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SUPREME COURT
FILED

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Deputy

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEOPOLDO PENA MENDOZA, ET AL.,

Plaintiffs and Appellants,

v.

FONSECA McELROY GRINDING, INC., ET AL.,

Defendants and Respondents.

After a Decision by the United States Court of Appeals
for the Ninth Circuit, Case No. 17-15221

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF CALIFORNIA CONSTRUCTION AND INDUSTRIAL MATERIALS ASSOCIATION IN SUPPORT OF RESPONDENTS

JEFFER MANGELS BUTLER & MITCHELL LLP
KERRY SHAPIRO (Bar No. 133912)
kshapiro@jmbm.com
MATTHEW D. HINKS (Bar No. 200750)
mhinks@jmbm.com
MARTIN P. STRATTE (Bar No. 290045)
mstratte@jmbm.com
Two Embarcadero Center, 5th Floor
San Francisco, California 94111-3813
Telephone: (415) 398-8080
Facsimile: (415) 398-5584

Attorneys for Amicus Curiae California Construction and Industrial Materials Association

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Construction and Industrial Materials Association ("CalCIMA") respectfully requests permission to file the attached amicus curiae brief that is combined with this application.

CalCIMA is a non-profit organization and trade association for the construction and industrial material industries in California, which includes producers of construction aggregates, industrial minerals, and ready mixed concrete. These producers provide people and businesses with aggregate, cement, concrete, and other materials used to build and repair California's roads, homes, schools, airports, bridges, and other public infrastructure.

CalCIMA's members also include equipment vendors, service providers, and multidivisional companies that both produce construction materials and provide general contracting construction services.

CalCIMA serves its members and the public by providing information on construction aggregates, industrial minerals, and ready mixed concrete; supplying safety, technical, and environmental compliance training; and addressing legislative, regulatory, and judicial matters that affect the construction and industrial materials industries.

Because CalCIMA's members provide construction materials and equipment to public works projects that are sometimes subject to California prevailing wage laws, CalCIMA is interested in filing this application to address the important question certified for resolution by this Court, which the United States Court of Appeals for the Ninth Circuit referred to as one that "could yield wide-ranging results." (Certification Order, p. 18.)

CalCIMA closely monitors issues related to prevailing wage laws and seeks to address the certified question because the outcome of this

action could (i) alter the manner in which the delivery of things (equipment in particular) to prevailing wage jobsites is classified under the prevailing wage laws, and (ii) alter the classification of offsite work performed at locations that are not dedicated to prevailing wage jobsites. The manner in which the Court resolves these issues could necessitate changes to the operations of CalCIMA's diverse members, whose companies provide a variety of services that at times are associated with prevailing wage projects throughout the state.

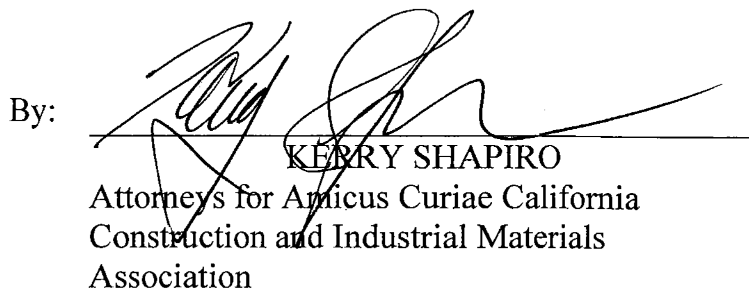
CalCIMA's brief will assist the Court in deciding this matter by providing additional analysis regarding why Appellants' offsite mobilization work is distinguishable from the type of work intended to be subject to prevailing wage laws.

For the reasons stated above, CalCIMA respectfully requests leave to file the brief that is combined with this application.

The amicus curiae brief was authored by Kerry Shapiro, Matthew Hinks, and Martin Stratte of Jeffer Mangels Butler & Mitchell LLP. No party or party's counsel made a monetary contribution to fund the preparation or submission of the brief.

DATED: December 2, 2019

JEFFER MANGELS BUTLER & MITCHELL LLP
KERRY SHAPIRO
MATTHEW D. HINKS
MARTIN P. STRATTE

By: 
KERRY SHAPIRO
Attorneys for Amicus Curiae California Construction and Industrial Materials Association

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I.

INTRODUCTION

The United States Court of Appeals for the Ninth Circuit described the resolution of this action as one that "could yield wide-ranging results." (Cert. Or., 18.) Before that, the District Court concluded this action could affect the "transportation of many things needed for a public works construction jobs, such as 'tools, portable toilets, generators, portable water, lumber, asphalt, steel, . . . cranes, etc.' for on-site use." (ER 14, lines 17-19.)

Due to the potentially significant ramifications of this action, the California Construction and Industrial Materials Association ("CalCIMA") provides the following discussion in support of Respondents.

CalCIMA's members are concerned that arguments raised by Appellants would create uncertainty with respect to the application and longstanding interpretation of the prevailing wage laws.

II.

CALCIMA'S INTEREST

CalCIMA is a trade association for the construction and industrial materials industries in California, which include aggregate, industrial minerals, and ready-mixed concrete producers. These producers provide people and businesses with aggregate, cement, concrete, and other materials used to build and repair California's roads, homes, schools, hospitals, transit and water systems, airports, bridges, and other public infrastructure.

CalCIMA's members include about 75 producer members, including Defendant and Respondent Granite Rock Company, from a variety of construction and industrial materials companies. These members own and/or operate more than 500 production sites throughout California. Many of these members are multidivisional companies that both produce construction materials and provide general contracting construction

services. CalCIMA's members also include more than 70 equipment vendors and service providers.

CalCIMA serves its members and the public by providing information on construction aggregates, industrial minerals, and ready mixed concrete; supplying safety, technical, and environmental compliance training; and addressing legislative, regulatory, and judicial matters that affect the construction and industrial materials industries.

CalCIMA closely monitors issues and pending litigation related to prevailing wage laws, because changes to those laws can significantly impact the operations of CalCIMA's members.

For example, CalCIMA had serious concerns regarding the operational implications of AB 219, which expanded prevailing wage laws to include offsite activities: specifically, the "hauling and delivery of ready-mixed concrete to carry out a public works contract". Cal. Lab. Code § 1720.9. That expansion continues to significantly impact the operations of CalCIMA's ready-mixed concrete producer members and the larger ready-mixed concrete industry of which they are part.

With respect to the pending litigation, CalCIMA is concerned that the Court's decision in this case could have similar consequences for CalCIMA's members, which provide a variety of construction materials and equipment to public works projects that are sometimes subject to California prevailing wage laws. Accordingly, CalCIMA's members could be impacted by the bright-line rule sought by Appellants, who seek a determination that prevailing wage laws apply to non-construction activities occurring at offsite locations not dedicated to public works contracts, such as the facilities of CalCIMA's members.

As the trade association and representative for the construction and industrial materials industries in California, CalCIMA is uniquely positioned to discuss the wide-ranging ramifications of this action.

III.

SUMMARY OF ARGUMENT

Appellants ask the Court to establish a bright-line rule declaring that offsite "mobilization work" is, as a matter of law, subject to prevailing wage laws, if that work is performed by a worker who also performs work on a prevailing wage jobsite. However, by focusing upon who is performing the offsite work, rather than whether the work performed is integral to the construction activities at a prevailing wage jobsite, Appellants' proposed rule is not consistent with the statutory text at issue in these proceedings or the manner in which the courts have interpreted and applied the statute. Moreover, Appellants fail to provide evidence suggesting that the Legislature intended prevailing wage laws to apply to offsite mobilization work. Thus, Appellants' proposed rule would greatly expand the application of prevailing wage laws to many activities impacting CalCIMA without evidence of a legislative intent to do so. The Court should therefore reject Appellants' proposed bright line rule and confirm that offsite activities that are not "functionally related to the process of construction" or an "integrated aspect of the 'flow' process of construction" are not performed "in the execution" of a contract for public work and therefore, not subject to the prevailing wage laws.

In addition, the Court should disregard Appellants' criticism of the material supplier exception, because the doctrine has not been placed at issue in this action.

IV.

ARGUMENT

For the reasons set forth below, the Court should reject the bright-line rule sought by Appellants.

A. Appellants' Mobilization Work was not Performed "in the Execution" of a Public Works Contract

Whether an activity is subject to prevailing wage laws depends upon the "role" the activity plays "in the execution" of a public works contract. *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 752 (discussing Cal. Lab. Code § 1772). An activity may be deemed to be performed "in the execution" of a public works contract if the activity is "functionally related to" or an "integrated aspect of the 'flow' process of construction." *Williams, supra*, 156 Cal.App.4th at p. 751 (citing *Green v. Jones* (1964) 23 Wis.2d 551, 563). Here, Appellants' offsite mobilization work, which consisted of (i) equipment transport, and (ii) offsite equipment maintenance, was not performed "in the execution" of a public works contract under these standards.

As an initial matter, as the Ninth Circuit recognized, Appellants failed to provide "evidence of the custom or practice of the industry regarding transportation of heavy equipment to public works project sites" or evidence regarding whether "offsite mobilization work was 'an integrated aspect of the "flow" process of construction.'" Certification Order, pp. 11-12. The District Court made similar observations. ER 13, lines 22-23; ER 14-15, lines 24-4 ["Therefore, there is nothing to support a conclusion that the 'transport was required to carry out a term of the public works contract.'" (citing *Williams, supra*, 156 Cal.App.4th at pp. 752, 754)]. Thus, Appellants failed to satisfy their burden on appeal to overcome the "presumption of regularity" that attaches to final judgments. *Parke v. Raley* (1992) 506 U.S. 20, 29 [113 S.Ct. 517, 523, 121 L.Ed.2d 391].

In any event, there is evidence in the record relevant to the issue of applicable industry custom and practice, and that evidence is contrary to Appellants' argument. In particular, as Appellants themselves explained in their Opening Brief (hereinafter "AOB"), Appellants' union representatives

at Operating Engineers Local No. 3 ("Local No. 3") negotiated a non-prevailing wage rate for offsite mobilization work. AOB, pp. 10-11; ER 300-303 (Stipulated Undisputed Material Facts), ¶ 4, attaching Memorandum of Agreement at ER 402-403 (referring to offsite mobilization work as "Lowbed Transport"). Local No. 3's assent to a rate for offsite mobilization that was lower than the prevailing wages detailed in the 2013-2016 Master Agreement for Northern California (including the prevailing wage for Appellants' onsite work), evidences an industry custom of deeming offsite mobilization work as work not performed "in the execution" of a public works contract. ER 300-303 (Stipulated Undisputed Material Facts), ¶ 3, attaching 2013-2016 Master Agreement at ER 304-400. Thus, the Memorandum of Agreement is the best evidence in the record regarding the applicable industry custom and practice.

Moreover, with respect to the equipment transportation component of Appellants' mobilization work, Appellants assert their transportation of the grinding equipment to the prevailing wage jobsite was the "primary aspect" of the mobilization work entitling them to a prevailing wage. AOB, p. 17. However, like all activities, whether the transportation of materials and equipment to a public works jobsite is performed "in the execution" of a public works contract depends upon its role in a party's performance of the contract. *Williams, supra*, 156 Cal.App.4th at p. 752 ["We conclude that what is important in determining the application of the prevailing wage law is not whether the truck driver carries materials to or from the public works site. What is determinative is the role the transport of the materials plays in the performance or 'execution' of the public works contract" (italics omitted)]. Appellants' proposed bright-line rule therefore sweeps too broadly.

Appellants argue that, as a practical matter, "it would have been impossible for them to perform their road-grinding" work onsite, had they

not retrieved the equipment from offsite. AOB, p. 17. But that does not mean their offsite activities were necessarily performed "in the execution" of a public works contract for purposes of prevailing wage laws. Indeed, companies engage in a multitude of activities, from hiring employees to processing payroll, expenses and receivables, that are also "necessary" for the work their employees perform at a prevailing wage job site, but which are not subject to prevailing wage laws.

A similar argument to the one Appellants make here has been previously considered and rejected. Like Appellants, the plaintiff in *Williams, supra*, 156 Cal.App.4th 742, argued that the off-haul of materials was "necessary" "as part of the completion of the overall [public works] project" and therefore subject to a prevailing wage. *Id.* at p. 753 (modification in original). The court rejected that conclusory argument, because plaintiff had failed to establish that such work was "'an integrated aspect of the "flow" process of construction.'" *Ibid.*

Like the *Williams* plaintiff, Appellants have not carried their burden of demonstrating that offsite mobilization work was "functionally related to" or an "integrated aspect of the 'flow' process of construction." Equipment may be transferred to and from a job site for a multitude of reasons. The equipment may be needed at a different job site. The equipment may be in need of repair or maintenance. Or, a company may transfer equipment to and from a job site for security reasons. Absent any evidence of a "connection" between the act of transporting a piece of equipment and the use of the equipment within the flow of process of construction, Appellants have failed to establish that the transportation of equipment between a public works jobsite and a non-dedicated remote location is "in the execution" of a contract for public work. Appellants have therefore failed to justify a basis to impose the broad bright-line rule they seek.

Finally, with respect to offsite equipment maintenance component of Appellants' mobilization work (and irrespective of whether the transportation component of Appellants' offsite mobilization work is subject to prevailing wage laws, which, as discussed above, is not), Appellants have not justified why prevailing wage laws should apply. For example, although *Green, supra*, 23 Wis.2d 551, concluded that the plaintiffs were entitled to a prevailing wage for their spreading of road base performed in furtherance of the public works contract and on a public works jobsite, they were not also entitled to a prevailing wage for their offsite maintenance of the trucks used to spread the road base—*i.e.*, their *equipment* used to perform the onsite work.

Appellants overlook this distinction and instead assert that they are entitled to a prevailing wage for offsite maintenance simply because they use the equipment on a prevailing wage jobsite. Thus, Appellants ask the Court to focus on *who* performs an activity, instead of the "role" an activity plays "in the execution" of a public works contract; but, that approach is contrary to applicable precedent. *Williams, supra*, 156 Cal.App.4th at p. 752 [the "role" an activity plays "in the execution" of a public works contract is the determinative factor with respect to whether the activity is subject to prevailing wage laws].

In sum, Appellants' offsite mobilization work is distinguishable from their onsite work—*i.e.*, road grinding—which was a component of the subject public works contracts. The mere fact that Appellants performed onsite work subject to prevailing wage laws does not mean their offsite activities were necessarily performed "in the execution" of a public works contract. Accordingly, the Court should reject the bright-line rule proposed by Appellants, because it will impermissibly expand the application of prevailing wage laws. Instead, the Court should confirm that offsite activities that are not "functionally related to the process of construction" or

an "integrated aspect of the 'flow' process of construction" are not "in the execution" of a contract for public work within the meaning of Labor Code § 1772.

B. Appellants have not Provided Evidence of a Legislative Intent to Apply Prevailing Wage Laws to Offsite Mobilization Work

In their reply brief, Appellants cite Labor Code sections 1720.3 and 1720.9 as support for the following statement: "just because the Legislature has singled out certain type[s] of offsite work as constituting a public work, does not mean that it intended these sections to constitute the entire universe of off-work-site activity for which a prevailing wage is owed." Appellants' Reply Brief, p. 7.

But Appellants' briefs fail to provide evidence that the Legislature *did* intend to subject the "entire universe" of offsite mobilization work to prevailing wage laws. If the Legislature had done so, there would presumably be a robust record of associated legislative facts and justifications similar to that discussed in *Allied Concrete and Supply Co. v. Baker* (2018) 904 F.3d 1053.

The resolution of *Allied* turned on the Ninth Circuit's application of the rational basis test to plaintiffs' equal protection claim challenging the amendment. *Allied, supra*, 904 F.3d at p. 1060. In applying the rational basis test, the Ninth Circuit considered the "overall purpose of the prevailing wage law", as previously discussed by this Court in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987. That "overall purpose" includes the following three goals: "(1) generally protecting employees on public works projects, (2) benefitting the public through the superior efficiency of well-paid employees, and (3) permitting union contractors to compete with nonunion contractors." *Allied, supra*, 904 F.3d at p. 1061 (citing *Lusardi* at p. 987).

The Ninth Circuit ultimately concluded that the facts and justifications cited by the Legislature were sufficient to withstand plaintiffs' equal protection claim. *Allied, supra*, 904 F.3d at pp. 1060-1066.

The critical difference between *Allied* and the instant litigation is that Allied arose from formal action taken by the Legislature to amend the prevailing wage laws. Similar legislative action would be necessary to implement the interpretation being requested by Appellants.[1]

Appellants argue that prevailing wage laws should be "liberally construed." AOB, p. 6. But Appellants fail to provide evidence that the Legislature ever intended prevailing wage laws to apply to offsite mobilization work. *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 306-307 ["Courts will liberally construe prevailing wage statutes, but they cannot interfere where the Legislature has demonstrated the ability to make its intent clear and chosen not to act. We do not share plaintiffs' view that the Legislature has overlooked changes in county needs or practices in this area. It has in fact been active." (citing *McIntosh v. Aubry* (1993) 14 Cal.App.4th, 1576, 1588-1589, internal citations omitted in original).]

Accordingly, the Court should reject Appellants' unsupported assertion that the Legislature intended prevailing wage laws to apply to offsite mobilization work.

C. The Court Should Disregard Appellants' Criticism of the Material Supplier Exception

The material supplier exception is of immense importance to CalCIMA's members, who rely on this doctrine, as articulated in *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434

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[1] *I.e.*, a bright-line rule declaring that all offsite mobilization work is, as a matter of law, subject to prevailing wage laws, if the work is performed by a worker who also performs onsite activities at a prevailing wage jobsite.

and *Williams, supra*, 156 Cal.App.4th 742, for confirmation that prevailing wages laws do not apply to the delivery of construction and industrial materials to public works jobsites.

Over the years, the validity of the doctrine has been recognized and applied by the Department of Industrial Relations ("DIR") on multiple occasions.[2] The Legislature has also recognized its validity. For example, in 2015, when the Legislature approved AB 219,[3] it explained that: "Under current law and DIR precedent, the employees of subcontractors who haul material to prevailing wage sites must be paid prevailing wage. Conversely, employees of bona fide material suppliers are excluded from prevailing wage requirements." AB 219, 2015-2016 Reg. Session, Senate Committee Bill Analysis.

Appellants here criticize the doctrine multiple times throughout their opening brief, even though they also acknowledge that the doctrine has "no application" to this case. AOB, pp. 7, 19.[4] Appellants' criticism is misguided given that California courts, DIR, and the Legislature have repeatedly recognized the validity of the doctrine for several decades.

CalCIMA is concerned by Appellants' remarks because the doctrine confirms that the delivery of construction and industrial materials to a public works jobsite is not subject to prevailing wage laws. The doctrine

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[2] *See, e.g.*, Public Works Case No. 99-047 (Alameda Corridor Project) ER 46; Public Works Case No. 2002-016 (Clear Lake Basin) ER 60; Public Works Case No. 2008-027 (City of Morgan Hill) ER 63-64; Public Works Case No. 04-0180 PWH (Triple E Trucking) ER 72-74.
[3] AB 219 enacted Labor Code section 1720.9, which amended prevailing wage laws to include offsite activities; specifically, the "hauling and delivery of ready-mixed concrete to carry out a public works contract". Cal. Lab. Code § 1720.9.
[4] In fact, Appellants have previously stated that, "The material supplier exemption is not at issue in this case" (capitalization omitted). Appellants' Ninth Circuit Opening Brief, Doc. ID: 10475775, p. 20, § D.

therefore ensures that prevailing wages laws are not misapplied to activities that are independent of work performed in furtherance of a public works contract. Thus, the alteration of the doctrine would cause significant confusion regarding the applicability of prevailing wage laws to the operations of CalCIMA's members, including the delivery of construction materials to prevailing wage jobsites. *Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 213 (citing *McIntosh, supra*, 14 Cal.App.4th at p. 1593, superseded by statute) ["[P]arties must be able to predict the public-works consequences of their actions under reasonably precise criteria and clear precedent"].

Such a significant change in the law should not occur in a matter in which the issue has not been fully briefed or developed in the lower courts. Accordingly, CalCIMA respectfully submits that the Court, in resolving this action, should not alter the application of the material supplier exception, because the doctrine has not been placed at issue in this action.[5]

V.

CONCLUSION

Based on the foregoing, CalCIMA respectfully requests that the Court deny the relief sought by Appellants.

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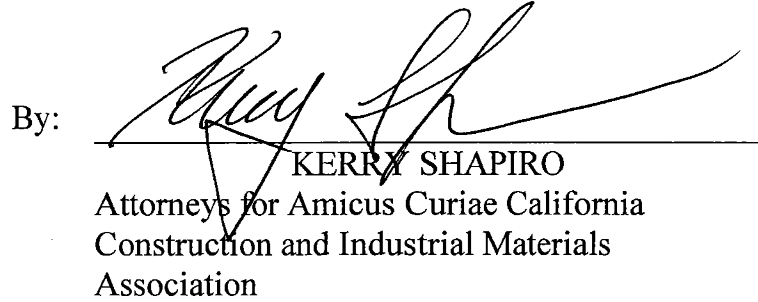
[5] *Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 793 ["In addressing the issue presented here, we emphasize that our role is only to answer the 'question of California law' that the Ninth Circuit posed to us. (Cal. Rules of Court, rule 8.548(a))"].

DATED: December 2, 2019

JEFFER MANGELS BUTLER & MITCHELL LLP
KERRY SHAPIRO
MATTHEW D. HINKS
MARTIN P. STRATTE

By: 

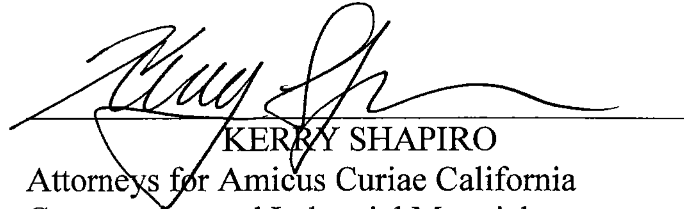
KERRY SHAPIRO
Attorneys for Amicus Curiae California Construction and Industrial Materials Association

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)(1)

Pursuant to California Rules of Court Rule 8.204(c)(1) I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 3,511 words.

DATED: December 2, 2019

JEFFER MANGELS BUTLER & MITCHELL LLP
KERRY SHAPIRO
MATTHEW D. HINKS
MARTIN P. STRATTE

By: 

KERRY SHAPIRO
Attorneys for Amicus Curiae California Construction and Industrial Materials Association

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Two Embarcadero Center, 5th Floor, San Francisco, CA 94111-3813.

On December 3, 2019, I served true copies of the following document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF CALIFORNIA CONSTRUCTION AND INDUSTRIAL MATERIALS ASSOCIATION IN SUPPORT OF RESPONDENTS** as follows:

United States Court of appeals for the Ninth Circuit
James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103
T.: (415) 355-8000

Case No.: 17-15221

Tomas E. Margain, Esq.
Justice at Work Law Group
84 West Santa Clara St., Ste. 790
San Jose, CA 95113
T. (408) 317-1100
Email: tomas@jawlawgroup.com

Attorneys for Plaintiffs/Appellants
Leopoldo Pena Mendoza, Elviz Sanchez and Jose Armando Cortes

Paul V. Simpson, Esq.
Sarah E. Lucas, Esq.
Simpson, Garrity, Innes & Jacuzzi, P.C.

Hon. William H. Orrick
District Judge
United States District Court for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102
T.: (415) 522-2000

Case No.: 3:15-cv-05143-WHO

Stuart B. Esner, Esq.
Holly N. Boyer, Esq.
Esner, Chang & Boyer
234 East Colorado Blvd., Ste. 975
Pasadena, CA 91101
T. (626) 535-9860
Email: sesner@ecbappeal.com
hboyer@ecbappeal.com

Attorneys for Plaintiffs/Appellants
Leopoldo Pena Mendoza, Elviz Sanchez and Jose Armando Cortes

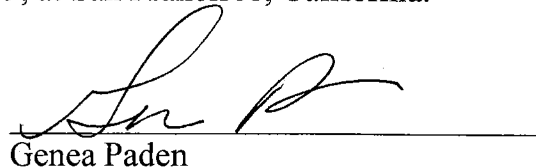
601 Gateway Blvd., Suite 950
South San Francisco, CA 94080
T. (650) 615-4860
Email: psimpson@sgijlaw.com
slucas@sgijlaw.com

Attorneys for Defendants/Respondents
Fonseca McElroy Grinding, Co., Inc.
and Granite Rock Company

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Jeffer Mangels Butler & Mitchell LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

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

Executed on December 3, 2019, at San Francisco, California.



Genea Paden