ASCDC Association of Southern California Defense Counsel

A·D·C VERITAS

GREINES MARTIN STEIN & RICHLAND LLP
Robert A. Olson, SBN 109374
5900 Wilshire Blvd 12th FL
Los Angeles, CA 90036
Tel: (323) 330-1030
Fax: (323) 330-1060
rolson@gmsr.com

GORDON & REES LLP
Don Willenburg, SBN 116377
275 Battery Street, Suite 2000
San Francisco, CA 94111
Tel: (415) 986-5900
Fax: (415) 986-8054
dwillenburg@gordonrees.com

October 1, 2013

AMICUS LETTER IN SUPPORT OF REVIEW
(California Rules of Court, rule 8.500(g)(1))

Honorable Tani Cantil-Sakauye, Chief Justice
Honorable Joyce L. Kennard, Associate Justice
Honorable Marvin R. Baxter, Associate Justice
Honorable Kathryn Mickle Werdegar, Associate Justice
Honorable Ming W. Chin, Associate Justice
Honorable Carol A. Corrigan, Associate Justice
Honorable Goodwin Liu, Associate Justice
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Purton v. Marriott International, Inc.*, No. S213205

Dear Honorable Justices:

I write on behalf of the Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada (Associations) to urge this Court to grant review in this case.

The Associations are the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions, comprised of over 2,000 leading civil defense bar attorneys in California. They are active in assisting courts on issues of interest to their members and have appeared as amico curiae in numerous appellate cases. The Associations also provide their members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multi-faceted support, including a forum for the exchange

of information and ideas. Each has appeared numerous times as amici curiae in this Court and the Court of Appeal.

Association members regularly encounter scope of employment issues in defending claims. They are readily familiar with the uncertainty and changing contours of the law in this area. The uncertainty in this area of the law spans from when someone is to be treated as an employee or agent (see *Patterson v. Domino's Pizza, LLC*, review pending California Supreme Court case no. S204543 [whether franchisor can be vicariously liable for franchisee accused of sexual harassment]; *Monarrez v. Automobile Club of Southern Cal.*, review pending California Supreme Court case no. S207726 [briefing held pending outcome of Patterson; same re whether national automobile club vicariously liable for tow truck driver's negligence]; *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097 [grocery store not liable for negligence, as opposed to intentional misconduct, committed by employees of independent contractor security company who detained shopper]) to whether someone who is undoubtedly an employee is on duty or off duty (the case here).

On the latter issue, the law is all over the place. Compare, e.g.:

- The present case – employer liable when employee goes out again after being driven home from an employer party;

- *Moradi v. Marsh USA, Inc.* (Sept. 17, 2013 No. B239858) ___ Cal.Rptr.3d ___ [2013 WL 5203485] [employer liable for auto accident caused by employee stopping for frozen yogurt and yoga class on her way home from work because employee needed to use her personal car to go to work meetings occasionally]; and

- *Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427 [employer liable when employee hit pedestrian while returning home from airport after out-of-town business trip]

with

- *Halliburton Energy Services, Inc. v. Department of Transportation* (Cal.App., Oct. 1, 2013, No. F064888) [no vicarious liability where employee was driving company truck to commute from home town (Bakersfield) to drilling site (Seal Beach)];

- *Fields v. State* (2012) 209 Cal.App.4th 1390 [no vicarious liability where employee was driving to work from workers' compensation doctor's appointment];

- *Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552 [employer not vicariously liable for employee's run to get cookies for self and co-worker during paid break];

- *Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055 [employer not liable where employee hit pedestrian while on way to personal estate planning lawyer even though minutes before accident he had a cellphone call with one of the crews he supervised];

- *Kephart v. Genuity, Inc.* (2006) 136 Cal.App.4th 280 [employer not vicariously liable for employee's road rage incident on his way to airport for business flight where he left home five hours early and stopped for several hours before the flight to have dinner with his family and friends]; and

- *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal.App.4th 1 [employer not vicarious liable where employee on temporary duty in California rear-ended vehicle after hours in the drive-through lane of a fast food restaurant].

As this case, *Halliburton Energy Services*, *Moradi* and *Fields* demonstrate, the issue presented is current and ongoing and has yielded frankly irreconcilable results. It is not going away.

There's an even more fundamental underlying issue here – the evolving nature of the work relationship and the line between work and personal lives. With modern technology, it is hard to say that an employee is ever completely "off duty." Employees check their email by iPhone or iPad when at the dentist, their child's ball game, or even out on a date. Yet, as one Court of Appeal presciently noted nearly 20 years ago, that should not suffice for respondeat superior liability: "Modern technology has changed the means by which we communicate. Beepers, pagers, facsimile machines and cellular phones keep us literally at a fingertip's distance from one another. But on-call accessibility or availability of an employee does not transform his or her private activity into company business." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610.)

The same can be said for employee events. At some point, the employee is no longer part of the event, employer responsibility should end and the employee should be solely responsible for his or her own actions. Here, the employee appears to have been driven home by others and then went out on his own. What if the employer had provided cabs home for employees? Presumably under the opinion here the employer would still be liable if the employee, upon arriving home, decided to go out again.

The whole rationale behind the respondeat superior doctrine is that the employer is empowered to *control* the employee's conduct. Ultimately, the concept of respondeat superior allocates responsibility between the individuals' work lives, for which an employer is liable, and their personal lives, for which the employer is not. Decisions such as this case and *Moradi* completely blur the lines between work and personal lives (lines that cases like *Halliburton Energy Services*, *Fields*, *Miller*, and *Kephart* keep clear). Perhaps an employer is liable for everything that an employee does in his or her personal life. If so, though, that is a vast expansion of employer liability. And, if so, employers need to know that and be allowed to select employees on that basis. If employers are to have expanded liability for employees' personal pursuits the natural question then is are they to be given corresponding expanded control over employees' personal lives?

The decision here is another reason discouraging employers from having social or bonding events for employees. That is not necessarily a good policy result. It undermines employee loyalty and cohesiveness. But it is the message that the Court of Appeal has clearly sent. (See *Marriott Case Could Curb Alcohol At Company Parties*, Law360.com (Sept. 20, 2013).)

The law in this area is confused and unpredictable. It will remain so unless and until this Court steps in. We urge the Court to grant review.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL
Robert A. Olson

ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA
Don Willenburg

By: 

Robert A. Olson
Greines, Martin, Stein & Richland LLP

cc: Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036-3697.

On October 2, 2013, I served the foregoing document described as: **AMICUS LETTER IN SUPPORT OF REVIEW** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on October 2, 2013, at Los Angeles, California.

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

JOYCE McGILBERT

PURTON
v.
MARRIOTT INTERNATIONAL, INC.
[Case No. S213205]

Armen Kevork Akaragian
Mardirossian & Associates Inc.
6311 Wilshire Boulevard
Los Angeles, California 90048
[Attorneys for Plaintiffs and Appellants Alan Purton and Christina Purton]

Eran Lagstein
Law Ofices of Eran Lagstein
5900 Wilshire Boulevard, 26th Floor
Los Angeles, California 90036
[Attorneys for Plaintiffs and Appellants Alan Purton and Christina Purton]

Jeffrey Isaac Ehrlich
The Ehrlich Law Firm
16130 Ventura Boulevard, Suite 610
Encino, California 91436
[Attorneys for Plaintiffs and Appellants Alan Purton and Christina Purton]

Ravi Sudan
Robert B. Ryder
Brady, Vorwerck, Ryder & Caspino
One City Boulevard West, 18th Floor
Orange, California 92868-3622
[Attorneys for Defendants and Respondents Marriott International, Inc.; Sunstone Hotel Investors, Inc.; and Marriott Hotel Services, Inc.]

Clerk of the Court
California Court of Appeal
Fourth District, Division One
750 B Street, Suite 300
San Diego, California 92101
[Court of Appeal Case No. D060475]

Clerk to Hon. Richard Strauss
San Diego Superior Court
Hall of Justice Courthouse
330 West Broadway
San Diego, California 92101
[San Diego Superior Court Case No. 37-2010-00099161-CU-PA-CTL]