Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 3/12/2021 at 3:10:04 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/12/2021 by Tao Zhang, Deputy Clerk

Case No. S266001

In the

Supreme Court

of the

State of California

WALLEN LAWSON,
Plaintiff-Appellant,

v.

PPG ARCHITECTURAL FINISHES, INC.,
Defendant-Appellee.

CERTIFICATION OF THE QUESTION OF LAW TO
THE CALIFORNIA SUPREME COURT SUBMITTED BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 19-55802

OPENING BRIEF ON THE MERITS

CHAKA OKADIGBO (SBN 224547)
HKM EMPLOYMENT ATTORNEYS LLP
700 South Flower Street
Suite 1067
Los Angeles, California 90017
(213) 431-6209 Telephone
cokadigbo@hkm.com

BRUCE C. FOX *(Pro Hac Vice Pending)*
OBERMAYER REDMANN
MAXWELL & HIPPEL LLP
575 William Penn Place
Suite 1710
Pittsburgh, Pennsylvania 15219
(412) 566-1500 Telephone
bruce.fox@obermayer.com

Attorneys for Petitioner Wallen Lawson

COUNSEL PRESS · (213) 680-2300

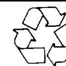
PRINTED ON RECYCLED PAPER


TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.. 4

ISSUES CERTIFIED FOR REVIEW 6

STATEMENT OF FACTS.. 6

PROCEDURAL HISTORY 10

I. The District Court Erroneously Applied the Looser Employer-Friendly *McDonnell Douglas* Framework for Assessing California Labor Code Section 1102.5 Retaliation Claims, Instead of the "Clear and Convincing Evidence" Standard of California Labor Code Section 1102.6 10

II. The Ninth Circuit Has Certified This Question of Law To This Court For Resolution 11

ARGUMENT 12

I. The Legislative History Shows That the California Legislature Intended the Heightened Evidentiary Standard of Labor Code Section 1102.6 to Apply to All Whistleblower Claims Brought under Labor Code Section 1102.5.. 12

II. The Erroneous Application of the *McDonnell Douglas* Framework Would Have a Determinative Influence on the Outcome of this Matter 15

III. The *McDonnell Douglas* Framework Does Not Displace Section 1102.6 in Federal Court............................. 17

IV. Applying the *McDonnell Douglas* Framework Conflicts with the California Legislature and the Court's Established History of Protecting Employees and Whistleblowers from Retaliation 18

A. The California Legislature Has Historically Protected Employees from Retaliation Consistent with a Longstanding Public Policy to Do So 18

B. Adoption of the Lenient *McDonnell Douglas* Framework Would Contradict the Legislature's Express Aim to Afford Greater Protection to Whistleblowers 20

CONCLUSION 22

CERTIFICATE OF COMPLIANCE 23

DECLARATION OF SERVICE 24

TABLE OF AUTHORITIES

Cases **Page(s)**

Diego v. Pilgrim United Church of Christ,
(2014) 231 Cal.App.4th 913 .... 18, 19

Frlekin v. Apple Inc.,
(2020) 8 Cal.5th 1038 21

James River Ins. Co. v. Rapid Funding, LLC,
658 F.3d 1207 (10th Cir. 2011) 17

McClean v. State of California,
(2016) 1 Cal.5th 615 21

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 6, 10, 11, 12, 14, 15, 16, 17, 18, 20, 21

Mendiola v. CPS Security Solutions, Inc.
(2015) 60 Cal.4th 833 .... 20, 21

Morgan v. Regents of University of California
(2000) 88 Cal.App.4th 52 14

Prue v. Brady Company/San Diego, Inc.
(2015) 242 Cal.App.4th 1367 19

Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.,
559 U.S. 393 (2010) 17

Troester v. Starbucks Corp.
(2018) 5 Cal. 5th 829 20

Von Nodurth v. Steck
(2014) 227 Cal.App.4th 524 21

Statutes

California Labor Code §1102.5 .... *passim*

California Labor Code §1102.6 .... *passim*

Other Authorities

2003 Cal. Legis. Serv. Ch. 484 (S.B. 777) 12, 13

Legislative History to §1102.6, Cal. Stats. 2003 Ch 484 13

S. Rules Comm. 2003-2004 Reg. Sess., Cal. Bill Analysis 15

ISSUES CERTIFIED FOR REVIEW

In light of the California Legislature's expressly stated interest in protecting employees, does the evidentiary standard set forth in section 1102.6 of the California Labor Code replace the less employee-friendly *McDonnell Douglas* test as the relevant evidentiary standard for retaliation claims brought pursuant to section 1102.5 of the California Labor Code?

Suggested Answer: Yes

STATEMENT OF FACTS

The Ninth Circuit Court of Appeals certified this question to this Court for resolution based upon its conclusion that there is no controlling California precedent and that this Court's resolution would greatly affect whistleblower claims and employees' rights in California. Here, had the section 1102.6 standard been applied, Petitioner's case would have proceeded past the summary judgment stage; yet the district court erroneously applied the *McDonnell Douglas* framework.

Petitioner Wally Lawson was a thirty-five-year veteran of the paints and coatings industry when he became employed by Respondent PPG Architectural Finishes, Inc. ("PPG") in 2015 as a Territory Manager ("TM").

(2 ER 82).[1] Lawson's role as a TM was to merchandise PPG paint products in the Lowe's home improvement stores in his assigned territory. (2 ER 82).

In April 2017, Lawson's Regional Manager, Clarence Moore, instructed twelve TMs under his supervision to intentionally "mis-tint" a slow-selling PPG paint product. (2 ER 115-18). Moore directed the TMs to surreptitiously take a gallon of paint, tint it to a random color, and then put it on the paint department's "oops" rack, where it would be sold to the public at a deep discount. (1 ER 3). Moore told each of the TMs to try to mis-tint at least 2-3 gallons of paint a day. (2 ER 140). Moore further instructed his TMs that if caught by Lowes personnel while mis-tinting paint, they should dissemble and say that a customer ordered the paint and failed to return to pick it up. (2 ER 115). This fraudulent practice allowed PPG to avoid buying back the unsold paint from Lowe's, inflating Moore's sales metrics. In discovery, Lawson learned that PPG investigated several regional managers for engaging in similar practices and did not discipline any of them. (2 ER 146, 156-57, 160).

---

[1] Petitioner's Excerpt of Record ("ER") filed with the Ninth Circuit in Lawson v. PPG Architectural Finishes, Inc. (No. 19-55802) is incorporated by reference herein as if fully set forth herein.

Lawson considered the mis-tinting practice to be an organized scheme to effectively defraud Lowes. (3 ER 293-94) He therefore submitted an anonymous report to PPG's web-based ethics reporting portal on April 21, 2017 exposing Moore's scheme. (3 ER 293-94). Soon thereafter, Lawson confronted Moore and told him there was "no way" he was going to comply with Moore's directive to commit fraud. (2 ER119-21, 125-26). Lawson equated Moore's directive to unauthorized personal use of a company postage meter and spoke of John Dean, the Watergate whistleblower. (2 ER 125-26). Moore became agitated and told Lawson not to "concern himself" with the issue. Lawson understood from Moore's reaction that his remarks were not well-received. (2 ER 129-30).

Just a couple of weeks later, in May 2017, Moore placed Lawson on a Performance Improvement Plan ("PIP"). (3 ER 349). As a result of Lawson's reporting Moore's misconduct, the company launched an internal investigation of Moore. (2 ER 37). Yet Moore was allowed to oversee Lawson's PIP during the pendency of the investigation and was allowed to fire Lawson. (2 ER 77-79).

Moore gave Lawson a "marginal" score on a mid-July 2017 market walk evaluation, despite the fact that Lawson's previous supervisor had given

him the highest market walk score in the country (out of 210 territory managers). (3 ER 263, 338). This led to a second market walk evaluation in August for which Moore gave Lawson an even lower score. (3 ER 261-62) PPG fired Lawson on September 6, 2017 at Moore's recommendation. (2 ER 84, 2 ER 198, 3 ER 346-47). Not only did Lawson introduce evidence disputing the validity of many elements of these evaluations, but PPG's reasons for firing Lawson also shifted throughout the course of events, suggesting they were not genuine and would not withstand scrutiny. (2 ER 201,3 ER 279-80, 3 ER 346-47).

David Duffy, PPG's lead investigator of Moore's mis-tinting scheme, testified that he found it "ironic" that PPG retained Moore, while firing his whistleblower, Lawson. (2 ER 186). Remarkably, Duffy testified that he thought that Moore, not Lawson, should have been the one that PPG should have fired. *Id.*

PROCEDURAL HISTORY

I. The District Court Erroneously Applied the Looser Employer-Friendly *McDonnell Douglas* Framework for Assessing California Labor Code Section 1102.5 Retaliation Claims, Instead of the "Clear and Convincing Evidence" Standard of California Labor Code Section 1102.6

Lawson brought a retaliation claim under California Labor Code section 1102.5 before the U.S. district court. Lawson developed ample evidence showing that Moore knew Lawson had reported the mis-tinting scheme, and that Lawson's reporting of Moore's misconduct was, at the very least, a contributing factor in Moore's decision to fire him. While the district court found that Lawson made a prima facie case for retaliation under California Labor Code section 1102.5, it erroneously granted PPG's motion for summary judgment by applying the *McDonnell Douglas* framework instead of California Labor Code section 1102.6.

Section 1102.6 provides the standard of proof for section 1102.5 claims. Section 1102.6 states:

> In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the

> employee had not engaged in activities protected by Section 1102.5.

Applying section 1102.6 to the instant case, PPG has the burden to show by clear and convincing evidence that PPG would have taken the same action against Lawson even if he had not opposed or complained of Moore's directive to mis-tint. Unlike section 1102.6 evidentiary standard, the *McDonnell Douglas* framework assigns a substantially lower evidentiary burden to PPG to merely proffer a legitimate and nondiscriminatory reason. Because the district court failed to apply section 1102.6 in granting summary judgment, Lawson appealed its decision granting summary judgment.

II. The Ninth Circuit Has Certified This Question of Law To This Court For Resolution

In its ruling on Lawson's appeal, the Ninth Circuit Panel found that this Court has not yet addressed the evidentiary standard applicable to section 1102.5 retaliation claims and certified the issue for resolution by this Court. (Certification Order at 8). The Ninth Circuit explained the basis for its certification: "California statutory law seems to provide one standard, while some California courts have provided… another and materially different standard." (Certification Order at 15).

The Ninth Circuit Panel further observed that there is a material difference between section 1102.6 and *McDonnell Douglas,* stating that "subjecting defendants in cases involving section 1102.5 retaliation claims to the lower *McDonnell Douglas* standard does some damage to workers' rights." (Certification Order at 17). The Court further reasoned that "the California legislature's decision to apply a heightened evidentiary standard—such as clear and convincing evidence—to section 1102.5 retaliation claims indicates that there are 'particularly important interests' … at stake." (internal citation omitted) (Certification Order at 17).

Finally, the Ninth Circuit observed that the district court's failure to apply the correct standard was outcome-determinative in this case: "While the district court held that Lawson's claims failed under the *McDonnell Douglas* test, it seems reasonably clear that Lawson would survive summary judgment under section 1102.6." (Certification Order at 18).

ARGUMENT

I. The Legislative History Shows That the California Legislature Intended the Heightened Evidentiary Standard of Labor Code Section 1102.6 to Apply to All Whistleblower Claims Brought under Labor Code Section 1102.5

In 2003, the California Legislature passed Senate Bill 777, which "*establish[ed] the evidentiary burdens of the parties participating in a civil*

action or administrative hearing *involving an alleged violation of Labor Code section 1102.5*." 2003 Cal. Legis. Serv. Ch. 484 (S.B. 777). (italics added for emphasis).

In enacting Labor Code section 1102.6, the California Legislature expressly intended to impose a heightened evidentiary standard favoring whistleblowers in order to protect them from retaliation and encourage them to come forward. The Legislature enacted section 1102.6 in 2003 in the wake of Enron, Worldcom and other corporate accounting scandals of that era. The legislative history reveals that it did so in order to strengthen section 1102.5 by shifting the burden of proof strongly in favor of the employee. Indeed, the history discloses:

> § 1. The Legislature finds and declares that unlawful activities of private corporations may result in damages not only to the corporation and its shareholders and investors, but also to employees of the corporation and the public at large.
>
> * * *
>
> *It is the intent of the Legislature to protect employees who refuse to act at the direction of their employer or refuse to participate in activities of an employer that would result in a violation of law.*

(Legislative History to §1102.6, Cal. Stats. 2003 Ch 484) (emphasis supplied). Hence, the legislative history of section 1102.6 leaves no doubt that the California Legislature was motivated by a goal to hold employers to

an elevated evidentiary standard in order to protect whistleblowers from retaliation and, for this precise purpose, it enacted section 1102.6, thus imposing on employers "the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons, even if the employee had not engaged in activities protected by section 1102.5." Cal. Labor Code §1102.6.

Significantly, the bill analysis of the section 1102.5 whistleblower claims reveals that the California Legislature expressly intended to replace the *McDonnell Douglas* burden-shifting framework with the section 1102.6 clear and convincing standard:

> Existing case law provides that, after a plaintiff shows by a preponderance of evidence that the action taken by the employer is proscribed by the whistleblower statute, the burden shifts to the employer to show by a preponderance of the evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by the whistleblower statute. [*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.]
>
> This bill ***instead*** requires the employer to make that showing by ***clear and convincing evidence***.

See S. Rules Comm. 2003-2004 Reg. Sess., Cal. Bill Analysis at Analysis, sec. 4 (amended on Aug. 18, 2003, published on Aug. 22, 2003 as Senate Floor Analyses) (emphasis supplied).

The Ninth Circuit in this case acknowledged this legislative history and concluded that "[t]he California legislature expressly adopted a burden-shifting evidentiary standard that seemingly replaced the *McDonnell Douglas* test for section 1102.5 retaliation claims." (Certification Order at 11).

The Ninth Circuit also roundly rejected PPG's argument that the section 1102.6 standard applies only to "mixed-motive" claims, because "the plain language of the provision imposes no such limitations. Nor does the statute's context indicate such a limitation." (Certification Order at 11 n.8.) Therefore, the plain language of the statute and its legislative history unequivocally mandate that section 1102.6 apply to all whistleblower claims brought under section 1102.5.

II. The Erroneous Application of the *McDonnell Douglas* Framework Would Have a Determinative Influence on the Outcome of this Matter

The *McDonnell Douglas* framework is substantially and materially different from the section 1102.6 evidentiary standard. As stated by the Ninth

Circuit, the district court's application of section 1102.6 in lieu of the *McDonnell Douglas* framework would enable Lawson to defeat PPG's motion for summary judgment.

The *McDonnell Douglas* framework assigns an appreciably higher evidentiary burden to plaintiffs and a correspondingly lower evidentiary burden to defendants. *McDonnell Douglas* places the ultimate burden of persuasion on the plaintiff all times, while assigning the defendant a "relatively light" burden to merely proffer a legitimate and nondiscriminatory reason.

By contrast, section 1102.6 places a greater evidentiary burden on the defendant. The Ninth Circuit held that "once the plaintiff has carried his initial burden to show that activity protected by section 1102.5 'was a contributing factor in the alleged prohibited action,' the burden of persuasion shifts from the plaintiff to the defendant 'to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by [s]ection 1102.5." Cal. Lab. Code § 1102.6. (Certification Order at p.16). Additionally, the Ninth Circuit held that the

plaintiff has no burden to show pretext, and once he has made his initial showing, the burden of persuasion stays with the defendant. *Id.*

III. The *McDonnell Douglas* Framework Does Not Displace Section 1102.6 in Federal Court

PPG fancifully argues that the *McDonnell Douglas* framework applies to section 1102.5 claims in federal court, wholly displacing section 1102.6 and rendering it a nullity. This argument flies in the face of the U.S. Supreme Court's holding in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). *Shady Grove* restricts the scope of federal procedural rules and dictates that they "shall not [alter] any substantive right." *Id.* at 395. The Court held that "[a] federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id.* at 423 (Stevens, J., concurring); *see also James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1217 (10th Cir. 2011) (explaining that Justice Stevens' concurrence provides the controlling analysis in *Shady Grove*). Because the California Legislature specifically intended section 1102.6 to expand the scope of protection to whistleblowers and to subject employers to a heightened evidentiary standard to defeat section 1102.5

retaliation claims, applying the *McDonnell Douglas* standard in federal court would substantially impair the substantive rights of whistleblowers and improperly subvert the will of the California Legislature.

IV. Applying the *McDonnell Douglas* Framework Conflicts with the California Legislature and the Court's Established History of Protecting Employees and Whistleblowers from Retaliation

A. The California Legislature Has Historically Protected Employees from Retaliation Consistent with a Longstanding Public Policy to Do So

California's strong policy of protecting whistleblowers from retaliation extends back several decades, beginning with the original enactment of section 1102.5 in 1984. Its enactment "reflects the broad public policy interest in encouraging workplace whistleblowers to report unlawful acts without fearing retaliation." *Diego v. Pilgrim United Church of Christ*, 231 Cal. App. 4th 913, 927 (2014). The California Legislature subsequently amended and expanded section 1102.5 several times to afford employees even more protection. The 2015 amendments to section 1102.5 expanded its reach to protect a broader group of employees, including a prohibition on anticipatory retaliation where the employer believes that the employee may report unlawful activity regardless of whether the employee has actually done so. Cal. Lab. Code, § 1102.5 subd. (b). The Legislature also added

safeguards for employees who internally report illegal conduct to either a supervisory or other employee who has authority to investigate. *Id.* Additionally, human resource employees who complain of violations of the law as part of their job duties are now explicitly protected. *Id.* Notably, section 1102.5 applies even where the employer is mistaken in believing that the employee reported unlawful conduct. *Prue v. Brady Company/San Diego, Inc.*, 242 Cal. App. 4th 1367, 1379-80 (2015). Protection further extends to an employee's family members who have, or are perceived to have, engaged in protected activities. Cal. Lab. Code, § 1102.5, subd. (h).

Significantly, when the California Legislature amended Labor Code section 1102.5 in 2003, it simultaneously added Labor Code section 1102.6. This reflects the Legislature's determination of California to enact some of the most protective whistleblower and retaliation laws in the nation. The California Legislature's decision to apply a clear and convincing evidence standard to section 1102.5 retaliation claims demonstrates that there are particularly important interests at stake. Moreover, as California courts have recognized, "[t]his policy benefits society at large, not any specific employer or employee." *Diego,* 231 Cal. App. 4th at 926 (2014).

B. Adoption of the Lenient *McDonnell Douglas* Framework Would Contradict the Legislature's Express Aim to Afford Greater Protection to Whistleblowers

The misapplication of the *McDonnell Douglas* framework to California Labor Code retaliation claims is injurious to California workers and contrary to settled California public policy of construing its Labor Code to protect California employees. This Court has consistently declined to import any federal standard where doing so expressly eliminates substantial protections or does harm to employees, thus underscoring the importance of preserving the protections afforded to employees under California law. As the California Supreme Court noted, "[f]ederal regulations provide a level of employee protection that a state may not derogate. Nevertheless, California is free to offer greater protection." *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 839 (2018). This Court has "'cautioned against 'confounding federal and state labor law'" and explained "that where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced." *Mendiola v. CPS Security Solutions, Inc.* 60 Cal.4th 833, 843 (2015).

On a number of occasions, this Court recognized the divergence between the California Labor Code and federal law, and generally found state

law more protective than federal law. *See., e.g. Frlekin v. Apple Inc.*, 8 Cal. 5th 1038, 1050 (2020) (noting that the California Supreme Court's "departure from the federal authority is entirely consistent with the recognized principle that state law may provide employees greater protection than the FLSA.") *See also Mendiola*, 60 Cal.4th at 843 (refusing to apply the sleep exemption that exists under the FLSA to California wage claims, thereby excluding "sleep time" from 24-hour shifts.)

The controlling policy underlying the California Labor Code is to promote the protection of employees. *McClean v. State of California*, 1 Cal. 5th 615, 622 (2016) (holding that "[i]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours, and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection."); *Von Nodurth v. Steck*, 227 Cal. App. 4th 524, 532 (2014) (holding that "[t]he provisions of both the Labor Code and the wage orders are to be liberally construed with an eye to promoting employee protections, and must be interpreted in the manner that best effectuates that protective intent.") Therefore, this Court should not apply the federal *McDonnell*

Douglas framework, which wholly fails to afford the same level of protection to employees as does the California Labor Code.

CONCLUSION

Based on the plain language of the section 1102.6 of the California Labor Code and its legislative history, and California court's rejection of the importation of federal standards into California law where employee rights would be impaired, this Court should rule that section 1102.6 applies to every whistleblower claim brought under section 1102.5 of the California Labor Code.

Date: March 12, 2021

Respectfully submitted

/s/ Chaka Okadigbo

Chaka Okadigbo
cokadigbo@hkm.com
HKM Employment Attorneys LLP
700 S. Flower Street, Suite 1067
Los Angeles, CA 90017
Tel: (213) 431-6209

Bruce C. Fox *(pro hac vice pending)*
bruce.fox@obermayer.com
Obermayer Rebmann
Maxwell &Hippel LLP
525 William Penn Place, Suite 1710
Pittsburgh, PA 15219
Tel: (412) 566-1500

Attorneys for Petitioner
Wallen Lawson

CERTIFICATE OF COMPLIANCE

Typeface and Size: The typeface selected for this Brief is 13-point Times New Roman. The font used in the preparation of this Brief is proportionately spaced.

Word Count: The word count for this Brief, excluding Table of Contents, Table of Authorities, and the Cover is 3,192 words. This count was calculated utilizing the word count feature of Microsoft Word 2016.

Dated: March 12, 2021

By: *<u>/s/ Chaka Okadigbo</u>*
Chaka Okadigbo

State of California)
County of Los Angeles)
)

Proof of Service by:
US Postal Service
Federal Express

I, Stephen Moore, declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017.

On 3/12/2021 declarant served the within: Opening Brief on the Merits
upon:

Copies FedEx USPS

ELECTRONICALLY SERVED VIA TRUEFILING:

Karin Morgan Cogbill • Michael Manoukian
HOPLINS & CARLEY
70 South First Street
San Jose, California 95113
kcogbill@hopkinscarley.com
mmanoukian@hopkinscarley.com
Attorneys for Respondent PPG Architectural Finishes, Inc.

Copies FedEx USPS

ELECTRONICALLY SERVED VIA TRUEFILING:

Rachael S. Lavi
LITTLER MENDELSON, P.C.
2049 Century Park East, Fifth Floor
Los Angeles, California 90067
rlavi@littler.com

Attorneys for Respondent PPG Architectural Finishes, Inc.

Copies FedEx USPS

ELECTRONICALLY SERVED VIA TRUEFILING:

Theodore A. Schroeder
LITTLER MENDELSON
625 Liberty Avenue, 26th Floor
Pittsburgh, Pennsylvania 15222
tschroeder@littler.com

Attorneys for Respondent PPG Architectural Finishes, Inc.

Copies FedEx USPS

ELECTRONICALLY SERVED VIA THE
NINTH CIRCUIT COURT'S CM/ECF SYSTEM:
Office of the Clerk
U.S. COURT OF APPEALS FOR THE
NINTH CIRCUIT
95 Seventh Street
San Francisco, California 94103-1526

the address(es) designated by said attorney(s) for that purpose by depositing **the number of copies indicated above,** of same, enclosed in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of California, or properly addressed wrapper in an Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of California

I further declare that this same day the **original and** copies has/have been hand delivered for filing OR the **original and** copies has/have been filed by third party commercial carrier for next business day delivery to:

ELECTRONICALLY FILED VIA TRUEFILING:

SUPREME COURT OF CALIFORNIA
350 McAllister Street
Room 1295
San Francisco, California 94102-4797

I declare under penalty of perjury that the foregoing is true and correct:

Signature: /s/ Stephen Moore, Senior Appellate Paralegal, Counsel Press Inc.; ca@counselpress.com