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IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,
v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B296639

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 4

ISSUE PRESENTED 9

INTRODUCTION 10

STATEMENT OF THE CASE 14

A. Ford is sued in a 2011 class action in Illinois over alleged defects in diesel engines used in various vehicles between 2003 and 2007. After precertification discovery is conducted, the class action is settled. 14

B. In this individual California action against Ford, Raul Berroteran seeks to rely at trial on hearsay deposition testimony from discovery in other cases, including the Illinois class action. Relying on *Wahlgren*, the trial court excludes the eight-year-old deposition testimony as hearsay. 16

C. The Court of Appeal disagrees with *Wahlgren* and reverses the trial court's evidentiary ruling, holding that the hearsay deposition testimony is admissible based on a presumption that counsel routinely have an interest in cross-examining their own side's witnesses at depositions. 19

LEGAL ARGUMENT 22

I. Trial courts must retain discretion to exclude hearsay deposition testimony from earlier cases, consistent with the statutory language, legislative history, and practical realities of deposition practice. 22

A. Hearsay deposition testimony from an earlier legal proceeding is admissible under Evidence Code section 1291 only if the proponent of the evidence shows the objecting party had an actual interest and motive to cross-examine the deponent similar to the examination that would occur at trial in the later proceeding. 22

B. The Legislature intended that prior deposition testimony would rarely be admitted in later proceedings. 25

C. The Court of Appeal's rationale for finding the depositions were admissible erroneously shifts the burden of proof, misreads federal authorities, and does not comport with the realities of deposition and trial practice. 31

D. Unless this Court disapproves the *Berroteran* opinion requiring admission of hearsay deposition testimony, counsel will be compelled to unduly expand the scope of deposition examinations, and parties still will be unfairly prejudiced by untested hearsay testimony. 44

II. If this Court overrules the *Wahlgren* rule and endorses the *Berroteran* rule, that decision should have only prospective effect 49

CONCLUSION 51

CERTIFICATE OF WORD COUNT 52

TABLE OF AUTHORITIES

Page(s)

Cases

Annunziata v. City of New York
(S.D.N.Y., May 28, 2008, No. 06 Civ. 7637 (SAS))
2008 WL 2229903 39

Brindowski v. Alco Valves, Inc.
(E.D.Pa., Jan. 12, 2012, Consol. Under MDL 875;
E.D.Pa. Civ. Action No. 2:10-CV-64684-ER)
2012 WL 975080 40

Buchanan v. Nye
(1954) 128 Cal.App.2d 582 22

Byars v. SCME Mortgage Bankers, Inc.
(2003) 109 Cal.App.4th 1134 ..... 24, 25

Claxton v. Waters
(2004) 34 Cal.4th 367 49

Cottini v. Enloe Medical Center
(2014) 226 Cal.App.4th 401 43

DeLuryea v. Winthrop Laboratories, etc.
(8th Cir. 1983) 697 F.2d 222 ..... 41, 42

Eicher v. Advanced Business Integrators, Inc.
(2007) 151 Cal.App.4th 1363 49

Estate of Propst
(1990) 50 Cal.3d 448 49

Gordon v. Law Offices of Aguirre & Meyer
(1999) 70 Cal.App.4th 972 49

Grafton Partners v. Superior Court
(2005) 36 Cal.4th 944 50

Hendrix v. Raybestos-Manhattan, Inc.
(11th Cir. 1985) 776 F.2d 1492..... 41

In re Navistar Diesel Engine Products Liability Litigation
(N.D.Ill., July 3, 2013, Case No. 11C2496
[MDL No. 2223]) 2013 WL 10545508 ..... 14, 16

Klein v. United States of America
(2010) 50 Cal.4th 68..... 26

Mihaly v. Westbrook
(1971) 403 U.S. 915 [91 S.Ct. 2224, 29 L.Ed.2d 692]..... 50

Moradi-Shalal v. Fireman's Fund Ins. Companies
(1988) 46 Cal.3d 287 50

Moss v. Superior Court
(1998) 17 Cal.4th 396..... 49

Neel v. Magana, Olney, Levy, Cathcart & Gelfand
(1971) 6 Cal.3d 176 49

Newman v. Emerson Radio Corp.
(1989) 48 Cal.3d 973 49

People v. Hicks
(1983) 147 Cal.App.3d 424 50

People v. Rodriquez
(1969) 274 Cal.App.2d 770 32

People v. Salas
(1976) 58 Cal.App.3d 460 23

People v. Sanford
(1976) 63 Cal.App.3d 952 50

Polozie v. U.S.
(D.Conn. 1993) 835 F.Supp. 68 ..... 37, 38

Principal Life Ins. Co. v. Peterson
(2007) 156 Cal.App.4th 676..... 27

S.E.C. v. Jasper
(9th Cir. 2012) 678 F.3d 1116 38

Smith v. Rae-Venter Law Group
(2002) 29 Cal.4th 345 ..... 49, 50

Target National Bank v. Rocha
(2013) 216 Cal.App.4th Supp. 1 22

U.S. v. Carson
(D.C. Cir. 2006) 455 F.3d 336 36

U.S. v. McFall
(9th Cir. 2009) 558 F.3d 951 39

U.S. v. Salerno
(1992) 505 U.S. 317 [112 S.Ct. 2503,
120 L.Ed.2d 255] 36, 39

United States v. DiNapoli
(2d Cir. 1993) 8 F.3d 909 ..... 38, 39

United States v. Feldman
(7th Cir. 1985) 761 F.2d 380 37

United States v. Omar
(1st Cir. 1997) 104 F.3d 519 38

United States v. Rojas-Contreras
(1985) 474 U.S. 231 [106 S.Ct. 555,
88 L.Ed.2d 537] 37

USA v. Shayota
(N.D.Cal., Oct. 19, 2016, No. 15-CR-00264-LHK-1)
2016 WL 6093238 39

Wahlgren v. Coleco Industries, Inc.
(1984) 151 Cal.App.3d 543 ..... *passim*

Westbrook v. Mihaly
(1970) 2 Cal.3d 765 50

Williams & Fickett v. County of Fresno
(2017) 2 Cal.5th 1258 50

Woods v. Young
(1991) 53 Cal.3d 315 50

Yelp Inc. v. Superior Court
(2017) 17 Cal.App.5th 1 43

Statutes

Code of Civil Procedure
§ 2025.620, subd. (c)(2) 48
§ 2025.620, subd. (c)(2)(D) 13
§ 2025.620, subd. (g) 17

Civil Code
§ 1750 et seq. 16
§ 1790 et seq. 16

Evidence Code
§ 1290 28
§ 1290, subd. (c) 23
§ 1291 ..... *passim*
§ 1291, subd. (a)(2) 10, 17, 23, 26
§ 1292 24
§ 1292, subd. (a)(3) 24

Rules of Court

Federal Rules of Evidence
rule 804 32
rule 804(b)(1) 35, 36, 38, 39, 40

Uniform Rules of Evidence
rule 62 28
rule 63 27
rule 63(3) 27, 28

Miscellaneous

Assem. Com. on Judiciary, com.,
29B pt. 5 West's Ann. Evid. Code (2015 ed.)
foll. § 1291 ..... 23, 30, 31, 35

Dunne, Dunne on Depositions in California
(Sept. 2019 update) Cross-examining own client,
§ 7:40 43

Haydock & Herr, Discovery Practice
(8th ed., 2020-1 suppl.) Questioning the Deponent,
§ 18.08 44

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& Tactics (Oct. 2019 update) Cross-examination of
deponent, § 7:26 43

Lisnek & Kaufman, Depositions: Procedure, Strategy
& Technique (Nov. 2018 update) Rehabilitation-
Questioning the Deponent, § 11:10 44

Wegner et al., Cal. Practice Guide: Civil Trials and
Evidence (The Rutter Group 2019) ¶ 8:1002 22

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ISSUE PRESENTED

Counsel attending an opponent's deposition of a witness *aligned with counsel's own client* generally does not cross-examine that witness, because there are seldom advantages to doing so and there are strong strategic reasons not to undermine the witness or telegraph trial strategies during discovery. The question presented here is whether trial courts must nonetheless assume that counsel *did* have a motive to cross-examine friendly witnesses at every deposition, creating a presumption that the deposition testimony may be admitted as *trial testimony* not only in the case in which it was taken, but also in future cases against the same party under a statutory exception to the hearsay rule that would otherwise bar such testimony.

INTRODUCTION

Each party preparing a case for trial bears the burden of gathering admissible evidence, often through conducting depositions to discover information that may later become evidence at trial in that case. The hearsay rule prevents a party from taking shortcuts in that process, generally barring admission of deposition testimony from a *prior* case at the trial in a *later* case. The Court of Appeal here misread Evidence Code section 1291's narrow exception to that rule, construing it so broadly as to all but destroy the hearsay rule's preference for in-court testimony. This Court should reverse, and reaffirm the contrary rule in *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543, 546-547 (*Wahlgren*), which allows trial judges to apply a limited, case-by-case exception to the hearsay rule that—unlike the version espoused by Court of Appeal in this case—comports with the basic policy underpinnings of the hearsay rule, with the legislative intent behind Evidence Code[1] section 1291, and with the realities of discovery and trial court practice.

* * *

Everyone agrees that testimony from one case, when offered for its truth in another case, is hearsay. Section 1291, subdivision (a)(2) provides a limited exception to the hearsay rule: deposition or other testimony from one case is admissible as trial testimony in a later case where the party against whom the testimony is

[1] All further statutory references are to the Evidence Code unless otherwise indicated.

offered "had the right and opportunity to *cross-examine* the declarant [in the earlier proceeding] with an *interest and motive similar to that which he has at the* [*later*] *hearing*." (Emphasis added.)

In *Wahlgren*, the Court of Appeal held that prior *deposition* testimony of a declarant aligned with the party against whom it is offered usually does not satisfy section 1291's twin requirements of an interest and motive to cross-examine the witness similar to the interest and motive at a later trial in a different case—even if the subject matter of the two cases is similar. "[A] deposition hearing normally functions as a discovery device" and a party defending a deposition of its own employees or other aligned witnesses has little reason to participate in the process by engaging in cross-examination. (*Wahlgren*, *supra*, 151 Cal.App.3d at p. 546.) Indeed, the court recognized there are sound reasons *not* to undertake cross-examination during a deposition. (*Ibid*.) It would unduly lengthen depositions (prompting redirect, recross, and so forth). It also usually would serve no useful purpose in the prior action for the party defending the deposition to question the witness, as that party already knows what aligned witnesses are likely to say at trial. And engaging in cross-examination would put counsel defending the deposition in the position of prematurely revealing their litigation strategy. "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.)

In other words—then as now—normal depositions are relatively passive affairs on the part of attorneys defending the deposition. Other than raising privilege objections and generally ensuring the procedure is a fair one, the defending attorney seldom elicits much in the way of substantive information from the deponent. Recognizing the practical reality that depositions are *not* mini trials, the court in *Wahlgren* accordingly held that the trial court properly excluded deposition testimony taken in a prior action raising related issues where the party attempting to introduce the hearsay evidence demonstrated no case-specific motive on the part of the objecting party to have "cross-examin[ed]" the witnesses at those earlier depositions. (*Wahlgren, supra,* 151 Cal.App.3d at p. 547.)

In *Berroteran v. Superior Court*, the Court of Appeal disagreed with *Wahlgren*. Its disagreement stemmed from a fundamentally different view about the role depositions play in litigation. The court in *Berroteran* thought that *Wahlgren*'s view of depositions as discovery devices was "outdated given the prevalence of videotaped deposition testimony in modern trial practice." (Typed opn. 23.) The court raised the theoretical possibility that deposed witnesses may unexpectedly die or for other reasons become unavailable to give live trial testimony *in the same case* for which they were deposed, and reasoned that counsel defending a deposition must therefore be *presumed* always to have a motive to examine every deposition witness—even one aligned with counsel's own client—just in case the deposition will be needed to replace live testimony at the trial in the case for which

the witness was deposed. (*Ibid.*; see Code Civ. Proc., § 2025.620, subd. (c)(2)(D) [deposition of unavailable witness admissible at the trial in which the deposition occurred].) From that premise, the court further presumed that the interest and motive to cross-examine one's own witness in a given case was necessarily similar to the interest and motive the party would have to examine the witness if brought in to testify live at trial *in a different lawsuit*, any time the two matters raised overlapping issues. (Typed opn. 25.)

With these presumptions, the court relieved the party seeking to introduce hearsay evidence of the burden of proving that its opponent, in fact, had an *actual* motive to conduct a cross-examination during the deposition in the earlier case that was substantively similar to the motive the party would have to examine the witness at trial in the later case. By looking solely at points of overlap in the merits of the former and latter litigation, the court created a fiction that any lawyer defending a witness at deposition on a particular subject matter will be motivated to examine that witness about similar issues that could arise in different cases, at different times, in different geographical, procedural, and strategic contexts.

The court's holding fails to defer to the trial court's discretion in finding no such motive existed. It 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. It fails to appreciate that, unlike an attorney's direct examination to elicit a witness's

recollections and opinions, "cross-examin[ation]" referenced in section 1291 is meant to challenge the witness, such as by undermining the witness's credibility or competence. This is seldom something a lawyer would reasonably do during the other side's deposition of a "friendly" witness. And the holding drives 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. The court's ill-advised interpretation of section 1291 cannot stand.

STATEMENT OF THE CASE

A. Ford is sued in a 2011 class action in Illinois over alleged defects in diesel engines used in various vehicles between 2003 and 2007. After precertification discovery is conducted, the class action is settled.

In 2010, a class action was filed against Ford in the United Stated District Court for the Northern District of Illinois that alleged defects in the company's 6.0-liter diesel engine. (Vol. 1, exh. 8, p. 488.) In 2011, in the same Illinois federal court, the pending class action was merged into a multidistrict nationwide class action. (*In re Navistar Diesel Engine Products Liability Litigation* (N.D.Ill., July 3, 2013, Case No. 11C2496 [MDL No. 2223]) 2013 WL 10545508 (*In re Navistar*) [nonpub. final order and judgment]; typed opn. 5.)

The complaint in the multidistrict litigation broadly alleged " 'there were defects in the 6.0-liter diesel engine that Ford installed in a range of pickup trucks, sports utility vehicles, vans, and ambulances between 2003 and 2007.' " (Typed opn. 5.) It alleged Ford knew about problems but failed to disclose them to vehicle purchasers. (Typed opn. 6.) The complaint asserted no common law fraud claims, asserting only causes of action for breach of implied warranty, breach of express warranty, and violation of various state consumer protection laws. (Vol. 1, exh. 8, pp. 447-481.)

During the precertification stage of the class action, plaintiffs' counsel deposed five current and former Ford employees in Michigan and Florida about the evolving design of the engine as used in various vehicles: Frank Ligon, Scott Eeley, John Koszewnik, Michael Frommann, and Mark Freeland. (Typed opn. 7; see vol. 1, exh. 9, pp. 792, 1150, 1231, 1827, 2119.) The questions focused principally on the period between 2002 and 2005, but often the questions were vague as to time. (See, e.g., vol. 1, exh. 9, pp. 1874, 1884-1885, 1892, 2171-2172, 2218, 2242.) Ford's class action counsel in attendance, a stranger to the subsequent California litigation against Ford, *did not pose any questions to the witnesses*. (PWM 26 [verified allegation of Berroteran's petition not disputed by Ford]; see vol. 1, exh. 9 [transcribed depositions of Eeley, Bob Fascetti, Freeland, Frommann, Koszewnik, and Ligon].)

After the precertification discovery, the parties settled the case in late 2012 or early 2013. (Typed opn. 6; vol. 1, exh. 4, p. 147.)

B. In this individual California action against Ford, Raul Berroteran seeks to rely at trial on hearsay deposition testimony from discovery in other cases, including the Illinois class action. Relying on *Wahlgren*, the trial court excludes the eight-year-old deposition testimony as hearsay.

In 2006, Raul Berroteran purchased a new 2006 Ford F-250 truck equipped with a 6.0-liter diesel engine. (Vol. 1, exh. 1, p. 13.) Berroteran alleges that when buying the truck, he relied on Ford's vague representations that the engine was "high-quality," "free from inherent defects," and was " 'best-in-class.' " (Vol. 1, exh. 1, pp. 13-14; see typed opn. 4.) He alleges he suffered various breakdowns and needed to be towed. (Vol. 1, exh. 1, p. 14.) He took the truck to a Ford authorized repair facility for repairs, but says the repairs were not effective. (Vol. 1, exh. 1, pp. 14-15; typed opn. 4.)

In 2013, Berroteran opted out of the *In re Navistar* class settlement so that he could pursue an individual state court action in California. (Vol. 1, exh. 1, pp. 25-26; typed opn. 6.) After driving the truck for more than seven years, he sued Ford. (See vol. 1, exh. 1, p. 27:23-27.) The operative complaint asserts claims for several types of common law fraud, violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and violation of California's "lemon law"—the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.). (Vol. 1, exh. 1, p. 11; typed opn. 4-5.)

Berroteran could have, but did not, notice the depositions of witnesses who had been questioned in the class action discovery, to examine them in the context of the present case. Instead, Berroteran planned at the 2019 trial in this case to introduce excerpts from the video depositions of the five current or former Ford employees taken years earlier in the class action discovery. (PWM 24-25, 37.) Berroteran also planned to introduce deposition testimony from three current Ford employees (Scott Clark, Eric Gillanders, and Eric Kalis) taken in lawsuits against Ford by other individual vehicle owners, and the deposition testimony of Ford employee Fascetti taken in a class action that involved ambulances. (PWM 32-34, 37.)

Ford moved to exclude the deposition testimony on the ground it was inadmissible hearsay that did not fall within any exception to the hearsay rule. (Vol. 1, exh. 2, p. 76; typed opn. 11.) Berroteran argued that the prior deposition testimony was admissible under the hearsay exception in section 1291.[2] (Vol. 1, exh. 4, p. 148.) Section 1291, subdivision (a)(2) provides that hearsay testimony from one case is admissible in a later case if the party against whom the testimony is offered "had the right and opportunity to *cross-examine* the declarant [in the earlier proceeding] with an *interest and motive similar to that which he has at the* [*later*] *hearing*." (Emphasis added.) As the proponent

[2] Berroteran also argued the class action depositions were admissible under Code of Civil Procedure section 2025.620, subdivision (g). (Vol. 1, exh. 4, pp. 150-152.) The Court of Appeal here expressed no holding regarding application of that statute. (Typed opn. 14-15, fn. 8.)

of the evidence, Berroteran, was required to prove that Ford's attorneys in the 2011 and 2012 class action proceedings had the same motive and opportunity to "cross-examine" its employees and former employees during the depositions as the defense attorneys in this individual California case would have if the testimony were elicited live at trial. (Vol. 1, exh. 4, p. 148.)

Ford responded that Berroteran's showing was insufficient under *Wahlgren*. (Vol. 1, exh. 2, pp. 79-80.) The court in *Wahlgren* distinguished former deposition testimony from former trial testimony, holding that a party rarely has a motive to cross-examine its own witnesses at a deposition, so that prior deposition testimony from such witnesses generally is *not* admissible in later independent proceedings. (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) *Wahlgren* created no categorical rule of exclusion, but explained that the trial court may take into account parties' tactical considerations—for example, not exposing its defenses—that fully justify a party's decision not to question a witness at a discovery deposition. (*Ibid*.) Other reasons to forego cross-examination at a deposition could include an understanding that the case is highly unlikely to go to trial (as is true in the vast majority of class actions), or that the aligned witness has agreed to be available to testify in person, or that other discovery not yet completed will obviate the need for further examination of the witness.

Citing *Wahlgren*, Ford argued Berroteran had not met his burden of proving the hearsay exception applies, noting that 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.' " (Typed opn. 12; see vol. 1, exh. 2, p. 80.)

The trial court agreed, granting Ford's motion to exclude the deposition testimony. (Typed opn. 15; vol. 1, exh. 7, p. 331.) Berroteran filed a writ petition seeking reversal of that ruling. (See typed opn. 15.)

C. The Court of Appeal disagrees with *Wahlgren* and reverses the trial court's evidentiary ruling, holding that the hearsay deposition testimony is admissible based on a presumption that counsel routinely have an interest in cross-examining their own side's witnesses at depositions.

The Court of Appeal in *Berroteran* held, in express disagreement with *Wahlgren,* that a party *necessarily* has a motive to conduct cross-examination after opposing counsel has deposed a witness because it *theoretically* might become necessary to use the deposition *in the same case in which the deposition was taken.* (See typed opn. 22.) The court thus lifted the burden from the proponent of the hearsay evidence to demonstrate that the statutory exception to inadmissibility applies, and placed the burden on Ford, the party objecting to the hearsay evidence, to rebut the court's presumption that Ford had a similar motive to cross-examine aligned witnesses at their earlier depositions as it would have to cross-examine those witnesses if they testified at

Berroteran's trial. (See typed opn. 25 ["Ford made no showing that it lacked a similar motive to examine its witnesses during their depositions"].)

Then, contrary to *Wahlgren*, the court held that tactical considerations bearing on the case for which the deposition was taken are irrelevant in analyzing whether a defendant had a similar motive to cross-examine its own witnesses as counsel would have at a live trial in a later case. (Typed opn. 19.) Under the court's reasoning, a defendant refrains from cross-examining witnesses at depositions—on both the issues presented in the instant case, and every issue that *might* arise in a *future* case—at its peril.

Applying that logic here, the Court of Appeal concluded that Ford's attorneys in the nationwide class action filed in Illinois, and in the other individual opt-out suits, must have had a sufficiently similar motive in those earlier depositions "to *disprove* the allegations of misconduct, and knowledge, all of which centered around the 6.0-liter diesel engine." (Typed opn. 25, emphasis added.) It did not matter that Ford's attorneys in those cases apparently did not believe their client's interests would be served by such cross-examination, given that the attorneys did not in fact do so.

The court held this supposed motive in the prior case was enough to grant to Berroteran the procedural shortcut of not conducting his own discovery in this case, and instead relying on hearsay testimony from depositions other counsel conducted in the much earlier Illinois class action and other plaintiffs' individual

actions. (See typed opn. 25.) The court did not address the fact that allegations are not proved or disproved in fact-finding discovery—they are disproved at trial, which is where the real motivation for examination of a party's own witnesses comes into play. Nevertheless, the Court of Appeal held the trial court *abused its discretion* by finding Berroteran had failed to meet his burden on the motive test under section 1291. (Typed opn. 27.)

On December 9, 2019, Ford filed a timely petition for review. On February 11, 2020, this Court granted Ford's petition.

LEGAL ARGUMENT

I. Trial courts must retain discretion to exclude hearsay deposition testimony from earlier cases, consistent with the statutory language, legislative history, and practical realities of deposition practice.

A. Hearsay deposition testimony from an earlier legal proceeding is admissible under Evidence Code section 1291 only if the proponent of the evidence shows the objecting party had an actual interest and motive to cross-examine the deponent similar to the examination that would occur at trial in the later proceeding.

Hearsay evidence is inadmissible because "an out-of-court statement is not subject to *cross-examination* to test the *declarant's perception, memory and veracity* when the statement was made. Lacking the benefit of cross-examination . . . hearsay evidence is inherently *unreliable* as substantive proof." (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2019) ¶ 8:1002, p. 8D-1.)

As the Court of Appeal held in *Target National Bank v. Rocha* (2013) 216 Cal.App.4th Supp. 1, 7, quoting *Buchanan v. Nye* (1954) 128 Cal.App.2d 582, 585, " '[t]he essence of the hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination. [Citation.] The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested

assertion of a witness, may be best brought to light and exposed by the test of cross-examination.' "

Section 1291, subdivision (a)(2) creates a limited exception to the hearsay rule for testimony in prior litigation if "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and *had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing*." (Emphasis added.) Former testimony includes "[a] deposition taken in compliance with law in another action." (§ 1290, subd. (c).) Thus, the opportunity to cross-examine the witness at the earlier deposition serves as a proxy for that party's usual ability to cross-examine the declarant at the later trial—but *only if* the interest and motive to do so is similar in both proceedings. (§ 1291, subd. (a)(2); see Assem. Com. on Judiciary, com., 29B pt. 5 West's Ann. Evid. Code (2015 ed.) foll. § 1291, p. 87; *People v. Salas* (1976) 58 Cal.App.3d 460, 469.)

In *Wahlgren, supra*, 151 Cal.App.3d at pages 546-547, the Court of Appeal held that a party rarely has a motive to cross-examine a party aligned with the party's side of the case during a deposition conducted by opposing counsel. Deposition testimony from such witnesses is therefore generally not admissible in later unrelated proceedings:

> [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.

(*Ibid.*, emphasis added.)

Wahlgren concluded the trial court in the case before it properly excluded the deposition testimony of defendant Coleco's officers in an earlier product liability case that involved the same alleged defect. (*Wahlgren, supra,* 151 Cal.App.3d at pp. 545, 547.)

In *Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1150 (*Byars*), the court reached the same conclusion about the difference between admitting former trial testimony and former deposition testimony. "Former testimony from a deposition rather than a trial is problematic since depositions generally function as a discovery device where examination of one's own client is typically avoided so as not to reveal a weakness in the case or to prematurely disclose a defense. In contrast, at trial, the parties seek to resolve issues of liability and therefore ' "the interest and motive in cross-examination increases dramatically." ' "[3] (*Byars*, at p. 1150.)

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[3] *Byars* involved section 1292, which uses the same "interest and motive" test as section 1291 to create a related exception to the hearsay rule. Under section 1292, subdivision (a)(3), former testimony may be admitted against person who was *not* a party to the earlier proceeding if there was another party in the prior action who "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing."

The sound reasoning from *Wahlgren* and *Byars* holds true in the procedural posture presented by Berroteran's case: an individual opt-out from a prior nationwide, multi-year class action. In addition to the typical reasons for not cross-examining one's own client or other aligned witnesses, there is even less reason to do so in a class action. As the American Tort Reform Association notes in its letter supporting review, "few class actions ever reach trial, because the decision on class certification as a practical matter either terminates the litigation (if the certification is denied) or provides a powerful incentive for the defendant to settle (if certification is granted)." (American Tort Reform Association Amicus Curiae Letter in Support of Petition for Review 1.)

Because the likely result of the prior class action was dismissal or settlement—and not a trial, where counsel would need to be concerned about the possibility of unavailability of witnesses—class counsel's motive to put his own clients' employees on the record in the class action was almost non-existent here—as it was in *Wahlgren* and *Byars*.

B. The Legislature intended that prior deposition testimony would rarely be admitted in later proceedings.

The interpretation of section 1291 employed by *Wahlgren* is supported by the statute's legislative history. The Legislature made clear that, while prior *trial* testimony would generally be admissible, prior *deposition* testimony would not.

When interpreting a statute, California courts "aim 'to ascertain the intent of the enacting legislative body so that [they] may adopt the construction that best effectuates the purpose of the law.' " (*Klein v. United States of America* (2010) 50 Cal.4th 68, 77.) Courts "look first to the words of the statute, 'because the statutory language is generally the most reliable indicator of legislative intent.' " (*Ibid*.) But when the statutory text "fails to resolve the question of its intended meaning, courts look to the statute's legislative history and the historical circumstances behind its enactment." (*Ibid*.)

Section 1291, subdivision (a)(2)'s exception to the hearsay rule turns on a party's opportunity to cross-examine the witness in a prior proceeding "with an *interest and motive similar to that which he has at the [later] hearing*" in which the testimony is offered. (Emphasis added.) The statute does not define what it means to have a similar interest and motive. The Court of Appeal here believed that a party *presumptively* has a motive to cross-examine a witness during depositions because of the theoretical possibility in every case that a witness might die or become unavailable before trial. (See typed opn. 23.) Construing "interest and motive" to include remote possibilities of this type would mean that deposition testimony would be admissible in virtually any later action at which the testimony might be relevant.

Wahlgren, on the other hand, concluded the existence of a motive would turn on a case-by-case analysis of an attorney's belief about whether it is desirable to engage in cross-examination, and

whether it is tactically advantageous to forego cross-examination. (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.)

The legislative history directly supports *Wahlgren*'s conclusion that parties rarely have an interest and motive to cross-examine witnesses during depositions conducted by opposing counsel—and certainly not an interest similar to that at trial in a later case. No presumption to the contrary should aid a hearsay proponent in meeting the burden of identifying specific features of the earlier case that might show such a motive.

Section 1291 was enacted as part of the Legislature's decision almost 60 years ago to adopt the state's first comprehensive evidence code. Drafting the code began with a directive by the Legislature to the California Law Revision Commission to conduct a study of the Uniform Rules of Evidence, adopted in 1953, to determine whether they might be the basis for a revision of California law. (MJN, vol. 3, exh. 1, p. 526; vol. 7, exh. 1, p. 1614.) Rule 63 of the Uniform Rules deals with hearsay and its exceptions. (See *Principal Life Ins. Co. v. Peterson* (2007) 156 Cal.App.4th 676, 689.) Rule 63(3) addresses the admissibility of former testimony. It provides that, if the declarant is unavailable, the declarant's former testimony is admissible if it was given as a witness in another action or in a deposition in another action when

> (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination *with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered*.

(Uniform Rules of Evidence, rule 63(3); see MJN, vol. 9, exh. 2, p. 2134.) The language at issue in this case thus originates with the Uniform Rules of Evidence.

In one of its first actions, the Law Revision Commission recommended that the State adopt Uniform Rules of Evidence, rule 63(3) as state law. (MJN, vol. 1, exh. 1, pp. 16-18.) The Commission rejected several amendments to the rule and, with minor changes in language, it was enacted in 1965 as section 1291 of the new Evidence Code.[4] Section 1291 represented a calculated expansion of prior California law, under which testimony from a prior legal proceeding was admissible only if the other proceeding was a former action between the same parties relating to the same subject matter. (MJN, vol. 3, exh. 1, pp. 548-549.)

In 1961, a few years after it began drafting the new code, the Commission explained that Uniform Rules of Evidence, Rule 63(3) would permit prior deposition testimony to be admitted only rarely. In its initial Comment to the proposed legislation, the Commission explained that courts should bar testimony of precisely the type at issue here, contemplating that a judge would

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[4] The changes to Uniform Rules of Evidence, rule 63(3) considered by the Commission include the following: It 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. (MJN, vol. 2, exh. 1, pp. 376-377.) The Commission deleted a provision of rule 63(3) that would have applied the statute to criminal proceedings. (MJN, vol. 8, exh. 1, p. 1910.) It changed the words "another action" to "former action." (MJN, vol. 3, exh. 1, pp. 703-704.) And it moved the definition of " 'former testimony' " from rule 63(3) into rule 62 (now Evidence Code section 1290). (MJN, vol. 3, exh. 1, pp. 738, 743.)

> exclude former testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action if he determines that the deposition was taken for discovery purposes and that a party did not subject the witness to a thorough cross-examination in order to avoid a premature revelation of the weaknesses in his testimony or in the adverse party's case. In such a situation, the *interest and motive for cross-examination on the previous occasion is substantially different than the interest and motive of the party against whom such evidence is being offered at the trial of another action.*

(MJN, vol. 4, exh. 1, pp. 797-798.)

This comment was repeated verbatim in later versions of the statute, and it was included in the final Recommendation of the California Law Revision Commission Proposing an Evidence Code (January 1965). (MJN, vol. 6, exh. 1, p. 1385; vol. 7, exh. 1, pp. 1474, 1536; vol. 8, exh. 1, p. 1912; vol. 9, exh. 1, p. 2016; vol. 11, exh. 3, p. 2562.) Notably, the reports of the Assembly Committee on the Judiciary and the Senate Committee on the Judiciary expressly state that the Commission's comments reflect the Legislature's own intentions. (See MJN, vol. 13, exh. 5, p. 3139 [Report of Assembly Committee on the Judiciary: "the comments contained under the various sections of Assembly Bill No. 333 as set out in the Recommendation of the California Law Revision Commission Proposing an Evidence Code (January 1965) reflect the intent of the Assembly Committee on Judiciary in approving the various provisions of Assembly Bill No. 333" (emphasis omitted)], p. 3143 [Report of Senate Committee on Judiciary on Assembly Bill No. 333 [same]].) The Legislature's view that

section 1291 should rarely be applied to depositions taken in prior proceedings was then formally included in the published version of the statute.

Any confusion about what the Legislature meant for a party to have an "interest and motive" in cross-examining a witnesses at a deposition is dispelled by this legislative history. The history makes clear that a litigant is presumed *not* to have an interest or motive in cross-examining a witness during an opposing party's deposition of an aligned witness because doing so would result in "a premature revelation of the weaknesses in the testimony of the witness or in the adverse party's case." (Assem. Com. on Judiciary, com., 29B pt. 5 West's Ann. Evid. Code, *supra*, foll. § 1291, p. 87.)

To establish a basis for introducing deposition testimony from prior litigation, the moving party accordingly must present evidence that some unusual aspect of the prior case provided its opponent with an interest and a motive to cross-examine the witnesses at a deposition in a way similar to how the opponent would be expected to do at trial in the later case. In this case, Berroteran offered no evidence that Ford had an actual motive to cross-examine its own employees. Indeed, if Ford *had* been so motivated during the class action, there would be evidence it in fact did so. But it did not. Because Berroteran did not meet his burden of proof, the trial court correctly exercised its discretion in ruling that the deposition testimony was inadmissible.

C. The Court of Appeal's rationale for finding the depositions were admissible erroneously shifts the burden of proof, misreads federal authorities, and does not comport with the realities of deposition and trial practice.

Without citing evidence of what counsel defending depositions actually do, the Court of Appeal surmised that a party *presumptively* has a motive to cross-examine witnesses, not only for the theoretical possibility of trial in *that* case, but for all theoretical future cases with potentially overlapping issues. (Typed opn. 25.) The court expressed the view that a deposition is where a party defending the deposition "disprove[s]" the opposing party's theories of the case, and also that parties routinely use depositions to set up preservation evidence, even in the absence of indications that the witness may become unavailable for trial. (Typed opn. 26.) The court held the earlier depositions were admissible here because "*Ford* fails to demonstrate that it *lacked* a similar motive to examine its witnesses in the former litigation." (*Ibid.,* emphasis added; see typed opn. 2 ["Ford failed to demonstrate any such different motive or interest here"]; typed opn. 24, fn. 10 [Ford "did not proffer any evidence that there was any strategic reason for not cross-examining its witnesses at their depositions here"], 24 ["Ford offered no further explanation why its motive to examine any specific employee or former employee differed from its motive in the current case"].)

In reaching its conclusions, the Court of Appeal made several errors. First, it imposed the burden of proof on the wrong party. It mistakenly assumed that *Ford* had the burden to prove that the requirements for admitting deposition testimony under Evidence Code section 1291 did *not* exist, when it was in fact *Berroteran's* burden to prove they *did*. Second, it held that its analysis of section 1291 was supported by federal case law interpreting the similar provisions of Federal Rules of Evidence, rule 804, but it misread federal law and ignored a critical distinction between the statutes. Third, it assumed without evidence that the advent of videotaped depositions affected their admissibility. We address these errors in turn.

The court's improper presumption and resulting burden-shifting. The court's first error was upending the traditional burden borne by the hearsay proponent of proving the admissibility of the evidence proffered. As the proponent of hearsay evidence, Berroteran was required to demonstrate that the foundational requirements for admitting the evidence had been met. (*People v. Rodriquez* (1969) 274 Cal.App.2d 770, 777 ["if a hearsay objection is properly made, the burden shifts to the party offering the hearsay to lay a proper foundation for its admissibility under an exception to the hearsay rule"].) The Court of Appeal's twin presumptions—not only that a party necessarily has an interest to cross-examine friendly witnesses at every deposition, but also that the interest and motive to cross-examine in that deposition is necessarily similar to the motive to cross-examine that would occur in a later trial in any other case involving

overlapping factual or legal issues (typed opn. 26)—improperly relieved Berroteran of his burden to establish a case-specific basis for an exception to the hearsay rule under section 1291.

A key problem with the court's reasoning is that, while a litigant has an interest and motive to disprove its opponent's claims *at trial*, there is no reason to assume the litigant has the same motive to disprove its opponent's allegations *at a deposition,* much less to disprove *every future opponent's* allegations that involve overlapping facts and legal principles.[5] A deposition is simply not the time or place for the lawyer *defending* the witness at the deposition to draw out opinions or recollections that the lawyer who is *taking* the deposition has not explored, or to *cross-examine* his own witness.

If a party has a specific reason to expect that an important witness will not be available for that party to call at trial, the party may have a motive to spend extra resources to put the witness's testimony on the record before the trial begins. But there is no evidence that was the case with respect to any of the witnesses

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[5] The Court of Appeal overstated the similarities between the issues in the class action and the issues in Berroteran's individual case. The class action involved alleged defects in all of the engines manufactured over a five-year period. (See Plaintiff's MJN in Support of PWM 34-35.) Berroteran's case involved problems with a single engine manufactured in 2006. (Vol. 1, exh. 1, p. 12.) Ford's position is that the 6.0-liter engine improved continuously over its five-year run. (See Return to PWM 18.) Whether it did is a key issue in Berroteran's case, since he bought his truck in 2006. (Vol. 1, exh. 1, p. 12.) In the class action, improvements that occurred during the five-year production run were far less important, because they would not have immunized Ford from liability.

who were deposed in this case. If anything, the lack of cross-examination plainly demonstrates the opposite.

There are very plausible reasons why Ford had *no* reason to (and in fact did not) cross-examine its own employees or former employees. Its attorneys might have been confident the class action would settle before trial, the typical outcome of a class action, providing even less reason to put the employees' testimony on the record. (See American Tort Reform Association Amicus Curiae Letter in Support of Petition for Review 2.) The Court of Appeal's presumption that Ford *necessarily* had a motive to disprove its opponent's case during pretrial depositions, at a time when the parties were still gathering facts and the case was likely headed for settlement, does not square with the realities of litigation generally, or class actions in particular.

Moreover, even if Ford's counsel had believed the class action would be the rare one that would go all the way through trial, counsel might have been confident that at the time the depositions were taken, the witnesses would cooperate in attending trial, making cross-examination at the deposition unnecessary.

The Court of Appeal's holding that none of these strategic considerations may be considered in rebutting the new presumption created by the court (see typed opn. 19-20) disregards the purpose of discovery, and turns a blind eye to a lawyers' obligation to protect clients' interests during discovery. It is also in direct conflict with the Assembly Committee Report, which explains that 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." (Assem. Com. on Judiciary, com., 29B pt. 5 West's Ann Evid. Code, *supra*, foll. § 1291, p. 87.)

The court's flawed analysis of federal hearsay rules. The court's second error was its view that *Wahlgren*'s interpretation of Evidence Code section 1291 was "contrary to persuasive federal law interpreting an analogous hearsay exception." (Typed opn. 3.) Federal Rules of Evidence, rule 804(b)(1), provides that former testimony is admissible if it was given at "a trial, hearing, or lawful deposition," and is "offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination." The court believed this rule authorizes federal courts to admit prior deposition testimony based solely on the similarity of issues in the two cases, with no weight given to tactical considerations that might have weighed against cross-examination, and that this justifies a gloss on section 1291 to the same effect. (Typed opn. 19-20.)

The court misread federal law. A survey of cases applying Federal Rules of Evidence, rule 804(b)(1) shows that the most important factor federal courts consider in deciding whether testimony from a prior proceeding is admissible is whether the party opposing admission had an actual, practical motive (not a presumptive motive) to examine the witness at the earlier proceeding.

The Supreme Court made that clear in *U.S. v. Salerno* (1992) 505 U.S. 317 [112 S.Ct. 2503, 120 L.Ed.2d 255] (*Salerno*). In *Salerno*, the Court of Appeals held that a witness's testimony at a preliminary hearing exonerating the defendant should have been admitted in a later proceeding in the same criminal prosecution without a showing that the prosecutor actually had a motive to examine the witness at the preliminary hearing. The Supreme Court reversed, holding that the Court of Appeals "erroneously concluded that the respondents [the defendant] did not have to demonstrate a similar motive in this case to make use of Rule 804(b)(1)." (*Id*. at p. 325.) Justice Blackmun explained in his concurring opinion that the similar-motive inquiry "is inherently a *factual* inquiry, depending *in part* on the similarity of the underlying issues *and on the context* of the grand jury questioning." (*Id*. at p. 326, first emphasis added (conc. opn. of Blackmun, J.).)

In *U.S. v. Carson* (D.C. Cir. 2006) 455 F.3d 336, 378-379, the court explained that in *Salerno*, "[t]he Court rejected any presumption that a prosecutor's motives to develop testimony before the grand jury and at trial are similar and held that respondents could not make use of Rule 804(b)(1), unless they could 'demonstrate' that the government, *in fact*, had a 'similar motive' to develop the testimony in both proceedings." (Emphasis added.) "On remand from the Supreme Court [in *Salerno*], the Second Circuit held that district courts are to make 'fact-specific' inquiries into the motives of the prosecution during these different stages of the investigation and trial." (*Id*. at p. 379.)

In *United States v. Feldman* (7th Cir. 1985) 761 F.2d 380, 385, abrogated on another ground in *United States v. Rojas-Contreras* (1985) 474 U.S. 231, 232, fn. 1 [106 S.Ct. 555, 88 L.Ed.2d 537], the court likewise held that "[m]ere 'naked opportunity' to cross-examine is not enough; *there must also be a perceived 'real need or incentive to thoroughly cross-examine'* at the time [the former testimony was given]." (Emphasis added.) "In determining whether a party had [a similar] motive, a court must evaluate not only the similarity of the issues, but also the purpose for which the testimony is given. [Citations.] Circumstances or factors which influence motive to develop testimony include '(1) the type of proceeding in which the testimony is given, (2) *trial strategy*, (3) the potential penalties or financial stakes, and (4) the number of issues and parties.' " (*Ibid.*, emphasis added.)

In *Polozie v. U.S.* (D.Conn. 1993) 835 F.Supp. 68, 71-72, where the defendant *did* examine the plaintiff's witness at a deposition, the court held the evidence was nonetheless inadmissible because its motive at the deposition differed from its motive to question the witness at trial. At the deposition, "the defendant's motive was to gather information and, generally, to learn as much as it could about [the physician's] opinions and their bases. It was not the defendant's motive at that point to test [the physician's] methodology or to challenge his skill, credibility, and confidence in his own assessments. The defendant's motive for cross-examination at trial was entirely different. Had the physician testified at trial, he would have been subjected to a highly competent and challenging cross-examination which was

dramatically different from the one he experienced at the deposition." (*Id*. at p. 72.)

And in *United States v. DiNapoli* (2d Cir. 1993) 8 F.3d 909, 912 (*DiNapoli*) (en banc), the Second Circuit held, "we do not accept the position . . . that the test of similar motive is simply whether at the two proceedings the questioner takes the same side of the same issue." The proper test is whether the questioner had "a *substantially similar degree of interest* in prevailing" on the related issues at both proceedings. (*Ibid*., emphasis added.) *DiNapoli* held the party's interest in prevailing is affected by the nature of the proceeding. If a prosecutor uses a grand jury for the purpose of investigation, "the prosecutor is not trying to prove any side of any issue, but only to develop the facts." (*Id*. at p. 913.) In that context, the prosecutor would not have a "motive to show the falsity of [a witness's] testimony, similar to the motive that would exist at trial." (*Ibid*.)

By the same token, no one "prevails" at a deposition, so the "similar motive" test would not ordinarily be met when one attempts to use deposition testimony at trial—much less, as here, at a trial in a later case. (See *United States v. Omar* (1st Cir. 1997) 104 F.3d 519, 522-524 [the government will rarely have a similar motive in questioning a witness before a grand jury as it would have at trial]; *S.E.C. v. Jasper* (9th Cir. 2012) 678 F.3d 1116, 1129 ["Under [Rule 804(b)(1)], admission of evidence 'is a matter for the trial judge's discretion, to be exercised on the basis of his evaluation of the realities of cross-examination and the motive and

interest with which [one party] carried out the prior examination' "].)[6]

The federal courts disagree at the margins in interpreting the federal rule. For example, in *USA v. Shayota* (N.D.Cal., Oct. 19, 2016, No. 15-CR-00264-LHK-1) 2016 WL 6093238, at p. *15 [nonpub. opn.], the District Court noted the different approaches taken by the Ninth Circuit in *McFall* and the approach taken by the First Circuit and Second Circuit, which "take a more 'fine-grained' approach by looking to . . . whether the party 'had the same degree of interest to prevail at each proceeding.' " But the federal courts recognize that analyzing a party's motives is a factual question that cannot be answered by a presumption arising from overlapping issues in different cases. (*DiNapoli*, *supra*, 8 F.3d at p. 914 [rejecting the use of presumptions and holding that "the inquiry as to similar motive must be fact specific"].)

Federal courts also agree that the party who proposes introducing hearsay testimony from a prior proceeding has the burden of proving that that the motives were in fact similar. (See, e.g., *Salerno, supra,* 505 U.S. at p. 322 [" 'The respondents . . . had no right to introduce DeMatteis' and Bruno's former testimony under Rule 804(b)(1) without showing a 'similar motive' "]; *Annunziata v. City of New York* (S.D.N.Y., May 28, 2008,

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[6] But see *U.S. v. McFall* (9th Cir. 2009) 558 F.3d 951, 961 (*McFall*) [while the admissibility of testimony under Rule 804(b)(1) involves a fact-intensive inquiry, "[w]e cannot agree . . . with the Second Circuit's gloss on Rule 804(b)(1). As one of the dissenters in *DiNapoli* (an en banc decision) noted, the requirement of similar 'intensity' of motivation conflicts with the rule's plain language, which requires 'similar' but not identical motivation."].

No. 06 Civ. 7637 (SAS)) 2008 WL 2229903, at p. *7 [nonpub. opn.] [" 'In order to admit prior testimony under Rule 804(b)(1), the proponent has the burden to show by the preponderance of the evidence that (1) the witness is unavailable; (2) the party against whom the testimony is offered is the same as in the prior proceeding; and (3) that party had the same motive and opportunity to examine the witness' "]; *Brindowski v. Alco Valves, Inc.* (E.D.Pa., Jan. 12, 2012, Consol. Under MDL 875; E.D.Pa. Civ. Action No. 2:10-CV-64684-ER) 2012 WL 975080, at p. *1, fn. 1 [nonpub. order] ["the burden is on the proponent of the evidence to prove that a defendant in the present case would have had an opportunity and similar motive to cross-examine a witness who was deposed in an earlier action"].) In contrast to the Court of Appeal here, federal courts do not *presume* a party had a motive to cross-examine a witness during an opposing party's deposition, or that the motive to do so is necessarily similar between a deposition in one case and a trial in a different one.

The Court of Appeal relied on two federal cases to support its contrary interpretation of federal law, but neither involved introducing hearsay deposition testimony at trial against a party *aligned* with the witness, and neither involved importing deposition testimony from a class action into an individual action years later in a different state. On the contrary, both involved using depositions of witnesses adverse to the objecting party—who could on the facts of those cases be found by the trial court to have had good reason to cross-examine those witnesses during an earlier deposition.

The first case, *Hendrix v. Raybestos-Manhattan, Inc.* (11th Cir. 1985) 776 F.2d 1492, 1504, involved the deposition of a former corporate officer who, in his deposition, was testifying *adversely* to his former employer. The employer defendant actually did undertake some cross-examination. (See *id.* at pp. 1505-1506.) Indeed, there was apparently a basis for obtaining preservation testimony from the elderly witness: the corporate officer was a doctor who became medical director for the corporation in 1944, retired in 1966, was deposed in 1976, and died the year after the deposition. (*Id.* at p. 1504.) And the court stressed that, when the deposition was taken in 1976, the law in that jurisdiction affirmatively indicated that the hearsay testimony would be admissible in future matters, so the employer's counsel "took a calculated risk in limiting his cross-examination of the witness." (*Id.* at p. 1506.) The Court of Appeals *affirmed* the trial court's exercise of discretion in admitting the evidence. (*Id.* at pp. 1506, 1509.)

The second case, *DeLuryea v. Winthrop Laboratories, etc.* (8th Cir. 1983) 697 F.2d 222, 226, involved deposition testimony taken specifically to adjudicate the merits of the plaintiff's workers' compensation claim at an administrative hearing. The witness was the plaintiff's former psychiatrist who provided deposition testimony directly adverse to his former patient about her abuse of pain medication. (*Ibid.*) Her counsel asked one key question in cross-examination, but chose to proceed no further to explore the adverse testimony. (*Ibid.*) Under those circumstances, the Court of Appeals held that "the purpose for which Dr. Ivie's

testimony was offered at the workers' compensation hearing was such that [plaintiff] DeLuryea had a similar motive for testing the credibility of the testimony on cross-examination," so the hearsay evidence was admissible at the defendant's urging in a later civil trial regarding liability for the plaintiff's injuries from the medication abuse. (*Id*. at pp. 226-227.)

Neither of the foregoing cases supports the court's opinion in this case, even if federal law were helpful in interpreting the plain language of the California statute—which it is not. Whatever gloss federal courts have placed on the term "motive," the California Legislature did not leave California courts with similar leeway. The Legislature, and the Law Revision Commission before it, explained that, at a deposition, "the interest and motive for cross-examination . . . is substantially different than the interest and motive of the party against whom such evidence is being offered at the trial of another action." No comparable legislative history accompanied the federal rule.

The court's unsupported characterization of depositions as a quasi-adjudicatory proceeding. The Court of Appeal's final reason for rejecting *Wahlgren* was its view that *Wahlgren* relied on an "outdated" assumption that depositions function principally as a discovery device for pretrial fact-finding. (Typed opn. 23.) "That assumption is at best outdated given the prevalence of videotaped deposition testimony in modern trial practice." (*Ibid*.) But placing a camera in front of the witness does nothing to change the fundamental purpose of a deposition, which is *not* a mini-trial. Recording a deposition on video rather than on

the pages of a court reporter's notes gives trial counsel no reason to expect that hearsay depositions would or should be more freely admitted at trial—especially in future trials years down the road, involving different parties, counsel, and claims, as here—in place of live testimony.

The logical rationale underlying *Wahlgren* simply has not changed since the advent of videotape. *Wahlgren* reasoned that an attorney will rarely have a motive to cross-examine a witness aligned with the attorney's side of the case because, "[a]t 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." (*Wahlgren*, *supra*, 151 Cal.App.3d at pp. 546-547.) That is just as true when the deposition is videotaped as it is when the deposition is transcribed by a reporter. And the purpose of depositions has not changed. It continues to be to assist the parties obtain the information they need to establish their case or defense. (*Yelp Inc. v. Superior Court* (2017) 17 Cal.App.5th 1, 15; *Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 415-416.)

Contrary to the Court of Appeal's presumption, a number of leading treatises on discovery and depositions today expressly *advise against* cross-examining a friendly witness in a deposition in the ordinary course. (See, e.g., Dunne, Dunne on Depositions in California (Sept. 2019 update) Cross-examining own client, § 7:40 ["Generally, it is not a good idea to cross-examine one's own client even though counsel has the right to do so"]; Imwinkelreid & Blumof, Pretrial Discovery Strategy & Tactics (Oct. 2019 update)

Cross-examination of deponent, § 7:26 ["the predominant school of thought is that you should conduct little or no cross-examination of the deponent"; collecting authority]; Lisnek & Kaufman, Depositions: Procedure, Strategy & Technique (Nov. 2018 update) Rehabilitation-Questioning the Deponent, § 11:10 ["When determining whether questions of one's own client should be asked, an attorney must exercise restraint"]; Haydock & Herr, Discovery Practice (8th ed., 2020-1 suppl.) Questioning the Deponent, § 18.08 ["In what situations should you question your client deponent? The best question may be no question."].)

In sum, the practice of videotaping depositions did not change the hearsay rules, and a deposition, whether transcribed or videotaped, is not admissible unless it comes within an exception to those rules.

D. Unless this Court disapproves the *Berroteran* opinion requiring admission of hearsay deposition testimony, counsel will be compelled to unduly expand the scope of deposition examinations, and parties still will be unfairly prejudiced by untested hearsay testimony.

If *Berroteran* rather than *Wahlgren* represents the law of California, it will fundamentally change the way depositions are conducted. For example, depositions in class actions around the country will have to be dramatically expanded in scope because they will routinely be admissible in California as trial testimony in every individual opt-out case. And lawyers in those class actions

may not be aware of the California rule, so they may be caught unaware that their interest and motivation in representing their client has been preordained by a California court, which has supplanted their professional judgment to effectively mandate cross-examination (and redirect, and recross) at all depositions—on every factual nuance a later opt-out plaintiff's case might implicate.

The same is true in innumerable cases involving issues that cut across a broad swath of cases. Lawyers will have foisted on them a presumption that, contrary to their client's actual interests and strategies in a particular case, searching cross-examination during depositions must take place, such as:

- in an individual product liability action about characteristics of the product that may be at issue in other plaintiffs' cases;
- in a premises liability case where questions arise about the construction, maintenance, and condition of property, as well as notice of incidents at the property;
- in cases against health care providers, where the witness discusses a defendant's practices with patients and standards of care;
- in cases against educational institutions, where a witness describes policies and procedures involving students and educators;
- in a wrongful termination matter if the employer's practices may come up in future litigation by other employees;

- in a matter concerning a bank's or other financial services defendant's business practices in a contract or tort matter that raises claims similar to those that other consumers may raise;
- in a matter involving real property title or nuisance issues, which may repeatedly crop up over long periods of time; and
- simply put: any case that touches an organization's policies and procedures or deals with a series of repeatable circumstances.

If the *Berroteran* rule held, lawyers defending against these types of claims and many others will be forced to cross-examine every deponent, with a view to representing their clients' interests not only in the case at hand, but also keeping in mind possible issues that could arise in future litigation defended by different counsel in circumstances calling for different strategies. This is true not only for California lawyers, but lawyers whose clients may later be sued in California courts on a claim with overlapping issues. Far from serving the goal of pretrial discovery to *streamline* litigation, depositions will take on the character of full blown trials—because, according to *Berroteran*, the defendant always has a motive "to disprove the allegations of misconduct" *at the discovery stage*. (Typed opn. 25; see The Product Liability Advisory Council, Inc. Amicus Curiae Letter in Support of Petition for Review 7 [expressing the opinion that, under *Berroteran*'s interpretation of section 1291, the cost of litigation will increase dramatically].)

Even armed with the knowledge that a deposition could be admitted in a future case, the cross-examination that the court in *Berroteran* contemplates demands prescience of deposition-defending counsel. This case is a good example. In multidistrict litigation consolidated into a nationwide class action in 2011, plaintiffs alleged defects in hundreds of thousands of 6.0-liter engines manufactured between 2003 and 2007. (See vol. 1, exh. 8, pp. 374, 444.) Depositions of Ford employees focused principally on problems that surfaced in the engine's early years. (See, e.g., vol. 1, exh. 9, pp. 1874, 1884-1885, 1892, 2171-2172, 2218, 2242.) In the current litigation, Berroteran takes the position that those problems persisted into 2006. (See typed opn. 25-26, quoting vol. 1, exh. 1, p. 17.) Ford takes the opposite position. (See Return to PWM 18.) Whether Berroteran is wrong—whether the problems were largely or completely solved in later years—is the critical issue in the current litigation. But when Ford's engineers were deposed in 2012, for a class action that was headed to settlement, Ford had no way of knowing that California would later adopt a ruling making it necessary to explore issues specific to Berroteran or to any of the other putative class members who might later file individual actions.

As Ford's counsel explained below, "it is hard to even articulate how somebody sitting in that deposition as a Ford counsel would come to the conclusion that, I better start asking merits-related issues in case a particular opt-out from one of these model years sues." (Vol. 1, exh. 7, p. 339.)

Berroteran argued he needed to use the depositions from the class action because the engineers deposed in the class action reside out of state and he could not call them as live witnesses. (Vol. 1, exh. 6, p. 304; PWM 12.) But nothing prevented Berroteran's attorneys deposing the engineers where they live, obtaining context-informed answers to questions relevant to questions tailored to *this case*. He would not then have needed to stretch the meaning of section 1291 for those depositions to be admissible here. (See Code Civ. Proc., § 2025.620, subd. (c)(2).)

Instead of availing himself of the normal discovery procedure, Berroteran sought at trial in 2019 to introduce untested hearsay testimony from depositions taken in 2011 and 2012 in separate out-of-state litigation involving other parties. Nothing in section 1291 permits a party to introduce untested hearsay simply because they chose to forego taking depositions of key witnesses.

In sum, parties should not be forced to disclose their trial theories at depositions called by opposing counsel, and they should not be penalized in subsequent litigation if they fail to do so. They also should not be put in the position of guessing what use will be made of prior deposition testimony in subsequent California courts. This Court should reaffirm *Wahlgren*'s holding that depositions are fact-finding tools at which cross-examination seldom occurs—especially cross-examination of witnesses aligned with the party defending the deposition. They are not a substitute for trials from which hearsay testimony can regularly be imported into other cases.

II. If this Court overrules the *Wahlgren* rule and endorses the *Berroteran* rule, that decision should have only prospective effect.

"Generally, judicial decisions are applied retroactively" under California law. (*Estate of Propst* (1990) 50 Cal.3d 448, 462.) "This rule of retroactivity, however, has not been an absolute one." (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 979.) " ' "[C]onsiderations of fairness and public policy" may require that a decision be given only prospective application.' " (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378.) Indeed, retroactive application of a judicial decision that unsettles prior authority on which people reasonably relied in ordering their affairs has a constitutional dimension, as it may deny due process. (See *Moss v. Superior Court* (1998) 17 Cal.4th 396, 429.)

Whether to apply a decision retroactively "turns primarily upon the extent of the public reliance upon the former rule [citation], and upon the ability of litigants to foresee the coming change." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 193, superseded by statute on another ground as stated in *Gordon v. Law Offices of Aguirre & Meyer* (1999) 70 Cal.App.4th 972, 977.) These key considerations of reliance and foreseeability, in turn, hinge primarily on whether the decision represented a clear break from prior precedent. (See *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372-373 (*Smith*), superseded by statute on another ground as stated in *Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1384.)

A "decision alters a settled rule upon which parties justifiably relied" when the decision " 'disapprove[s] a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities.' " (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 967.) Courts hold "consistently and categorically" that a new rule does not apply retroactively when it is " ' "a clear break with the past." ' " (*People v. Hicks* (1983) 147 Cal.App.3d 424, 427; see *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 800-801 [declining to apply decision retroactively], judg. vacated on another ground *sub nom. Mihaly v. Westbrook* (1971) 403 U.S. 915 [91 S.Ct. 2224, 29 L.Ed.2d 692]; *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305 [same]; *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1282-1283 [whether to limit retroactive reach of a new rule includes an analysis of " ' " 'the purposes to be served by the new rule,' " ' " and whether applying a new rule to past conduct might deprive litigants of expected remedies or defenses]; *Smith, supra,* 29 Cal.4th at pp. 372-373 [applying prospectively opinion that "represents a clear break from [prior] courts' construction of the [fee-shifting] statute"]; *Woods v. Young* (1991) 53 Cal.3d 315, 330-331; *People v. Sanford* (1976) 63 Cal.App.3d 952, 956-959.)

The *Berroteran* rule, impinging on trial courts' discretion to exclude hearsay deposition testimony based on a court-made presumption that attorneys *do* have an interest and motive in cross-examining a friendly witness during deposition, is contrary to attorneys' long-standing practice of protecting their clients' interests by *not* engaging in such cross-examination. If this new

interest and motive is to be imposed on attorneys as a matter of law, attorneys should have fair notice of it before their clients (often represented by different counsel, as here) are confronted at trial with hearsay testimony that was never tested, clarified and supplemented at the time the deposition was taken.

CONCLUSION

For the reasons explained above, this Court should hold that *Wahlgren* properly construed section 1291 and the trial court correctly exercised its discretion in ruling that the hearsay deposition testimony from earlier proceedings is not admissible at trial in this case.

May 13, 2020

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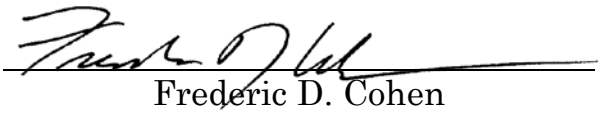
By: 
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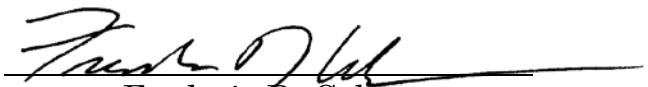

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PROOF OF SERVICE

Berroteran v. The Superior Court of Los Angeles County
Supreme Court Case No. S259522

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

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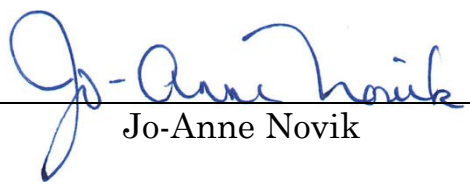

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