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December 3, 2020

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Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Butler America, LLC v. Aviation Assurance Company, LLC, et al.*, S265474

Association of Southern California Defense Counsel’s
Letter in Support of Appellants’ Petition for Review
(Cal. Rules of Court, rule 8.500(g))

Honorable Justices:

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The Association of Southern California Defense Counsel (ASCDC) submits this letter pursuant to Rule 8.500(g) in support of the petition for review filed on November 9, 2020 by Defendants/Appellants Aviation Assurance Company, LLC, ComAv, LLC, ComAv Asset Management, LLC, ComAv Technical Services, LLC and Craig Garrick (collectively, “the ComAv entities”). ASCDC urges this court to grant review of the Court of Appeal’s published opinion in *Butler America, LLC v. Aviation Assurance Company, LLC, et al.*, (September 29, 2020, B298696) 55 Cal.App.5th 136.

IDENTITY AND INTEREST OF ASCDC

ASCDC is a voluntary membership association comprised of approximately 1,100 attorneys, among whom are some of the leading trial lawyers of California’s civil defense bar. ASCDC members routinely defend professionals, businesses and civic institutions who provide the goods, services, jobs and investments vital to the country’s economic health and prosperity. The association is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation and trial practice in this State.

REASONS WHY REVIEW SHOULD BE GRANTED

As evidenced by the Court of Appeal’s opinion, some district courts of appeal in this state have sanctioned the use of the extremely broad language in section 187 of the Code of Civil Procedure to summarily amend judgments by way of motion practice alone, and without a trial on the merits, to add judgment debtors to judgments even though the judgment debtors were not named or represented in the underlying litigation. However, this Court has yet to consider or opine on the propriety of this practice under the facts presented here.

Document received by the CA Supreme Court.

This Court did hold in 2010 that “[t]he law favors settlements.” (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 930.) In that case, this Court also opined that when an insured signs a settlement agreement with its insurer to end litigation, and the insured subsequently learns that the insurer fraudulently concealed the true insurance policy limits, the insured may rescind the settlement agreement on the basis of fraud. (*Ibid.*) In 2019, this Court also held that, when counsel of record for a settling litigant signs a settlement agreement approving it as to content, and that agreement contains a confidentiality provision that imposes the duty of confidentiality on the litigant’s counsel of record, a subsequent advertisement by that attorney concerning the success of the settlement is a breach of the confidentiality provision. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 785-86.) This is true even though the counsel of record who signed the agreement was not one of the litigants.

To be sure, these cases did not consider the amendment of judgments under Code of Civil Procedure section 187. However, they recognized the importance of participating in litigation in the first instance, and the execution of settlement agreements. In contrast, the within case takes the amendment of judgments to the next level, imposing judgment debtor obligations on parties that were not parties to the underlying litigation, were not signatories to any settlement agreement, who were known by the plaintiff, and yet were forced to defend alter ego claims years after the settlement by way of a noticed motion. In light of federal and state Constitutional protections for *litigants*, it can hardly be imagined that the Legislature intended such a result under section 187.

At least one other DCA disagrees with the holding in this case. In *Oyakawa v. Gillett* (1992) 8 Cal.App.4th 628, the court held that a non-debtor spouse could not be added to a judgment against her husband when she was not a party to the action. (*Id.* at p. 632.) Similarly, in *NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, another DCA held that absent a presence in the underlying action and an ability to defend itself, a purported alter ego of the judgment defendant could not be added to the judgment by motion. (*Id.* at 778-81.)

Nevertheless, here, the Court of Appeal rationalized that a contrary holding would end alter ego liability. (*Butler, supra*, at p. 149.) However, this reasoning fails to recognize that, while alter ego liability is a valuable and recognized legal theory, a plaintiff should not be able to throw caution to the wind, fail to explore it, ignore it when it manifests in litigation *and* settlement negotiations, settle without ensuring protections to include it and then haul parties into court years later to pay judgments they did not have the ability to defend in the first instance – all based on points and authorities limited to 15 pages. (See Cal. Rules of Court, rule 3.1113(d).)

Code of Civil Procedure section 187 – employed by litigants to add judgment debtors through motion practice – expressly refers to *jurisdiction* and *means* created by the Constitution and the Code of Civil Procedure. It also expressly requires proceedings “most conformable with the spirit of the Code.” However, in the Code of Civil Procedure – with all of its provisions for motion practice before, during and after trial – the Legislature has not in any way provided for a summary law and motion proceeding to bring new parties into litigation post-judgment when they have not been sued or served, never had the ability to defend themselves, and were not parties to settlements. The published opinion in this

case allows litigants and jurists to ignore Constitutional protections respected by the federal courts and argued in the pending Petition for Review. It further evidences how the parameters of the judicially-created process continue to inch towards the deprivation of those rights and protected by the legislatively-created Code of Civil Procedure.

CONCLUSION

Review is necessary to settle the breadth of section 187, and to send a signal to the Legislature that some courts are creating and expanding on the “spirit of the Code” in ways not remotely consistent with the Code, the Constitution and other existing enactments.

Respectfully submitted,

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PROOF OF SERVICE

I am over the age of 18 and not a party to the within action. I am employed in the County of Riverside, State of California with my office located at 3610 Fourteenth Street, Riverside, CA 92502.

On the date set forth below, I served the within document(s) entitled:

**ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE
COUNSEL’S LETTER IN SUPPORT OF APPELLANTS’
PETITION FOR REVIEW**

By placing a true and correct copy thereof in a sealed envelope addressed to the parties as follows:

SEE ATTACHED SERVICE LIST

- BY ELECTRONIC MAIL:** On December 3, 2020, I transmitted a true copy of said document(s) via electronic mail through TrueFiling and no error was reported. Said email was directed as indicated on the attached service list.

I declare under the penalty of perjury under the laws of the State California that the foregoing is true and correct.

Executed this 3rd day of December 2020 at Riverside, California.

/s/

ERMINIA OLIVAS

SERVICE LIST

Re: Butler America, LLC v Aviation Assurance Company, LLC, et al.

Case No. S265474

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