S235357

IN THE SUPREME COUT OF THE STATE OF CALIFORNIA

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DOMINIQUE LOPEZ,

Plaintiff, Appellant, and Petitioner,

vs.

SONY ELECTRONICS, INC.,

Defendant and Respondent.

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After A Decision By The Court Of Appeal,
Second Appellate District, Case No. B256792;
Los Angeles County Superior Court, Case No. BC476544

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PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Plaintiff, Appellant, and Petitioner Dominique Lopez (Dominique) hereby submits this reply brief on the merits.

INTRODUCTION

As shown by Dominique in her opening brief, the judgment of the Court of Appeal should be reversed because the statute of limitations applicable to her claim is Code of Civil Procedure section 340.8,[1] not section 340.4, and this action was timely filed under it. Section 340.8 is applicable based on its clear language and because it is a later, more specific statute.

In its answer brief, Defendant and Respondent Sony Electronics, Inc. (Defendant Sony or Sony) argues that the judgment of the Court of Appeal should be affirmed because this action is subject to and barred by the statute of limitations in section 340.4. Sony argues that nothing in the language or legislative history of section 340.8 indicates that the Legislature intended a claim for prebirth injuries based on exposure to a hazardous material or toxic substance to be governed by section 340.8, rather than section 340.4, and that the application of section 340.8 to such a claim would contravene the Legislature's intent.

These arguments fail because Defendant Sony ignores the rules of statutory construction. "'If no ambiguity appears in the statutory language,

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[1] Unless stated otherwise, all undesignated statutory references are to the Code of Civil Procedure.

we presume that the Legislature meant what it said, and the plain meaning of the statute controls.'" (*People v. Gray* (2014) 58 Cal.4th 901, 906, quoting *People v. Stanley* (2012) 54 Cal.4th 734, 737.) As both the court in *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522 (*Nguyen*) and the dissent in the Court of Appeal in this case found, there is no ambiguity in the language of section 340.8, and the plain meaning of its clear language shows that it is the statute of limitations applicable to an action for prebirth toxic substance injuries. Sony cannot change the plain meaning of the statute by ignoring or asking this Court to rewrite its language or by resorting to its legislative history. "Although legislative history often can help interpret an ambiguous statute, it cannot change the plain meaning of clear language." (*In re Steele* (2004) 32 Cal.4th 682, 694.) Moreover, even if the legislative history of section 340.8 is considered, it does not support Sony's interpretation of the statute. Consistent with its statutory language, the legislative history shows that section 340.8 was enacted to establish a *separate* statute of limitations applicable to *all* actions for injury based on exposure to a hazardous material or toxic substance, *regardless of age*, except actions for injury based on exposure to asbestos or the professional negligence of a health care provider.

Accordingly, this Court should find, like the court in *Nguyen* and dissent below, that section 340.8 is the statute of limitations applicable to an action for prebirth injuries based on exposure to a hazardous material or

toxic substance, and it should reverse the judgment of the Court of Appeal because this action was timely filed under section 340.8.

LEGAL DISCUSSION

I. SECTION 340.8 IS THE APPLICABLE STATUTE OF LIMITATIONS BASED ON THE PLAIN MEANING OF ITS CLEAR LANGUAGE.

As discussed by Dominique in her opening brief, based on a plain language analysis, the statute of limitations applicable to her claim is section 340.8, not section 340.4. (Petitioner's Opening Brief on the Merits (OBM) at pp. 15-36.) Defendant Sony disagrees. It argues that section 340.4 is applicable because "[n]either the text nor the legislative history of section 340.8 mentions section 340.4, or claims arising from prenatal injuries," and because "[n]othing in the statute or in its legislative history states that the Legislature intended section 340.8 to have any effect whatsoever on the applicability of section 340.4." (Respondent's Answer Brief on the Merits (ABM) at p. 19; see also *id.* at pp. 4-5.) Sony is wrong, as it ignores the clear language of section 340.8 and improperly attempts to rewrite the statute using its legislative history.

A. The Clear Language Of Section 340.8 Establishes That It Is The Applicable Statute Of Limitations.

In her opening brief, Dominique explained in detail that, based on the plain meaning of its clear language, section 340.8, not section 340.4, is the statute of limitations applicable to an action for prebirth injuries based

on exposure to a hazardous material or toxic substance. (OBM at pp. 18-26.) First, section 340.8 is an all encompassing statute of limitations that applies to "any" – and thus every – "civil action for injury or illness based upon exposure to a hazardous material or toxic substance." (Code Civ. Proc., § 340.8, subd. (a); see *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 ["the word 'any' means without limit and no matter what kind"]; *California State Auto. Ass'n Inter-Ins. Bureau v. Warwick* (1976) 17 Cal.3d 190, 195 ["From the earliest days of statehood we have interpreted 'any' to be broad, general and all embracing. . . . [T]he word 'any' means every ...."]; *California Highway Patrol v. Superior Court* (2008) 158 Cal.App.4th 726, 737 ["[T]he ordinary meaning of the word 'any' is clear, and its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application."].)

Second, pursuant to its express language, section 340.8 excludes only two types of actions from its broad scope: (1) actions "subject to Section 340.2," the statute of limitations for asbestos-related injury claims; and (2) actions "subject to Section . . . 340.5," the statute of limitations for injury claims based on the professional negligence of a health care provider. (Code Civ. Proc., § 340.8, subd. (c)(1); *Nguyen*, *supra*, 229 Cal. App.4th at pp. 1540, 1546.) Section 340.8 does *not* exclude actions subject to section 340.4 from its coverage, i.e., actions for prebirth or birth injuries. (Code Civ. Proc., § 340.8, subd. (c)(1); *Nguyen*, at p. 1546.)

Third, the language in subdivision (d) of section 340.8 shows that while the statute was not intended to "change the law in effect . . . with respect to actions *not based upon exposure to a hazardous material or toxic substance*," (Code Civ. Proc., § 340.8, subd. (d), italics added), it was intended to "change the law in effect" with respect to actions that *are* based on exposure to a hazardous material or toxic substance, by making *all* such actions subject to its provisions, except for the two exclusions expressly specified in the statute. (See *Nguyen*, *supra*, 229 Cal.App.4th at p. 1548 [holding that subdivision (d) "supports the conclusion that section 340.8 was intended to change existing law regarding the limitations periods for actions 'based upon exposure to a hazardous material or toxic substance,' but not other types of actions"]; *Lopez*, typed dis. opn. of Rubin, J., at p. 8 ["the full import of this language [in subdivision (d)] becomes apparent by holding it up to an analytical mirror and examining its corollary obverse: Section 340.8 does 'limit, abrogate, and change the law in effect upon the effective date . . . with respect to actions' that are based on exposure to toxic substances. That language shows a clear intent to affect section 340.4, albeit by necessary inclusion, if not express iteration."].)

All of these provisions, read together according to their plain meaning, demonstrate that section 340.8 was intended to establish a separate statute of limitations having broad application to virtually *all* actions for injury based on exposure to hazardous materials or toxic

substances, *including prebirth injuries.* (See *People v. Blackburn* (2015) 61 Cal. 4th 1113, 1123 [a statute's provisions are to be read in "light of the statute as a whole"]; *City of Huntington Beach v. Board of Admin.* (1992) 4 Cal.4th 462, 468 ["all parts of a statute should be read together"]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54 ["In construing the words of a statute . . . to discern its purpose, the provisions should be read together . . . ."].) This was the analysis and conclusion of the court in *Nguyen* and the dissent below, (*Nguyen, supra,* 229 Cal.App.4th at pp. 1528, 1539-1540, 1543-1551; *Lopez,* typed dis. opn. of Rubin, J., at pp. 1-2, 4-13), and it should be the analysis and conclusion of this Court.

B. Defendant Sony's Arguments Regarding The Language Of Section 340.8 Are Meritless.

Unhappy with the plain meaning of section 340.8, Defendant Sony tries to avoid it by manufacturing an exclusion in the statute for actions subject to section 340.4, even though the Legislature chose not to include one itself. With respect to the application of section 340.8 to "any" action "based on exposure to a hazardous material or toxic substance," (Code Civ. Proc., § 340.8, subd. (a)), Sony argues that the Legislature's use "of the word 'any' . . . should not be interpreted as enacting an abrogation of section 340.4 . . . ." (ABM at p. 23.) Citing *Nelson v. Indevus Pharms., Inc.* (2006) 142 Cal.App.4th 1202, Sony claims that "the reasonable interpretation of the word 'any' in section 340.8 is that the delayed

discovery rule set forth therein is applicable to 'any' toxic exposure case regardless of the type of toxic substance at issue in the case; i.e., all toxic exposure cases previously subject to C.C.P. § 335.1." (ABM at p. 23.) This argument has no support in the language of the statute or *Nelson*.

In *Nelson*, the defendant argued that section 340.8 "applies only to actions concerning environmental hazards, not to personal injury actions such as this one, which are governed solely by section 335.1." (*Nelson*, *supra*, 142 Cal.App.4th at p. 1209.) The plaintiff argued "that section 340.8 is not limited to environmental hazards, but under its plain meaning applies to cases which allege personal injury caused by harmful chemicals." (*Ibid.*) The court agreed with the plaintiff:

> We agree with Nelson. When we look to the clear language of the statute [citation] we see that it applies to "any" civil action "for injury or illness based upon exposure to a hazardous material or toxic substance." Nothing in the statute limits its provisions to environmental hazards, or provides that they do not apply to cases alleging injury from prescription drugs, and we cannot import such a provision into the law.

(*Ibid*, fn. omitted.)

The same is true here. Nothing in section 340.8 limits its application to "toxic exposure cases previously subject to Section 335.1," as Defendant Sony contends. (ABM at p. 23.) Nor does the language of the statute state, or even suggest, that it does not apply to actions for prebirth injuries based on exposure to a hazardous material or toxic substance, and Sony "cannot

import such a provision into the law." (*Nelson*, *supra*, 142 Cal.App.4th at p. 1209.)

Moreover, the "reasonable interpretation" of the word "any," as used in section 340.8, subdivision (a), is the interpretation given to that word by the courts of this state, including this Court, "[f]rom the earliest days of statehood," (*California State Auto. Ass'n Inter-Ins. Bureau*, *supra*, 17 Cal. 3d at p. 195): that it is "broad, general and all embracing," (*ibid*); that "'any' means every," (*ibid*); that "'any' means without limit and no matter what kind," (*Delaney*, *supra*, 50 Cal.3d at p. 798); and that "the ordinary meaning of the word 'any' is clear, and its use in a statute unambiguously reflects a legislative intent for that statute to have a broad application." (*California Highway Patrol*, *supra*, 158 Cal.App.4th at p. 737.)

With respect to section 340.8, subdivision (c)(1), wherein the Legislature expressly excluded "action[s] subject to Section 340.2 or 340.5" from the term "any civil action" in section 340.8, subdivision (a), but did not exclude actions subject to section 340.4, Defendant Sony, citing *In re Michael G.* (1988) 44 Cal.3d 283, acknowledges the rule that where a statute expressly specifies exclusions, other exclusions will not be implied or presumed. (ABM at pp. 19.) It argues, however, that this rule is inapplicable here because it "does not apply 'where its operation would contradict a discernible and contrary legislative intent. [Citation].'" (*Ibid*, quoting *Michael G.*, at p. 291.)

Dominique agrees that this rule of construction is inapplicable where there is a clear and contrary legislative intent. Indeed, she cited *Michael G.* in her opening brief, along with *Imperial Merchant Servs., Inc. v. Hunt* (2009) 47 Cal.4th 381, where this Court observed that "'if exemptions are specified in a statute, [courts] may not imply additional exemptions unless there is a clear legislative intent to the contrary.'" (*Id.* at p. 389; see OBM at pp. 22-23, 29.) Defendant Sony's argument fails, however, because there is no "discernible" or "clear legislative intent" to exclude actions for prebirth injuries based on exposure to a hazardous material or toxic substance from section 340.8. The Legislature certainly did not express any such intent in the statute itself and, as discussed, the statute's plain language establishes that it was intended to create a separate statute of limitations applicable to all actions for injury based on exposure to a hazardous material or toxic substance, regardless of age, except actions for injury based on exposure to asbestos or the professional negligence of a health care provider. This was the conclusion in *Nguyen*, where the court found no "legislative intent that precludes application of the rule" against implying exclusions beyond those expressly specified in a statute. (*Nguyen*, *supra*, 229 Cal.App.4th at p. 1546 & fn. 10; see also *Lopez*, typed dis. opn. of Rubin, J., at p. 8 ["The Legislature's choice to specifically exempt asbestos exposure and medical malpractice claims from [section 340.8's] reach, but no others, also supports my interpretation" that section 340.8 is

the applicable statute of limitations].)[2]

With respect to section 340.8, subdivision (d), Defendant Sony adopts the interpretation given to that provision by the majority in the Court of Appeal, which "'read subdivision (d) to mean only that section 340.8 does not change any law except that it codifies the delayed discovery rule in personal injury cases based on toxic exposures that were previously governed by the two-year limitations period of section 335.1." (ABM at p. 25, quoting *Lopez*, typed maj. opn. at p. 10.) As discussed by Dominique in her opening brief, the majority's interpretation was erroneous because that is not what subdivision (d) says. (OBM at pp. 30-32)

Subdivision (d) states that "[n]othing in this section shall be construed to limit, abrogate or change the law in effect on the effective date of this section with respect to actions not based upon exposure to a hazardous material or toxic substance." As seen from its language,

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[2] The facts of *Michael G.* do not help Defendant Sony either, as the issue there was whether a juvenile court's contempt power under Welfare and Institutions Code section 213 was limited by the subsequent enactment of Welfare and Institutions Code sections 207 and 601, subdivision (b). (*Michael G.*, *supra*, 44 Cal.3d at pp. 288-295.) Notwithstanding the Legislature's failure to include section 213 amongst the specified exceptions to section 207, the Court held that because of "the fundamental nature of the contempt power," it would "not presume the Legislature intended to override such long-established power" unless such an intent was clearly apparent, and neither section 207 nor section 601, subdivision (b), clearly expressed this intent. (*Ibid.*) This case, of course, does not involve a court's fundamental contempt power or purported limits on that power. The issue in *Michael G.* was unique and the Court's analysis and resolution were specific to that issue.

subdivision (d) does not say that the only change in the law made by section 340.8 was to "codif[y] the delayed discovery rule in personal injury cases based on toxic exposures that were previously governed by the two-year limitations period of section 335.1," as the majority below concluded. (*Lopez,* typed maj. opn. at p. 10.) Rather, as the court in *Nguyen* held, the plain language of subdivision (d) "supports the conclusion that section 340.8 was intended to change existing law regarding the limitations periods for actions 'based upon exposure to a hazardous material or toxic substance,' but not other types of actions." (*Nguyen, supra*, 229 Cal.App. 4th at p. 1548.) Similarly, the dissent in the Court of Appeal found that "the full import of this language" in subdivision (d) shows that section 340.8 was intended to "'limit, abrogate, and change the law in effect upon the effective date . . . with respect to actions' that are based on exposure to toxic substances," and "shows a clear intent to affect section 340.4, albeit by necessary inclusion, if not express iteration." (*Lopez*, typed dis. opn. of Rubin, J., at p. 8.)

Defendant Sony cites *Poole v. Orange County Fire Auth.* (2015) 61 Cal.4th 1378, (ABM at pp. 13-15), but *Poole* supports Dominique's position. In *Poole*, the issue was whether the Firefighters Procedural Bill of Rights Act (FPBRA) (Gov't Code, § 3250 et seq.) "gives an employee the right to review and respond to negative comments in a supervisor's daily log, consisting of notes that memorialize the supervisor's thoughts and

observations concerning an employee, which the supervisor uses as a memory aid in preparing performance plans and reviews." (*Id.* at p. 1382.) Plaintiffs argued that the supervisor's daily log was subject to review and response under the FPBRA, specifically Government Code section 3255, "which provides that '[a] firefighter shall not have any comment adverse to his or her interest entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment.'" (*Id.* at pp. 1382-1383.)

In resolving the issue, the Court noted that "[t]he statutory language [in Government Code section 3255] referring to a file 'used for any personnel purposes by his or her employer' might, in isolation, be read broadly enough to include [the supervisor's] log, which he used in the performance of his duties as a supervisor." (*Poole*, *supra*, 61 Cal.4th at p. 1385.) However, when construed in context with other provisions of the FPBRA, the Court found that "the Legislature did not intend section 3255 to be read so broadly." (*Id.* at p. 1385.) Read together with the FPBRA's other provisions, the Court held that "the phrase 'any other file used for any personnel purposes by his or her employer' . . . should be interpreted to encompass any written or computerized record that, although not designated a personnel file, can be used for the same purposes as a file of the sort described in section 3256.5 – as a record that may be used by the

employer to make decisions about promotion, discipline, compensation, and the like." (*Id.* at p. 1386.) The Court then held that "[a] supervisor's log that is used solely to help its creator remember past events does not fall within the scope of that definition," and that "[e]ven if a supervisor uses his or her notes to help draft performance evaluations and other documents that ultimately *are* placed in a personnel file, the notes themselves are not a file preserved by the employer for use in making decisions about the firefighter's employment status." (*Id.* at pp. 1386-1387.)

Contrary to Defendant Sony's argument, *Poole* does not undermine Dominique's position. As set forth above, Dominique agrees that statutory provisions must be read in context. (*Ante*, at pp. 11-12; see *Poole*, *supra*, 61 Cal.4th at pp. 1384-1385; *People v. Blackburn*, *supra*, 61 Cal.4th at p. 1123 [a statute's provisions are to be read in "light of the statute as a whole"].) In *Poole*, the Court read Government Code section 3255 in context with other provisions of *the same act*, i.e., the FPBRA, to resolve the issue in that case. As in *Poole*, the provisions of section 340.8 must be read together, not in isolation from each other. When that is done, it is clear that section 340.8 was enacted to establish a separate statute of limitations for all actions for injuries based on exposure to hazardous materials or toxic substances, including prebirth injuries, with the only exceptions being actions for injuries based on exposure to asbestos or the professional negligence of a health care provider.

C. The Legislature Was Not Required To Expressly State That Section 340.8 Supersedes Section 340.4 With Respect To Prebirth Toxic Substance Injury Actions.

Defendant Sony argues that "Section 340.4 should control" because "the Legislature made no express reference to section 340.4 in enacting section 340.8." (ABM at p. 21.) According to Sony, "[i]f the legislature intended to abrogate section 340.4" with respect to actions for prebirth injuries based on exposure to a hazardous material or toxic substance, "it would have done so expressly" in section 340.8. (*Id.* at p. 23.) This argument is baseless.

The mere fact that section 340.8 does not make an "express reference" to section 340.4, or expressly state that it is superseding section 340.4 with respect to actions for prebirth injuries based on exposure to a hazardous material or toxic substance, does not establish that it was the intent of the Legislature to exclude prebirth toxic substance injury actions from the broad scope of section 340.8 or that such actions are to be governed by section 340.4. Indeed, as discussed in Dominique's opening brief, (OBM at pp. 21-23), and as reiterated above, the absence of section 340.4 from the exclusions expressly specified in section 340.8, subdivision (c)(1), together with the statute's other provisions, establishes that it was the Legislature's intent *not* to exclude actions for prebirth toxic substance injuries from section 340.8.

The same argument made by Defendant Sony was rejected in

Nguyen, with the court there holding that "[w]hile the Legislature did not expressly state that it enacted section 340.8 in denigration of – or as an exception to – section 340.4, we think such a conclusion is necessarily implied from the broad language of section 340.8." (*Nguyen, supra*, 229 Cal.App.4th at p. 1547, citing *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 199 (*Zamudio*).) As the court explained,

> section 340.8 applies to "any" action for injury or illness based upon exposure to a hazardous material or toxic substance. It expressly provides for delayed accrual of the cause of action under the discovery rule, and says that media reports alone are not enough to trigger the statute of limitations under the discovery rule. And while it exempts other types of claims from its coverage, it does not exempt birth or pre-birth injuries. All of these provisions in section 340.8 support the conclusion that the Legislature intended section 340.8 to have broad application to all claims based upon exposure to hazardous materials or toxic substances, including birth and pre-birth injuries.

(*Id.* at pp. 1547-1548.)

Moreover, as discussed in Dominique's opening brief, (OBM at pp. 33-34), a similar argument – that the Legislature was required to expressly state that a particular statute of limitations was applicable to a particular claim – was rejected in *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874. Relying on the plain language of the statute, the court there held that a claim for malicious prosecution against an attorney is subject to section 340.6, the statute of limitations for actions against attorneys, rather than the general statute of limitations for malicious

prosecution claims in section 335.1. (*Id.* at pp. 880-881.) The court observed that "[t]here is no language in [section 340.6] which exempts malicious prosecution claims [against attorneys] from the limitations period," and it was "not persuaded by Vafi's argument that the Legislature was required to amend the statute to expressly add malicious prosecution to the reach of the statute," when the statute's plain language showed that it "applies to all actions, except those for actual fraud, brought against an attorney 'for a wrongful act or omission' which arise 'in the performance of professional services.'" (*Id.* at p. 881.)

The analysis in *Vafi* applies equally here. There is no language in section 340.8 excluding actions for prebirth injuries based on exposure to a hazardous material or toxic substance, and the Legislature was not required to expressly state that section 340.8 is applicable to such actions, when the plain language of the statute shows that such actions fall within its scope.

D. There Is No Inference That Legislature Intended Section 340.4, Rather Than Section 340.8, To Apply To Prebirth Toxic Substance Injury Actions.

Defendant Sony cites several cases for the purported proposition that "failure to address the potential conflict between two statutes gives rise to an inference that the Legislature intended the earlier statute to remain in effect." (ABM at pp. 21-22.) None of the cases cited by Sony, however, involved section 340.8 or 340.4, and none of them is apposite.

Defendant Sony cites three cases – *Anson v. County of Merced*

(1988) 202 Cal.App.3d 1195, *Martell v. Antelope Valley Hosp. Med. Ctr.* (1998) 67 Cal.App.4th 978, and *Roberts v. County of Los Angeles* (2009) 175 Cal.App.4th 474 – addressing whether an action for medical negligence against a public entity is subject to Government Code section 945.6, the statute of limitations for actions against a public entity, or section 340.5, the general medical malpractice statute of limitations. (ABM at pp. 21-22.) In *Anson*, the court held that Government Code section 945.6 was the applicable statute. (*Anson*, at pp. 1198-1202.) The plaintiff, relying on *Young v. Haines* (1986) 41 Cal.3d 883, argued that section 340.5 was applicable because it was a later, more specific statute. (*Id.* at pp. 1200-1201.) The court disagreed, holding that "neither [statute] [wa]s more specific" and, "[t]herefore, the premise upon which the Supreme Court based its decision in *Young*" was inapplicable. (*Ibid.*)

In *Martell*, the public entity defendant argued that Government Code section 945.6 was the applicable statute based on its "plain meaning," because it governs "'*any* suit brought against a public entity.'" (*Martell*, *supra*, 67 Cal.App.4th at p. 981.) The court agreed, holding that "'[s]uits against a public entity are governed by the specific statute of limitations provided in the Government Code, rather than the statute of limitations which applies to private defendants.'" (*Ibid.*) Thus, even though section 340.5 was a later statute, it was not more specific. (*Ibid.*)

In *Roberts*, the court held that "the statute of limitations in

Government Code section 945.6 can be harmonized with the three-year period in Code of Civil Procedure section 340.5 when the latter statute is viewed as establishing the outside date by which actions against health care providers, including public entities, must be brought." (*Roberts*, *supra*, 175 Cal.App.4th at p. 477; see *id.* at pp. 478-487.) As in *Anson*, the *Martell* court stated that it could not "apply the rule that the more specific provision trumps the more general statute" because "'neither [statute] is more specific than the other.'" (*Id.* at p. 484.)

Anson, *Martell*, and *Roberts* are inapposite because this case does not involve a claim for medical malpractice against a public entity or the interplay between Government Code section 945.6 and section 340.5 as it pertains to such a claim. The issue here is whether an action for prebirth injuries based on exposure to a hazardous material or toxic substance is governed by section 340.8 or 340.4. This issue was not considered in *Anson*, *Martell*, or *Roberts*, and those cases are therefore inapplicable. (See *Styne v. Stevens* (2001) 26 Cal.4th 42, 57 ["An opinion is not authority for a point not raised, considered, or resolved therein."].) Moreover, in contrast to *Anson* and *Roberts*, the premise upon which *Young v. Haines* was decided – that a later, more specific statute controls over an earlier statute – is fully applicable here because section 340.8 *is* a later, more specific

statute, as addressed in the next part of this brief.[3]

II. SECTION 340.8 IS THE APPLICABLE STATUTE OF LIMITATIONS BECAUSE IT IS A LATER, MORE SPECIFIC STATUTE.

As discussed in Dominique's opening brief, (OBM at pp. 36-41), in *Young v. Haines*, *supra*, 41 Cal.3d 883, the issue was whether an action for birth injuries caused by medical malpractice was governed by the statute of limitations for prebirth and birth injuries in former Civil Code section 29, the predecessor of section 340.4, or the medical malpractice statute of limitations in section 340.5. (*Id.* at p. 889.) Although both statutes were

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[3] Defendant Sony cites four other cases: *In re Greg F.* (2012) 55 Cal. 4th 393; *Zamudio*, *supra*, 23 Cal.4th 183; *Barker v. Brown & Williamson Tobacco Corp.* (2001) 88 Cal.App.4th 42; and *Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888. (ABM at pp. 20, 22.) These cases, like *Anson*, *Martell*, and *Roberts*, are inapposite because they did not consider the issue here involving sections 340.8 and 340.4. In *Greg. F.*, the court held that the enactment of Welfare and Institutions Code section 733, subdivision (c), did not "deprive juvenile courts of their long-standing discretion to dismiss delinquency petitions when appropriate" under Welfare and Institutions Code section 782. (*Greg F.*, at pp. 402, 404-415, 419.) In *Zamudio*, the court held that the enactment of Penal Code section 1016.5 did not alter the "legislative command [under Penal Code section 1404] that courts disregard technical errors in procedure unless they impact the substantial rights of defendants." (*Zamudio*, at pp. 198-200.) In *Barker*, the issue was whether "the 1997 amendments to [Civil Code] section 1714.45, by implication, repealed the limitations period for tobacco-related wrongful death suits otherwise contained in Code of Civil Procedure section 340, subdivision (3)." (*Barker*, at pp. 47-48.) The court held they did not. (*Ibid.*) And in *Community Cause*, the court simply held that the two-year statute of limitations in the Political Reform Act of 1974 was subject to the rule "that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the limitations period is tolled during the time consumed by those administrative proceedings, because during that period the plaintiff is legally prevented from taking any action to protect his rights." (*Community Cause*, at p. 903.)

equally specific on their face, this Court held that section 340.5 was more specific because it "[wa]s a later-enacted statute, intended to cover all personal injury claims arising from medical malpractice," and because it evinced "a plain legislative intent . . . to treat all malpractice victims differently from other personal injury victims." (*Id.* at pp. 893-894.) As a result, the Court held that section 340.5 prevailed under the rule that a "later, more specific statute . . . must be found controlling over an earlier statute, even though the earlier statute would by its terms cover the present situation." (*Ibid*; accord, *Woods v. Young* (1991) 53 Cal.3d 315, 324-325 [applying the "rule of statutory construction that a later, more specific statute controls over an earlier, general statute"].)

Defendant Sony argues that *Young* does not support Dominique's position because "section 340.5 was part of the Medical Injury Compensation Reform Act (MICRA), a comprehensive, interrelated statutory scheme," and because "it was the intent of the Legislature in enacting MICRA to restrict the common law delayed discovery rule" for medical malpractice claims, "including claims by minors." (ABM at p. 28.) According to Sony, this rationale does not apply here because "section 340.8 is not part of a comprehensive, interrelated statutory scheme," and because it "was enacted merely to codify the delayed discovery rule as to

toxic injury claims."[4] (*Ibid.*) It also claims that section 340.4 "is part of an interrelated statutory scheme designed to afford children injured *in utero* the right to bring suit for such injuries." (*Ibid.*)

This argument fails because Defendant Sony misconstrues *Young*. In *Young*, the intent identified by the Court in concluding that section 340.5 was more specific was that it was "intended to cover all personal injury claims arising from medical malpractice." (*Young*, *supra*, 41 Cal.3d at p. 894.) The Court found that "[t]he plain legislative intent" of the statute "was to treat all malpractice victims differently from other personal injury victims." (*Ibid.*) Because of this, the Court held that section 340.5 was applicable as a later, more specific statute. (*Ibid.*)

The situation here is the same. Based on the clear language of its provisions, including subdivisions (a), (c)(1), and (d), read together as a whole, section 340.8 was intended to establish a separate statute of limitations covering *all* actions for injury based on exposure to a hazardous material or toxic substance, regardless of the injured person's age. The only two exceptions, as specified in the statute, are actions subject to section 340.2 or 340.5; there is no exception in the statute for actions subject to section 340.4. (Code Civ. Proc., § 340.8, subd. (c)(1); *Nguyen*,

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[4] This contention – that "section 340.8 was enacted merely to codify the delayed discovery rule as to toxic injury claims" – is addressed below, in the part of this brief addressing the legislative history of section 340.8. (See *post*, at pp. 33-36.)

supra, 229 Cal.App.4th at pp. 1540, 1546.) Thus, just as *Young* held that section 340.5 controlled over former Civil Code section 29 in an action for birth injuries caused by medical malpractice, because it was a later, more specific statute intended "to deal specifically with all medical malpractice claims," (*Young*, *supra*, 41 Cal.3d at p. 894), section 340.8 controls over section 340.4 in an action for prebirth injuries based on exposure to a hazardous material or toxic substance, because it is a later, more specific statute that, except for the two specified exclusions, is intended to cover *all* claims for injury "based upon exposure to a hazardous material or toxic substance." (Code Civ. Proc., § 340.8, subd. (a).)

This was the analysis and conclusion in *Nguyen*. (*Nguyen*, *supra*, 229 Cal.App.4th at pp. 1548-1550.) Based on its review of *Young* and its "plain language analysis of section 340.8 and the breadth of the language used in that section," the *Nguyen* court "conclude[d] that like section 340.5 in *Young*, '[section 340.4] is the later, more specific statute which must be found controlling over an earlier statute, even though the earlier statute would by its terms cover the present situation.'" (*Id.* at p. 1550.) The *Nguyen* court acknowledged that "section 340.8 is not part of an 'interrelated legislative scheme enacted to deal with' claims involving exposure to hazardous material and toxic substances," but that was not determinative because the court found, based on the language of the statute, including subdivision (d), that "section 340.8 evinces a legislative intent to

treat victims of toxic substance exposures 'differently from other personal injury victims.'" (*Id.* at pp. 1549-1550, quoting *Young*, *supra*, 41 Cal.3d at p. 894.)

Similarly, the dissent in the Court of Appeal did not base its analysis on whether section 340.8 is part a comprehensive scheme. Indeed, the dissent "acknowledge[d] that section 340.8 is not part of a comprehensive scheme," just as it acknowledged, contrary to Defendant Sony's suggestion, that "nor is section 340.4 part of a comprehensive scheme." (*Lopez*, typed dis. opn. of Rubin, J., at p. 6, fn. 5.) Rather, like the court in *Nguyen*, the dissent found that the plain language of section 340.8, including subdivision (d), established an intent by the Legislature to treat persons injured by exposure to hazardous materials or toxic substances differently from other personal injury claimants. (*Id.* at pp. 6-8; see *id.* at p. 13 ["As I see it, section 340.8 is just another extension of the Legislature's intent to treat toxic tort cases differently from other personal injury actions"].)

Accordingly, because it is a later, more specific statute, section 340.8 is the statute of limitations applicable to an action for prebirth injuries based on exposure to a hazardous material or toxic substance.

III. SECTION 340.8 CANNOT BE JUDICIALLY REWRITTEN BASED ON ITS LEGISLATIVE HISTORY.

Defendant Sony's primary argument is that if section 340.8 is applicable to actions for prebirth injuries based on exposure to a hazardous

material or toxic substance, rather than section 340.4, then the limitations period for such actions will be "dramatically" enlarged based on the availability of minority tolling under section 352. (ABM at pp. 2-5, 10-29.) Sony argues that this would be improper because "[n]either the text nor the legislative history of section 340.8 mentions section 340.4, or claims arising from prenatal injuries," and because "[n]othing in the statute or in its legislative history states that the Legislature intended section 340.8 to have any effect whatsoever on the applicability of section 340.4." (*Id.* at p. 19; see also *id.* at pp. 4-5.) Sony repeatedly asserts that "the legislative history of section 340.8" shows that "the Legislature simply intended to codify the delayed discovery rule for toxic injury cases," and that "[n]othing in the legislative history reflects an intent to create a new limitation period for toxic injuries generally, or for prenatal injuries specifically." (*Id.* at p. 4; see also *id.* at pp. 11-12, 15-19, 23-24, 26-28.)

These arguments fail because Defendant Sony cannot contravene the plain language of section 340.8 by using its legislative history to effectively rewrite the statute to add an exclusion for actions subject to section 340.4, when the Legislature chose not to include one itself. "[R]esort to a statute's legislative history is appropriate only if the statute is reasonably subject to more than one interpretation or is otherwise ambiguous." (*Ste. Marie v. Riverside County Reg'l Park and Open-Space District* (2009) 46 Cal.4th 282, 290; accord, *People v. Farell* (2002) 28 Cal.4th 381, 394; *Esberg v.*

Union Oil Co. (2002) 28 Cal.4th 262, 269.) "Although legislative history often can help interpret an ambiguous statute, it cannot change the plain meaning of clear language." (*In re Steele*, *supra*, 32 Cal.4th at p. 694; see *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992 ["A court may not, 'under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.'"]; *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 73-74 ["A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed."]; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827 [it is a "cardinal rule [of statutory construction] that courts may not add provisions to a statute"]; *In re Marriage of Hokanson* (1998) 68 Cal.App.4th 987, 993 [legislative history cannot be used to rewrite a statute "[w]hen the language of the statute is clear and unambiguous"].) Moreover, as this Court has observed, it is a statute, not its legislative history, that is enacted. "It is the former that 'must prevail over' the latter, and not the opposite." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854, citing and quoting *In re Cervera* (2001) 24 Cal.4th 1073, 1079-1080.)

As shown, section 340.8 is clear and unambiguous. According to its plain meaning, it applies to any action for injury based on exposure to a hazardous material or toxic substance, regardless of age, except actions subject to section 340.2 or 340.5. (Code Civ. Proc., § 340.8, subds. (a),

(c)(1); *Nguyen, supra*, 229 Cal.App.4th at pp. 1543-1551.) Because section 340.8 is clear and does not exclude actions subject to section 340.4, its legislative history is irrelevant to its construction and cannot be used to rewrite the statute to create such an exclusion.

Defendant Sony argues that "[t]he fact that both statutes facially apply to prenatal toxic injury cases necessarily creates an ambiguity regarding which section applies here," thus allowing reference to the legislative history of section 340.8. (ABM at pp. 11-13.) This argument fails for the reasons discussed above. According to its clear language, section 340.8 establishes a separate statute of limitations for all actions for injury based on exposure to a hazardous material or toxic substance, *regardless of whether the injury is suffered before, during or after birth.* The only exceptions to the statute are actions for injuries based on exposure to asbestos or the professional negligence of a health care provider. There is no exception in the statute for actions for prebirth injuries based on exposure to a hazardous material or toxic substance, and the Legislature was not required to expressly state that section 340.8 applies to such actions, given that its plain language shows that such actions fall within its scope. Sony cannot ignore the plain language of section 340.8 to manufacture an ambiguity. Indeed, as this Court has explained, "'[w]here the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist." [Citation.]'" (*Lennane v. Franchise Tax*

Bd. (1994) 9 Cal.4th 263, 268.)

As discussed in Dominique's opening brief, (OBM at pp. 44-48), both the court in *Nguyen* and dissent below recognized that it was unnecessary to consider the legislative history of section 340.8 because the statute is clear and unambiguous. But even if they did consider the legislative history, both concluded that it would not change their determinations that section 340.8 is the applicable statute of limitations, because "the legislative history does not indicate that in enacting a new statute of limitations for civil actions for injury or illness based on exposures to toxic substances, the Legislature intended that a different limitations period apply if the exposure occurred before or during the plaintiff's birth." (*Nguyen*, *supra*, 229 Cal.App.4th at pp. 1550-1551; see *Lopez*, typed dis. opn. of Rubin, J., at pp. 8-9 [the legislative history "does not mention an intent to restrict section 340.8 to toxic substance exposure cases to minors and adults"].)

As noted, Defendant Sony argues that section 340.8 was not intended to create a new statute of limitations for injury actions based on exposure to a hazardous material or toxic substance, but was merely intended to codify the discovery rule for such cases, and that it simply repeats the general two-year statute of limitations for personal injury actions in section 335.1. (See ABM at pp. 4-5, 11-12, 15-19, 23-24, 26-28.) These arguments are meritless. As discussed by Dominique in her

opening brief, (OBM at pp. 45-46), the Legislative Counsel's Digest for the bill to enact section 340.8 expressly states that the bill was intended to "establish a *separate* statute of limitations for a civil action for injury or illness based upon exposure to a hazardous material or toxic substance other than asbestos, as specified.'" (Legis. Counsel's Dig., Stat. 2003, ch. 873, Sen. Bill No. 331 as chaptered Oct. 12, 2003, italics added.)[5] This expression of intent, in addition to the language of the statute, supports the conclusion, reached by the dissent, that "section 340.8 created a new statute of limitations for all toxic exposure actions except for those types of action specifically excepted."[6] (*Lopez*, typed dis. opn. of Rubin, J., at p. 9; see *Nguyen*, *supra*, 229 Cal.App.4th at pp. 1550-1551 [section 340.8 is "a new statute of limitations for civil actions for injury or illness based on exposures to toxic substances"].)

Moreover, the dissent "observe[d] that if the Legislature had intended to adopt only a discovery rule for toxic tort cases," as Defendant

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[5] The Legislative Counsel's Digest for the bill to enact section 340.8 (Senate Bill No. 331) is available at <http://www.leginfo.ca.gov/bilinfo.html> (as of April 17, 2017).

[6] In addition, consistent with the codified language in section 340.8, subdivision (a), Senate committee analyses of the bill stated that the statute would apply to "*any* civil action for injury or illness based upon exposure to a hazardous substance." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 331 (2003-2004 Reg. Sess.) as amended Apr. 29, 2003, p. 2, italics added; Sen. Com. on Judiciary, May 6, 2003, analysis of Sen. Bill No. 331 (2003-2004 Reg. Sess.) as amended Apr. 29, 2003 at p. 2, italics added.)

Sony argues, "it could have simply amended section 335.1 which deals generally with personal injuries and which at that time applied to toxic torts." (*Lopez*, typed dis. opn., Rubin, J., at p. 10.) The Legislature did not do that, however. "Instead, the Legislature adopted a new statute of limitations for exposure to hazardous materials and toxic substances, stated its intent that the new statute apply to any action for such exposure, and excluded from its ambit [only] asbestos and medical malpractice causes of action." (*Ibid.*) It is well-settled that courts do not presume that, in enacting legislation, "the Legislature . . . engaged in an idle act or enacted a superfluous statutory provision." (*California Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal.4th 627, 634; accord, *Hagberg v. California Fed. Bank FSB* (2004) 32 Cal.4th 350, 379.) Here, the Legislature's enactment of section 340.8 was not an idle or superfluous act. It was an act that established a new statute of limitations for injury actions based on exposure to hazardous materials or toxic substances, including where those injuries are suffered before or during birth.

Furthermore, indulging Defendant Sony's argument, even if section 340.8 was enacted merely to codify the discovery rule for toxic injury cases, why should the statute, and its codification of the discovery rule, apply only to actions for toxic injuries suffered after birth, when there is no such limitation in the statute? The *Nguyen* court recognized this issue, when it observed that "there is no indication that the Legislature intended,

and it makes no sense, for there to be a different discovery rule (e.g., regarding inquiry notice and media reports) depending on whether the toxic exposure occurred before or after birth." (*Nguyen, supra*, 229 Cal.App.4th at p. 1551.) Similarly, the dissent below recognized that it would make no sense to have one inquiry notice rule for toxic exposure claims based on post-birth injuries and a different rule for toxic exposure claims based on prebirth or birth injuries. (*Lopez*, typed dis. opn. of Rubin, J., at p. 10.)

Accordingly, contrary to Defendant Sony's contention, section 340.8 is not a redundant statute of limitations that merely codifies the discovery rule. As demonstrated by its plain language and, if considered, by its legislative history, including the Legislative Counsel's Digest, section 340.8 was intended to create a new and separate statute of limitations applicable to all actions for injury based on exposure to a hazardous material or toxic substance, regardless of age, except actions based on exposure to asbestos or professional medical negligence.

IV. THE APPLICATION OF SECTION 340.8 TO PREBIRTH TOXIC SUBSTANCE INJURY ACTIONS WILL NOT CONTRAVENE THE INTENT OF THE LEGISLATURE OR LEAD TO "ABSURD RESULTS".

Defendant Sony argues that applying section 340.8 to an action for prebirth injuries based on exposure to a hazardous material or toxic substance, instead of section 340.4, will contravene the intent of the Legislature and "lead to absurd results," because the limitations period for

those prebirth injury actions will be subject to minority tolling under section 352. (ABM at pp. 2-5, 20, 24-25, 27-29.) Sony also claims that sections 340.8 and 340.4 can be "harmonized" or "reconciled" with respect to prebirth toxic substance injury actions by applying section 340.4 to those actions. (*Id.* at pp. 5, 27.)

These arguments fail because they ignore the plain language of section 340.8 and, if considered, its legislative history, which show that section 340.8 was enacted to establish a separate statute of limitations applicable to all actions for injury based on exposure to a hazardous material or toxic substance, regardless of the injured person's age, except actions for injuries based on exposure to asbestos or the professional negligence of a heath care provider. As shown above and in Dominique's opening brief, the language of section 340.8 establishes that it was intended to change existing law with respect to toxic injury actions, by making such actions subject to its provisions, and there is no exception in the statute for actions for prebirth toxic substance injuries.

Defendant Sony cannot avoid or nullify the plain meaning of section 340.8 by asking this Court to "rewrite [the] statute . . . to make it conform to a presumed intent that is not expressed," (*Cornette v. Department of Transp.*, *supra*, 26 Cal.4th at pp. 73-74), or by attempting to create an exclusion in the statute for prebirth injury actions under the guise of statutory "harmonization" or "reconciliation." (See *State Dep't of Pub.*

Health v. Superior Court (2015) 60 Cal.4th 940, 956 ["[T]he requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach. . . . This canon of construction, like all such canons, does not authorize courts to rewrite statutes."]; *DiCampli-Mintz v. County of Santa Clara*, *supra*, 55 Cal.4th at p. 992 ["A court may not, 'under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.'"]; see also *Adoption of Kelsey S.*, *supra*, 1 Cal. 4th at p. 827 [it is a "cardinal rule [of statutory construction] that courts may not add provisions to a statute"]; accord, Code Civ. Proc., § 1858.) Contrary to Sony's arguments, application of section 340.8 to an action for prebirth injuries based on exposure to a hazardous material or toxic substance, rather than section 340.4, will effectuate, not contravene, the intent of the Legislature, based on the Legislature's most recent expression of its intent in section 340.8.

With respect to Defendant Sony's argument that "absurd results" will follow if section 340.8 is applicable, Dominique addressed and debunked that argument in her opening brief. As explained there, there is nothing absurd about having one statute of limitations for prebirth injury claims based on toxic substance exposures (section 340.8), with other statutes of limitations for other types of prebirth injury claims (section 340.5 for medical malpractice claims and section 340.4 for all other

claims). (See OBM at pp. 48-51.)

CONCLUSION

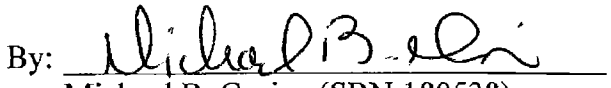
For the reasons set forth above and in Dominique's opening brief, the statute of limitations applicable to an action for prebirth injuries based on exposure to a hazardous material or toxic substance is section 340.8, not section 340.4. Because Dominique's claim was not time-barred under section 340.4 on January 1, 2004, when section 340.8 became operative, her claim became subject to section 340.8 at that time. And because the limitations period in section 340.8 is subject to minority tolling under section 352, this action was timely filed because Dominique was a minor when her claim accrued and when the action was filed. Defendant Sony's motion for summary judgment should have therefore been denied.

Accordingly, the judgment of the Court of Appeal should be reversed, as should the judgment entered in favor of Defendant Sony, because this action was timely filed under section 340.8.

Dated: April 17, 2017

Respectfully submitted,

WATERS, KRAUS & PAUL

By: 
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned hereby certifies that this Petitioner's Reply Brief on the Merits contains 8,386 words, exclusive of the cover page, tables, statement of the issue for review, signature block, and this certification, as counted by the Mircrosoft Word word-processing program used to generate it.

Michael B. Gurien
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PROOF OF SERVICE

Dominique Lopez, Plaintiff and Appellant
vs.
Sony Electronics, Inc., Defendant and Respondent
Los Angeles Superior Court Case Number BC476544
Supreme Court Case Number S235357

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, Deborah Ristovski, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 222 North Sepulveda Boulevard, Suite 1900, El Segundo, California. I am employed in Los Angeles County, California.

On April 17, 2017, I served a copy of the following document(s):

PETITIONER'S REPLY BRIEF ON THE MERITS

in this action to be served by placing the true and correct copies thereof enclosed in sealed envelopes addressed

☒ (By Mail) I caused each envelope with postage fully prepaid, to be placed in the United States Mail at El Segundo, California as follows:

William A. Bossen
Musick, Peeler & Garrett LLP
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Los Angeles, California 90017
Attorneys for Defendant Sony Electronics, Inc.

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

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at El Segundo, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

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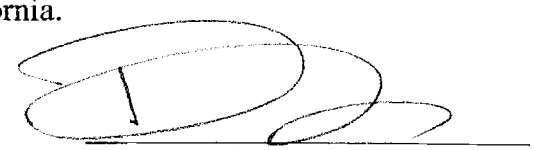

Deborah Ristovski