

No. B197993

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

MARY HUTTON SNYDER, *et al.*,
Plaintiffs and Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

Respondent.

CATERPILLAR, INC.,
Real Party in Interest.

APPLICATION OF COALITION FOR LITIGATION JUSTICE, INC.,
ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL
FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES FOR
LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF THE
RESPONDENT COURT AND OF REAL PARTY IN INTEREST
CATERPILLAR, INC.

From an Order of Dismissal
Case No. BC343305 (The Honorable Alice E. Altoon)

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The Coalition for Litigation Justice, Inc., Association of California Insurance Companies, Chamber of Commerce of the United States of America, National Association of Manufacturers, National Federation of Independent Business Legal Foundation, and National Association of Mutual Insurance Companies - collectively "*amici*" - hereby apply for leave to file a brief in support of Respondent and Real Party in Interest. As organizations whose members include California asbestos defendants and their insurers, *amici* have an interest in this matter.

This matter involves Los Angeles Superior Court Second Amended General Order No. 29 (G.O. 29), one of a series of general orders adopted to promote the fair and orderly administration of asbestos cases. G.O. 29 requires a plaintiff to file a "Case Report" within eight months after the filing of the complaint. The Case Report must include basic information about the claim, including medical information and evidence relating to plaintiff's exposure to asbestos-containing products (i.e., product identification), as well as supporting documentation. A defendant may bring a "motion to dismiss" if the Case Report does not identify witnesses or documents linking the defendant to the plaintiff's exposure.¹ The motion shall contain a notice of hearing in accord with the standard sixteen-court-day notice requirement of C.C.P. § 1005. The plaintiff may move to

supplement the Case Report up to ten days before the motion is heard. If the motion is granted, claims are dismissed *without prejudice*.

G.O. 29 represents a sound approach to help address what the United States Supreme Court has described as the “asbestos-litigation crisis.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). California has not escaped the “enormous burden” of the litigation. See Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 883, 884 (2007). In fact, the asbestos litigation in California appears to be worsening.² A decision by this Court to vacate G.O. 29 would exacerbate these problematic trends.

This Court should find G.O. 29 to be within the scope of the Superior Court’s authority. It is “well established” that courts have the fundamental “inherent power to control litigation before them.” *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 967 (1997) “That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation, *including discovery matters*, in order to insure the orderly administration of justice.” *Asbestos Claims Facility v. Berry & Berry*, 219 Cal. App. 3d 9, 19 (1990) (emphasis added). The

¹ The motion may be filed no sooner than 45 days and no later than 75 days after service of the Case Report.

² See Wasserman, 34 Pepp. L. Rev. at 885 (“With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state.”).

Legislature has also recognized the authority of courts to manage their proceedings. *See* C.C.P. §§ 128, 187, 575.1, 575.2, 583.150; Govt. Code § 68070. The Judicial Council's recommended standards for processing complex litigation presuppose the existence of these inherent powers.

* * *

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment.³ The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.9 percent of the property/casualty insurance in California, including 56.1 percent of personal automobile insurance, 42.8 percent of commercial automobile

³ The Coalition for Litigation Justice includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, (Footnote continued on next page)

insurance, 39 percent of homeowners insurance, 32.5 percent of business insurance and 46 percent of private workers compensation insurance.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

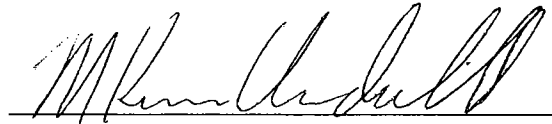
Liberty Mutual Insurance Group, and the Great American Insurance Company.

The National Federation of Independent Business Legal Foundation (NFIB), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business. NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than 40 percent of the property/casualty insurance premium in the United States. NAMIC members account for 47 percent of the homeowners market, 39 percent of the automobile market, 39 percent of the workers' compensation market, and 34 percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

Amici have an interest in the subject matter and believe their brief will be helpful to the Court by providing context derived from their nationwide experience with asbestos litigation. *Amici* respectfully ask the Court to grant their application for leave to file the attached brief in support of Respondent and Real Party in Interest.

Respectfully submitted,



Dated: July 19, 2007

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QUESTION PRESENTED

Whether the Los Angeles Superior Court acted within its authority in adopting Second Amended General Order No. 29, requiring plaintiffs in asbestos cases to file basic information to support their claims and allowing defendants to move to dismiss without prejudice if the required case report does not identify witnesses or documents linking the defendant to the plaintiff's exposure. *Amici* ask this Court to uphold General Order No. 29.

STATEMENT OF INTEREST

As organizations whose members include California asbestos defendants and their insurers, *amici* have a significant interest in ensuring the fair and orderly administration of asbestos cases.

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment.¹ The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition files *amicus curiae* briefs in important

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The Association of California Insurance Companies (ACIC) is an affiliate of the Property Casualty Insurers Association of America and represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write 40.9 percent of the property/casualty insurance in California, including 56.1 percent of personal automobile insurance, 42.8 percent of commercial automobile insurance, 39 percent of homeowners insurance, 32.5 percent of business insurance and 46 percent of private workers compensation insurance.

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The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's

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benefits its member companies through public policy development, advocacy, and member services.

STATEMENT OF FACTS

Amici adopt the facts as stated by Real Party in Interest Caterpillar.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This matter involves one of a series of general orders adopted by the Los Angeles Superior Court to promote the fair and orderly administration of asbestos cases. Asbestos cases have been categorically classified by the Los Angeles Superior Court (and other California courts) as “complex” under Section 19 of the Judicial Council’s Standards of Judicial Administration. The complex litigation procedure is intended to facilitate pretrial resolution of evidentiary and other issues, and to minimize the time and expense of trials, in civil cases which require specialized management to avoid placing unnecessary burdens on trial courts and litigants. *See* Cal. Standards Jud. Admin. § 19.

Specifically, this matter involves Second Amended General Order No. 29 (“G.O. 29”), adopted by the Los Angeles Superior Court on May 12, 2005.² G.O. 29 requires the plaintiff to serve and file a “Case Report” within eight months after the complaint is filed. The Case Report must

² The original version of G.O. 29 was adopted nearly two decades ago; the first amended version was entered in June 1995.

include basic information about the claim, including medical information, exposure history, and evidence relating to plaintiff's exposure to asbestos-containing products (i.e., product identification), as well as supporting documentation. A defendant may bring a "motion to dismiss" if the Case Report does not identify witnesses or documents linking the defendant to the plaintiff's exposure.³ The motion shall contain a notice of hearing in accord with the standard sixteen-court-day notice requirement of C.C.P. § 1005. The plaintiff may move to supplement the Case Report up to ten days before the motion is heard. If the motion is granted, any or all claims dismissed as to the moving defendant are dismissed *without prejudice*.

G.O. 29 represents a sound approach to help address what the United States Supreme Court has described as the "asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). California has not escaped the "enormous burden" of the litigation. *See* Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 883, 884 (2007). In fact, the asbestos litigation in California appears to be worsening. A decision by this Court to vacate G.O. 29 would exacerbate these problematic trends. This Court should find G.O. 29 to be within the scope of the Superior Court's authority.

³ The motion may be filed no sooner than 45 days and no later than 75 days after service of the Case Report.

ARGUMENT

I. AN OVERVIEW OF THE LITIGATION ENVIRONMENT IN WHICH THIS MATTER MUST BE CONSIDERED

A. The Current Asbestos Litigation Environment

Courts and commentators have recognized since the early 1990s the extraordinary problems created by the “elephantine mass” of asbestos cases. *Norfolk & W. Ry. Co., v. Ayers*, 538 U.S. 135, 166 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)); see also *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005) (“For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.”).⁴ As far back as 1991, the Federal Judicial Conference Ad Hoc Committee on Asbestos Litigation found:

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

⁴ See also Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. Tex. L. Rev. 945 (2003).

Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 2-3 (Mar. 1991), reprinted at 6:4 Mealey's Litig. Rep.: Asbestos 2 (Mar. 15, 1991).

By 2002, approximately 730,000 claims had been filed. See Stephen J. Carroll *et al.*, *Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005), available at <http://www.rand.org/publications/MG/MG162> [hereinafter RAND].⁵

1. Bankruptcies and the Economic Impact of the Litigation

“For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy,” *In re Combustion Eng'g, Inc.*, 391 F.3d at 201, including an estimated eighty-five employers. See Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29;

⁵ “By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic.” James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 823 (2002). Mass screenings have “driven the flow of new asbestos claims by healthy plaintiffs.” Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003); see also *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) (“Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.”); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33 (2003).

see also Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (after a bankruptcy, “mounting and cumulative” financial pressure is placed on “remaining defendants, whose resources are limited.”). RAND found: “Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings” – the number of filings as in both prior decades combined, but in just over three years. RAND, *supra*, at xxvii.

Nobel-Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues studied the direct impact of asbestos bankruptcies on workers and found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. See Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003). Those workers and their families lost up to \$200 million in wages, *see id.* at 76, and employee retirement assets declined roughly twenty-five percent. *See id.* at 83; see also Jonathan Orszag, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 44 S. Tex. L. Rev. 1077 (2003).

Another study, which was prepared by National Economic Research Associates, found that workers, communities, and taxpayers will bear as

much as \$2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. *See* Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003). For every ten jobs lost directly, the community may lose eight additional jobs. *See id.* at 8. Plant closings and job cuts decrease per capita income, leading to a decline in real estate values, and lower federal, state, and local tax receipts. *See id.* at 11-13.

Bankrupt companies and communities are not the only groups affected:

The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands of American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

George S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003). A Managing Director at Goldman Sachs also explained, “the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their shareholders and employees, and the economy as a whole.” *Solving the Asbestos Litigation Crisis: Hearing on*

S. 1125, the Fairness in Asbestos Injury Act of 2003, before the Sen. Comm. on the Judiciary, 107th Cong. (June 4, 2003) (statement of Scott Kapnick, Managing Director, Goldman Sachs).

RAND has estimated that \$70 billion was spent in asbestos litigation through 2002; future costs could reach \$195 billion. *See* RAND, *supra*, at 92, 106. To put these vast sums in perspective, former United States Attorney General Griffin Bell has pointed out that asbestos litigation costs will exceed the cost of “all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks.” Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts’ Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat’l Legal Center for the Pub. Interest June 2002), *available at* <http://www.nlcpi.org>.

2. **Peripheral Defendants Are Being Dragged into the Litigation**

Over 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin Columns: Asbestos, Aug. 2004, at 5, as “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.” Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314; *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy.

L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to “peripheral defendants”). One well-known plaintiffs’ attorney has described the litigation as an “endless search for a solvent bystander.” *‘Medical Monitoring and Asbestos Litigation’—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey’s Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs); *see also* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486. Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND, *supra*, at 94. Real Party in Interest is an example of this trend at work.

3. California’s Experience Reflects These National Trends

California has not escaped the “enormous burden” of asbestos litigation. Steven D. Wasserman *et al.*, *Asbestos Litigation in California: Can it Change for the Better?*, 34 Pepp. L. Rev. 883, 884 (2007); *see also* Dominica C. Anderson & Kathryn L. Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis*, 45 Santa Clara L. Rev. 1 (2004). In fact, contrary to other regions of the country, asbestos litigation in California appears to be worsening. *See* Wasserman, *supra*, at 885 (“With plaintiff firms from Texas and elsewhere opening offices in California, there is no

doubt that even more asbestos cases are on their way to the state.”⁶ A decision to overturn G.O. 29 would only exacerbate these problems.

II. G.O. 29 REFLECTS A SOUND APPROACH TO LOS ANGELES ASBESTOS LITIGATION

It is “well established” that courts have fundamental inherent powers, including the “inherent power to control litigation before them.” *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 967 (1997); *Volkswagen of Am., Inc. v. Superior Court*, 94 Cal. App. 4th 695 (2001); *Cottle v. Superior Court*, 3 Cal. App. 4th 1367 (1992). “That inherent power entitles trial courts to exercise reasonable control over all proceedings connected with pending litigation, *including discovery matters*, in order to insure the orderly administration of justice.” *Asbestos Claims Facility v. Berry & Berry*, 219 Cal. App. 3d 9, 19 (1990) (emphasis added). The Legislature has also recognized the authority of courts to manage their proceedings. *See* C.C.P. §§ 128, 187, 575.1, 575.2, 583.150; Govt. Code § 68070. The Judicial Council’s recommended standards for processing complex litigation presuppose the existence of these inherent managerial powers.

⁶ According to recent data collected by the Coalition for Litigation Justice, an insurer group participating in this brief, over *thirty percent* of pending asbestos claims sampled in California involve plaintiffs with out-of-state addresses. *See* Victor E. Schwartz *et al.*, *Litigation Tourism Hurts Californians*, 21:20 Mealey’s Litig. Rep.: Asbestos 41 (Nov. 15, 2006).

This Court should find that the Los Angeles Superior Court did not exceed its authority with regard to G.O. 29. *See Cottle, supra*. Presumably, when a complaint is filed, a plaintiff has evidence to support it such that the filing is not a malicious act. G.O. 29 simply requires a plaintiff to show that to be the situation – many months after the filing of the complaint. If the plaintiff’s “homework” still has not been done, or the plaintiff cannot identify any witnesses or documents linking the defendant to the plaintiff’s exposure, then defendants should be given an efficient mechanism to avoid the high cost of further litigation. Holding defendants hostage in litigation that cannot be shown to properly involve them is unjust, depletes resources needed to compensate deserving claimants, and may facilitate “blackmail settlements” (i.e., defendants might conclude it is cheaper to settle than to pay legal costs defending claims, regardless of their merit).

Furthermore, G.O. 29 is consistent with the authority of courts to dismiss actions or take other measures in the administration of their dockets. *See* C.C.P. §§ 128.7, 418.10, 425.16, 1030, 2023.010.

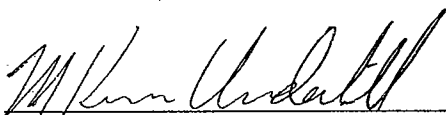
Finally, it is important to bring the Court’s attention to the remedy provided by G.O. 29 – plaintiffs determined to be out of compliance are subject to a “motion to dismiss without prejudice.” G.O. 29 does not result

in a final judgment,⁷ it does not become res judicata, and it cannot be used for collateral estoppel purposes. It is simply a common-sense rule that relieves defendants of the unfair burden of defending against claims that cannot be or have not been substantiated, without prejudicing any plaintiff who might have legitimate claims.

CONCLUSION

For these reasons, *amici* ask this Court to uphold Los Angeles Superior Court Second Amended General Order No. 29.

Respectfully submitted,



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⁷ Plaintiffs argue that G.O. 29 is essentially a summary judgment mechanism and cite cases holding that general orders cannot alter statutory requirements applicable to summary judgments. *See, e.g., Kalivas v. Barry Controls Corp.*, 49 Cal. App. 4th 1152 (1996); *Urshan v. Musicians' Credit Union*, 120 Cal. App. 4th 758 (2004); *Boyle v. CertainTeed Corp.*, 137 Cal. App. 4th 645 (2006). As described above, however, the motion to dismiss without prejudice in G.O. 29 is materially different from a summary judgment.

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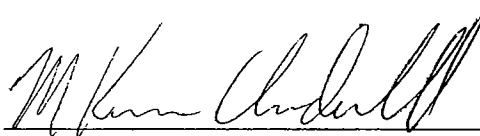
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I certify that the foregoing brief is printed in proportionally spaced, 13-point Times New Roman type, and consists of fewer than 7,000 words (exclusive of captions, tables, and this certification), according to the word processing program used to prepare it. The document complies with Rule of Court 8.204(c)(1).



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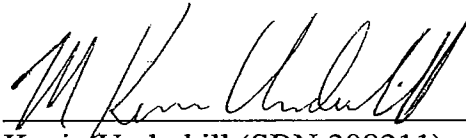
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