Dykema Gossett PLLC
2723 South State Street
Suite 400
Ann Arbor, MI 48104
WWW.DYKEMA.COM
Tel: (734) 214-7660
Fax: (734) 214-7696

John M. Thomas
Direct Dial: (734) 214-7613
Direct Fax: (855) 262-3751
Email: JThomas@dykema.com

January 27, 2020

The Honorable Tani Cantil-Sakauye, Chief Justice, and Associate Justices
The Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Petition for Review in *Berroteran v. Superior Court* (2019), No. S259522, 41 Cal.App.5th 518

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

Pursuant to California Rule of Court 8.500(g), the American Tort Reform Association ("ATRA") asks this Court to grant the Petition for Review.

ATRA is a national, nonpartisan, nonprofit organization with a diverse membership of organizations, including nonprofit entities, small and large companies, as well as state and national trade, business, and professional associations. ATRA has affiliated coalitions in more than 40 states. Its members hail from across the United States, and many, if not most, are brick-and-mortar entities that serve people in facilities open to the public.

ATRA is dedicated to improving the American civil justice system, and depositions are a significant component of that system. ATRA has a significant interest in promoting rules that will allow such depositions to be used only to the extent that they promote fairness, predictability, and efficiency. As Petitioner and other amici have explained, review is amply warranted here to clarify the circumstances under which depositions of a *defendant's own employees*, taken by plaintiffs *in a class action*, may be introduced into evidence against that defendant by a different plaintiff asserting only individual claims.

The facts that this particular case is a class action, and that the depositions at issue were depositions of the defendant's own employees, are important. First, few class actions ever reach trial, because the decision on class certification as a practical matter either terminates the litigation (if certification is denied) or provides a powerful incentive for the defendant to settle (if certification is granted). *See, e.g.*, *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757 (denial of certification "effectively rang the death knell for the class claims"); *Newton v. Merrill Lynch,*

Pierce, Fenner & Smith, Inc. (3d Cir. 2001) 259 F.3d 154, 165 ("[C]ertifying the class may place unwarranted or hydraulic pressure to settle on defendants.") Whether class certification is granted or denied, the ruling "will likely have a dispositive impact on the course and outcome of the litigation." *Id.* Further, discovery in class actions is commonly bifurcated, such that discovery prior to certification focuses on issues relevant to class certification; this appears to have been the case in the *Navistar* class action in which the depositions at issue were taken. (*See* slip op. at 13.). As a result of both of these factors, a defendant's motivation to examine its own witnesses in the initial discovery phase of a class action is significantly different than it would be at a trial on the merits.

Second, depositions of a corporation's current employees are, in effect, depositions of the corporation itself. This is literally true in the case of a "person most knowledgeable" or "PMK" deposition. It is also true as a practical matter in the case of depositions of other employees, whose testimony is likely to be used by the opposing party as admissions by the defendant. And, a defendant's motivation to cross-examine itself differs significantly from its motivation to examine third-party or overtly hostile witnesses. For example, a defendant can be relatively confident that its own employees will be available and willing to testify at trial; it can have less confidence that this will be true for other witnesses. And there are additional considerations that reduce a defendant's motivation to cross-examine itself at a deposition. *See, e.g., Wahlgren v. Coleco Indus., Inc.* (1984) 151 Cal.App.3d 543,

Wahlgren was not a class action, but like this case it did involve depositions of corporate employees taken in one case that were offered into evidence by a different plaintiff in a later case. The issues in the two cases were similar, but the Court of Appeal nevertheless held that the depositions were properly excluded in the later case pursuant to Evidence Code §1291. The Court recognized that the defendant had had an opportunity to cross-examine the deponents in the first case, and that the deponents were unavailable to testify in the later case. Nevertheless, the Court held that the depositions were not admissible in the later case because the defendant's interest and motive in cross-examination was dissimilar:

> All respected authorities, in fact, agree that given the hearing's limited purpose and utility, examination *of one's own client* is to be avoided. At best, such examination may clarify issues which could later be clarified without prejudice. At worst, it may unnecessarily reveal a weakness in a case or prematurely disclose a defense.
>
> In contrast, a trial serves to resolve any issues of liability. Accordingly, the interest and motive in cross-examination increases dramatically. Properly exercised, this right serves to clarify a litigant's position and may result in his or her complete exoneration. Given the practical differences between each of the proceedings involved, it is therefore clear … that the trial court acted properly in excluding the deposition testimony.

Wahlgren, 151 Cal. App. 3d at 546-47 (emphasis added). As in *Wahlgren*, Ford's motivation to examine itself during the deposition was minimal. Even further, to the extent Ford had any motivation to examine itself, that motivation related primarily to class certification issues. *A fortiori*, under *Wahlgren*, the trial court did not abuse its discretion in excluding the deposition testimony at issue here.

Plaintiff, echoing the Court of Appeal, argues that the decision in *Wahlgren* "is contrary to persuasive, uniform federal law applying Federal Rules of Evidence, Rule 804(b)(1), the federal analogue to section 1291." (Answer to Petition for Review at 36.) Plaintiff and the Court of Appeal are wrong. The "uniform" federal case law on which Plaintiff and the Court of Appeal relies consists of two cases, neither of which involve class actions or depositions of "one's own client." Both were individual cases and both involved depositions of *adverse* witnesses. *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492 involved the deposition of a former corporate officer who, in his deposition, was testifying *against* his former employer. *Id.* at 1504. *De Luryea v. Winthrop Labs., Div. of Sterling Drug, Inc.* (8th Cir. 1983) 697 F.2d 222, 226 involved the deposition of the plaintiff's former psychiatrist who, in his deposition, provided testimony directly adverse to his former patient. Neither was a case in which the motivation to examine or cross-examine one's own client would differ depending on whether the context is a deposition or a trial. Neither supports the decision in this case.[1]

The federal court decisions interpreting Rule 804(b)(1) are more nuanced, and depend more heavily on the specific facts of each case, than Plaintiff or the Court of Appeal acknowledge. As the Court of Appeal appeared to recognize, the most widely-followed federal decision case is the Second Circuit's *en banc* decision in *United States v. DiNapoli* (2d Cir. 1993) 8 F.3d 909. Under that case, "[t]he proper approach … in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of *substantially similar intensity* to prove (or disprove) the same side of a

[1] The Court of Appeal also relied on *Pearl v. Keystone Consol. Industries, Inc.* (1989) 884 F.2d 1047, 1052 for the proposition that a "party who makes the decision not to cross-examine witness in deposition cannot complain that the failure to cross-examine renders the deposition inadmissible." (Slip op. at 20.) Like *Hendrix* and *DeLuryea, Pearl* was not a class action and did not involve the deposition of one's own client. Moreover, the plaintiff, without explanation, simply failed to appear for a deposition without explanation, and then argued that the deposition should be excluded in a later proceeding because she had no opportunity to cross-examine the witness at the deposition. Not surprisingly, the court rejected this argument because the plaintiff "had an 'opportunity' to cross-examine Kirschner, and her failure to cross-examine was essentially her own decision." *Pearl*, 884 F.2d at 1052. The court did not address whether the plaintiff had a similar motive to examine the witness.

substantially similar issue." *Id.* at 914-15 (emphasis added). The "intensity" to prove an issue "will sometimes be affected by the nature of the proceedings." *Id.* at 912. For example, "[w]here both proceedings are trials and the same matter is seriously disputed at both trials, it will normally be the case that the side opposing the version of a witness at the first trial had a motive to develop that witness's testimony similar to the motive at the second trial." *Id.* But "[t]he situation is not necessarily the same where the two proceedings are different in significant respects, such as their purposes or the applicable burden of proof." *Id.* at 913.

The facts of *DiNapoli* illustrated this. In that case, a criminal defendant sought to introduce at trial exculpatory testimony contained in grand jury testimony, claiming that the prosecution in the grand jury proceedings had a motivation to discredit this testimony similar to its motivation at trial. But the prosecutor's only burden of proof at the grand jury stage is to establish probable cause to believe the suspect is guilty. *Id.* If other evidence already establishes probable cause, "[t]hat circumstance alone will sometimes leave the prosecutor with slight if any motive to develop the exonerating testimony in order to persuade the grand jurors of its falsity." *Id.* Moreover, "additional circumstances"—such as a desire not to prematurely reveal surveillance techniques—might cause a prosecutor not to use "powerful ammunition" in the grand jury proceedings and to save that ammunition for trial. *Id.* Under the specific circumstances of *DiNapoli*, the court held that the grand jury testimony was not admissible because the prosecution did not have the same interest in developing that testimony that it would have at trial. However, the court refused to adopt a blanket rule that prior grand jury testimony can never be admitted in a subsequent criminal prosecution. Rather, "the inquiry as to similar motive must be fact specific, and the grand jury context will sometimes, but not invariably, present circumstances that demonstrate the prosecutor's lack of a similar motive." *Id.* at 914. As the Second Circuit later elaborated, the relevant inquiry is whether "the lawyer taking the deposition had a 'similar motive' to develop the testimony as the same party would later have at trial." *United States v. Whitman* (2d Cir. 2014) 555 F. App'x 98, 103.[2]

[2] *See also, e.g., U.S. v. Geiger* (9th Cir. 2001) 263 F.3d 1034, 1038 ("The 'similar motive' requirement is inherently factual and depends, at least in part, on the operative facts and legal issues and on the context of the proceeding."); *SEC v. Jasper* (9th Cir. 2012) 678 F.3d 1116, 1129 ("Under [Rule 804(b)(1)] especially, admission of evidence 'is a matter for the trial judge's discretion, to be exercised on the basis of his evaluation of the realities of cross-examination and the motive and interest with which [one party] carried out the prior examination.'"); *United States v. Feldman* (7th Cir. 1985) 761 F.2d 380, 385 ("Mere 'naked opportunity' to cross-examine is not enough; there must also be a perceived 'real need or incentive to thoroughly cross-examine' at the time of the deposition."); *United States v. Martoma* (S.D.N.Y. Jan. 7, 2014) 2014 U.S. Dist. LEXIS 152926, at *15-17 ("Application of *DiNapoli* here indicates that the SEC's motive to cross-examine Cohen at the investigative deposition is not comparable to the motive that the USAO would have to cross-examine him at Martoma's trial.")

Prima facie, the analysis in *DiNapoli* requires the same result in this case as *Wahlgren*. Ford's interest in proving or disproving any issue was not of the same or similar "intensity" as its interest in proving issues at trial. Like the prosecution in *DiNapoli,* which had a minimal burden of proof in grand jury proceedings, Ford had no burden of proof at all in the depositions, leaving Ford "with slight if any motive to develop" the testimony. *Id.* at 913. Further, as in *DiNapoli,* "additional considerations" existed to save potentially "powerful ammunition" for trial; as the Court of Appeal noted in *Wahlgren,* examining one's own client "may unnecessarily reveal a weakness in a case or prematurely disclose a defense." *Wahlgren,* 151 Cal. App. 3d at 547; *cf. United States v. McDonald* (5th Cir. 1988) 837 F.2d 1287, 1293 ("ANICO, knowing that it would have the opportunity to cross-examine Minteer at trial did not have the same incentives to then develop inaccuracies in the deposition testimony.").

As in *DiNapoli,* this does not mean that prior deposition testimony of one's own client is never admissible in later proceedings, only that "the inquiry as to similar motive must be fact specific." *DiNapoli,* 8 F.3d at 914. But federal courts uniformly hold that the proponent of the evidence has the burden to prove that the motive was similar. *See, e.g., United States v. Salerno* (1992) 505 U.S. 317, 322 ("The respondents … had no right to introduce DeMatteis' and Bruno's former testimony under Rule 804(b)(1) without showing a 'similar motive.'"); *Annunziata v. City of New York* (S.D.N.Y. May 28, 2008) 2008 U.S. Dist. LEXIS 42097 ("In order to admit prior testimony under Rule 804(b)(1), the proponent has the burden to show by the preponderance of the evidence that (1) the witness is unavailable; (2) the party against whom the testimony is offered is the same as in the prior proceeding; and (3) that party had the same motive and opportunity to examine the witness."); *Brindowski v. Alco Valves, Inc.* (E.D. Pa. Jan. 12, 2012) 2012 U.S. Dist. LEXIS 14569, at *13 n.1 ("[T]he burden is on the proponent of the evidence to prove that a defendant in the present case would have had an opportunity and similar motive to cross-examine a witness who was deposed in an earlier action.").

In this regard—the allocation of the burden of proof—the decision of the Court of Appeal is flatly contrary to the federal cases. The Court of Appeal repeatedly made it clear that the trial court abused its discretion in excluding the prior deposition testimony, not because Plaintiff established a similar motive, but because Ford failed to establish the absence of a similar motive:

- "Ford offered no further explanation why its motive to examine any specific employee or former employee differed from its motive in the current case." (Slip op. at 24.)
- "Ford offered no analysis of the causes of action in the prior litigation generating the challenged depositions and did not argue that those causes of action were different from the current litigation." (*Id.*)
- "Ford, however, did not proffer any evidence that there was any strategic reason for not cross-examining its witnesses at their depositions here." (*Id.* n.10.)

- "Ford fails to demonstrate that it lacked a similar motive to examine its witnesses in the former litigation." (*Id.* at 26.)
- "In short, the record does not support the conclusion that Ford did not have a similar motive to cross-examine its own witnesses in the prior litigation." (*Id.* at 27.)

Under federal law, Ford had no burden to prove that it did not have a similar motive to cross examine its own client; Plaintiff had the burden to prove that Ford *did* have a similar motive. California law is the same. *E.g., People v. Livaditis* (1992) 2 Cal.4th 759, 778 ("The proponent of hearsay . . . has the burden of laying the proper foundation"). Thus, the decision of the Court of Appeal is contrary to *both* federal *and* California law.

ATRA respectfully requests that this Court grant the Petition for Review and reverse the judgment of the Court of Appeal.

Respectfully submitted,

DYKEMA GOSSETT, PLLC

/s/ John M. Thomas

John M. Thomas