S169753

IN THE SUPREME COURT OF CALIFORNIA

JEFFREY TVERBERG and CATHERINE TVERBERG,
Plaintiffs and Appellants,

v.

FILLNER CONSTRUCTION, INC.,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NO. A120050

REPLY BRIEF ON THE MERITS

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

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TVERBERG v. FILLNER CONSTRUCTION, INC.
(S169753)

Full Name of Interested Entity/Person	Party/	Non-Party	Nature of Interest
Stephen L. Welge	☐	☒	Shareholder of Fillner Construction, Inc.
John C. Tyer	☐	☒	Shareholder of Fillner Construction, Inc.
Michael Carruth	☐	☒	Shareholder of Fillner Construction, Inc.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Miscellaneous

IN THE SUPREME COURT OF CALIFORNIA

JEFFREY TVERBERG and CATHERINE TVERBERG,
Plaintiffs and Appellants,

v.

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REPLY BRIEF ON THE MERITS

INTRODUCTION

In their answer brief, plaintiffs do not dispute that the *Privette* doctrine places a number of well-reasoned limitations on hirer liability for injuries arising during the performance of contractors' work. In essence, these limitations generally permit hirers to delegate hazardous work to contractors without the need to supervise the contractors' activities to assure the safety of those performing the work.

Plaintiffs contend, however, that *Privette*'s limitations on hirer liability apply *solely* to claims by contractors' employees, not to claims by self-employed contractors. According to plaintiffs, a hirer has an affirmative duty to assure that a self-employed contractor

performs his work in a safe manner and is not injured as a result of work-related activities—even though a hirer generally owes no duty of care under *Privette* to contractors' employees.

Plaintiffs provide no logical explanation why a hirer owes a broad duty of care to self-employed contractors despite *Privette*'s limitations on the scope of a hirer's duty of care to contractors' employees. The rationale offered by plaintiffs is that the *Privette* doctrine is based primarily on the availability of workers' compensation; that relatively few self-employed contractors purchase workers' compensation policies to cover their work-related injuries; and that *Privette* therefore should not apply to self-employed contractors.

Contrary to plaintiffs' proffered rationale, hirers are entitled to assume that self-employed contractors, who are charged with knowledge of the hazards inherent in their occupation, will insure against those hazards by purchasing either workers' compensation or some form of insurance coverage providing benefits equivalent or superior to those provided under a workers' compensation policy. No hirer—whether a homeowner, small business owner, or general contractor—should be penalized for the unilateral decision of a self-employed contractor to undertake inherently dangerous work without appropriate casualty coverage.

Denying hirers the right to invoke *Privette* against claims by self-employed contractors also undercuts numerous other policies supporting the *Privette* doctrine. Plaintiffs attempt to brush aside these policies in their answer brief, but, when given the weight to

which they are entitled, these policies fully support extension of *Privette* to claims by self-employed contractors.

LEGAL ARGUMENT

I. THE POLICIES UNDERLYING THE *PRIVETTE* DOCTRINE APPLY TO CLAIMS BY SELF-EMPLOYED CONTRACTORS.

A. *Privette* imposes reasonable rules designed to limit hirer liability.

Under the *Privette* doctrine, hirers are generally not liable for personal injuries sustained by those performing services on behalf of the hirer. (See generally *Privette v. Superior Court* (1993) 5 Cal.4th 689, 698-702 (*Privette*) [contractor's employees may not recover from hirer on peculiar risk theory]; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 206-209 (*Hooker*) [*Privette* doctrine extended to retained control theory of liability]; *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 1091-1094 [*Privette* doctrine extended to self-employed contractors].) Instead, a hirer may be held liable for injuries to those who perform contract work only in exceptional circumstances, such as where the hirer has failed to warn of a concealed dangerous condition or has affirmatively contributed in some other manner to the plaintiff's injury. (See Opening Brief on the Merits (OBOM) 9-10.)

Privette's limitations on hirer liability are based in part on the availability of workers' compensation for work-related injuries and the hirer's de facto payment of a pro rata portion of the premium for workers' compensation (or alternative coverage) for those who perform the contract work. The doctrine is also based on numerous other equally compelling considerations, including (i) the anomaly of holding hirers vicariously liable for injuries caused by parties from whom the hirer may not be able to recover; (ii) the unwarranted windfall that injured workers would obtain if they could pursue a tort claim in addition to obtaining workers' compensation; (iii) the public policy in favor of encouraging property owners to retain contractors, who have the expertise to perform hazardous work in a safe manner; and (iv) the right of hirers to delegate hazardous work to contractors, with the reasonable expectation that they (the hirers) will generally not incur liability for injuries sustained by those performing the work. (See OBOM 11-15.)

In part B below, we will demonstrate that, plaintiffs' contentions to the contrary notwithstanding, the same policies that limit hirer liability to contractors' employees likewise limit hirer liability to self-employed contractors. Before examining in detail the policies underlying *Privette*, however, it bears emphasis that even where the *Privette* doctrine is applicable, it does *not* create complete immunity for all work-related injuries. Thus, just as the *Privette* doctrine will not preclude an injured contractor's employee from recovering from a hirer who conceals a dangerous condition or affirmatively contributes in some manner to the employee's injury,

it will likewise not preclude self-employed contractors from recovering to the same extent.

The issue in this case is whether a hirer sued by a self-employed contractor is entitled to the *some* reasonable limitations on liability imposed when the hirer is sued by an injured contractor's employee—no more and no less. Based on the policy reasons discussed in the *Privette* line of cases, there is no reason to confer greater rights on injured self-employed contractors than on injured contractors' employees.

B. The policy considerations underlying *Privette* apply to claims by self-employed contractors.

1. Self-employed contractors are *eligible* for workers' compensation, even if they elect to purchase some other form of coverage or none at all.

One of the primary reasons *Privette* should apply to self-employed contractors is that contractors, like their employees, are eligible to purchase workers' compensation benefits, either from private insurers or the State Compensation Insurance Fund (SCIF). (See OBOM 26-30.)

In the Court of Appeal, plaintiffs vigorously argued that self-employed contractors are *ineligible* to obtain workers' compensation coverage and *Privette* therefore has no application to claims against hirers by self-employed contractors. (E.g., AOB 14.) The Court of Appeal accepted plaintiffs' argument, predicating its decision that

Privette should not apply to self-employed contractors on the assumption that self-employed contractors are ineligible for workers' compensation coverage. (Typed opn., 1, 9.)

In this Court, plaintiffs have retreated from the argument that self-employed contractors are ineligible for workers' compensation. (See ABOM 29, 31-32.) Plaintiffs now argue a very different position, albeit one that is equally indefensible. Specifically, plaintiffs have argued that because relatively few self-employed contractors elect to purchase workers' compensation, the *Privette* doctrine should not apply to *any* claims by self-employed contractors. (ABOM 31-33.)

It is indisputable that many self-employed contractors may elect to purchase some form of casualty insurance other than workers' compensation, such as medical and disability policies providing benefits that are equivalent or superior to those of a workers' compensation policy. Plaintiffs have provided no reasonable explanation, however, why the decision of some self-employed contractors to purchase a form of casualty insurance other than workers' compensation coverage (or the election by other contractors to purchase no insurance or inadequate insurance) is a basis for denying hirers the benefit of *Privette*'s limitations in defending against claims by self-employed contractors. As this Court has explained, hirers are reasonably entitled to "*anticipate* that the independent contractor will insure against the risk" of hazardous work. (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 13 (*State Compensation*), emphasis added.)

Given that hirers have no control over the decision made by self-employed contractors to purchase workers' compensation insurance for their own benefit, the decision by some contractors to purchase some form of insurance other than workers' compensation should have nothing to do with the application of *Privette* to self-employed contractors. This conclusion is only reinforced by the now undisputed fact that there is no legal impediment to a contractor procuring workers' compensation coverage prior to the injury.

Similarly, the election of some self-employed contractors to forgo insurance coverage altogether is not a basis to withhold *Privette*'s protections from hirers of self-employed contractors. A contractor's unreasonable decision to procure no insurance (or inadequate insurance) conflicts with the hirer's *reasonable* assumption that the contractor will procure such coverage.

Plaintiffs advance a number of other contentions in support of their argument that *Privette* has no application absent workers' compensation coverage for the injured worker, but none has any merit:

1. Plaintiffs contend that hirers should be denied *Privette*'s protections in actions by self-employed contractors because of the "fundamental differences between workers' compensation insurance and private medical and disability policies" that many self-employed contractors may choose in lieu of workers' compensation policies. (ABOM 37.) There are no such fundamental differences. Like workers' compensation benefits, policy benefits under a medical or disability policy (*first-party* policies) are available to the beneficiary

without the need to prove any third party's liability. (See OBOM 30.)

Even *assuming* there were any material distinctions between workers' compensation coverage and first-party medical and disability coverage, the extent of a hirer's liability should have nothing to do with whether or not a contractor has elected to purchase workers' compensation coverage. It is the contractor, not homeowners or other hirers, who bears primary responsibility for assessing the risks inherent in his work and procuring coverage that reflects the nature and degree of that risk. (See *Torres v. Reardon* (1992) 3 Cal.App.4th 831, 840 (*Torres*) ["the contractor better understands the nature of the work[,] . . . is better able to recognize risks peculiar to it," and "is also able to insure against the risk and cost of injury as an expense of his own business"].)

While many homeowners and other hirers will themselves no doubt have *some* form of coverage for catastrophic work-related accidents, many hirers lack the sophistication and resources sufficient to obtain adequate coverage for such accidents. Accordingly, *Torres* properly requires contractors to recognize and insure against the risks inherent in their work and the *Privette* doctrine, consistent with the well-reasoned rationale underlying *Torres*, limits hirer liability to both contractors' employees and self-employed contractors.

2. Plaintiffs contend that *Privette* applies only "when a worker is *actually covered* by" appropriate insurance coverage. (ABOM 32, original emphasis.) Taken literally, plaintiffs' argument would mean that if a self-employed contractor has purchased

appropriate coverage, *Privette* would apply to the contractor's claims against the hirer—while *Privette* would not apply to the contractor's claims if the contractor failed to purchase such coverage.

To avoid conferring greater rights on those self-employed contractors who have elected to purchase some form of insurance in lieu of workers' compensation (or no insurance at all), application of the *Privette* doctrine cannot depend on whether self-employed contractors have *elected* to procure workers' compensation, but instead depends only on the undisputed fact that self-employed contractors, as a class, are *eligible* under California law to purchase workers' compensation. Because California law does not preclude self-employed contractors from purchasing such coverage, the *Privette* doctrine should apply to such workers, whether or not they have purchased workers' compensation insurance.

3. Plaintiffs contend that *Privette* should not apply to self-employed contractors because some contractors may be deemed "too high a risk" to obtain casualty coverage. (ABOM 38.) Yet, plaintiff Jeffrey Tverberg does not contend that he has been unable to obtain workers' compensation or other coverage. Nor do plaintiffs cite any authority establishing that self-employed contractors could not obtain casualty coverage based on the hazardous nature of their work.

Even where a self-employed contractor cannot obtain coverage from a *private insurer* based on the risks inherent in the contractor's work, the contractor may generally obtain coverage through SCIF, the workers' compensation insurer of "last resort."

(*Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 949; Ins. Code § 11784, subd. (c).)

Pursuant to Insurance Code section 11784, subdivision (c), SCIF generally may not "refuse to insure *any* workers' compensation risk under state law, [when] tendered with the premium therefor." (Emphasis added.) The sole exceptions to section 11784, subdivision (c) are (i) where the applicant has failed to comply with "the minimum requirements of the industrial accident prevention authorities with regard to construction, equipment, and operation"; and (ii) where the risk "is beyond the safe carrying of the fund." (*Ibid.*)

Neither of the exceptions to section 11784, subdivision (c) justify denying *Privette*'s defenses to hirers in actions by self-employed contractors. First, the fact that some contractors may not qualify for workers' compensation from SCIF as a result of their failure to comply with the minimum standards imposed by accident prevention authorities is not a basis to increase hirer liability to self-employed contractors. It would be contrary to public policy to give contractors greater rights against hirers as the result of contractors' failure to comply with minimum safety standards applicable to their construction method, equipment, and operations.

Likewise, the fact that *some* risks may be "beyond the safe carrying of the fund" is not a basis to deny *Privette*'s defenses to hirers in actions by self-employed contractors. If the risk from a contractor's operations is so great that SCIF cannot reasonably underwrite the risk, it is unreasonable to expect individual homeowners and other hirers to bear such risks. Thus, the only

reasonable course of action for the contractor is to refuse to undertake the project, thereby shifting the work to contractors who can either obtain the necessary coverage through private insurance or who have the financial resources to be able to self-insure the risk.

4. Plaintiffs contend the *Privette* doctrine does not apply to claims by self-employed contractors because this Court's *Privette* decisions have all been based on the statutorily-mandated availability of workers' compensation to the plaintiffs injured in those cases. (ABOM 32.)

It is true that in the *Privette* cases decided by this Court, the plaintiffs have been covered by workers' compensation: each of the *Privette* cases decided in this Court have arisen from injuries to contractors' employees, who are automatically entitled to workers' compensation for work-related injuries even where the employer has failed to purchase such coverage. (See Lab. Code § 3716, subd. (b) [establishing right of employee of uninsured employer to recover from Uninsured Employers Benefits Trust Fund (UEBTF)].) The fortuity that the Court has not yet decided a case in which the plaintiff was a self-employed contractor is not, however, a reasonable basis for concluding that the *Privette* doctrine has no application where the plaintiff is a self-employed contractor. The dispositive point in this case is that the policies underlying *Privette* support extension of the doctrine to claims by self-employed contractors, for the many reasons discussed herein.

5. Plaintiffs contend that "every other court which has considered the issue has determined that the key to the application of the *Privette* doctrine is the *actual existence* of workers'

compensation coverage." (ABOM 35, original emphasis.) In making this argument, plaintiffs cite *Bell v. Greg Agee Construction, Inc.* (2004) 125 Cal.App.4th 453 (*Bell*) and *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal.App.4th 430 (*Lopez*). Neither of these cases, however, discussed the extent to which a self-employed contractor may recover against a hirer. Consequently, neither case examined whether the "key" to application of the *Privette* doctrine is "actual existence" of workers' compensation coverage.

Both *Bell* and *Lopez* actually hold that the *Privette* doctrine applies to claims by contractors' employees even where a contractor has failed to purchase workers' compensation on behalf of the contractors' employees. The rationale for applying *Privette* in this context is that the employees are entitled to recover workers' compensation benefits from the UEBTF. As explained by the court in *Bell*, "[s]ince the fundamental social policy of providing compensation *to an injured employee* is achieved" through operation of the UEBTF, there is no justification for imposing liability on the hirer under the peculiar risk doctrine. (*Bell, supra*, 125 Cal.App.4th at p. 466, emphasis added; accord, *Lopez, supra*, 101 Cal.App.4th at p. 445.)

Bell and *Lopez* nowhere refer to a "fundamental social policy" of providing compensation to self-employed contractors who fail to procure workers' compensation (or equivalent coverage) on their own behalf prior to commencing hazardous work. In fact, there is no such "fundamental social policy." Unlike a contractor's employee, a self-employed contractor negotiates directly with the hirer and can (and should) negotiate a price that is sufficient to

cover workers' compensation benefits or whatever equivalent coverage the contractor may choose to procure. (*Torres, supra,* 3 Cal.App.4th at p. 840.) A contractor's employee, in contrast, has no control over the contract price, but must instead rely on his or her employer to negotiate a price that is sufficient to cover the employee's workers' compensation premium.

Furthermore, a self-employed contractor, upon being paid by the hirer, has direct control over whether to purchase workers' compensation (or equivalent coverage) on his own behalf with the portion of the contract price that should be allocated to such coverage. An employee, in contrast, has no control over the contractor's purchase of workers' compensation on his or her behalf.

Because the courts in *Bell* and *Lopez* did not have occasion to consider whether the *Privette* doctrine applies to self-employed contractors, and likewise did not have occasion to consider whether the policies underlying *Privette* also apply to self-employed contractors, neither *Bell* nor *Lopez* is controlling in the present case.[1]

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[1] In addition to *Bell* and *Lopez*, plaintiffs cite a number of out-of-state cases for the proposition that hirer liability cannot be limited absent workers' compensation coverage. As in *Bell* and *Lopez*, the plaintiff in each of the out-of-state cases was a contractor's employee, not a self-employed contractor. (See ABOM 36, citing *Dillard v. Strecker* (1994) 255 Kan. 704 [877 P.2d 371, 372] (*Dillard*); *Herrell v. National Beef Packing Co., LLC* (2009) 41 Kan.App.2d 302, 303 [202 P.3d 691, 693]; *Matteuzzi v. Columbus Partnership, L.P.* (Mo. 1993) 866 S.W.2d 128, 129; *Mouser v. Caterpillar, Inc.* (8th Cir. 2003) 336 F.3d 656, 659.) The cases thus lend no support to plaintiffs' argument that hirers cannot rely on *Privette* in defending claims against self-employed contractors.

For all these reasons, hirer liability to self-employed contractors should not be expanded based on the assumption that some contractors may unwisely choose to engage in hazardous work without obtaining casualty coverage. To impose liability on this basis would have the perverse effect of encouraging contractors to engage in hazardous work without obtaining adequate insurance, a result that is clearly contrary to public policy, including the policies underlying *Privette*.[2]

2. Hirers indirectly pay for self-employed contractors to purchase casualty insurance coverage.

As this Court made clear in numerous cases, hirers effectively pay contractors to procure appropriate levels of workers' compensation. (*Privette, supra*, 5 Cal.4th at p. 699; *State Compensation, supra*, 40 Cal.3d at p. 13.)

Plaintiffs attempt to deflect the impact of this significant policy consideration with the facile argument that "where the self-employed worker has not purchased workers' compensation insurance, the hirer obviously cannot be deemed to have paid for non-existent insurance." (ABOM 34.) Plaintiffs' argument conveniently overlooks the fact that even if a contractor has failed to

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[2] Because a contractor cannot reasonably undertake hazardous work without workers' compensation coverage (or some other form of casualty coverage chosen by the contractor), there is no need for a trial on the issue whether Tverberg himself purchased workers' compensation (or other coverage). (See ABOM 31, fn. 3.)

purchase workers' compensation coverage or some other form of insurance coverage for work-related injuries, some portion of the compensation the contractor receives from the hirer *should have been* applied to the purchase of workers' compensation or equivalent coverage. It is unreasonable to impose greater liability on the hirer merely because the contractor has failed to use a portion of his compensation to procure workers' compensation.

Plaintiffs also contend that some contractors may choose to underbid other contractors to the point they receive insufficient compensation to pay for their own casualty insurance. (See ABOM 40-41.) Once again, plaintiffs' argument fails to provide a principled rationale for denying homeowners and other hirers the protections of *Privette*. As noted in one of the very authorities cited by plaintiffs in their answer brief, our "'economic system permits workers who presume to undertake dangerous work to bargain for an enhanced reward for assuming the danger'" inherent in the work. (*Dillard, supra*, 877 P.2d at p. 377.) Consequently, the fact that some contractors may elect to undertake hazardous work without procuring sufficient compensation to procure casualty coverage is not a basis for denying hirers *Privette*'s defenses against claims by self-employed contractors.

3. Imposing a general duty of care on hirers in favor of self-employed contractors would lead to the anomaly of some hirers incurring a disproportionate share of liability.

To permit self-employed contractors to recover under the peculiar risk doctrine would lead to "'the anomalous result that a nonnegligent person's liability for an injury is greater than that of the person whose negligence actually caused the injury.'" (OBOM 34-35, citing *Privette, supra*, 5 Cal.4th at p. 698.) Here, for example, if the *Privette* doctrine did not apply to this case, Fillner, as the general contractor, could be held vicariously liable to plaintiffs under the peculiar risk doctrine for the negligent conduct of other contractors at the work site, such as Lane (the subcontractor retained by Fillner) or Perry (the subcontractor retained by Lane).

Plaintiffs insist there is no possibility of hirers bearing a disproportionate share of the liability because equitable indemnity is available from those directly responsible. According to plaintiffs, with equitable indemnity available, "the hirer need not fear being 'left holding the bag' for [a] contractor's negligence." (ABOM 15.)

The availability of equitable indemnity as a potential basis for recovery is not, however, a reason to deny hirers the right to invoke *Privette* in defense of claims by self-employed contractors. Given the severity of many accidents sustained at construction sites, the parties who are directly liable for the injuries will not always be able to fully indemnify the hirer—and thus hirers held vicariously liable have very good reason to fear that they may be "left holding the bag" if their only recourse is an equitable indemnity claim. A

simple hypothetical illustrates this point. If a hirer retains a general contractor who in turn retains a subcontractor, the hirer may be left to bear a disproportionate share of liability if the *Privette* doctrine does not apply to the subcontractor's claims against the hirer. For example, the subcontractor might seek to hold the hirer vicariously liable for the *general contractor's* negligence. If the general contractor has insufficient insurance coverage or assets to cover the subcontractor's injuries, the hirer could most definitely be "left holding the bag" for the subcontractor's injuries, a result contrary to *Privette*, which properly recognized that a non-negligent hirer should not be required to shoulder greater liability than that of the person whose negligence actually caused the injury. (*Privette, supra*, 5 Cal.4th at p. 698.)

4. Imposing a general duty of care on hirers in favor of self-employed contractors would confer an unwarranted windfall on contractors.

As discussed in some of the very authorities relied upon by plaintiffs, to the extent contractors or their employees are permitted to recover from hirers in contravention of the limitations of *Privette*, "a limited class of injured workers," such as those "who can convince a judge that their work . . . was inherently dangerous," and therefore gives rise to liability under the peculiar risk doctrine, are permitted "to avoid the limitations of workers' compensation." (*Dillard, supra*, 877 P.2d at pp. 376-377.) Thus, if *Privette* does not apply to claims by self-employed contractors, a limited class of workers may obtain a windfall tort recovery denied to other injured

workers, whose tort recovery is limited by the exclusive remedy provisions of workers' compensation. (See OBOM 36.)

Plaintiffs contend that if a self-employed contractor has *not* purchased workers' compensation insurance, there is no risk of a windfall and, therefore, the contractor's tort recovery should not be limited by the *Privette* doctrine. (See ABOM 13-14.) Plaintiffs' argument misses the point: the windfall is the *tort recovery* by a limited class of workers in excess of the tort recovery available to other similarly-situated workers. Thus, to permit a limited group of workers (self-employed contractors who fail to procure workers' compensation or equivalent coverage) to recover in excess of *Privette* is to confer a windfall on one class of workers that is denied to other workers (such as contractors' employees or self-employed contractors who have purchased casualty coverage).

A self-employed contractor's failure to purchase casualty coverage, moreover, is not a valid reason to impose liability on hirers to an extent greater than is permitted under *Privette*. No hirer should incur greater liability to a self-employed contractor as a consequence of the contractor's ill-advised decision to perform hazardous work without procuring casualty coverage. The effect of plaintiffs' argument would be to unfairly deny hirers the defenses available under *Privette* because *some* self-employed contractors may fail to purchase insurance before undertaking hazardous work.

Plaintiffs also contend that the collateral source rule precludes consideration of the possible windfall to those self-employed contractors who use a portion of the proceeds from the hirer to purchase casualty insurance, then seek recovery from the

hirers on tort claims that would otherwise be barred by *Privette*. (See ABOM 34.) According to plaintiffs, "[t]he existence of insurance proceeds paid for by the injured person for his own benefit should be completely irrelevant." (*Ibid.*, citing *Helfand v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1 (*Helfand*).) Not so.

The collateral source rule merely precludes introduction of evidence of collateral sources of compensation that are "*wholly independent* of the tortfeasor." (*Helfand, supra*, 2 Cal.3d at p. 6, emphasis added; accord, *Miller v. Ellis* (2002) 103 Cal.App.4th 373, 378.) A contractor's recovery of medical and/or disability benefits is not "*wholly independent*" of the hirer because the hirer, in paying the contract price, has effectively paid the portion of the premium covering the contractor's claims for injuries occurring during the performance of the contract work. (See *Privette, supra*, 5 Cal.4th at p. 699 [cost of insurance premium for work-related activity is "'borne by the defendant who hires [the contractor]'"].) Therefore, the evidence of such insurance is relevant and may properly be considered as a reason to apply the *Privette* doctrine to claims by self-employed contractors.

5. Imposing a general duty of care on hirers in favor of self-employed contractors would discourage retention of contractors, making worksites more hazardous.

Privette is also based on the public policy of encouraging retention of contractors, specialists who have the expertise to

perform hazardous work in a safe manner. By placing limits on hirer liability for work-related accidents caused by contractors and their employees, *Privette* encourages hirers to delegate hazardous work to specialty contractors rather than rely on their own employees to perform work that may not be directly within their employees' field of expertise. (OBOM 37-38.)

As aptly explained by the Kansas Supreme Court in one of the cases cited by plaintiffs, a hirer with its own employee work force "'may choose to direct [its] own employees to do the work despite [the employees'] lack of expertise.'" (*Dillard, supra*, 877 P.2d at p. 376.) "'That simple choice limits the [hirer's] exposure to that provided under worker's compensation. But that choice also increases the risk of injury to the employees and to innocent third parties.'" (*Ibid.*) Denying hirers of self-employed contractors the protections afforded under the *Privette* doctrine thus has the effect of "'(1) rewarding [hirers] who, despite their own lack of expertise, choose to perform work negligently[,] resulting in injury to [their employees], (2) increasing risks to innocent third parties and (3) punishing [hirers] who seek expert assistance in an effort to avoid'" potential injuries and liability to others. (*Ibid.*)

Plaintiffs contend the risk that liability in excess of that permitted by *Privette* might deter hirers from retaining contractors "is considerably mitigated" because of the possibility the hirer might recover indemnity from other parties directly responsible for a self-employed contractor's work-related injuries. (ABOM 15.) As noted, however, not *all* hirers will be fully indemnified for catastrophic injuries to self-employed contractors—where a hirer is held

vicariously liable to a subcontractor as a result of a general contractors' negligence, for instance, the hirer will not be able to obtain complete indemnity if the general contractor has inadequate insurance coverage or assets to pay the judgment. Consequently, to permit liability in excess of that permitted by *Privette* may very well lead many commercial entities to delegate hazardous work to their own employees (to whom their liability is limited to workers' compensation) rather than to delegate the work to contractors.

6. Hirers should be permitted to delegate hazardous work to contractors without being required to assure that the contractors perform the work in a safe manner.

Plaintiffs do not deny that in retaining a contractor, a hirer "generally delegates" to the contractor the duty to assure that the contract work is performed in a safe manner. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 673-674.) Plaintiffs nonetheless contend that hirers should have a broad duty of care to self-employed contractors, and be liable for breach of that duty of care, because it is "unrealistic to expect [self-employed contractors] to undertake responsibility for their own safety." (ABOM 53.) Plaintiffs' contention cannot be reconciled with this Court's decision in *Kinsman* that all hirers are permitted to delegate work to contractors with the expectation that the contractors will undertake primary responsibility for assuring that they perform their work in a safe manner. (*Kinsman*, at pp. 673-674.) If a hirer may generally delegate to contractors the responsibility for workplace safety, then

hirers should not owe a broad duty of care to contractors to assure that the contractors perform their work in a safe manner.

Plaintiffs further contend that hirers are not entitled to delegate to self-employed contractors the duty to assure that hazardous work is performed in a safe manner because a self-employed contractor, unlike an employee, lacks the "right to complain" about unsafe working conditions. (ABOM 51.) According to plaintiffs, if a self-employed contractor refuses to work in unsafe conditions, "the hirer or contractor *can terminate his contract and replace him* with another self-employed worker." (*Ibid.*, emphasis added.)

Contrary to plaintiffs' argument, self-employed workers have economic protection in the form of their *contract* with the hirer. By requiring a contractor to work in unsafe conditions that cannot be remedied by the contractor, a hirer would effectively hinder or prevent the contractor's performance, thereby giving the contractor a right to stop work and sue for breach. (See generally 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 850, p. 937 [prevention or hindrance of performance is a breach of contract].)

Plaintiffs cite Labor Code sections 6310 and 6311—which prevent retaliation against employees who file complaints with state agencies based on unsafe working conditions—in support of their argument that self-employed contractors have fewer rights than do employees. These Labor Code sections do not, however, preclude a self-employed contractor from bringing a civil action for breach of contract against a hirer who demands that a contractor

work in unsafe conditions that cannot be effectively remedied by the contractor.

Plaintiffs cite *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219 in an attempt to support their argument that contractors need broader tort remedies than contractors' employees, in order to deter hirers from requiring contractors to work in unsafe conditions. In *McKown*, this Court held only that a hirer who creates unsafe working conditions (e.g., by providing defective equipment for use by a contractor's employee) affirmatively contributes to injuries caused by such defective equipment and can therefore be liable for such injuries notwithstanding the *Privette* doctrine. (ABOM 52.)

As applied to claims by self-employed contractors, *McKown* does not support the sweeping rule that plaintiffs urge, i.e., that *all* hirers sued by self-employed contractors should be denied *Privette*'s protections merely because *some* hirers abuse their superior bargaining position by requiring contractors to work in unsafe conditions. Instead, *McKown* stands for the much narrower proposition that those hirers who affirmatively contribute to the self-employed contractor's injuries by requiring that the contractors work in unsafe conditions can be held liable to the contractor consistent with the *Privette* doctrine.[3]

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[3] Plaintiffs also contend that, for the same reasons that hirers owe a non-delegable duty of care to assure that their contractors do not cause injury to third parties, hirers should have a non-delegable duty to assure that their self-employed contractors perform their work in a safe manner. (ABOM 47-48.) As discussed above, hirer liability to contractors is limited based on numerous compelling (continued...)

II. THE *PRIVETTE* DOCTRINE APPLIES TO PECULIAR RISK CLAIMS ASSERTED BY SELF-EMPLOYED CONTRACTORS—REGARDLESS OF THE RELATIVE "SOPHISTICATION" OF THE DEFENDANT.

A. Even relatively unsophisticated defendants face liability under the peculiar risk doctrine and are therefore in need of *Privette*'s protection.

Plaintiffs contend there is no need to extend the protections of *Privette* to "ordinary homeowners, small business persons, and other unsophisticated hirers" because such hirers are not subject to liability under the peculiar risk doctrine. (ABOM 46; see ABOM 43.) Rather, plaintiffs assert, "[o]nly persons who have knowledge and experience in the field, and businesses [with] sophistication and resources" face potential liability under this doctrine. (ABOM 46.)

Contrary to plaintiffs' contention that homeowners cannot be subject to liability under the peculiar risk doctrine, the peculiar risk claim at issue in the *Privette* case itself was asserted against the owner of a *duplex* by a contractor's employee injured in a fall in the course of the roofing project. (*Privette, supra,* 5 Cal.4th at p. 692.)

(...continued)
policies. Many of these policy reasons—including the hirer's indirect payment of workers' compensation coverage—have no application to third-party claims against hirers. The significant differences in the relationship between a hirer and a contractor, on the one hand, and a hirer and a third party, on the other, invalidate plaintiffs' argument that a hirer should be liable to a self-employed contractor to the same extent as the hirer is liable to a third party.

The claim against homeowner Franklin Privette belies plaintiffs' contention that "ordinary homeowners and unsophisticated hirers" face no potential peculiar risk liability. (See ABOM 46.)

The doctrinal basis for plaintiffs' contention that "ordinary homeowners . . . and unsophisticated hirers" do not face liability under the peculiar risk doctrine originates in a comment from the Restatement Second of Torts indicating that in evaluating whether a defendant should be liable under the peculiar risk doctrine:

> "the extent of the employer's knowledge and experience in the field of work to be done is to be taken into account . . . *an inexperienced widow* employing a contractor to build a house is not to be expected to have the same information, or to make the same inquiries . . . as is a real estate development company employing a contractor to build the same house."

(ABOM 45, emphasis added, citing Rest.2d Torts, §413, com. f, pp. 386-387.)

Unfortunately for most defendants sued under the peculiar risk doctrine, very few qualify for the "inexperienced widow" defense. But for the protections of the *Privette* doctrine, the vast majority of defendants sued under the peculiar risk doctrine would, like Franklin Privette and other homeowners and small business entities sued on a peculiar risk theory, face an extremely arduous task in convincing a jury that they, like the "inexperienced widow" referred to in the Restatement comment, were sufficiently inexperienced to be relieved of vicarious liability under the peculiar risk doctrine.

B. Under *Privette*, even relatively sophisticated hirers are entitled to delegate without fear of incurring peculiar risk liability.

Plaintiffs also contend that "sophisticated" defendants are not deserving of *Privette*'s protections. This Court has already considered and rejected a virtually identical contention. (See *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 268. (*Toland*).) In *Toland*, two justices suggested in a concurring and dissenting opinion that a hirer could be held liable under the peculiar risk doctrine if the hirer's knowledge of the risks inherent in the work, and the precautions necessary to avoid them, was "superior" to that of the contractor. (*Id.* at p. 271 (conc. & dis. opn. of Werdegar, J.) The majority opinion rejected this approach, aptly noting that the determination whether a hirer has superior knowledge (i.e., is more sophisticated) than a contractor "presents considerable difficulties" and that there is "little basis on which a jury could sensibly impose liability using the concurring and dissenting opinion's 'comparative knowledge' rule." (*Id.* at p. 268.) Accordingly, this Court concluded that even sophisticated hirers such as general contractors should not be denied "a right available to any other hiring person: the right to delegate to independent contractors the responsibility of ensuring the safety of their own workers." (*Id.* at p. 269.)

After *Toland*, the *Privette* doctrine is fully applicable to all peculiar risk claims, regardless of the relative sophistication of the hirer and the contractor. Consequently, where a general contractor,

such as Fillner, retains a subcontractor to render services, the general contractor is entitled to delegate to a subcontractor the responsibility of ensuring the safety of the subcontractor as well as that of those retained by the subcontractor (whether employees or other contractors), without fear of incurring vicarious liability for the subcontractor's negligence.

C. The availability of contractual indemnity is not a basis to deny hirers the protections afforded by *Privette*.

Plaintiffs also contend there is no need to extend the *Privette* doctrine to peculiar risk claims by self-employed contractors because "sophisticated hirers" can avoid such liability through contractual indemnity provisions. (ABOM 49-50.)

Plaintiffs' argument fails for several reasons:

First, as reflected by the fact that plaintiffs limit this argument to "sophisticated hirers," the argument fails to take into account "unsophisticated hirers," i.e., most homeowners and small businesses, who have no understanding of contractual indemnity and lack the sophistication to bargain for it. As explained, it is the contractor, not the homeowner or small business owner, who is presumed to know the risks of their employment and who is charged with responsibility for procuring adequate insurance. (See *ante*, § I.B.1.)

Second, as noted above, this Court has already decided that even so-called "sophisticated" hirers (i.e., hirers with "superior

knowledge") are entitled to *Privette*'s protections against claims by contractors' employees. (See *ante*, § II.B.) If, notwithstanding the availability of contractual indemnity, sophisticated hirers are entitled to *Privette*'s protections against claims *by contractors' employees*, then the availability of contractual indemnity is not a reason to deny sophisticated hirers *Privette*'s protections against claims *by self-employed contractors*.

Finally, whatever the hirer's level of sophistication, the availability of contractual indemnity is no substitute for *Privette*'s multi-faceted defenses. Indemnity is of no value whatsoever where the person or entity who might be held liable to indemnify the hirer (e.g., a general contractor that is retained by a hirer and is directly liable for injuries to an injured subcontractor) is insolvent or otherwise unable to pay the share of damages directly attributable to their fault arising from a catastrophic work-related accident.

D. The comparative fault defense is not a substitute for the *Privette* doctrine.

Plaintiffs contend that the comparative fault doctrine provides a sufficient defense to hirers against peculiar risk claims arising from the negligent conduct of self-employed contractors and that hirers therefore have no need to invoke *Privette* to defend against such claims. (See ABOM 48-49.)

As is implicit in this Court's *Privette* decisions, however, comparative fault principles alone provide insufficient protection where hirers are sued for injuries arising from work-related

accidents. Plaintiffs often seek to utilize the peculiar risk theory to hold a hirer *vicariously* liable for the negligent conduct of a supervising contractor. In such circumstances, the comparative fault doctrine will typically provide no protection to the hirer whatsoever. For example, an injured subcontractor might sue a property owner under the peculiar risk doctrine on the theory that the hirer should be vicariously liable for a general contractor's negligent conduct. In such an action, the comparative fault doctrine, unlike the *Privette* doctrine, would not be a viable defense to the property owner if the jury found the general contractor liable and allocated no fault to the subcontractor.

Thus, for the same reason *Privette* precludes such claims by contractors' employees, it likewise should apply to preclude such claims by contractors themselves.

III. THE *PRIVETTE* DOCTRINE APPLIES TO RETAINED CONTROL CLAIMS ASSERTED BY SELF-EMPLOYED CONTRACTORS.

A. Hirers are not liable to contractors' employees on a retained control theory absent proof that the hirer affirmatively contributed to the employee's injury.

The retained control doctrine provides generally that one who entrusts work to a contractor, "but who retains the control of any part of the work, is subject to liability for physical harm to others

for whose safety the employer owes a duty to exercise reasonable care." (Rest.2d Torts, § 414.)

As plaintiffs candidly admit, prior to this Court's decision in *Hooker*, section 414 was broadly construed to impose liability on hirers who failed to prevent unsafe practices by their contractors. (See ABOM 26-28, citing *Hooker, supra*, 27 Cal.4th 198.) The basis for such expansive liability arose from various sources, including a comment to section 414 which provides that a hirer may be held liable on the retained control theory merely because the hirer "retain[ed] only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others." (ABOM 26-27, quoting Rest.2d Torts, § 414, com. a, p. 387.) Similarly, another comment to section 414 provides that if the hirer "knows or should know" that contractors have "carelessly done their work in such a way as to create a dangerous condition," the hirer may be liable on the retained control theory for failure "to remedy [the dangerous condition] himself or by the exercise of his control cause the [contractor] to do so." (Rest.2d Torts, § 414, com. b.)

Prior to *Hooker*, some California courts gave effect to these comments to section 414, holding that a hirer could be liable on the retained control theory of liability solely on the ground that the hirer had authority to "decide all questions as to the acceptability of the work performed and the acceptability of the manner of performance of the work" and had knowledge of the contractor's use of unsafe equipment. (See, e.g., *Holman v. State of California*

(1975) 53 Cal.App.3d 317, 334 (*Holman*), disapproved by *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235.)

Of course, *all* hirers have the authority to decide the "acceptability" of a contractor's work, just as all hirers have the right to forbid the performance of the contractor's work in a manner likely to be dangerous to the contractor or to others. (See *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 788 [all hirers have a "general supervisory right to control the work so as to insure its satisfactory completion"].) Thus, the retained control theory, broadly construed, threatened to become a liability theory as expansive as the peculiar risk doctrine, under which employers can be held vicariously liable for contractors' negligence.

In *Hooker*, this Court, recognizing the potential abuse of retained control claims against hirers, imposed a number of reasonable limitations on the scope of hirer liability to contractors' employees under the retained control doctrine, holding that a hirer may not be liable under this theory of liability to an employee of the contractor "merely because the hirer retained control over safety conditions at a worksite." (*Hooker*, *supra*, 27 Cal.4th at p. 202.) Instead, a hirer may be liable to a contractor's employee on a retained control theory of liability only "insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injury." (*Ibid.*)

As this Court further explained in *Hooker*, if the "affirmative contribution" limitation were not a required element of proof by contractors' employees seeking recovery on a retained control theory of liability, this theory could easily become a pretext for holding

hirers *vicariously* liable for the acts or omissions of the contractor, the very type of liability that the *Privette* doctrine was meant to preclude.[4] (*Hooker*, *supra*, 27 Cal.4th at pp. 211-212.)

B. Hirers may not be held liable to a self-employed contractor on a retained control theory absent proof that the hirer affirmatively contributed to the contractor's injury.

Plaintiffs inexplicably contend that *Hooker* does not apply where the plaintiff is a self-employed contractor rather than a contractor's employee. Under plaintiffs' theory, a hirer could be liable to a self-employed contractor on a retained control theory even where the contractor could not prove that the hirer affirmatively contributed to his injury. (See ABOM 25-28, citing *Holman*, *supra*, 53 Cal.App.3d at pp. 332-335.)

Just as a hirer may be held liable to a contractor's employee only where the hirer affirmatively contributed to the employee's

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[4] The CACI committee has not incorporated this Court's express requirement of proof of affirmative contribution in the CACI form instruction on the retained control doctrine. (See CACI No. 1009B (2009 Supp.).) The omission of the requirement in the form instruction is particularly perplexing in light of the CACI committee's notes following the form instruction, which specifically quote *Hooker*'s "affirmative contribution" requirement. (See Sources and Authority to CACI No. 1009B (2009 Supp.) ¶ 1.)

The erroneous statement of the law in the CACI instruction warrants this Court's comment not only for the potential benefit of the parties and courts in this case, but in many other pending and future cases as well.

injury, a hirer may be held liable to a self-employed contractor only where the hirer affirmatively contributed to the contractor's injury. (See *Hooker*, *supra*, 27 Cal.4th at p. 210.) A self-employed contractor should not be permitted to recover without proving the same elements that a contractor's employee must prove to recover.

As explained in *Hooker*, the "fairness rationale" at the core of the *Privette* doctrine precludes imposition of liability to contractors' employees under the retained control doctrine "where such liability would exceed that imposed on the injured plaintiff's immediate employer, who created the hazard." (*Hooker*, *supra*, 27 Cal.4th at p. 211.) By parity of reasoning, it is fundamentally at odds with *Privette* and *Hooker* to hold hirers liable to self-employed contractors on the retained control theory of liability for the negligence of the contractor himself (or, on multiemployer worksites, those contractors supervising the injured contractor's activities), i.e., the party (or parties) who created the hazard. To impose such liability on hirers of self-employed contractors effectively requires that hirers assume a duty to assure that the contractors perform their work in a safe manner, a duty that hirers do not owe to either contractors or their employees. (See *ibid.*)

C. Fillner did not affirmatively contribute to plaintiffs' injuries.

Plaintiffs also contend Fillner affirmatively contributed to plaintiffs' injuries.[5]

To demonstrate affirmative contribution, plaintiffs must prove some form of *affirmative* misconduct rather than mere inaction. (See *Hooker, supra*, 27 Cal.4th at p. 210 [hirer did not affirmatively contribute merely by failing to prevent worker from performing his work in an unsafe manner]; *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 674 [same].) A hirer's mere inaction in the form of failing to assure that a contractor performs his work in a safe manner is not affirmative contribution. (*Hooker*, at p. 202.) Instead, a hirer's inaction rises to the level of affirmative contribution only in exceptional circumstances, such as where the hirer has "*promise[d] to undertake* a particular safety measure," but failed to do so, resulting in injury. (*Id.* at p. 212, fn. 3, emphasis added.)

Here, the undisputed evidence shows that Fillner retained Lane Supply to install a canopy over the gas station under construction by Fillner. (AA 38.) In retaining Lane Supply, Fillner

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[5] Fillner did not raise the affirmative contribution issue in its petition for review because the Court of Appeal did not discuss the issue. Plaintiffs filed no answer to Fillner's petition for review and therefore did not raise the affirmative contribution issue prior to briefing. However, Fillner does not object to the Court's consideration of this issue and addresses it here should the Court deem it appropriate to reach the issue.

delegated responsibility for care and safety during installation of the canopy. Lane Supply, in turn, contracted with Perry Construction for installation of the canopy (*ibid.*), thereby delegating to Perry responsibility for care and safety during the installation. Perry retained Jeffrey Tverberg to assist in the installation of the canopy. (*Ibid.*)

It is undisputed that prior to the accident, Tverberg knew of the existence of the bollard holes and knew that they presented a potential hazard, yet did not take any precautions against any danger they presented. (AA 39-40.) Tverberg's only undertaking in an attempt to assure his safety prior to commencement of the work was to request that Fillner cover the holes, something Fillner never agreed to do. (AA 112.) Thus, even though the bollard holes remained uncovered at the time he planned to begin work, Tverberg elected to begin his work without covering the holes himself *or* insisting that someone (whether Perry, Lane, or Fillner) cover the holes before he began his work.

The relevant facts thus demonstrate that Fillner did not affirmatively undertake any duty to assure plaintiff's safety and therefore did not affirmatively contribute to Tverberg's injury. Had Fillner promised to cover the bollard holes, then failed to do so, plaintiffs could reasonably argue that Fillner's conduct constituted affirmative contribution under the reasoning of *Hooker*. It is undisputed, however, that Fillner did not promise to cover the holes. Nor is there evidence that Fillner engaged in any other form of affirmative misconduct.

Plaintiffs contend Fillner affirmatively contributed because "Fillner had authority over safety at the jobsite; Fillner had the power to cover the holes or provide other safety measures; Fillner was on actual notice of the danger; and Fillner chose to take no action." (ABOM 30.) Plaintiffs' theory is precisely the theory rejected in *Hooker*, where the Court held that "a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at [the] worksite." (*Hooker, supra*, 27 Cal.4th at p. 202.) Likewise, under *Hooker*, the evidence that Fillner was aware of the dangerous condition is not a basis for a finding of affirmative contribution. (See *id.* at pp. 203, 214-215 [Caltrans' awareness of danger inherent in permitting freeway overpass to be used during construction did not constitute affirmative contribution].)

Ultimately, plaintiffs seek to hold Fillner responsible because Jeffrey Tverberg made an unwise decision to confront a condition that he personally knew to be dangerous, without first remedying the condition or requiring someone else to remedy it on his behalf. This evidence is insufficient to support recovery on the retained control theory of liability.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

September 10, 2009

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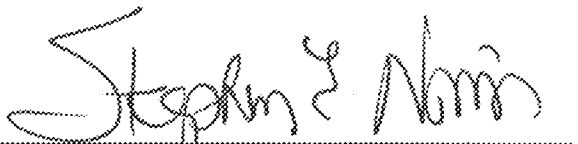
By: 
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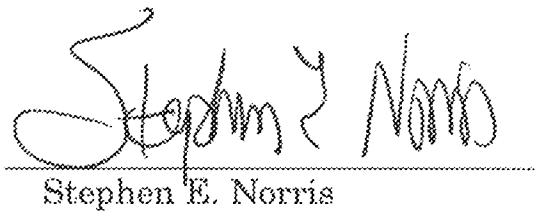
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(e)(1).)

The text of this brief consists of 8,398 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: September 30, 2009



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On **September 10, 2009**, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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 Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the 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 declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **September 10, 2009**, at Encino, California.

Pamela Donato

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Supreme Court Case No. S169753
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