A·D·C VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

April 13, 2015

Honorable Kathleen E. O'Leary, Presiding Justice
and the Associate Justices
California Court of Appeal
Fourth Appellate District, Division Three
601 W. Santa Ana Boulevard
Santa Ana, CA 92702

Re: ***Access Business Group LLC v. The Superior Court of Orange County***
Case No. G051728
Writ Petition Filing Date: April 6, 2015
Amicus Letter in Support of Petition for Writ of Mandate

Dear Presiding Justice O'Leary and Associate Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC) the Association of Defense Counsel of Northern California and Nevada (ADCNCN), and the International Association of Defense Counsel ("IADC"), collectively "Associations," to support the petition for writ of mandate filed by Access Business Group LLC ("ABG"), filed on April 6, 2015. The Associations urge the Court to issue an order to show cause or alternative writ.

The pending petition concerns the scope of respondeat superior liability for off-duty, off-premises conduct of employees – here, a temporary employee who went to a bar and purchased his own drinks, all after an employer sponsored event for regular employees at that establishment had ended.

The lynchpin for plaintiff's claims in the underlying Superior Court action is *Purton v. Marriott International, Inc.* (2013) 218 Cal.App.4th 499, review denied Oct. 16, 2013 (*Purton*). In *Purton*, the Court of Appeal held that respondeat superior liability can exist when activities occurring in the

course and scope of employment arguably cause an employee to become an "instrumentality of danger." (218 Cal.App.4th at 509, internal quotation marks omitted.) *Purton* involved an employee who was intoxicated at his employer's holiday party, who made it home safe but who thereafter left his home for a personal reason and caused an accident. (*Id.* at 503.) In finding a triable issue as to vicarious liability for what was clearly a personal trip, *Purton* transcended all boundaries and limitations of vicarious liability – as now exemplified by real parties' theory of respondeat superior for someone who was not even at the employer sponsored event.

ASCDC and ADCNCN are among the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions, including representing corporate employers faced with potential liability for acts or omissions of employees committed within the scope of those employees' employment, with issues arising in a variety of contexts. The Associations are 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 amicus 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.

IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC membership is comprised of partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost. In support of these principles, the IADC regularly files briefs in pending cases throughout the United States on civil justice issues of broad application.

Permutations of the issue presented here have been confronted by many members of the Associations. That experience of the Associations' members suggests that the issue is one of widespread interest. Accordingly, writ review would be appropriate. (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558.)

As another example of the importance of the issues raised by ABG's petition, in another recent case, *Doe v. Wells Fargo Bank* (Dec. 31, 2014, Case No. A137502), *Purton* was relied on (albeit unsuccessfully) by a plaintiff attempting to hold a branch of Wells Fargo Bank vicariously liable for alleged sexual misconduct of employees occurring after a holiday party. (Typed opn. at 9; 2014 WL 7463146, *5.) The opinion in *Doe v. Wells Fargo Bank, supra,* applied sound limits to the expansive rules of *Purton*. Unfortunately, despite the request by ASCDC and ADCNCN, the Court of Appeal declined to publish its opinion. Purton, thus, remains unlimited.

The issue presented is important, justifying interlocutory writ review.

ABG's PETITION SHOULD BE GRANTED AND SUMMARY JUDGMENT DIRECTED TO BE ENTERED IN ITS FAVOR

Writ relief should be granted because, whatever inconsistencies there may be in the law relative to employers' vicarious liability when company-sponsored events might be viewed as encouraging employees' consumption of alcohol, an employer should have confidence that vicarious liability will not be imposed when it does not provide alcohol to an employee. Where is the safe harbor for an employer to navigate to?

The Legislature has repeatedly held that responsibility for the consumption of alcoholic beverages should generally rest with the consumer of those beverages. "[T]he furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person." (Civ. Code, § 1714, subd. (b).) "[T]he consumption of alcoholic beverages rather than the serving of alcoholic beverages is the proximate cause of injuries inflicted upon another by an

intoxicated person." (Bus. & Prof. Code, § 25602, subd. (c).) If these are the presumptions even where defendants did serve alcohol, how much stronger the reasons for excusing defense from liability where they did NOT furnish alcohol.

Taking into account such immunities, if an employer spiked its employees' soft drinks with alcohol, vicarious liability based upon the employer's control over an employee's resulting intoxication would appear justified, as under that scenario the employee would not be choosing to consume. Perhaps there could be other circumstances in which an employer forces employees to become impaired by consumption of alcohol, or other intoxicants (subjugating employees to the will of their employer), under which vicarious liability might also be justified. In either of those examples, however, there are reasons for imposition of direct liability against such employers.

Now, based upon such appellate decisions as *Purton*, imposing liability upon employers who host social events at which alcohol is offered and provided at the request of the employees, employers who host such events appear to face the same degree of liability as an employer who deprives employees of the choice of whether to ingest intoxicants.

Based upon such appellate decisions, employers and their counsel increasingly perceive there to be no way to host a social event for employees without at least running the palpable risk of being entangled in high stakes litigation if an employee who attends the event ingests alcohol, including alcohol obtained by the employee's own resources.

As described in ABG's petition, it is ensnared in high-stakes litigation because a temporary employee went to the location of a company-sponsored event that he was not invited to attend and, while socializing with company employees who had attended the company sponsored event, consumed alcohol that was not purchased or provided by the company. Under this paradigm, it seems that employers could become entangled in such litigation when employees, perhaps including an employee with supervisor status, get together and drink beers when they do such things as meet at a local pub after work for Monday Night Football or have a weekend barbecue at a home.

If an employer sponsors a company picnic at a public park and provides no alcohol, but does provide the setting and food and soft drinks, will the employer be vicariously liable for negligent acts of employees who consume their own alcohol at such an event?

The limits of employers' responsibility for employees' consumption of alcohol is not a matter to be left to the determination of juries. As *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 instructs, "we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Id.* at 772 (italics by court).)

Such a determination should have been made by the trial court in this case, where the undisputed facts reveal no legal basis for a duty under the law owed by ABG. The ruling as it stands is inconsistent with the principles recognized in *The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, wherein the court reminded: "California courts have explicitly rejected the concept of universal duty. 'It must not be forgotten that "duty" got into our law for the very purpose of combatting what was then feared to be a dangerous delusion ... viz., that the law might countenance legal redress for all foreseeable harm.'" (*Id.* at 1527 (internal quotation marks omitted); quoting *County of San Luis Obispo* (1986) 178 Cal.App.3d 848, 865, quoting *Dillon v. Legg* (1968) 68 Cal.2d 728, 734; see also, *Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 487.)

For the foregoing reasons, the Associations support ABG's position that the Court should grant the petition and articulate the rule that an employer that does not provide alcohol to a worker cannot be vicariously liable for an alcohol-related accident where the worker purchased and consumed alcohol while off-duty at a public bar.

For these reasons, and the reasons expressed in ABG's petition, the Court should issue an order to show cause or alternative writ.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

By: _____
DAVID P. PRUETT
Carroll, Kelly, Trotter, Franzen, McKenna & Peabody

ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

By: _____
DON WILLENBURG
Gordon & Rees LLP

INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

By: _____
MARY-CHRISTINE SUNGAILA
Snell & Wilmer LLP

cc: See attached Service List

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 111 West Ocean Boulevard, 14th Floor, Long Beach, CA 90802-4646. On April 13, 2015, I served a true and correct copy of the following document(s) on the attached list of interested parties:

AMICUS LETTER IN SUPPORT OF PETITION FOR WRIT OF MANDATE

( ) **By United States Mail** (CCP §§1013a, et seq.): I enclosed said document(s) in a sealed envelope or package to each addressee. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, with postage fully prepaid.

(X) **By Overnight Delivery/Express Mail** (CCP §§1013(c)(d), et seq.): I enclosed said document(s) in a sealed envelope or package provided by an overnight delivery carrier to each addressee. I placed the envelope or package, delivery fees paid for, for collection and overnight delivery at an office or at a regularly utilized drop box maintained by the express service carrier at 111 West Ocean Boulevard, Long Beach, California.

I declare under penalty of perjury under the laws of the State of California and of the United States that the above is true and correct. I declare that I am employed in the office of a member of the Bar of the within court at whose direction this service was made.

Executed on April 13, 2015, at Long Beach, California.

LAURIE BAKER

Proof of Service Mailing List
Re: *Access Business Group LLC v. The Superior Court of Orange County*; Case No. G051728

Ely T. Chayet, Esq.
Cole Pedroza LLP
2670 Mission St., Ste. 200
San Marino, CA 91108
Attorneys for Petitioner, Access Business Group, LLC

Superior Court of Orange County
Hon. Ronald L. Bauer, # C103
700 Civic Center Dr. West
Santa Ana, CA 92701
Respondent

Eric V. Traut, Esq.
The Traut Firm
5 Hutton Center Dr., Ste. 700
Santa Ana, CA 92707
Attorneys for Real Party In Interest, Ellena W. Sabry

Lee P. O'Connor, Esq.
O'Connor, Schmeltzer & O'Connor
8001 Irvine Center Dr., Ste. 1550
Irvine, CA 92618-2936
Attorneys for Real Party In Interest, Ellena W. Sabry