No.: S259522

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RAUL BERROTERAN II, Petitioner, *vs*. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent.	Court of Appeal, Second Appellate District, Division 1 No. B296639 Los Angeles County Superior Court No. BC542525
FORD MOTOR COMPANY, Real Party in Interest	

On Review of an Judgment Granting a Petition for Writ of Mandate

APPLICATION TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF IN SUPPORT OF RAUL BERROTERAN II

Alan Charles Dell'Ario, SBN 60955
ATTORNEY AT LAW
Post Office Box 359
Napa, California 94559
707 - 666 - 5351
charles@dellario.org

Attorney for Consumer Attorneys of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amicus curiae for Raul Berroteran II - Consumer Attorneys of California in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: November 17, 2020 By: /s/ Alan Charles Dell'Ario

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Amicus Curiae Brief

Consumer Attorneys of California requests that the attached amicus brief be submitted in support of plaintiff Raul Berroteran. Counsel are familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief addresses the "similar interest-and motive" prong of Code of Civil Procedure section 1291 as interpreted by the criminal cases and the impact of Code of Civil Procedure section 2025.620, subdivision (g) on the admissibility of the depositions in question. No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST

Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals who are injured or killed because of the negligent or wrongful acts of others, including governmental agencies and employees. CAOC has taken a leading role in advancing and protecting the rights of Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent plaintiffs injured or killed as the result of negligence, CAOC is

interested in the significant issues presented by the court of appeal's decision in this case as to the use of prior, out-of-state depositions in California litigation involving the same parties.

AMICUS CURIAE BRIEF

Section 1291, subdivision (a)(2) excepts from the hearsay rule prior testimony of an unavailable witness when offered against "a party to the proceeding where the testimony was given and where the party had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." The trial court based its decision to exclude the prior depositions as hearsay on *Walgren v. Coleco Indus., Inc.* (1984) 151 Cal.App.3d 543 *(Walgren)*, a case that "espouses a blanket proposition that a party has a different motive in examining a witness at a deposition than at a trial." (Slip opn. at 2.)

I. The Court's criminal cases inform the interpretation of subdivision (a)(2). The party's motive to cross-examine in the prior case need only be similar to its motive in the present case.

In rejecting *Walgren's* conclusion, the Court of Appeal relied on this Court's criminal jurisprudence involving section 1291. (Slip opn. at 21–23.) Ford dismisses the criminal cases. (Reply Br. at 18–19.) CAOC believes the Court's criminal cases warrant careful consideration because section 1291 implicates a criminal defendant's Sixth Amendment right to confront the witnesses against the defendant. Section 1291 codifies the "traditional

exception to the confrontation requirement" where the defendant had the opportunity and motive to cross-examine the witness whose prior testimony is being offered. (*People v. Alcala* (1992) 4 Cal.4th 742, 784–785 *(Alcala)*.) The Legislature could not have intended to afford civil litigants a greater right to exclude former testimony[1] than a criminal defendant whose rights are secured by the federal Constitution. "When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 340.)

The question is not, as Ford asserts, whether the prior testimony is from a witness hostile to the party in the prior proceeding. (Reply Br. at 19.) In *People v. Zapien* (1993) 4 Cal.4th 929 *(Zapien)*, the defendant made the same argument Ford makes here. The defendant argued his motives to cross examine at the preliminary hearing differed from trial because "extensive cross-examination at the earlier hearing might reveal damaging evidence" and "he did not wish to alienate" the witness who "might be a crucial witness" later. (*Id.* at p. 974.) The Court rejected the claim. Noting the testimony incriminating the defendant the witness gave at the preliminary hearing, the Court concluded, "[d]efendant's interest and motive in discrediting this testimony was identical at both proceedings." (*Ibid.*) The requirement that the party have a similar interest and motive is

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[1] Hearsay is admissible and may constitute substantial evidence to support a judgment unless the party against whom it is offered makes an objection. (*People v. Stepp* (1947) 82 Cal.App.2d 49, 51.)

satisfied notwithstanding the decision of defense counsel to alter the nature or scope of cross-examination. (*Alcala, supra*, 4 Cal.4th at p. 784.)

Similarly, in *People v. Samayoa* (1997) 15 Cal.4th 795, 850, the defendant's motive and interests in cross-examining the now-unavailable witness at the preliminary hearing were "to attempt to discredit the witness's account of the crime,. . . while at the same time, in light of the witness's sympathetic circumstances, not offending or alienating the trier of fact by treating the witness harshly." These motives were not dissimilar to the defense motive to elicit favorable, mitigating testimony at the penalty phase of the capital trial.

The revelation of information impeaching or discrediting the witness coming to light after the first hearing fails to alter the "similar motive" calculus. For example, in *People v. Gonzalez* (2012) 54 Cal.4th 1234, 1262, the defense had sufficient motive and opportunity to examine a child witness "regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony." The subsequently-developed information included a "diagnosis of posttraumatic stress disorder and depression by a doctor who examined him to determine whether testifying at trial would be harmful." (*Ibid.*)

What emerges from these cases is the principle that a motive and opportunity to discredit a witness - here Ford's desire to discredit adverse testimony from its former employees, while not alienating them- will be sufficiently similar to its purposes at trial such that section 1291's requirements are met.

No question exists that Ford had an opportunity to cross-examine or that the witnesses are now unavailable to Berroteran.

The only question is whether Ford's motives to cross-examine then and now are sufficiently similar to its motives in the current case.

Walgren purported to create a bright-line rule regarding civil depositions that does not withstand scrutiny. As the Court of Appeal pointed out, *Walgren* cited no authority for its "blanket assumption" that examination of one's client "is to be avoided." (Slip opn. at 23.) The basic rule of statutory construction is that statutes are to be interpreted according to the plain meaning of the words the Legislature used. If the statutory language is unambiguous, then the plain meaning controls. (*People v. Cole* (2006) 38 Cal.4th 964, 975.) Section 1291 does not distinguish between civil and criminal cases or between depositions and preliminary hearings. It only refers to "[t]he party against whom the former testimony is offered." No reason exists to suppose the Legislature intended a bright-line rule for the admissibility of former depositions.

Moreover, civil discovery practice has changed in the decades since *Walgren* was decided and the Assembly Judiciary Committee comment to section 1291, on which Ford relies, was drafted. The Legislature adopted the current substance of the civil discovery act in 1986, replacing that which had been adopted in 1957. (See generally 2 B. Witkin, California Evidence 5th (2012)Discovery §5; Stats. 1986, ch. 1334.) Non-substantive numbering changes were made in 2004. (*Ibid.*)

The 1986 statute was the first to authorize video depositions. (Former Code Civ. Proc., § 2025, subd. (o). It would take another ten years before this Court held the section authorized the party taking a deposition to request "nonverbal as well as verbal

responses at a videotaped deposition," such as a re-enactment of an accident. (*Emerson Elec. Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1104.)

Moreover, the Assembly Judiciary Committee comment itself indicates the trial court is to make an assessment of the intentions of the lawyer defending the prior deposition. Rather than applying a bright-line rule, "the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case." As the Court of Appeal concluded, "Ford made no showing that it lacked a similar motive to examine its witnesses during their deposition, and the record demonstrates just the opposite." (Slip opn. at 25.) The trial court seemingly held the question was simply whether former testimony was "trial testimony or deposition testimony." (Slip opn. at 15.) This was the wrong standard. A trial court abuses its discretion when it applies the wrong standard to the issue before it. (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1517.)

Ford reads *Walgren* and the Assembly Judiciary Committee comment to suggest a rule that would impute to every lawyer defending a deposition of a "friendly" witness an identical "motive" (or lack of one) to cross-examine. The Court of Appeal rejected that construction and this Court should, too.

II. To the extent Berroteran was a party to the former proceedings, the depositions were admissible under section 2025.620, subdivision (g).

Ford also dismisses section 2025.620, subdivision (g) which directly addresses the use of depositions taken in a prior action between the same parties to the current litigation. The Court of Appeal found addressing this section unnecessary. (Slip opn. at 14 fn. 8.) But the section represents a further, independent basis to admit the depositions. Subdivision (g) allows depositions taken in a prior action between between the same parties *or their representatives* to be used in the current action. (3 B.Witkin, California Evidence 5th (2012) Presentation at Trial § 171.)

Whether or not Berroteran is deemed a party to the Illinois class action, his class representatives certainly were. "Unnamed parties may be considered "parties" for the limited purpose of discovery, but those same unnamed parties are not considered "parties" to the litigation." (*Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 266.) An unnamed party does have a right to intervene and become a party with standing to appeal. (*Id.* at p. 267.) But the Court need not determine whether Berroteran was a party or not. His class representatives were parties and that is all the subdivision requires. (*Id.* at p. 266 [class representatives are fiduciaries of unnamed plaintiffs].)

Although the Court of Appeal did not reach this question, the Court may still affirm its decision based on the subdivision. "[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon

any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*Zapien*, *supra*, 4 Cal.4th at p. 976.)

III. Conclusion - the deposition testimony is trustworthy.

In the end, the question of whether or not hearsay should be admissible is one of trustworthiness. The former testimony of a witness who is unavailable in the current proceeding is deemed sufficiently trustworthy if the opponent had the opportunity and similar motive to cross-examine in the prior proceeding. As between the same parties and/or their representatives, the identity of interest supplies the trustworthiness.

Both indicia of trustworthiness are present here. The Court should affirm the judgment of the Court of Appeal.

Respectfully submitted,

Dated: November 17, 2020 By: /s/ Alan Charles Dell'Ario

Attorney for Amicus curiae
for Raul Berroteran II
Consumer Attorneys of
California

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **1,826** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Dated: November 17, 2020 By: /s/ Alan Charles Dell'Ario

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Dated: November 18, 2020 By: /s/ Alan Charles Dell'Ario

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S259522**
Lower Court Case Number: **B296639**

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Connie Gutierrez Faegre Drinker Biddle & Reath LLP	connie.gutierrez@dbr.com	e-Serve	11/18/2020 2:01:14 PM
J Warfield Polsinelli LLP 186559	jalanwarfield@polsinelli.com	e-Serve	11/18/2020 2:01:14 PM
Matthew Proudfoot Gates, O'Doherty, Gonter & Guy, LLP	mproudfoot@gogglaw.com	e-Serve	11/18/2020 2:01:14 PM
Cara Sherman ONGARO PC 269343	csherman@ongaropc.com	e-Serve	11/18/2020 2:01:14 PM
Julian Senior SJL Law. P.C 219098	admin@sjllegal.com	e-Serve	11/18/2020 2:01:14 PM
Jo-Anne Novik Horvitz & Levy LLP	jnovik@horvitzlevy.com	e-Serve	11/18/2020 2:01:14 PM

Alan Lazarus Faegre Drinker Biddle & Reath LLP 129767	alan.lazarus@dbr.com	e-Serve	11/18/2020 2:01:14 PM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	11/18/2020 2:01:14 PM
Justin Sanders Sanders Roberts LLP 211488	breyes@sandersroberts.com	e-Serve	11/18/2020 2:01:14 PM
Lisa Perrochet Horvitz & Levy LLP 132858	lperrochet@horvitzlevy.com	e-Serve	11/18/2020 2:01:14 PM
Justin Sanders Sanders Roberts LLP	jsanders@sandersroberts.com	e-Serve	11/18/2020 2:01:14 PM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	11/18/2020 2:01:14 PM
Fred Hiestand Attorney at Law 44241	fred@fjh-law.com	e-Serve	11/18/2020 2:01:14 PM
Alan Charles Dell'Ario Law Offices of A. Charles Dell'Ario 60955	charles@dellario.org	e-Serve	11/18/2020 2:01:14 PM
Nadia Sarkis Greines, Martin, Stein & Richland LLP 227778	nsarkis@gmsr.com	e-Serve	11/18/2020 2:01:14 PM
John M. Thomas Dykema Gossett 266842	jthomas@dykema.com	e-Serve	11/18/2020 2:01:14 PM

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/s/Alan Charles Dell'Ario

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Dell'Ario, Alan Charles (60955)

Last Name, First Name (PNum)

Law Offices of A. Charles Dell'Ario

Law Firm