent hiring and retention cases, the plaintiff ultimately seeks to hold the employer liable for the acts of its employee.

Respondent also argues that an employer's liability for negligent hiring is no more derivative than would be its *punitive* liability for hiring an employee with vicious propensities. But a claim for punitive damages can expand the damages available to the plaintiff, because it is an additional, statutorily authorized basis for liability and not an alternative tort theory. For this very reason, some jurisdictions have held that the *Armenta* rule does not apply in cases involving a legally sufficient claim for punitive damages. (See, e.g., *Watson v. Strack* (N.Y.App.Div. 2004) 5 A.D.3d 1067, 1068; *Clooney v. Geeting* (Fla.Ct.App. 1977) 352 So.2d 1216, 1220.) Punitive damages are not at issue in this case. (2 CT 299 [jury instruction that punitive damages cannot be awarded].) Finally, respondent contends that negligent hiring claims are no more derivative than a legal malpractice claim for missing the statute of limitations, which would require the plaintiff to prove that he or she had a valid claim. (RAB at p. 36.) Yet

again in this example, the attorney is plainly being sued for his or her own negligence in handling the underlying lawsuit, not for any negligence of the defendant driver.

C. "Balancing" Does Not Work in this Context, Which Is Why the *Armenta* Rule is Necessary.

Respondent concedes that the *Armenta* rule serves several important policy goals, including (i) promoting judicial economy by barring the introduction of evidence on alternative theories once an employer admits liability under the doctrine of respondeat superior; (ii) preventing plaintiffs from using alternative theories of liability to make an end run around the character evidence prohibition of Evidence Code section 1104; and (iii) providing a powerful incentive for defendant employers to admit liability under respondeat superior, even in cases where it may be dubious. Instead, respondent argues that the trial court properly balanced these policies against the requirement of Proposition 51 that noneconomic damages be apportioned by fault. (RAB at pp. 1-2, 15-21.) This argument is misguided for several reasons.

As discussed in appellants opening brief on the merits and in the previous sections, once an employer admits liability under the doctrine respondeat superior there is no need to apportion separate fault to the employer. The employer is already strictly liable for all the fault of its employee in causing the plaintiff's injuries; the employer's separate fault in hiring or retaining the employee cannot expand that universe of fault. Evidence of negligent hiring not only can prejudice the jury in its determination of liability for the accident at issue, it also can bias and confuse the jury in its apportionment of fault and calculation of damages. Here, for example, it does not make sense that Sugar Transport's

negligence in hiring or retaining Carcamo as a driver could exceed the negligence of Carcamo himself in causing respondent's injuries.

Moreover, the trial court lacked authority to balance these allegedly competing concerns because it was bound by *Armenta* and by *Jeld-Wen.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Indeed, the very reason the *Armenta* rule is necessary in the first place is that balancing does not work in these circumstances. As discussed in appellants' opening brief, Evidence Code section 352 will rarely if ever result in the exclusion of evidence regarding an employee's driving record and character because it will *always* be the most probative evidence of negligent hiring. (OBM at p. 39.) As the Court of Appeal noted here, "such evidence is likely the only way [negligent hiring and retention] could be shown." (Opn. at pp. 10-11.)

Indeed, one need look no further than the trial of this action to see that balancing does not work. Despite the trial court's best efforts to balance the competing concerns and ensure the fairness of the proceedings, the focus of the trial was not the accident in which respondent was injured but rather Carcamo's driving history, performance reviews, illegal immigration status, and character, as well as Sugar Transport's hiring practices. (See OBM at pp. 8-10, 44-45.) Respondent's counsel took full advantage of this evidence to tell the jurors that unless they found Carcamo negligent, they would be putting "a big seal of approval" on his truck driving and on Sugar Transport's employment practices. (*Id.* at pp. 10-11, 45-46.) Heeding these warnings, the jury awarded respondent *$22.5 million* and found that Carcamo and Sugar Transport together bore more than half the fault for the accident, despite uncontroverted evidence that Tagliaferri's negligent driving set the accident in motion.

Finally, respondent characterizes appellants' position that *Armenta* remains binding precedent as "reflect[ing] a fundamental distrust of the jury system." (RAB at p. 20, fn. 4.) Not so. This Court in *Armenta* did not quarrel with the proposition that juries are presumed to follow limiting instructions that evidence may be considered for one purpose but not another. *Armenta* held that when evidence has *no proper purpose* and its only effect would be to inject prejudice into the proceeding, it should be excluded. (*Armenta*, 42 Cal.2d at pp. 457-458 ["Since the legal issue of [the employer's] liability for the tort was thereby removed from the case [by the admission of respondeat superior], *there was no material issue remaining to which the evidence could be legitimately directed*." (Italics added)].) Here, as in *Armenta*, the evidence of Carcamo's character and Sugar Transport's hiring practices had no legitimate purpose given the admission of respondeat superior liability.

III. RESPONDENT'S FORFEITURE AND PREJUDICE ARGUMENTS ARE REFUTED BY THE RECORD.

A. Respondent Simply Declines to Address the Evidence of Prejudice.

In the opening brief, appellants explained in detail how the trial court's error in not following *Armenta* prejudiced appellants. (OBM at pp. 42-48.) Respondent makes no attempt whatsoever to address the steady stream of prejudicial evidence and argument the jury heard regarding Carcamo's immigration status, employment history, and prior accidents. (RAB at pp. 40-41.) Instead, respondent points to the special verdict form and declares *ipse dixit* that "[t]he jury acted reasonably and reservedly." (RAB at p. 41.) Absent the inflammatory character evidence, however, the jury likely would have found Carcamo not negligent at all or less at fault, and may also have awarded less damages. At a minimum, the verdict

would have contained no apportionment of fault to Sugar Transport because, under *Armenta* and *Jeld-Wen*, Sugar Transport's liability should have been solely in respondeat superior.

Respondent tries to create the impression that the error was not prejudicial by including assertions in the "factual statement" that are counterfactual. For example, respondent asserts that Carcamo was angry and tried to "close the gap" on Tagliaferri. (RAB at p. 11.) The record contains no evidence of this, and it is inconsistent with the jury's allocation of 45% of fault to Tagiaferri and 20% to Carcamo. Respondent also asserts as a fact that Sugar Transport destroyed the truck's tachometer chart "so there would be no tachograph evidence of the employee's driving immediately prior to, and at the time of, the accident." (RAB at p. 12.) Again, the record contains no evidence that Sugar Transport "destroyed" or "got rid" of evidence to conceal acceleration by Carcamo. These were *inferences* respondent's counsel asked the jury to draw, but when reviewing the prejudicial effect of a trial court error, the Court does not view the evidence in the light most favorable to the prevailing party. (See, e.g., *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 674 [in reviewing the prejudicial effect of an incorrect jury instruction, the court views the evidence in the light most favorable to the losing party]; *Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 525 [reweighing the evidence in a case involving the erroneous admission of evidence of a prior accident].)

B. Respondent Repeats its Claims of Forfeiture Without Addressing the Facts.

In the opening brief on the merits, appellants demonstrated with evidence from the record that (i) Sugar Transport's admission of respondeat superior was never in dispute, as counsel for respondeat conceded on the

record at trial; (ii) appellants raised the *Armenta* issue and cited *Jeld-Wen* to the trial court on the third day of trial before any evidence of negligent hiring was presented; (iii) the trial court and counsel for all parties were aware of the *Armenta* issue and discussed it at length; (iv) appellants continued to raise the issue throughout the trial and in post-trial motions; and (iv) the trial court never suggested appellants had waived the issue. (OBM at pp. 40-42.)

Respondent has no response to these indisputable facts, and simply asserts that the formal stipulation of respondeat superior came too late. Respondent does not explain, however, *why* it was too late or *how* respondent was prejudiced by any purported delay, especially when Sugar Transport's admission of respondeat superior had "never been an issue" in the case. (2 RT 434:7-8; see also 2 RT 436:20-27.) Respondent spends close to two pages arguing that interrogatories verified under penalty of perjury are nonbinding (RAB at pp. 44-47), but respondent does not and cannot dispute that Sugar Transport's admission of vicarious liability for any negligence by Carcamo was unquestioned. (1 RT 103:6-12 [respondent's opening statement]; 1 RT 140:17-27, 145:19-27 [appellants' opening statement].)

Given that Sugar Transport made the formal stipulation before any evidence of negligent hiring was admitted, the only possible prejudice to respondent would have been if the jury wondered about her counsel's remarks about negligent hiring in his opening statement. But instead of delivering "*a death knell to plaintiff's counsel's credibility in front of the jury*," as respondent argues (RAB at p. 47), the trial court could have simply and fairly cured any potential prejudice by admonishing the jury as follows:

> Ladies and gentlemen, while you were away, Sugar Transport formally stipulated to vicarious liability for Carcamo's conduct on the date of the accident. This means that Sugar Transport is responsible for Carcamo's actions and is liable for the accident to the same degree, if any, for which you might find Carcamo liable. However, this stipulation also means that Sugar Transport no longer has any additional liability based on theories that it negligently hired or retained Carcamo. Those claims are therefore no longer at issue in the case.

Nothing in such an admonition would have prejudiced respondent, whereas the erroneous failure to apply *Armenta* allowed respondent's counsel to barrage the jury with inadmissible and plainly prejudicial character evidence for days on end.[7]

Respondent also argues that appellants should be estopped from relying on *Armenta* and *Jeld-Wen* because they did not move to bifurcate respondent's claims for negligent hiring and retention. (RAB at pp. 48-49.) Nothing in *Armenta* or *Jeld-Wen* suggests that bifurcation is an alternative to application of the *Armenta* rule. Moreover, bifurcation would still not adequately protect defendants from the type of prejudicial evidence the rule prohibits. Even when the liability of the employee for negligent driving is determined before the jury hears character evidence relevant to the negligent hiring claim against the employer, the jury would still have to hear that evidence before awarding damages and apportioning fault. The only situation in which bifurcation would avoid prejudice is when the jury finds the employee not negligent, which would effectively end the case. Thus, notwithstanding bifurcation, in any case where the jury reaches the

[7] Respondent also argues that appellants are precluded from relying on *Armenta* and *Jeld-Wen* because they did not make their objections clear on the record. (RAB at p. 48.) Once again, respondent simply closes her eyes to the contents of the record. (See OBM at pp. 41-42.)

apportionment stage, it will have heard the prejudicial character evidence that *Armenta* and *Jeld-Wen* prohibit.

Respondent relies on *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220 (RAB at p. 49), but no California case has ever applied *Las Palmas* to require a party to seek bifurcation in order to preserve evidentiary objections at trial.[8] Also, *Las Palmas* involved Civil Code section 3295, which provides that the trial court "*shall,* on application of any defendant," bifurcate a trial in which punitive damages are sought. (Civ. Code, § 3295, subd. (d), italics added.) Here, by contrast, the bifurcation decision lay entirely within the trial court's discretion. (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 504.) Finally, in *Las Palmas* the defendants failed to move to exclude evidence of their wealth until (a) after they had rested their case; (b) after the plaintiffs had cross-examined several of the defendants' witness at length about the defendants' net worth and assets, with no objection; (c) after the plaintiffs had announced their intention to call as their first witness the defendants' chief financial officer, who already had traveled from San Francisco to Los Angeles to be in court; and (d) after the plaintiffs moved to compel the defendants to produce their financial records. (*Las Palmas, supra,* 235 Cal.App.3d at pp. 1235-1236.) The facts here are entirely different.

Finally, respondent argues the Court should remand the procedural issues to the Court of Appeal. (RAB at p. 42, fn. 10.) Given that both

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[8] Indeed, nothing in California law required appellants to make their objections in the form of a pretrial motion. "Evidence Code section 353 does not exalt form over substance. No particular form of objection or motion is required[.]" *People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

parties have briefed these issues to the Court, which is as able to address them as the Court of Appeal, and their determination will give guidance to lower courts on when the *Armenta* rule applies, appellants respectfully submit it is more appropriate for the Court to decide these issues. (See, e.g., *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 476 ["Because we are as equipped as the Court of Appeal to analyze this point, we decide it here rather than remanding the matter to the intermediate court."].)

CONCLUSION

For the foregoing reasons, the Court should reverse and remand with instructions to grant a new trial.

Dated: September , 2010

Respectfully submitted,

JONES DAY

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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies, pursuant to Rule 8.504(d) of the California Rules of Court, that the enclosed brief was produced using 13-point type, including footnotes, and contains 7,617 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September , 2010

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On September 17, 2010, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

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in a sealed envelope, postage fully paid, addressed as follows:

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

Executed on September 17, 2010, at Los Angeles, California.

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