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Supreme Court of California
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No. S259522

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RAUL BERROTERAN

Petitioner and Respondent,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY

Respondent.

FORD MOTOR COMPANY

Real Party in Interest

California Court of Appeal, Second District, Division One Civil No. B296639
Appeal from Los Angeles Superior Court, Case No. BC542525
Honorable Gregory Keosian, Judge Presiding

ANSWERING BRIEF ON THE MERITS

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INTRODUCTION

Ford Motor Company suggests that the issue before this Court is whether Evidence Code section 1291, subdivision (a)(2) (section 1291(a)(2)), gives trial courts the discretion to *exclude* a defense witness's former videotaped deposition testimony in another lawsuit where the defendant chose not to examine the witness. That flips the issue on its head.

The real issue, as the Court of Appeal recognized, is whether courts have discretion under section 1291(a)(2) to *allow* such testimony as trial evidence. The Court of Appeal did not hold that prior defense witness testimony *always* comes in. It held that *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543 (*Wahlgren*) is wrongly decided "to the extent it espouses a blanket proposition that a party has a different motive in examining a witness at a deposition than at trial." (*Berroteran v. Superior Court* (2019) 41 Cal.App.5th 518, 520-521 (*Berroteran*).) The Court of Appeal held that there was no *blanket bar* to the prior testimony. Rather, courts must have discretion to determine whether such testimony is admissible.

Berroteran got it right. *Wahlgren* rests on an outdated notion that "a deposition hearing normally functions as a discovery device" only and has "limited purpose and utility," such

that defense counsel has no reason to cross-examine a defense witness. (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) *Wahlgren* was decided in 1984, before California authorized videotaped depositions. As *Berroteran* recognized, *Wahlgren*'s assumptions "are unsupported by legal authority, inconsistent with modern trials and the omnipresence of videotaped depositions during trial, and contrary to persuasive federal law interpreting an analogous hearsay exception." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 521.)

A party's decision not to examine its own witness at a deposition cannot *categorically preclude* that testimony from being used as trial evidence in another lawsuit when the witness is unavailable. After all, section 1291(a)(2) merely requires "the right and opportunity" to cross-examine, not actual cross-examination—a right and opportunity clearly present here.

Ford's motion in limine treated *Wahlgren* as barring all of Ford's witnesses' prior deposition testimony, and the trial court granted Ford's motion without ever reviewing any testimony or pleadings. In reversing, *Berroteran* recognized that given the nature of the deposition testimony and the other lawsuits, it was an abuse of discretion not to apply section 1291(a)(2)'s hearsay exception. (41 Cal.App.5th at pp. 534-535.)

In fact, not only does Ford misrepresent the issue presented, it also presents a whitewashed view of the record. Ford's brief omits the central reasons why the Court of Appeal held that section 1291(a)(2)'s hearsay exception applies here:

- Each videotaped deposition was taken in either (1) a master consolidated class action in which plaintiff Raul Berroteran II (Berroteran) was a putative member before opting out at the settlement stage to sue Ford individually for the same claims (five witnesses), (2) lawsuits by other plaintiffs who likewise opted out of that same class action to sue Ford for the same claims (three witnesses), or (3) another class action based on the same defective engine (one witness). Thus, this case involves videotaped depositions taken to create *trial* evidence in federal and state lawsuits involving the *same* fraud and engine-defect allegations against the *same* defendant.

- Berroteran specifically modeled his opt-out lawsuit on the master class action complaint, as did the other opt-out plaintiffs. The other opt-out lawsuits allege *identical* causes of action and virtually identical allegations as Berroteran's lawsuit.[1]

[1] The class action depositions also are admissible under Code of Civil Procedure section 2025.620, subdivision (g) ("CCP 2025.620(g)"), which applies to depositions taken in a prior action involving the same parties and same subject matter. The Court of Appeal never reached that issue. (*Berroteran*, *supra*, 41

- The depositions here were not mere discovery devices. They were taken to be used as evidence against Ford at the trials of the suits in which they were taken. The only reason the lawyers incurred the cost of *videotaping* them was to be able to play testimony to the jury. And on their faces, most deposition transcripts expressly refer to testimony being shown to "the jury."

- Each deposition has already been used as evidence *in trials* brought by other opt-out plaintiffs against Ford.

- Each witness appeared at deposition as a Ford witness, represented by Ford's counsel. Ford prepared/coached the witnesses, attended each deposition, made objections, and had the opportunity to ask questions.

- Ford actually examined two of the witnesses at their depositions.

- One of the depositions was actually used at the trial of the lawsuit in which it was taken. The only reason the other depositions were not so used is because those lawsuits settled.

- Three class action deponents had retired from Ford at the time of their depositions, meaning that Ford itself had no

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Cal.App.5th at p. 528, fn. 8.) Accordingly, if the section 1291(a)(2) holding were reversed, the Court of Appeal would have to resolve the CCP 2025.620(g) issue on remand.

assurance it could get them to attend trial and thus had every reason to fully examine them during their depositions.

- Three deponents testified as Ford's "person most knowledgeable" designees in opt-out lawsuits virtually identical to Berroteran's, and pursuant to deposition notices expressly stating that the testimony *would be used as trial evidence*.

- Although each witness remains alive, Berroteran cannot compel them to attend trial because they live outside California. But Ford has never claimed these witnesses, most of whom remain Ford employees, are unavailable *to Ford*. If Ford believed any deposition testimony was inaccurate or incomplete, Ford could moot the hearsay issue by having the witnesses appear at trial and elicit additional information. Yet in the opt-out lawsuits where these depositions came in as trial evidence, Ford merely counter-designated other deposition testimony. Ford refuses to have the witnesses appear at trial.

At bottom, Ford's position is gamesmanship. Ford claims that despite the lawsuits' irrefutable overlap, Berroteran cannot use the prior testimony at his trial because he did not go through the pointless, duplicative and expensive task of re-deposing each deponent in other states, asking them to confirm what they said in their prior depositions years before when their memories were

fresher. But Ford has never shown it would have done anything different had the depositions been re-taken in this lawsuit. Ford has never identified *any* testimony as inaccurate or untrustworthy. Indeed, most of the testimony addresses *undisputed* information, such as historical facts or the authentication of documents. Yet Ford's position would mean that each of the hundreds of opt-out consumers must take each of these depositions.

And Ford's gamesmanship is designed to evade evidence of *fraud*. Among other things, the master class action alleged that Ford made fraudulent statements and concealments about the engine's reliability. The opt-out plaintiffs modeled their fraud claims on the class action's fraud allegations. Ford asserted its *Wahlgren* argument only *after* the depositions came in as evidence in multiple other opt-out trials that garnered large fraud verdicts. Thus, Ford seeks to use *Wahlgren* to avoid damning evidence of fraud. Yet Ford's brief omits virtually any mention of fraud.

Ford's complaints about "unfairness" ignore that section 1291(a)(2) merely creates a hearsay exception. Ford may still object to portions of testimony as inadmissible—e.g., that particular testimony is irrelevant to Berroteran's claims. But what Ford cannot do is use its own decision not to examine

its own witnesses to *categorically bar* the use of that testimony in another trial. As cases construing section 1291(a)(2)'s federal analogue hold, "'as a general rule, a party's decision to limit cross-examination in a discovery deposition is a strategic choice and *does not preclude* his adversary's use of the deposition at a subsequent proceeding.'" (*Berroteran*, *supra*, 41 Cal.App.5th at p. 531, italics added, citation and bracket omitted.)

The Court of Appeal's decision should be affirmed.

STATEMENT OF THE CASE

A. A master multidistrict-litigation class action is created against Ford, alleging warranty and fraud claims based upon problems with a particular 6.0-liter engine.

In 2011, a multidistrict litigation panel created a multidistrict-litigation class action case in Illinois federal court, entitled MDL No. 2223, *In re: Navistar 6.0L Diesel Engine Products Liability Litigation* (the Class Action); it transferred and consolidated thirty-nine class and individual lawsuits against Ford from across the country involving claims by consumers of vehicles equipped with an allegedly defective 6.0-liter diesel engine manufactured by Navistar. (1PE/25-26, 374.)

Berroteran was a putative class member because (a) he purchased a 2006 Ford truck equipped with the defective engine, and (b) he was a putative member of two California class actions and one federal class action that were consolidated into the master Class Action. (1PE/12-13, 24-37, 488-509.)

A master class action complaint (Class Action Complaint) was filed, alleging that Ford installed a defective 6.0-liter diesel engine in trucks and other vehicles between 2003 and 2007, and that the defects caused poor performance and safety hazards, expensive repairs, and loss of usage. (1PE/374-509.) The Class Action Complaint alleged that Ford breached its warranty obligations, "fail[ed] to authorize necessary major engine repairs or engine replacements during the warranty period, instead only authorizing cheaper services . . . which were not adequate repairs," and concealed from consumers its inability to repair the engines. (1PE/396-403.)

The Class Action Complaint alleged that Ford committed fraud against all class members and sought compensatory and punitive damages. (1PE/456, 458.) It alleged that Ford "knew from the outset that there were severe and pervasive design, manufacturing, and quality issues plaguing the Ford 6.0L Engines," yet "never disclosed any of these issues to consumers" and instead made false representations to consumers about the

engine. (1PE/387-388.) "No class member knew, or could have known, about Ford's inability to repair the defects in its engines because . . . Ford kept this information highly confidential, even sending internal warnings not to share this information outside of Ford." (1PE/404.) "[T]he factual bases of Ford's misconduct are common to all class members, as—regarding the defective nature of the 6.0L Engines—Ford made uniform misrepresentations to and uniformly withhold [*sic*] material information from Plaintiffs and all class members." (1PE/446.)

The Class Action Complaint included breach-of-warranty and fraud allegations for violating various states' laws, including California's, and included claims that Ford's treatment of California consumers violated California's Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) (CLRA) and California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.). (1PE/447-481.) The Class Action Complaint created a Consumer Fraud Class and a California Consumer Fraud Sub-Class, both of which included Berroteran. (1PE/442.) A count for violation of state consumer protection laws alleged all elements of fraud, including reasonable reliance, on behalf of the Consumer Fraud Class. (1PE/454-456.) The CLRA count did the same on behalf of the California Consumer Fraud Sub-Class. (1PE/456-458.)

B. During the Class Action discovery, videotaped depositions of Ford witnesses are taken to establish trial evidence.

Berroteran sought admission of excerpts from five videotaped depositions of key Ford witnesses that class counsel took during Class Action discovery. These depositions established Ford's knowledge of and inability to repair the defects in the Navistar-manufactured engine in Ford's 2003-2007 vehicles and Ford's concealment of those defects (the "Class Action depositions"). (See 1PE/2119-2315 [Ligon]; 1PE/1827-2117 [Koszewnik]; 1PE/1231-1374 [Frommann]; 1PE/1150-1229 [Freeland]; 1PE/792-989 [Eeley].)

The Class Action Complaint specifically references numerous statements by these witnesses. (E.g., BMJN/41, 43-44, 46-47, 51, 55, 57-59, 64-65.)[2]

(a) ***Frank Ligon***. Ligon was Ford's director of service engineering in charge of new products/recalls and director of

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[2] The publicly available copy of the Class Action Complaint (1PE/374-486) contains redactions. The Court of Appeal therefore judicially noticed Ford's Answer to that complaint, which repeats the complaint's allegations without redactions. (*Berroteran*, *supra*, 41 Cal.App.4th at p. 523, fn. 3.) Berroteran submits that Answer to this Court via the accompanying judicial-notice motion ("BMJN").

vehicle services and programs. (1PE/2136-2173.) He became aware of Ford's problems with the 6.0-liter engine at its launch and knew about the ongoing driveability concerns; he described Ford's awareness of the problems, including in emails. (1PE/2119-2315.)

(b) ***John Koszewnik***. Koszewnik held various supervisory and manager roles before becoming Ford's director of North American diesel products in charge of investigating the engine's failures. (1PE/1841-1852.) He testified about Ford's knowledge of the engine and warranty problems, and Ford's knowledge that certain engine components were going to fail. (1PE/1827-2117.)

(c) ***Mike Frommann***. Frommann managed Ford's warranty and recall programs. (1PE/1263, 1279.) He testified about the problems with Ford's efforts to perform warranty repairs, how engine recalls often caused further problems, how he recommended that Ford delete key emails discussing certain engine problems giving the risk of a class action, and how he personally deleted such an email. (1PE/1231-1374.)

(d) ***Mark Freeland***. Freeland was a Ford vehicle test engineer and engine researcher. (1PE/1156-1158.) He testified about the engine's known problems and how Ford's attempts to

recalibrate the engine adversely impacted performance. (1PE/1150-1229.)

(e) ***Scott Eeley***. Eeley was Ford's service and training manager and North American sales manager. (1PE/808-809.) He testified about the problems Ford encountered trying to fix the engine (1PE/792-989)—including senior management's comments that the engine was a "crap" product that could not be fixed (1PE/862-865).

All five witnesses appeared at their videotaped depositions as Ford witnesses, represented by Ford's attorneys. (1PE/796-797, 799-802, 1154, 1163, 1235-1236, 1248-1249, 1833, 1836-1837, 2120, 2134-2135.) Ford chose not to ask questions, but it prepared and coached the witnesses before and during their depositions and had the opportunity to assert objections and ask questions. (*Ibid.*; Ford Return, p. 17 [admitting Petition ¶¶ 15-17]; *Berroteran*, *supra*, 41 Cal.App.5th at p. 534, fn. 11.)

Class counsel's questions at the depositions demonstrate that plaintiffs fully intended to play the videotaped testimony to the jury as trial evidence. (See, e.g., 1PE/1277 [Frommann deposition: "*[T]he jury that's going to be hearing this might not know much about engines*, so can you explain in general terms what causes pressure to build up in a cylinder in a diesel

engine?"; italics added], 1299-1300 [Frommann deposition: "I think I know what you mean, *but to be clear for the judge and the jury*, a service part means a—a part used when someone brings their vehicle in for repair, . . ., right?"; italics added], 1169 [Freeland deposition: "*[G]ive the ladies and gentlemen of the jury* a brief overview of this project"; italics added], 1174 [Freeland deposition: "[A]nd *for the ladies and gentlemen of the jury*, the codes that you refer to, . . . where do these codes come from?"; italics added].)

At the time of their depositions, Ligon, Freeland, and Koszewnik had retired from Ford, so that even Ford could not be certain they would be available for trial. (1PE/1156, 1834-1835, 2127; *Berroteran*, *supra*, 41 Cal.App.5th at pp. 523-524.)

C. Berroteran opts out of the Class Action at the settlement/certification stage and sues Ford for claims modeled on the Class Action Complaint.

In November 2012, after these depositions occurred, Ford stipulated to class certification and agreed to a court-approved settlement. (Ford Return, p. 18 [admitting Petition ¶¶ 22, 23]; *Berroteran*, *supra*, 41 Cal.App.5th at p. 523.)

Berroteran opted out of the Class Action at the settlement stage. (1PE/25-26.) Shortly thereafter, he brought this

individual action against Ford. (1PE/27.) He modeled the facts and claims in his complaint on the facts and claims alleged in the Class Action Complaint. (Compare 1PE/11-71 with 1PE/374-482 and BMJN/30-175; see BMJN/13-27 [side-by-side comparison].)

Berroteran's complaint specifically references two of the Class Action deponents at issue (see 1PE/18, 41, 59 [Frommann]; 1PE/20, 42-43, 46-47, 49-50, 52-53, 58, 61, 65, 68 [Ligon]), and contains further allegations that are based on comments by Freeland, Koszewnik, Ligon and Frommann (see, e.g., BMJN/43-44, 46-47, 57 [¶¶ 37, 39, 40, 59]).

Berroteran's complaint alleges that he purchased a Ford truck in 2006 with a defective 6.0-liter Navistar diesel engine, relying on Ford's representations that the engine "was reliable and offered superior power," and that the vehicle experienced numerous problems that Ford failed to repair. (1PE/13-15.) The complaint describes pervasive defects in Ford's Navistar-manufactured engines—including the 2006 models—and Ford's fraudulent sales and repair strategy. (1PE/14-24; *Berroteran*, *supra*, 41 Cal.App.5th at p. 522.) The complaint alleges fraud in the inducement; negligent misrepresentation; fraud in the performance of contract; violation of the CLRA; and violation of the Song-Beverly Consumer Warranty Act. (1PE/11.)

D. Videotaped depositions of other Ford witnesses are taken to establish trial evidence in other lawsuits based on the same defective engine.

In addition to the Class Action deponents, Berroteran sought admission of excerpts from videotaped depositions of (a) three Ford "person most knowledgeable" (PMK) witnesses taken in other lawsuits by Class Action members who opted out to sue Ford individually for claims modeled on the Class Action Complaint ("opt-out lawsuits"); and (b) a Ford employee who testified in a different class action involving the same defective engine:

(a) ***Scott Clark***. Clark's videotaped deposition was taken in an opt-out lawsuit entitled *Preston v. Ford Motor Company* (*Preston*), which alleged the same claims against Ford as Berroteran's lawsuit. (Compare 1PE/646-690 with 1PE/11-75.) Clark was operations manager for Ford's customer relations center; he testified as Ford's designated PMK regarding Ford's policies, standards and training from 2003 onward regarding California Lemon Law claims and consumer complaints to the Better Business Bureau, including Ford's policies and procedures for warranty claim buybacks. (1PE/699-771.)

(b) ***Eric Gillanders***. Gillanders's videotaped deposition was taken in *Preston*. (See 1PE/1377.) He was Ford's global business manager and former dealer operations manager; he testified as Ford's designated PMK and a custodian of records regarding Ford's policies and procedures for the reduction of warranty claim buybacks under California law from 2003 onward. (1PE/1377-1586.) He stated his testimony would "be the same in any Ford lemon law case pending in California." (1PE/1586.)

(c) ***Eric Kalis***. Kalis's videotaped deposition was taken in two opt-out lawsuits, *Dokken v. Ford Motor Company* (*Dokken*) and *Brown v. Ford Motor Company* (*Brown*), both of which alleged the same claims against Ford as Berroteran's lawsuit. (Compare 1PE/511-644 with 1PE/11-75.) Kalis was a leader in Ford's automotive safety office's design analysis group; he testified as Ford's PMK and a custodian of record on numerous issues, including the repair rates for the 6.0-liter diesel engine and Ford's analysis of the root causes of the engine's problems. (1PE/1590-1816.)

(d) ***Bob Fascetti***. Fascetti's videotaped deposition was taken in a federal class action lawsuit in Texas, *Williams A. Ambulance v. Ford Motor Company* (*Williams*), alleging Ford equipped ambulances with the defective 6.0-liter engine.

(1PE/1046.) Fascetti was Ford's director of gas and diesel engineering in 2006-2008; he testified about problems with the engine, including that the repair rates were "very high" and the worst in Ford's history, and that Ford was still unable to fix the problems 3-4 years after the engine's launch. (1PE/1046-1146.)

All four witnesses were current Ford employees when deposed and appeared as Ford witnesses represented by Ford's counsel; Ford coached them before and during the depositions and had the opportunity to raise objections and ask questions. (1PE/699, 1049, 1383-1385, 1595-1596; Ford Return, p. 20 [admitting Petition ¶¶ 40, 43]; *Berroteran*, *supra*, 41 Cal.App.5th at p. 534, fn. 11.)

In fact, Ford examined Clark and Gillanders during their depositions. (1PE/766-768, 1582-1586; *Berroteran*, *supra*, 41 Cal.App.5th at p. 525.)

The opt-out lawsuits in which the Clark, Gillanders, and Kalis depositions were taken—*Preston*, *Dokken* and *Brown*—allege identical causes of action and virtually identical allegations as Berroteran's complaint; the attorneys who represent Berroteran represented those other opt-out plaintiffs too. (Compare 1PE/11-75 [Berroteran's complaint] with 1PE/511-644 [*Brown* and *Dokken* complaints] and 1PE/646-690 [*Preston*

complaint]; see *Berroteran*, *supra*, 41 Cal.App.5th at pp. 524-525 & fn. 5.) Indeed, Ford admitted that these depositions were "taken in other lawsuits brought against Ford alleging the same fraud claims as the Class Action and [Berroteran's] lawsuit[.]" (Return, p. 19 [admitting Petition ¶ 35].)

Although Fascetti's deposition did not occur in an opt-out lawsuit, Berroteran's complaint specifically relies on Fascetti's prior testimony that the defective engine had unprecedented repair rates and accounted for most of Ford's engine-warranty spending. (1PE/47 [¶ 191].) The Class Action Complaint had likewise relied on Fascetti's statements. (BMJN/34-35, 41-43, 48, 50-51, 61, 64, 67.)

Clark, Gillanders and Kalis testified as Ford's PMK designees under Code of Civil Procedure section 2025.230, and pursuant to deposition notices *expressly stating* that their testimony would be used for both discovery and as evidence at trial. (Petition ¶ 45; Return, p. 20 [response to Petition ¶ 45].)

Counsels' comments at these depositions also make clear that plaintiffs intended to play the testimony at trial to the jury as evidence. (See, e.g., 1PE/748 [Clark deposition: "*You are telling the jury* . . . Ford Motor Company doesn't know that that is a repurchase/replacement request?"; italics added], 1448-1449

[Gillanders deposition: "Just so that *when we're playing this in trial later on or dealing with this in trial*, can you break down the acronyms when we haven't gone over them"; italics added], 1122 [Fascetti deposition: "[S]o would you *describe for the ladies and gentlemen of the jury* the process of installing an engine"; italics added], 1743 [Kalis deposition: counsel commenting that he is inquiring as to Kalis's background for *the jurors'* benefit].)

E. The subject depositions already have been used as evidence at trials by other opt-out plaintiffs.

Because the Class Action settled, it never went to trial. (Petition ¶ 29; Ford Return, p. 18 [admitting Petition ¶ 29.) Similarly, *Preston*, *Dokken* and *Williams* also settled before trial. (Petition ¶ 44; Return, p. 20 [response to Petition ¶ 44].) Nonetheless, *all* of the subject depositions taken in those actions have been admitted as evidence *in the trials* of four opt-out lawsuits—suits that yielded verdicts against Ford. (Petition ¶¶ 31, 44; Ford Return, pp. 19-20 [responses to Petition ¶¶ 31, 44]; *Berroteran*, *supra*, 41 Cal.App.5th at pp. 523, 536.) Three of those jury trials yielded fraud verdicts exceeding $1 million. (Petition ¶ 32; Ford Return, p. 19 [admitting Petition ¶ 32].)

Ford never raised its *Wahlgren*-based argument in any of those opt-out lawsuits. (Petition ¶¶ 34, 68, 69; Ford Return,

pp. 19, 24 [responses to Petition ¶¶ 34, 68, 69].) Nor did Ford have the witnesses appear at trial; instead, Ford simply counter-designated deposition testimony to be used as trial evidence. (*Ibid.*)

Ford raised its *Wahlgren* argument for the first time after juries began rendering large fraud verdicts. (Petition ¶¶ 34, 52, 68, 69; Ford Return, pp. 21, 24 [admitting Petition ¶¶ 34, 52, 68, 69].)

F. Relying on *Wahlgren*, the trial court excludes the depositions as trial evidence.

Ford moved in limine in the present case to exclude the videotaped depositions of Ligon, Eeley, Koszewnik, Frommann, Freeland, Clark, Gillanders, Kalis and Fascetti as hearsay. (1PE/76-89.) With respect to section 1291(a)(2)'s hearsay exception, Ford argued: "Ford clearly did not have a similar interest and motive to examine its employees at those depositions as it will have at trial in this case. Indeed, it is not established that Ford's counsel undertook any re-direct examination at the depositions. As a result, the deposition testimony of the Ford employees in the former cases is not admissible under § 1291(a)(2), and the jury should not hear this testimony." (1PE/80.)

As the Court of Appeal recognized, "[b]eyond these conclusory statements, Ford offered no analysis, explanation, or support for its statements. Instead, Ford relied on *Wahlgren* in support of its motion in limine." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 526.)[3]

In arguing that *Wahlgren* categorically barred its witnesses' deposition testimony, Ford emphasized *Wahlgren*'s statements that a "'deposition hearing normally functions as a discovery device'" and that "'[a]ll respected authorities, in fact agree that given the hearing's limited purpose and utility, examination of one's own client is to be avoided.'" (1PE/79-80, quoting *Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) Ford argued that "just like the corporate defendant in *Wahlgren*," Ford lacked "a similar interest and motive to examine its employees at those depositions" as it would have at Berroteran's trial. (1PE/80.)

Ford submitted no deposition transcripts or pleadings. Ford instead treated *Wahlgren* as *categorically* establishing that

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[3] As to CCP 2025.620(g), Ford argued that the statute did not apply to the Class Action depositions because Berroteran was not a "party" to the Class Action (even though he was a putative member until opting out). (1PE/82-83.)

Ford had a different motive at the deposition for purposes of section 1291(a)(2)—so that the entire deposition testimony was barred. (E.g., 1PE/83 ["[i]t is an empty point for Plaintiffs to argue that Ford should have cross-examined their own employees and former employees in deposition"]; 1PE/300 ["[t]he case law is clear" under *Wahlgren* "that parties almost never have a motive to cross-examine in the context of discovery, which is what these depositions were taken in, obviously"]; 1PE/333 [*Wahlgren* establishes that a party needs "a motive to cross-examine" and "you don't have that in discovery"].)

The Court of Appeal summarized: "Ford offered no further explanation why its motive to examine any specific employee or former employee differed from its motive in the current case. 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. In essence, Ford's argument was that a party *never* has the same motivation to examine its own witnesses in a deposition as it has at trial . . . ." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 534, italics added.)

Ford also told the trial court—*incorrectly*, as the Court of Appeal recognized—that the Class Action deposition testimony "was limited to certification issues such as commonality and

typicality, 'not merits issues.'" (*Berroteran*, *supra*, 41 Cal.App.5th at p. 527.)

The trial court granted Ford's in limine motion. (1PE/331, 341.) It did so without reviewing the complaints or deposition transcripts, despite Berroteran offering to provide them. (1PE/308, 332; see 1PE/370-2317 [pleadings/transcripts lodged *after* the ruling].) The court provided little analysis. (See (1PE/331 ["My ruling would be to grant the motion in limine and exclude those deposition transcripts for the reasons argued"]; *Berroteran*, *supra*, 41 Cal.App.5th at p. 528.)

G. The Court of Appeal reverses, finding Evidence Code section 1291(a)(2) applies.

Berroteran petitioned for a writ of mandate. (*Berroteran*, *supra*, 41 Cal.App.5th at p. 536.) The Court of Appeal granted the writ and directed the trial court to vacate the order excluding the deposition testimony and to issue a new order denying Ford's in limine motion. (*Ibid.*) It also directed the trial court to vacate a separate order excluding certain documents and to reconsider that order in light of the deposition ruling. (*Ibid.*) It held: "[A]lthough *Wahlgren* arguably supported Ford's argument and the trial court's conclusion, we disagree with *Wahlgren*'s categorical bar to admitting deposition testimony under section

1291 based on the unexamined premise that a party's motive to examine its witnesses at deposition always differs from its motive to do so at trial. Our conclusion that no such categorical bar exists is consistent with federal authority interpreting a similar provision in the Federal Rules of Evidence." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 529.)

The Court of Appeal reasoned:

- "*Wahlgren* assumed that deposition testimony is limited to discovery and has a 'limited purpose and utility.'" (*Id.* at p. 521.)

- *Wahlgren*'s "blanket assumption" that examination of one's own client is to be avoided "appears inconsistent with the reality of often overlapping lawsuits in different jurisdictions and the prospect that an important witness could retire or otherwise become unavailable." (*Id.* at pp. 520-521, 533.)

- *Wahlgren*'s analysis "conflicts with the plain language" of section 1291(a)(2). (*Id.* at p. 533.)

- *Wahlgren* conflicts with this Court's post-*Wahlgren* precedent. (*Id.* at pp. 532-533.)

- *Wahlgren* is contrary to precedent construing Federal Rules of Evidence, rule 804(b)(1), the federal analogue to section 1291. (*Id.* at pp. 529-532.)

After disagreeing with *Wahlgren*'s categorical bar, the Court of Appeal went on to analyze whether section 1291(a)(2) should apply here by examining the specific lawsuits and testimony at issue—something the trial court never did. (41 Cal.App.5th at pp. 522-526, 534-536.)

The Court of Appeal held that the trial court abused its discretion in excluding the depositions: "[T]he record does not support the conclusion that Ford did not have a similar motive to cross-examine its own witnesses in the prior litigation. Even if the causes of action in the current and prior cases are not identical, the crux of the litigation is the same in each case. In the trial court, Ford inaccurately characterized the depositions as involving only discovery and only 'class issues' such as 'commonality, whether there's typicality.' As summarized above, in fact, the former testimony concerned Ford's 6.0-liter diesel engine, policies and procedures for warranty claims, and the authentication of documents from a custodian of records. It is undisputed that the depositions have been admitted at trial in multiple cases, and thus did not serve only discovery purposes." (*Id.* at pp. 535-536.)

ARGUMENT

I. The Court Of Appeal Correctly Held That Section 1291(a)(2) Applies To These Depositions.

The Court of Appeal correctly held that section 1291(a)(2) erects no categorical bar to the admissibility of prior deposition testimony of a party's witnesses. The Court of Appeal also correctly held that the deposition testimony at issue here was admissible under the undisputed facts of this case.

A. *Berroteran* correctly declined to follow *Wahlgren.*

In rejecting the existence of any categorical bar, the Court of Appeal correctly disagreed with *Wahlgren.* That case is wrongly decided or at least distinguishable.

1. *Wahlgren.*

In *Wahlgren*, plaintiff was injured diving from a free-standing slide into an above-ground swimming pool. He sued the pool manufacturer and others. (151 Cal.App.3d at p. 545.) The trial court denied his request to use two depositions "taken in a prior unrelated action" in another state, at which officers of the pool manufacturer testified about a "policy of

placing labels on pools which alerted users to the dangers of diving." (*Ibid.*)

In "a sparse opinion" (*Berroteran*, *supra*, 41 Cal.App.5th at p. 533), *Wahlgren* upheld the exclusion because (a) plaintiff never authenticated the depositions, and (b) the depositions purportedly did not meet section 1291(a)(2)'s requirements (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547).

Wahlgren reasoned that the pool manufacturer lacked the same interest in cross-examining its officers at the deposition that the manufacturer would have at a trial. (*Id*. at p. 547.) *Wahlgren* held that the "interest and motive" determination "should be based *on practical considerations* and not merely on the similarity of the party's position in the two cases." (*Id*. at p. 546, original italics.) "[A] deposition hearing normally functions as a discovery device. 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." (*Id.* at pp. 546-547.)[4]

*Wahlg*ren cited no authority for its sweeping assertions.

2. *Wahlgren* is either distinguishable or wrongly decided, as it assumes depositions normally function merely as discovery devices.

Wahlgren said little about the depositions before it other than that they occurred in an unrelated out-of-state action. (See 151 Cal.App.3d at pp. 545-546 & fn. 1.) Because the deponents were officers of the corporate defendant, they could be compelled to attend any trial. (*Id.* at p. 545.) Thus, it is possible the depositions were mere discovery devices, taken in an unrelated

[4] Ford claims that *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1150 reaches "the same conclusion" as *Wahlgren*. (Op. Br. 24.) But that so-called "conclusion" is merely dicta traceable to *Wahlgren*. In affirming summary judgment for a defendant, *Byars* upheld exclusion of an expert deposition taken in a case involving a *different* defendant where nothing indicated the expert was unavailable. (See *Byars*, *supra*, 109 Cal.App.4th at pp. 1149-1150.) In dicta, *Byars* quotes another case, *Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 694-695 (*Gatton*), which was quoting *Walhgren*, also in dicta. *Gatton* involved an *available* witness and a *different* defendant in the prior proceeding; this Court later disapproved *Gatton*'s decision to exclude the deposition. (See *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 944, fn. 8.)

lawsuit involving different plaintiffs and different claims. (*Id.* at pp. 545-546.) If so, *Wahlgren* is readily distinguishable. The depositions here were taken to establish trial evidence; the lawsuits are class actions and opt-out lawsuits modeled on each other that involve the same fraud claims and overlapping issues; and the deposition testimony already has been used as evidence in other opt-out trials involving the same claims.

Regardless, *Wahlgren*'s sweeping statements that depositions "normally function as a discovery device" and have "limited purpose and utility" (151 Cal.App.3d at p. 546) are outdated and wrong. As *Berroteran* recognized, these assumptions "are unsupported by legal authority, inconsistent with modern trials and the omnipresence of videotaped depositions during trial, and contrary to persuasive federal law interpreting an analogous hearsay exception." (41 Cal.App.5th at p. 521.) "*Wahlgren*—a 1984 case—cites no support for its assertions that a deposition functions only as a discovery device. That assumption is at best outdated given the prevalence of videotaped deposition testimony in modern trial practice." (*Id.* at p. 533.)

Berroteran is correct: When *Wahlgren* was decided in 1984, the videotaping of depositions was rare and was *not even*

authorized in California. (See *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1108-1109 [Legislature authorized videotaping in 1986].) And, indeed, there is only one reason for a party to incur the extra cost of videotaping depositions: To be able to play the testimony to a jury. There is no reason to videotape depositions taken solely for discovery purposes. (See Dunne on Depositions in California (Sept. 2019 update) § 10:5 ["[v]ideotaped testimony is much more interesting and effective at trial than the reading of a deposition transcript"].)

Wahlgren's comment that a deposition of one's own client is of "limited purpose and utility" (151 Cal.App.3d at p. 546) could only ever make sense for testimony never intended to be played in court. But where, as here, videotaped depositions are taken to establish trial evidence, parties who decide not to ask questions assume the risk of the witness being unavailable at trial. Indeed, as *Berroteran* observed, *Wahlgren*'s blanket assumption "appears inconsistent with the reality of often overlapping lawsuits in different jurisdictions and the prospect that an important witness could retire or otherwise become unavailable." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 533; see also *Wright Root Beer Co. of New Orleans v. Dr. Pepper Co.* (5th Cir. 1969) 414 F.2d 887, 890 (*Wright*) ["The unexpected is to be expected at the trial of cases,

including the necessity for using depositions when the deponent has met an untimely death before trial"].)

As one practice guide puts it: "[L]awyers know there is always some risk that a witness will die or disappear before trial even if the prospect seems remote, in which case the deposition is admissible. Hence every lawyer knows that there is some risk in not questioning the witness, *and every party has some motive to do so and can ill afford to be silent if the witness says anything that might be damaging at trial*. In this setting, it becomes plausible to say that not asking questions should be viewed as a calculated risk. By extension of the same logic, when a deposition taken in one case is offered in the trial of another against a party who has a 'similar motive' in both to develop the testimony, *that party cannot very well complain that he would have done things differently if the deposition had been taken in the current proceeding*." (5 Mueller & Kirkpatrick, Federal Evidence (4th ed. 2020 update) § 8:121, italics added.)

Wahlgren's treatment of depositions as of "limited purpose and utility" is particularly erroneous where, as here, deponents reside beyond the court's subpoena powers, including in multidistrict litigation involving cases from across the country. "A party who makes the tactical decision during a deposition to refrain from examining a witness who is beyond the subpoena

power of the court, takes the risk that the testimony could be admitted at trial if the witness will not or cannot appear voluntarily." (*Henkel v. XIM Products, Inc.* (D.Minn. 1991) 133 F.R.D. 556, 557.) Failure to question a deponent "when it is known that the deposition will be used in lieu of live testimony . . . is a tactical decision with which a party must live." (*Ware v. Howell* (W.Va. 2005) 614 S.E.2d 464, 470.)

That tactical decision cannot be used as a shield.

B. ***Berroteran*'s application of section 1291(a)(2) comports with the statute's plain language.**

In disagreeing with *Wahlgren*, *Berroteran* correctly interpreted section 1291(a)(2). Courts construing a statute must ascertain the Legislature's intent "so as to effectuate the purpose of the enactment." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 487.) They "look first to the words of the statute, which are the most reliable indications of the Legislature's intent," construing words "in context, and harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." (*Ibid.*) Courts give words "a plain and commonsense meaning"— that "plain meaning controls" if the language is unambiguous. (*Los Angeles County Metropolitan Transportation Authority v.*

Alameda Produce Market, LLC (2011) 52 Cal.4th 1100, 1107.) Courts may consider extrinsic aids, such as legislative history, *only* if "the language supports more than one reasonable construction." (*Ibid.*)

Here, Section 1291(a)(2)'s plain language only supports *Berroteran*'s construction.

1. Section 1291(a)(2)'s plain language does not differentiate between deposition and trial testimony.

Ford argues that section 1291(a)(2) makes former *trial* testimony generally admissible, but not former *deposition* testimony. (Op. Br. 25.) The statute's plain language does not support this distinction. Ford's theory "conflicts with the plain language of section 1291, subdivision(a)(2), which on its face is unqualified: The statute states that it applies to '[t]he former testimony' and is not limited to former 'trial testimony.' (§ 1291, subd.(a)(2).)" (*Berroteran*, *supra*, 41 Cal.App.5th at pp. 533-534.)

2. Section 1291(a)(2)'s plain language merely requires the *opportunity* to cross-examine, not actual examination.

Ford suggests a party must have actually cross-examined its own witness for section 1291(a)(2) to apply. Not so.

Section 1291(a)(2) merely requires "*the right and opportunity* to cross-examine the declarant," not that the party against whom the testimony is offered *actually examined* the declarant. (Italics added.)

When section 1291(a)(2) was enacted, it was long recognized that the *opportunity* to ask questions is what matters: "The principle requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination, but merely an *opportunity to exercise the right to cross-examine* if desired. The reason is that, wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination. In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness. *This doctrine is perfectly settled*." (5 Wigmore, Treatise on the Anglo-American System of Evidence in Trials at Common Law (3d ed. 1940) § 1371, p. 51, first emphasis in original, second added [edition when section 1291(a)(2) enacted]; see 5 Wigmore, Evidence in Trials at Common Law (1974 Chadbourn rev.) § 1371, pp. 55-56 [same language in edition post-dating statute's enactment].)

Thus, section 1291(a)(2)'s hearsay exception tracks the "chief reasons for excluding hearsay evidence," which are "(a) [t]he statements are not made under oath[,] (b) [t]he adverse party has no opportunity to cross-examine the person who made them[,] [and] (c) [t]he jury cannot observe the person's demeanor as he or she makes them." (1 Witkin, Cal. Evidence (5th ed. 2020 update) Hearsay, § 1.)

The depositions here are admissible because they are sworn statements where the same defendant had the opportunity to cross-examine. Even the "cannot observe demeanor" concern is irrelevant here because the depositions were videotaped.

3. Section 1291(a)(2)'s plain language focuses on *cross*-examination.

Section 1291(a)(2)'s use of "cross-examination" indicates that the Legislature's focus was the testimony of third-party witnesses or an opposing party's witnesses, not a party's *own* witnesses. As Ford admits, "cross-examination" is "meant to challenge the witness, such as by undermining the witness's credibility or competence," which "is seldom something a lawyer would reasonably do during the other side's deposition of a 'friendly' witness." (Op. Br. 14.)

Where, as here, a party's counsel represented the party's own witnesses at the prior deposition, that party can shape the testimony to ensure trustworthiness—the concern underlying hearsay exceptions—without even asking questions. Its counsel can prepare witnesses before their deposition (as Ford's counsel did here), coach them or instruct them to clarify testimony during depositions (as Ford's counsel presumably did here), and assert objections or instruct the witness not to answer particular questions (as Ford did here). Thus, although a party does not "cross-examine" friendly witnesses, it certainly still has a motive and interest to ensure their sworn testimony is reliable and has the ability to shape the testimony. A party has no such ability with non-aligned witnesses.

The notion that "cross-examination" is essential to ensure the accuracy—and, thus, admissibility—of *all* deposition testimony sweeps too far. There is no reason for a party to ever "cross-examine" a witness regarding straightforward factual questions like a person's job title, whether she made prior statements, or whether she authored emails.

The present case is a good example: Much of the testimony involved undisputed historical facts not subject to refutation. Yet Ford's construction of section 1291(a)(2) would exclude the *entire* deposition. That is not what the Legislature intended.

4. Section 1291(a)(2)'s plain language should be construed in conjunction with CCP 2025.620(g).

The overall statutory framework for using former deposition testimony as trial evidence is also contrary to Ford's construction. That statutory framework includes CCP 2025.620(g). That statute applies to depositions taken in a prior action involving "the same subject matter" and "the same parties or their representatives or successors in interest." (CCP 2025.620(g).) This is a standalone hearsay exception. (*Ibid.* ["[a] deposition previously taken may also be used as permitted by the Evidence Code"]; 12FMJN/2954.)

The Legislature has thus concluded that if a prior action involves the same parties and same subject matter, the depositions bear sufficient trustworthiness to warrant a hearsay exception *no matter who asked questions* at the prior deposition. Under Ford's view, the parties most likely would not have questioned their own witnesses. Yet those depositions are admissible under CCP 2025.620(g) if a witness is unavailable.

Berroteran argued below that CCP 2025.620(g) applies to the Class Action depositions because (a) he was a party in that litigation as a putative class member until opting out, and

(b) the Class Action and opt-out lawsuits involve the same subject matter. (Fn. 1, *ante*.) The very reason courts toll the statute of limitations for opt-out lawsuits is because the putative members stand "as parties to the [class action] suit" until they opt-out, and the opt-out lawsuits involve the same subject matter. (*American Pipe & Const. Co. v. Utah* (1974) 414 U.S. 538, 551, 554.)

Although the Court of Appeal never reached this issue, CCP 2025.620(g) confirms that a close interrelationship between the parties and issues is what matters for hearsay-exception purposes. Regardless whether the Class Action depositions meet CCP 2025.620(g)'s "same parties" and "same subject matter" requirement, the depositions here are all from *related* actions involving *related* issues and *related* parties. Berroteran and the other-opt out plaintiffs were all putative members of the *same* class action involving the *same* defendant and *same* issues. There were sufficient indicia of trustworthiness to be admissible.

C. This Court's precedent supports *Berroteran*'s application of section 1291(a)(2).

Berroteran also correctly recognizes that this Court's post-*Wahlgren* precedent is contrary to Ford's *Wahlgren*-based theory that a tactical decision to not ask questions renders testimony categorically inadmissible. (*Berroteran*, *supra*, 41 Cal.App.5th at

pp. 532-533.) Specifically, *Wahlgren* was decided a decade before this Court decided *People v. Zapien* (1993) 4 Cal.4th 929 (*Zapien*). In *Zapien*, a criminal defendant claimed that he lacked a similar motive and interest in cross-examining a now-unavailable witness at his preliminary hearing as he would have at trial because—similar to Ford's assertions as to why parties don't examine their own witnesses at depositions—he did not want to risk revealing damaging information at the preliminary hearing that could hurt him at trial. (*Id.* at pp. 973-974.)

This Court held that the motive and interest for cross-examining "need not be identical" or "an exact substitute for the right of cross-examination at trial." (*Zapien*, *supra*, 4 Cal.4th at p. 975.) The Court reasoned that the defendant had an interest and motive at both proceedings in discrediting any adverse testimony, and that defense counsel's explanation that "he chose, *for strategic reasons*, not to vigorously cross-examine [the witness] does not render her former testimony inadmissible." (*Ibid.,* italics added.) "As long as defendant was given the opportunity for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether the defendant availed himself fully of that opportunity." (*Ibid.*; see also *People v. Williams* (2008) 43

Cal.4th 584, 627 [emphasizing defendant's opportunity to cross-examine the witness "on *any* relevant question," original italics].)

This Court has similarly held that "a defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of [section 1291(a)(2)], simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars." (*People v. Harris* (2005) 37 Cal.4th 310, 333 (*Harris*).)

Ford previously tried to distinguish *Zapien* by noting that the prior proceeding was "a preliminary hearing *in the same action*." (Return, p. 43, original italics.) That's a distinction without a difference. Section 1291(a)(2) does not differentiate between *types* of proceedings. Nor has this Court intimated that it makes any difference whether a preliminary proceeding was in the same criminal case; instead, this Court's decisions focus on whether the testimony was in a proceeding where the defendant had a similar interest in discrediting adverse testimony. This Court has thus applied section 1291(a)(2) to preliminary hearing testimony in *unrelated* criminal cases. (*People v. Samayoa* (1997) 15 Cal.4th 795, 850 (*Samayoa*) [preliminary-hearing testimony in prior criminal case admissible in unrelated murder case].)

D. Legislative history supports *Berroteran*'s construction of section 1291(a)(2).

Ford tries to evade section 1291(a)(2)'s plain language by claiming that *Berroteran* is contrary to the statute's legislative history. (Op. Br. 13, 25-30.) But the statute's plain language controls. Moreover, even if the legislative history could be properly considered, it supports the Court of Appeal's analysis.

The Legislature sought to expand the former-testimony hearsay exception for unavailable witnesses. The Legislature enacted section 1291 as part of adopting California's first Evidence Code; the California Law Revision Commission recommended adoption of the Uniform Rules of Evidence with certain variations. (10FMJN/2338, 2341-2342; 11FMJN/2713.) Section 1291 permits "a broader range of hearsay" than before, by "supersed[ing] Code of Civil Procedure Section 1870(8) which permit[ted] former testimony to be admitted in a civil case only if the former proceeding was an action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial of the action in which the testimony is offered." (Assembly Com. on Judiciary com., West's Ann. Evid. Code (2015 ed.) foll. § 1291, p. 87 ("Assembly Com. on Judiciary com. foll. § 1291"); see also

10FMJN/2346 [the prior former-testimony exception has been "substantially broadened"]; 12MJN/2955.)

The Commission partly relied on Professor McCormick's explanation that "if the witness is unavailable, then the need for the sworn, transcribed former testimony in the ascertainment of truth is so great, and its reliability so far superior to most, if not all the other types of oral hearsay coming in under the other exceptions, that the requirements of identity of parties and issues be dispensed with." (McCormick, Law of Evidence (1954 ed.) § 238, p. 501, quoted in Assembly Com. on Judiciary com., West's Ann. Evid. Code (2015 ed.) foll. § 1292, p. 120, italics omitted; 12FMJN/2957.) Although an unavailable witness cannot be cross-examined in the current proceeding, "the other types of admissible oral hearsay, admissions, declarations against interest, statements about bodily symptoms, likewise dispense with cross-examination." (*Ibid.*) "[T]he choice is not between perfect and imperfect conditions for the giving of testimony but between imperfect conditions and no testimony at all." (McCormick, Evidence (3d ed. 1984) § 256, pp. 765-766.)

Ford's interpretation of section 1291(a)(2) would arbitrarily bar the most compelling evidence: Based on a party's strategic decision not to examine its own witness, the defendant in a current lawsuit could not use the former deposition testimony of

a now-unavailable plaintiff-affiliated witness, and a plaintiff in a current lawsuit could not use the former deposition testimony of a now-unavailable defense witness. Under Ford's construction, this evidence *disappears forever* if the witness dies. The legislative history indicates the opposite is supposed to happen.

The opportunity to cross is what matters. Section 1291's legislative history confirms that the *opportunity* to cross-examine, not *actual* examination, is what matters: "Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence—lack of opportunity to cross-examine the declarant—is not applicable." (Assembly Com. on Judiciary com. foll. § 1291; 11FMJN/2561; 12FMJN/2955.)

The legislative history rejects Ford's contention that Berroteran must re-take the depositions. Ford argues that if Berroteran wants to use deposition testimony from these out-of-state witnesses, he must re-take their depositions in this lawsuit to make the testimony admissible under Code of Civil Procedure section 2025.620, subdivision (c). (Op. Br. 17, 48.)

But the Law Revision Commission *rejected* this concept. As Ford acknowledges, the Commission "considered but declined to define a declarant as 'unavailable' only if the declarant's deposition could not be taken in the later action without undue

hardship or expense." (Op. Br. 28, fn. 4, citing 2FMJN/376-377; see also 2FMJN/238; 11FMJN/2742.) The statute instead bases the unavailability of non-deceased witnesses on whether they are beyond the trial court's subpoena power—which is true of each witness here. (Evid. Code, § 240, subd. (a)(4).) The COVID-19 pandemic reinforces the wisdom of that choice, as it shows that needlessly requiring the re-taking of out-of-state depositions can be onerous beyond just monetary expense.

The legislative history distinguishes between deposition testimony taken as potential trial evidence (the context here) and deposition testimony taken <u>solely</u> for discovery. Ford argues that *Berroteran* "overlooks legislative history that contemplates admitting prior *trial* testimony in a later action, but not prior *deposition* testimony of declarants aligned with the party who is raising the hearsay objection." (Op. Br. 13.) "The Legislature intended that prior deposition testimony would rarely be admitted in later proceedings" and "made clear that, while prior *trial* testimony would generally be admissible, prior *deposition* testimony would not." (*Id.* at p. 25, original italics.) Ford even claims the Law Revision Commission "explained that courts should bar testimony of precisely the type at issue here . . . ." (*Id.* at p. 28.)

But the legislative history says *none* of these things. Ford's assertions rest entirely on one snippet—a comment in the Law Review Commission's recommendations that ended up in judiciary committee reports. With the relevant words emphasized, that comment states:

> The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on the similarity of the party's position in the two cases. For example, testimony contained in a deposition that was taken, *but not offered in evidence at the trial*, in a different action should be excluded if the judge *determines that the deposition was taken for discovery purposes* and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

(Assembly Com. on Judiciary com. foll. § 1291, italics added; see also 12FMJN/2955, 11FMJN/2562-2563 [final Commission reports]; 4FMJN/797-798, 6FMJN/1385, 9FMJN/2050-2051 [prior Commission reports].)

This statement merely differentiates between deposition testimony taken *for potential use as evidence at trial*—the type of testimony at issue here—and deposition testimony taken *solely* for discovery purposes (i.e., purely investigatory testimony never

intended to see a courtroom). The Commission's comment that the deposition "was not offered in evidence *at the trial*" assumes that *a trial already has occurred* and that the deposition testimony was *not* used as evidence at that trial. In *that* context, a judge has the discretion to determine that the deposition was taken "for discovery purposes" only.

Every deposition occurs during discovery, so the Commission's use of "for discovery purposes" must have meant more than simply that a deposition occurred. The only way to give meaning to all the language, rather than create surplusage, is to recognize that an unavailable witness's deposition testimony should be excluded only where it was *never* intended to establish trial evidence. In that context, a party has no reason to address an inaccuracy in their testimony—i.e., giving it sufficient indicia of trustworthiness to qualify under a hearsay exception.
But where, as here, deposition testimony *is* intended as potential trial evidence, a party has a motive and interest to ensure the testimony's trustworthiness because the testimony may become evidence. In that context, a party's tactical decision to ask no questions is a risk with which the party must live if the witness becomes unavailable.

Here, none of the depositions were mere discovery depositions. Each was a videotaped deposition taken to establish

trial evidence against Ford. Kalis's deposition in *Brown* was used as evidence in the *Brown* trial, and the only reason the other depositions were not used at trial in the lawsuits in which they were taken is because those cases settled. The PMK deposition notices specifically stated that the testimony would be used as trial evidence, and counsel's comments during the depositions themselves demonstrated that plaintiffs intended to do just that. (E.g., 1PE/1277 [tell "the jury that's going to be hearing this"].) Plus, the witnesses were either retired or out-of-state witnesses who could not be compelled to attend trial. And, each deposition already has been admitted as evidence in other opt-out trials and "thus did not serve only discovery purposes." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 536.) Thus, Ford produced no evidence that these were mere discovery depositions or that this legislative history snippet somehow applied. (*Id.* at p. 534, fn. 10.)

The "discovery deposition" snippet is inapposite. Even assuming it could be considered in interpreting section 1291(a)(2), it does not say what Ford wants it to say.

E. *Berroteran* correctly applies the burden of proof.

Ford tries to evade its failure to show the deposition testimony is untrustworthy by claiming that *Berroteran*

"upend[s] the traditional burden borne by the hearsay proponent of proving the admissibility of the evidence proffered." (Op. Br. 32.) Ford also argues that *Berroteran* conflicts with the burden of proof that federal courts apply to section 1291(a)(2)'s federal analogue. (Op. Br. 39-40.)

Berroteran comports with *both* California and federal law. As the hearsay proponent, Berroteran had the burden to show the witnesses are unavailable (which is undisputed here) and to show similarity between the issues and parties (which the pleadings and deposition transcripts show here).

In the face of this type of showing, the party opposing admissibility must present evidence of the testimony's untrustworthiness, because only that party would possess such information. (Cf. *Carpenter Steel Co. v. Pellegrin* (1965) 237 Cal.App.2d 35, 42 [courts tend to place burden of proof upon party who possesses the information enabling him to more easily carry that burden].) The party opposing admissibility must show why the testimony is unreliable—such as describing the information that party would have elicited through a cross-examination. (See *Samayoa*, *supra,* 15 Cal.4th at p. 851 ["Defendant fails to suggest, however, the evidence that might have been elicited from Raymond (had she testified at the penalty phase of the present capital case) but was not elicited at the

preliminary hearing, and that would have placed defendant's conduct . . . in a less aggravating light"].)

Federal law is in accord. Under the federal analogue to section 1291(a)(2) (see § I.F, *post*), "[i]t is incumbent upon *counsel objecting to admissibility of former testimony* to explain precisely why motive and opportunity of defendants in the first case were not adequate to develop cross-examination that the instant defendant would have presented to the witness." (Jones et al., Prac. Guide: Fed. Civil Trials & Evidence (The Rutter Group 2020) ¶ 8:3062, italics added; see *Dykes v. Raymark Industries, Inc.* (6th Cir. 1986) 801 F.2d 810, 817 ["it is incumbent upon counsel for the defendant when objecting to the admissibility of such proof to explain as clearly as possible to the judge precisely why the motive and opportunity" was inadequate]; *Battle ex rel. Battle v. Memorial Hosp. at Gulfport* (5th Cir. 2000) 228 F.3d 544, 553 ["[d]efendants posit no argument that [the witness's] deposition testimony lacked reliability" and "[t]hey do not suggest a single question or line of questioning that would have added reliability to the deposition"]; *Horne v. Owens-Corning Fiberglas Corp.* (4th Cir. 1993) 4 F.3d 276, 283 ["the party against whom the deposition is offered must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination"].)

Ford provided *no* evidence that *any* of the deposition testimony was unreliable. Most involved undisputed facts—e.g., having witnesses authenticate documents or confirm they made certain statements in emails. Ford never demonstrated that it would have done anything different had the depositions been taken in this case or if the witnesses appeared at trial.

Instead, in the prior opt-out trials where this deposition testimony was used as evidence, Ford merely relied on counter-designated deposition portions, rather than calling witnesses live to elicit additional testimony. Ford cannot complain about failing to present evidence that only Ford itself would possess. (*Wright*, *supra*, 414 F.2d at p. 890 [deposition testimony from prior lawsuit admissible at trial where defendant never "suggested the slightest indication of prejudice"].)

F. Precedent construing section 1291's federal analogue supports *Berroteran*'s analysis.

Berroteran correctly recognizes that *Wahlgren* is "contrary to persuasive federal law interpreting an analogous hearsay exception." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 521.)

The federal approach to former deposition testimony mirrors California's approach. Both jurisdictions have Civil Procedure analogues allowing trial usage of depositions taken in

prior actions involving the same parties and same subject matter. (Compare CCP 2025.620(g) with Fed. Rules Civ. Proc., rule 32(a)(8).) And, both have separate, broader Evidence Code hearsay-exception analogues for depositions in other prior actions. Specifically, section 1291(a)(2)'s federal analogue is Federal Rules of Evidence, rule 804(b)(1) ("FRE 804(b)(1)"), which provides a hearsay exception for testimony that "was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and [¶] is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination."

Ford argues that *Berroteran* "misread[s] federal law." (Op. Br. 35.) Ford claims that a "survey of cases" shows this (*ibid.*) and that *Berroteran* only "relied on two federal cases to support its contrary interpretation of federal law" (*id.* at p. 40).

None of that is true.

1. In federal court, a party's decision to limit cross-examination in a deposition taken by its opponent does not preclude use of the testimony in a subsequent proceeding.

In federal court, "as a general rule, a party's decision to limit cross-examination in a discovery deposition is a strategic

choice and does not preclude his adversary's use of the deposition at a subsequent proceeding" involving substantially similar claims. (*Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1506 (*Hendrix*).)

Contrary to *Wahlgren*, federal courts recognize that "'pretrial depositions are not only intended as a means of discovery, but also serve to preserve relevant testimony that might otherwise be unavailable for trial.'" (*Hendrix*, *supra*, 776 F.2d at p. 1506, quoting *Gill v. Westinghouse Elec. Corp* (11th Cir. 1983) 714 F.2d 1105, 1107; see *Holmes v. Merck & Co., Inc.* (D. Nev., June 22, 2006, No. 2:04CV00608-BES(GWF)) 2006 WL 1744300, at *2 ["The Federal courts have rather uniformly held that depositions serve the two purposes of discovery and preservation of testimony and have rejected objections that deposition testimony should not be admissible on the grounds that it was intended only for discovery purposes"].)

Under federal law, the fact that an employer may have had "a reduced motive" to cross-examine its own employee in a deposition "because it could presumably compel him to testify at trial as well as question him outside the deposition context . . . *does not* bar the transcripts' use at trial." (*Hynix Semiconductor Inc. v. Rambus Inc.* (N.D.Cal. 2008) 250 F.R.D. 452, 458-459, citing *Hendrix* [depositions admissible from other

action against same defendant alleging similar claims]; see also *U.S. v. Mann* (5th Cir. 1998) 161 F.3d 840, 861 [rejecting defendant's argument that prior deposition of defense witness "was a mere discovery deposition" at which he lacked cross-examination motive; Rule 804(b)(1) does not require "a compelling tactical or strategic incentive to subject the testimony to cross-examination, only that an opportunity and similar motive to develop the testimony existed"]; *DeLuryea v. Winthrop Laboratories, Etc.* (8th Cir. 1983) 697 F.2d 222, 227 (*DeLuryea*) [district court abused discretion in excluding deposition testimony because there was sufficient identity of issues and parties; decision to limit cross-examination did not bar use even though the party "might later have desired fuller cross-examination"]; *Pearl v. Keystone Consol. Industries, Inc.* (7th Cir. 1989) 884 F.2d 1047, 1052 [party whose failure to cross-examine was "her own decision" cannot "complain now that her failure to cross-examine . . . makes the deposition inadmissible"].)

Federal courts have repeatedly admitted deposition testimony of a defendant's now-unavailable current or former employees where similarly-situated plaintiffs took the depositions in lawsuits involving substantially similar issues, such as products liability suits, and the defendant chose to limit cross-examination. (E.g., *Hendrix, supra,* 776 F.2d at pp. 1505-1506

[deposition testimony of defendant's unavailable former employee taken in prior asbestosis suit admissible in different victim's subsequent asbestosis suit, rejecting defendant's claim that the deposition "was taken for discovery purposes only" and lacked same cross-examination motive]; *Murray v. Toyota Motor Distributors, Inc.* (9th Cir. 1982) 664 F.2d 1377, 1379-1380 [deposition testimony of defendant's former employee in Arizona lawsuit against defendant was admissible in similar Montana lawsuit because defendant had similar cross-examination motives in both cases and deponent was beyond subpoena power].)[5]

Respected treatises confirm *Berroteran*'s federal-law analysis: "The cases emphatically hold that judgments to limit or

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[5] See also *Clay v. Johns-Manville Sales Corp.* (6th Cir. 1983) 722 F.2d 1289, 1295 (*Clay*) (deposition of defendant's former employee in prior products liability cases); *In re Related Asbestos Cases* (N.D.Cal. 1982) 543 F.Supp. 1142, 1148 (deposition of defendant's former medical director in two prior asbestos cases: "We refuse to exclude highly relevant testimony because [defendant's] failure to avail itself of an ample opportunity to cross-examine [its former employee] turns out, in retrospect, to have been a tactical error"); *Winslow v. General Motors Corp.* (E.D.Ark., Mar. 20, 2003, No. 2:01CV76) 2003 WL 25676481, at *2 (depositions of defendant car manufacturer's employees in substantially same case by different plaintiff admissible because defendant was represented by counsel and had "same motive and opportunity to cross examine"); *Fullerform Continuous Pipe Corp. v. American Pipe & Const. Co.* (D.Ariz. 1968) 44 F.R.D. 453, 456 (*Fullerform*) (deposition admissible where defendants common to antitrust actions had same interest to disprove conspiracy).

waive cross-examination at that earlier proceeding based on tactics or strategy, even though these judgments were apparently appropriate when made, do not undermine admissibility. Instead, the courts look to the operative issue in the prior proceeding, and if basically similar and if the opportunity to cross-examine was available, the prior testimony is admitted." (2 McCormick, Evidence (8th ed. 2020 update) Hearsay, § 304.)

"[T]hat tactical decisions are made with respect to the extent of questioning does not negate the existence of opportunity and similar motive to develop the testimony." (Federal Rules of Evidence with Trial Objections (6th ed. 2017 update) § H150.) Thus, "when the opponent takes a deposition, counsel who refrains from laying bare the full story of his client or of a favorable witness assumes the risk that the deponent will be unavailable at trial so that his one-sided deposition becomes admissible." (7 Graham, Handbook of Federal Evidence (8th ed. 2019 update) § 804:1; see 12A Bateman, et al., Fed. Procedure, Lawyer's Edition (8th ed. 2020 update) § 33:470 ["a party's decision to limit cross-examination in a discovery deposition is a strategic choice and does not preclude the opposing party's use of the deposition at a subsequent proceeding"].)

FRE 804(b)(1)'s legislative history is in accord. (See Advisory Com. Notes to Fed. Rules Evid. 804(b)(1) [if the party

against whom testimony is "now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine"].)

Despite this abundant, uniform authority supporting *Berroteran*'s federal-law analysis, Ford treats that analysis as resting on only "two federal cases"—*Hendrix* and *DeLuryea*. (Op. Br. 40-41.) Ford tries to distinguish those cases on the ground that "neither involved introducing hearsay deposition testimony at trial against a party *aligned* with the witness." (Op Br. 40, original italics.) This characterization is incorrect. The *Hendrix* deponent was defendant's *own* former employee, who testified in a deposition taken by plaintiff about historical facts—what he had observed and warned about as an employee. (776 F.2d at pp. 1504-1505.) The *DeLuryea* deponent was plaintiff's *own* psychiatrist, who discussed plaintiff's injuries in a deposition taken by defendant. (697 F.2d at p. 226.) In both cases, the testimony was "adverse" to the objecting party in that it was offered as evidence against that party. That is the situation here. The depositions here were taken to establish evidence *against* Ford, and Berroteran seeks to use the testimony for that purpose.

Under federal law, Ford's decision not to ask questions would not bar FRE 804(b)(1) from applying.

2. The federal authority is persuasive.

"In resolving questions of statutory construction, the decisions of other jurisdictions interpreting similarly worded statutes, although not controlling, can provide valuable insight." (*In re Joyner* (1989) 48 Cal.3d 487, 492.) When "the 'objectives and relevant wording' of a federal statute are similar to a state law, California courts 'often look to federal decisions' for assistance in interpreting this state's legislation." (*People ex rel. Allstate Ins. Co. v. Weitzman* (2003) 107 Cal.App.4th 534, 563.)

California enacted section 1291 as part of enacting an Evidence Code and to broaden the prior rule that limited admissibility to testimony from prior actions involving the same parties and same subject matter. (Assembly Com. on Judiciary com. foll. § 1291.)

A few years later, FRE 804(b)(1) was adopted for a similar purpose as part of the new Federal Rules of Evidence. (See *Clay*, *supra*, 722 F.2d at pp. 1294-1295.)

The legislative history for FRE 804(b)(1) acknowledges that California Evidence Code sections 1290-1292 were in the "*same tenor*" in terms of "allowing substitution of one with the right and opportunity to develop the testimony with similar motive and

interest." (Advisory Com. Notes to Fed. Rules Evid. 804(b)(1), italics added.)

Case law interpreting a federal statutory analogue is "persuasive and entitled to considerable respect" even where the California statute came first. (*Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 387.)

3. Ford's cases do not undermine *Berroteran*'s analysis.

Ford claims that a "survey of cases" (Op. Br. 35) shows that *Berroteran* misinterprets federal law. None of Ford's cases involves the context presented here. Most address whether a government prosecutor had the same motive in examining witnesses at a grand jury proceeding that it would have at trial.

U.S. v Salerno (1992) 505 U.S. 317 (Op. Br. 36) merely rejected a circuit court's conclusion that FRE 804(b)(1)'s motive requirement should not apply where the government obtains immunized grand jury testimony from a witness who refuses to testify at trial; the Court remanded for a motive determination. (*Id*. at p. 321.) Post-*Salerno*, courts make fact-based assessments on whether the government had the same motive in a grand-jury proceeding as the government would have at trial, recognizing that grand-jury proceedings are often only preliminary

investigatory proceedings where the prosecutor may not care about supporting or discrediting a particular witness's testimony. (See *U.S. v. Carson* (D.C. Cir. 2006) 455 F.3d 336, 379 (Op. Br. 36) [prosecutor did not attempt to prove appellants' involvement in murders]; *U.S. v. DiNapoli* (2d Cir. 1993) 8 F.3d 909, 915 (*DiNapoli*) (Op. Br. 38) [prosecutor had no interest in statements' truth]; *U.S. v. Omar* (1st Cir. 1997) 104 F.3d 519, 523 (*Omar*) (Op. Br. 38) [in grand jury proceedings, often the "government neither aims to discredit the witness nor to vouch for him"].)

Federal grand jury cases—a context where the accused has no lawyer present and only the government or grand jurors ask questions—are not contrary to *Berroteran*'s federal-law analysis. Ford emphasizes Justice Blackmun's concurrence in *Salerno*, but *Berroteran* relies on it, too, citing it for the principle that under federal law "[e]xistence of a similar motive depends on the similarity of the underlying issues and the context of the questioning." (*Berroteran*, *supra*, 41 Cal.App.5th at p. 531.) Questioning in grand jury proceedings is worlds apart from the context here—videotaped depositions *taken by plaintiffs* to establish *evidence for a trial against Ford*.[6]

[6] *DiNapoli* and *Omar* also follow a heightened-motive standard that is inconsistent with Rule 804(b)(1)'s language, which only requires a similar motive. (See *U.S. v. McFall* (9th Cir. 2009) 558

The grand jury cases do not indicate that Ford can avoid such testimony by refusing to ask questions in response. The *Hendrix*-type cases control here.

Polozie v. U.S. (D.Conn. 1993) 835 F.Supp. 68 (Op. Br. 37) proves the point. Ford notes that the defendant there "*did* examine the plaintiff's witness at a deposition" yet the court found the testimony inadmissible. (Op. Br. 37, original emphasis.) But in *Polozie*, the *defendant* deposed *plaintiff's* expert witness to gather general information about her opinions, not to criticize or cross-examine those opinions as the defendant intended to do when the expert testified at trial. (See 835 F.Supp. at p. 72.) Not only did *Polozie* involve a limited-purpose deposition, the court specifically distinguished the context presented by this case, citing *Hendrix*: "This was *not* a case where the party against whom the deposition was offered failed to examine the deponent at the deposition and thereby assumed the risk that the deposition might be introduced at trial. *See, e.g., Hendrix* [rest of citation omitted]." (*Ibid.*, italics added.)

Nor does *U.S. v. Feldman* (7th Cir. 1985) 761 F.2d 380 (Op. Br. 37, abrogated on another ground in *U.S. v. Rojas-*

F.3d 951, 961 (*McFall*).) This Court holds that section 1291(a)(2) only requires a similar motive. (*Harris*, *supra*, 37 Cal.4th at p. 333; *Zapien*, *supra*, 4 Cal.4th at p. 975.)

Contreras (1985) 474 U.S. 231), undermine *Berroteran*'s analysis. *Feldman* held that the deposition of a criminal defendant's former colleague in a prior civil proceeding was inadmissible in the criminal proceeding. (761 F.2d at p. 384.) The criminal defendant did not bother attending the civil deposition despite having notice because he faced no liability in that civil proceeding, he lacked notice at that time of his criminal proceeding, and he never knew the deponent might give adverse testimony. (*Id.* at p. 385.) Only in that context did the court state that a naked opportunity to cross-examine is not enough (*ibid.*)—a context irrelevant here.

Moreover, *Feldman* recognizes that "[i]n determining whether a party had such a motive, a court must evaluate not only the similarity of the issues, but also *the purpose for which the testimony is given*." (761 F.2d at p. 385, italics added.) Here, plaintiffs deposed Ford's witnesses in videotaped depositions to establish evidence for trial. Ford thus had a motive and interest to rehabilitate or correct any erroneous testimony.

Nor does *S.E.C. v. Jasper* (9th Cir. 2012) 678 F.3d 1116 (Op. Br. 38) undermine *Berroteran*'s analysis. That case emphasized the distinction between the government's motive when deposing a witness "during an early [SEC] investigation, at which open-ended questions are typically asked without

expectation the witness will be needed at trial, *and its motivation at an adverse witness deposition, when battle lines have already been drawn and necessary witnesses identified*." (678 F.3d at pp. 1128-1129, italics added.) Here, consumers of Ford's defective engine took these depositions *after* the battle lines against Ford had been drawn and necessary witnesses identified.

Berroteran correctly analyzes federal law.

G. *Berroteran* correctly holds that excluding these depositions was an abuse of discretion.

Not only does *Berroteran* correctly analyze California and federal law, it correctly holds that excluding these specific depositions was an abuse of discretion. As *Berroteran* recognized, these were *not* mere discovery depositions. (41 Cal.App.5th at pp. 523, 536.) Moreover, the testimony largely involved historical facts, like confirming email statements and authenticating documents—undisputed testimony unlikely to induce "cross" examination in *any* forum. To the extent any witness made a misstatement—and Ford has made no such showing—Ford took a tactical risk in not asking clarifying or rehabilitative questions.

Ford also ignores that it actually questioned two of the PMK deponents and that in the other opt-out trials where these depositions became trial evidence, Ford merely

counter-designated deposition testimony. Ford never sought to elicit additional information by calling live witnesses.

Even assuming that Ford tactically chose not to ask questions, that does not mean Ford lacked the same motive and interest regarding the testimony's reliability. As *Berroteran* explains: "Ford made no showing that it lacked a similar motive to examine its witnesses during their depositions, and the record demonstrates just the opposite. Ford had a similar motive to examine each of the nine deponents. The videotaped deposition testimony from the former federal and state litigations was on the same issues Berroteran raises in his current lawsuit—whether the 6.0-liter engine was defective, Ford's knowledge of the alleged defect, and Ford's repair strategy. The deponents' testimony concerned matters relevant to the former and current actions. Ford had a similar motive to disprove the allegations of misconduct, and knowledge, all of which centered around the 6.0-liter diesel engine." (41 Cal.App.5th at p. 534.)[7]

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[7] Ford muddies matters by (a) claiming the Class Action depositions focused primarily on problems "in the engine's early years" while "Berroteran takes the position that those problems persisted into 2006"; and (b) asking how would a class action attorney know he should ask questions "in case a particular opt-out from one of those model years sues?" (Op. Br. 47.) Even ignoring that opt-outs are always likely, the Class Action's allegations encompassed Berroteran's model year and the depositions were taken to address *each* model year at issue.

Excluding these particular depositions was an abuse of discretion for another reason: If Ford truly believed any testimony was inaccurate or it needed additional testimony, Ford could moot the hearsay dispute by having the witnesses appear at trial. "The additional right to recall individuals previously deposed affords defendants the opportunity to correct, amplify or clarify any existing ambiguities or gaps in the record," and any such burden is less burdensome than requiring Berroteran to take "depositions over again from scratch." (*Fullerform, supra,* 44 F.R.D. at p. 456; see *McFall*, *supra*, 558 F.3d at p. 964 [district court's refusal to allow grand jury testimony was abuse of discretion, because the witness "was unavailable only to the defendant" and the government "could have called [the witness] in its rebuttal case to testify and pursued whatever line of impeachment or any other legitimate line of questioning it desired"]; 1 Discovery Proceedings in Federal Court (3d ed. 2020 update) Depositions taken in other actions, § 13:3 ["[a]ny prejudice arising from the use of depositions taken in other actions may be eliminated by allowing the objecting party to

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(*Berroteran*, *supra*, 41 Cal.App.5th at p. 535.) Further, if particular testimony is irrelevant to Berroteran's lawsuit, Ford can still assert relevancy objections even if section 1291(a)(2)'s hearsay exception applies to the deposition transcripts.

recall individuals previously deposed to correct, amplify, or clarify any existing ambiguities or gaps in the record"].)

Ford refuses to have these witnesses appear at any trial. The Court of Appeal properly saw through this gamesmanship.

H. Ford's parade of horribles is fictional.

Ford tries to obscure its gamesmanship by conjuring a parade of horribles in *other* cases. Ford claims an affirmance would "drive[] up the cost for litigants and the burden on witnesses by requiring wide-ranging cross-examination during depositions, as lawyers try vainly to guess how their clients might be confronted with the deposition testimony in unknown future cases." (Op. Br. 14.)

That's hyperbole. There's no need to ask questions about "unknown" future cases. Attorneys need only focus on the case before them. The only testimony admissible in future cases under section 1291(a)(2) is testimony regarding *overlapping* issues and where the *same* interest existed in the prior examination. There is no reason to ask deposition questions that are only relevant to some other, unknown lawsuit involving different issues and interests—indeed, section 1291(a)(2) would not apply in that situation. As for driving up costs to litigants and witnesses, Ford's version demands that the same deponents

subject themselves to the same questioning over and over—a costly endeavor for all involved.

Further, section 1291(a)(2) applies to *only one* evidentiary hurdle—the hearsay status of the testimony itself. Parties can still object to portions of testimony on any applicable admissibility ground—e.g., relevance, hearsay within hearsay, or prejudice outweighing probative value. In rendering its opinion, *Berroteran* stated that the court was expressing "no opinion concerning whether the evidence is objectionable on other grounds." (41 Cal.App.5th at p. 536, fn. 12.) In other words, if testimony is irrelevant or its admission is otherwise objectionable, those admissibility objections *can still be raised*.

Nor does *Berroteran* deprive courts of discretion to decide section 1291(a)(2)'s applicability on a case-by-case basis. *Berroteran* does not hold that prior deposition testimony *always* comes in; it held that the prior testimony here was admissible *in this case*. In so holding, *Berroteran* ruled on the narrow facts before it—similarly-situated plaintiffs who were putative members of the same class action and who opted out to sue the same defendant; deposition witnesses whom the defendant could still call live at trial to elicit additional information if needed; and deposition testimony that already has been used in other opt-out

trials in which the defendant relied on counter-designations rather than calling witnesses live.

Ford emphasizes one amici's sweeping statement that class actions rarely reach trial because certification decisions either terminate the class litigation or create settlement incentives. (Op. Br. 25, 34.) Even assuming that's true, the depositions here still were *merits-based* videotaped depositions taken for potential use *as trial evidence*, so Ford assumed a risk in not addressing any inaccurate testimony. That risk was particularly palpable here, because this class action involved multidistrict litigation consolidating lawsuits scattered across the country. When class counsel took the videotaped depositions, any reasonable attorney knew that (1) if the master class action failed to certify, the case would splinter into lawsuits across the country in which plaintiffs would seek to use the depositions; and (2) if the case settled before trial, some plaintiffs would opt out to sue Ford individually and seek to use the depositions.

Nor will affirming *Berroteran* "fundamentally change the way depositions are conducted" and make them "full blown trials" as Ford claims. (Op. Br. 44, 46.) A party's motive and interest to clarify or rehabilitate an erroneous statement made by its own witness at a videotaped deposition does not mean the party must present its *entire case* at the deposition. *Berroteran* adopts the

rule already followed in federal courts, and federal depositions have not experienced any of the complications Ford envisions.

Further, California lawyers already face the risk of their own witness's deposition testimony being used as trial evidence if the witness is unavailable. They can deal with that risk by:

- Asking questions (as Ford did for two witnesses);
- Steering the testimony and ensuring accuracy by preparing the witnesses and asserting objections, and using counter-designated portions at trial (as Ford did);
- Declining to ask questions and assuming the risk of the witness becoming unavailable if further examination is needed (Ford showed no such need);
- If the witness is unavailable only to the other side (as here), have the witness appear at trial (which Ford refuses to do);
- Using other witnesses or evidence to clarify or rehabilitate the deposition testimony (Ford has shown no such need).

Berroteran is not the game-changer that Ford claims.

II. This Court's Decision Should Apply Retroactively.

Ford's final gambit is to argue that this Court's decision should have prospective effect only. This argument fails. Retroactive application of this Court's civil decisions is the rule, not the exception. (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 979, 982 (*Newman*) [exceptions are "rare" even when new decision "represent[s] a clear change in the law" that parties "could not have anticipated"].) Nothing here justifies a departure from the rule of retroactivity.

No retroactivity question even arises unless a decision establishes a "new rule of law." A decision that merely "give[s] effect to a statutory rule"—like section 1291(a)(2)—does *not* establish a "new rule of law." (*Woosley v. California* (1992) 3 Cal.4th 758, 794 (*Woosley*).)

"[D]ecisions establish new rules when they (1) explicitly overrule a precedent of the California Supreme Court, or (2) disapprove a practice implicitly sanctioned by prior decisions of the Supreme Court, or (3) disapprove a longstanding and widespread practice expressly approved by a near-unanimous body of lower court authorities." (*In re Thomas* (2018) 30 Cal.App.5th 744, 761.)

None of those circumstances apply here.

There was no break with this Court's precedent, because no such Supreme Court precedent existed. Nor was there any widespread lower-court consensus. To the contrary, Ford relies upon a "single Court of Appeal decision"—*Wahlgren*—which is "hardly the kind of 'uniform body of law that might be justifiably relied on . . . .'" (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 967 (*Grafton*); *Newman, supra,* 48 Cal.3d at pp. 986-987 [where Supreme Court has not "previously issued a definitive decision, from the outset any reliance on the previous state of the law could not and should not have been viewed as firmly fixed"].) Even a decision that "resolves a conflict which existed in the appellate courts" is not a "new" rule for retroactivity purposes. (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 45 (*Droeger*).)

Retroactivity will not disturb a final judgment or impair contract or property rights acquired because of a prior rule (*Droeger*, *supra*, 54 Cal.3d at p. 45), nor deny anyone its "day in court" (*Grafton, supra,* 36 Cal.4th at p. 967). Instead, retroactive application "simply will deny to those who might have acted in reliance upon" *Wahlgren* "a benefit that they never had the right to obtain." (*Ibid.*)

"[E]very time this court overrules authority developed in the lower courts, but not yet definitively determined, it affects

expectations of litigants who stood to gain or lose under the approach taken below." (*Newman*, *supra,* 48 Cal.3d at p. 983.) That's no basis to limit retroactivity. This Court's interpretation of section 1291(a)(2) must apply in all cases, because retroactivity is "'essential'" to "'vindicate the original meaning of [the] enactment . . . .'" (*Woosley, supra,* 3 Cal.4th at p. 794.)

CONCLUSION

The Court of Appeal correctly ruled that section 1291(a)(2) erects no categorical bar to prior deposition testimony and that the testimony here was admissible. The Court should affirm.

Date: August 31, 2020

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/s/ Cynthia E. Tobisman
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