Case No. D053620

STATE OF CALIFORNIA

COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION ONE

REBECCA HOWELL

Plaintiff and Appellant

vs.

HAMILTON MEATS & PROVISIONS CO.

Defendant and Respondent.

San Diego County Superior Court, Case No. GIN053925
Honorable Adrienne Orfield, Judge

APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS CO.

PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS CO.

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Pursuant to California Rules of Court, rule 8.200(c)(1), the Association of Southern California Defense Counsel (ASCDC) respectfully requests leave to file an amicus brief supporting the position of respondent Hamilton Meats & Provisions Co.

ASCDC is the nation's largest and most preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,400 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of

interest to its members. It has appeared as amicus curiae in numerous appellate cases.

In addition to representation in appellate matters and comment on proposed Court Rules, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC members routinely represent clients in defending actions where medical expenses are being sought as economic damages. They have a direct interest that the law in this area be correct.

Counsel for ASCDC has reviewed the briefing in this matter and believes that ASCDC can provide an important broader perspective that goes beyond the facts of this particular case. No party has funded this amicus brief nor has any party drafted it. It is the work of counsel representing ASCDC.

This application is timely under rule 8.200(c)(1) of the California Rules of Court.

For all of these reasons, ASCDC respectfully requests that it be granted leave to file the accompanying Amicus Brief of the Association of

Southern California Defense Counsel In Support Of Respondent Hamilton Meats & Provisions Co.

Dated: May 4, 2009

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
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By: _____
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Case No. D053620

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PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS CO.

INTRODUCTION

In this appeal, plaintiff complains that she did not receive a sufficient windfall recovery for medical expenses that she never paid and never will pay. No principle of California law entitles plaintiff to such a damage recovery, nor should it.

It is a truism that a plaintiff in a tort action should not be placed in a better position than if no injury had occurred. Yet, that is what plaintiff here seeks. Plaintiff seeks to use a tort injury as a profit making proposition. She seeks to do so by arbitraging the actual cost of medical services versus a "list" price that is never paid. The law does not allow such schemes. The collateral source rule upon which she relies is a rule limiting offsets to and deductions from otherwise recoverable damages, not a rule increasing damages beyond amounts actually paid.

In truth, this issue should never have arisen in this case. It should not have arisen because the plaintiff should never have been allowed to introduce irrelevant evidence of inflated "prices" for medical services that were never paid or charged to her. The Court of Appeal opinions that have approved of admitting such evidence are ill-considered and should not be followed. Plaintiff's evidence of illusory medical charges – charges never paid or to be paid by plaintiff nor anyone on her behalf – should never have been admitted in the first place.

ARGUMENT

I. A Plaintiff's Compensatory Recovery Is Properly Limited To Amounts Actually Paid For Medical Care; Nothing In The Collateral Source Rule Suggests Or Permits A Plaintiff To Recover As Damages Amounts Exceeding What In Fact Was Paid Or Will Be Paid To Treat The Plaintiff's Injuries.

A. The principle that a tort plaintiff may not recover more than actually paid applies as much to medical expenses as to any other element of economic damages.

It is a fundamental precept of California law that "'[a] plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been in had the wrongful act not been done. [Citations.]'" (*Safeco Ins. Co. v. J & D Painting* (1993) 17 Cal.App.4th 1199, 1202; accord *Metz v. Soares* (2006) 142 Cal.App.4th 1250, 1255; *Valdez v. Taylor Automobile Co.* (1954) 129 Cal.App.2d 810, 821-822; *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 Cal.App.2d 578, 605.) "*The primary object of an award of damages* in a civil action, and the fundamental principle on which it is based, are *just compensation* or indemnity for the loss or injury sustained by the complainant, *and no more* [citations]." (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 576 original emphasis.)

This applies as much in the arena of medical expenses as in any other. (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 639-644 [Medi-Cal payments]; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 308 [payments made by a private insurer].) "[A]n award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes overcompensation." (*Hanif v. Housing Authority*, *supra*, 200 Cal.App.3d at p. 641.) "[W]hen the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact that it may have been less than the prevailing market rate." (*Ibid*.)

Put another way, inflated charges for medical bills that are never paid are not a "detriment proximately caused" by the defendant's conduct. (Civ. Code § 3333.) They do not fall within the statutory definition of recoverable damages. A detriment inherently means an *actual* loss or harm, not a theoretical one. Medical expenses paid or to be paid to treat an injury are economic damages. (Civ. Code, § 1431.2, subd. (b)(1); *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 641.) Like other economic damage they are measured by the amount, in fact, paid.

B. The collateral source rule's limitation on offsets and deductions provides no basis to allow a plaintiff to recover more than actually paid.

Plaintiff attacks the holding in *Hanif* and its progeny that limits recovery for medical expenses to amounts actually paid. She claims that the "collateral source rule" dictates that a plaintiff may recover for illusory medical expenses – that is, medical expenses which are never owed, never paid, and will be never owed and never paid. That is wrong.

First, the Supreme Court, to date, has specifically approved the *Hanif* rule: *"*Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor. (See *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 639-644 [where the provider has relinquished any claim to additional reimbursement, a Medicaid beneficiary may only recover the amount payable under the state Medicaid plan as medical expenses in a tort action].)" (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827.) The Supreme Court has arguably subsequently left open the collateral source rule issue, but unless and until it addresses that question, *Olszewski* remains the final, controlling word on the subject. (See *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, 611, fn. 16.)

Second, the collateral source rule does not act to inflate *compensatory* damages beyond amounts, in fact, actually paid. The collateral source rule is a judicially defined doctrine about the *credits* or

deductions that can or cannot be taken against damages actually incurred or suffered. "Simply stated, the rule is that 'if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, *such payment should not be deducted from the damages which the plaintiff would otherwise collect* from the tortfeasor.' (*Helfend* [*v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1,] 6.)" (*Rotolo Chevrolet v. Superior Court* (2003) 105 Cal.App.4th 242, 245, emphasis added.) Nowhere does the collateral source rule allow a plaintiff to *inflate* damages beyond amounts actually paid. It is an exception to a potential deduction from the amount actually paid. An exception to an deduction logically does not increase the amount recoverable in the first place. (See, e.g., *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 540 ["an exception to a policy exclusion does not create coverage not otherwise available under the coverage clause"].)

And, no one here is attempting to *deduct* from plaintiff's damages a payment, in fact, made. By its own terms the collateral source rule does not apply. Rather, plaintiff is advocating *increasing* her damages by amounts *not* paid and which never will be paid. The collateral source rule is *not* a rule defining or increasing recoverable damages in the first instance. Nothing in the formulation of the collateral source rule has ever suggested that the rule means that the plaintiff may recover *more* than the actual charges paid by the plaintiff or paid on the plaintiff's behalf.

The collateral source rule does not alter the fact that compensatory damages are just that, compensatory. They are to compensate, to redress, an

expense actually incurred. They are not to make a payment for a charge that *might* have been made in other circumstances.[1]

Third, this makes particular sense in the realm of medical expense payments. Despite the label applied, so-called "usual and customary" charges for medical care are neither usual nor customary. They are a list or stated price that virtually no payor of health services pays. (See Alderman, *Bargaining Down the Medical Bills* (Mar. 13, 2009) <www.nytimes.com/2009/03/14/health/14patient.html?_r=2&ref=business [as of Apr. 27, 2009].)

The amount *actually* paid – by a government program, by a private insurer – in fact, reflects the *actual* market rate charged. Health care providers are not forced to accept government program rates or health insurer rates. They do so as a result of a voluntary, arm's length transaction.

The collateral source rule applies fully to amounts actually paid; that is, there is no *deduction* from or credit against the damages awarded for amounts, in fact, paid on the injured plaintiff's behalf by others. Nor is the healthcare provider's acceptance of less than an exorbitant face value of a

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[1] To the extent that the plaintiff argues that the collateral source rule operates to compensate her for attorney's fees she has to incur in this litigation, her argument faces two problems. First, no judicially adopted rule can contravene or evade the *statutory* mandate that parties are to bear their own attorney's fees. (Code Civ. Proc., §1021.) Second, if plaintiffs are entitled to compensatory damages for their attorney's fees, as a matter of equal protection any such rule needs to apply across the board or to whole rational classes – not essentially randomly to those who can present inflated, never-paid "list," "MSRP," or "usual and customary" bills.

bill as payment in full an act of charity; it is what a willing seller of services, in fact, is prepared to accept as payment in full from the customers that it deals with the most. It is no different than a lawyer agreeing to charge a reduced rate to a repeat client.[2]

The collateral source rule affords no basis to award plaintiffs as damages sums that neither they nor anyone on their behalf has ever paid or assumed an obligation to pay and which neither they nor anyone on their behalf will ever pay or assume an obligation to pay.

C. Plaintiff's proposed reworking of the collateral source rule would create undoubted and unwarranted windfalls across a broad range of cases.

Plaintiff's proposed radically novel reshaping of the collateral source rule would have broad implications in a whole host of cases – driving up the cost of insurance and goods and services for the majority in order to provide windfalls to the few. One of the justifications that the Supreme Court has

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[2] The exception for a plaintiff who receives charity care is consistent with this analysis. First, an injured party who receives charity care may be contractually, morally, or ethically obligated to reimburse the value of that care to the extent that recovery from a third party is obtained. Second, in providing charity care a healthcare provider is acting on behalf of and for the benefit of the patient recipient. It is paying – with its services – on behalf of the injured party. That's not the case where the service provider is simply accepting a negotiated reduced rate. It is not reducing its rate as a charitable expenditure in kind to the patient. Rather, it is making a considered market decision as a seller of a service to accept a particular reduced price, not for the patient's benefit, but because that is what the market price for the service really is.

advanced for retaining the collateral source rule despite substantial criticism of that rule is that plaintiffs do not receive a double recovery in the many instances where insurers have rights to subrogation or refund of benefits after a tort recovery by the insured. (*Helfend*, *supra*, 2 Cal.3d at p. 11.) Yet, under plaintiff's formulation even in that situation – the most pristine in the Supreme Court's view for application of the collateral source rule – there is *still* a windfall to the plaintiff. The plaintiff's insurer is only entitled to subrogation for or refund of the amount *actually* paid by that insurer. The plaintiff gets to keep as a windfall profit the difference between an inflated "usual and customary" charge and the amount actually paid. Often that difference is several *times* the amount actually paid.

The absurdity of the result that plaintiff's theory will achieve would be particularly great in medical malpractice cases. An integral part of the Medical Injury Compensation Reform Act (MICRA), Civil Code section 3333.1 was intended to reduce the expense of medical malpractice actions. It allows a defendant to introduce evidence of amounts paid by collateral sources on the plaintiff's behalf. At the same time, it allows the plaintiff to introduce evidence of amounts that the plaintiff paid in premiums for such insurance as an offset. The collateral source payors are barred from any subrogated or like recovery against the plaintiff.

Under plaintiff's proposed theory here, a plaintiff in a medical malpractice case could both offset collateral source payments by insurance premiums paid *and* receive as a windfall profit the difference between amounts actually paid and an artificial "usual and customary" billed

amount. At the same time, the plaintiff's medical insurers receive nothing by way of subrogation for the amounts that they paid. The plaintiff thus pockets both premiums *and* the difference between the amount paid and the never-paid "usual and customary" rate. There is *no* suggestion that the Legislature – which thought it was eliminating the collateral source rule in medical malpractice actions – contemplated that plaintiffs would receive windfall "collateral source" amounts while health insurers were deprived of their subrogation rights.

And, the logic of plaintiff's theory would appear to apply outside the medical expense context. When an insured driver's car is damaged does the driver get to recover and pocket the difference between the insurer's negotiated body shop repair rate and what the body shop would charge to a walk in customer? If a new car is totaled, does the plaintiff get to recover the full "manufacturer's suggested retail price" or only the amount an insurer actually pays to replace the vehicle through a fleet purchase arrangement or the amount that the plaintiff actually pays to buy a replacement vehicle through an auto club buying service? If through the tort of another an insured plaintiff has been required to defend a lawsuit, are its damages the Civil Code section 2860 rate that its independent counsel agreed to accept to keep the business or does the insured get to claim as damages the maximum hourly rate that counsel sometimes is able to exact from a private client, with the insured plaintiff pocketing that rate difference as a windfall litigation profit?

The answer is simple. Of course, that's not the way damages are measured in any of those circumstances. Of course, the difference between the expense actually incurred and some hypothetical price that in fact was never charged is not an element of damages. Yet, these circumstances are conceptually no different than the medical expense scenario plaintiff presents.

And, what if that is the rule? What if this Court effects a sea change in the law and remakes the collateral source rule, will that be a fair, just and good outcome? Well, the result will be that plaintiffs will recover windfall "compensatory" damages that, in fact, are not compensation for anything that anyone has paid to someone else. That money will not come out of nowhere. It will come from defendants and their insurers. The result will be that defendants will have to increase the prices that they charge to the public at large for goods and services that they sell and insurers will have to raise premiums charged to the public at large. Thus, the public at large will ultimately bear the burden of providing windfall profits to a select group – tort litigation plaintiffs. That's neither fair, just, nor good public policy.

The rule is and should remain that a plaintiff may not recover more as *compensatory* economic damages than has actually been paid or will be paid on her behalf. Nothing in the traditional collateral source rule suggests otherwise. It should not be radically reformulated to create an unjust result.

II. Plaintiff Should Never Have Been Allowed To Introduce Evidence Of Her "List" Price Medical Bills In The First Place; *Greer v. Buzgheia* On Which Such Evidentiary Admission Is Premised Is Wrongly Decided To The Extent That It Holds Admissible Medical Bills That Do Not Represent The Actual Amounts Paid Or To Be Paid For Services To Treat A Plaintiff's Injuries.

Once it is clear that speculative, hypothetical amounts that might have been but were not paid for services or property are not the measure of compensatory economic damage, then there should be no basis to admit evidence of such unpaid first offers in price negotiations. Plaintiff's evidence of illusory medical charges – charges never paid or to be paid by plaintiff nor anyone on her behalf – should never have been admitted in the first place.

The *Nishihama/Hanif* line of cases is entirely correct in holding that a plaintiff may not recover as compensatory economic damages more than, in fact, was actually paid for the medical services. Later cases, *Greer v. Buzgheia* in particular, are wrong in holding that evidence of an inflated sticker price, the so-called "usual and customary" charge, not paid should be admissible for some other purpose, e.g., as relevant to the extent of injury. It should not be followed.

The seminal case was *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298. There a plaintiff was injured, falling as a result of an inadequately maintained manhole cover. The plaintiff

presented evidence of some $17,000 in medical bills for which the provider had accepted $3,600 as payment in full from an insurer. *Nishihama* holds that the plaintiff could not recover more than the $3,600 actually paid for the medical services. (*Id*. at p. 309.)

It then held that no *prejudicial* error resulted from introducing the full medical bills. (*Ibid*.) The defendant there had argued that the prejudice was that the bills might have led the jury to believe that plaintiff's injuries were greater than they otherwise were. In rejecting that argument, *Nishihama* did not suggest that medical bills were admissible or relevant to the determination of the extent of the plaintiff's injuries, just that once admitted a "list" price rate was no more inaccurate an indicator as to the extent of injury than a reduced negotiated actually paid rate properly introduced into evidence:

> We do not agree with the [defendant] City, however, that this error [in awarding as damages the amounts never paid] requires remand, because the jury somehow received a false impression of the extent of plaintiff's injuries by learning the usual rates charged to treat those injuries. There is no reason to assume that the usual rates provided a less accurate indicator of the extent of plaintiff's injuries than did the specially negotiated rates obtained by Blue Cross. Indeed, the opposite is more likely to be true.

(*Ibid*.)

Hanif v. Housing Authority (1988) 200 Cal.App.3d 635, followed *Nishihama*, again holding that a plaintiff may not recover as economic

medical expense damages amounts, in fact, not paid and never to be paid. (*Id.* at 639-641.) Like *Nishihama*, *Hanif* did *not* address the admissibility of illusory medical bill amounts that did not represent what was actually paid for the services.

Greer v. Buzgheia (2006) 141 Cal.App.4th 1150, 1157, however, then went astray on the admissibility question. It converted *Nishihama*'s after-the-fact *prejudice* analysis – and *Hanif*'s non-ruling on the issue – into a prospective rule that medical bills and rates (presumably high, low, average, mean, median and everything in between) are admissible (at least within the trial court's discretion). *Greer* agreed with *Hanif* and *Nishihama* that such never-paid or payable bills are *not* evidence of actual amount of economic medical expense damage. (*Greer*, *supra* 141 Cal.App.4th at p. 1157.)

It formulated a different theory as to admissibility. It took *Nishihama*'s statement that in the context of that case admission (whether erroneous or not) of evidence of potentially inflated bill amounts never paid was not *prejudicial* and transformed it into a rule that such never-payable bills were, at least potentially in a trial court's discretion, admissible. (*Ibid*.) It read *Nishihama* as suggesting such bills were relevant as "[s]uch evidence gives the jury a more complete picture of the extent of a plaintiff's injuries." (*Ibid*.) (*Greer* goes on to posit a complex and convoluted process whereby evidence of inflated bills is to be received and the defense is given the burden to obtain – as if excessive, unsupported damages is an affirmative defense – a special verdict form detailing the precise amount of

economic medical damages awarded in order to reduce the verdict to the appropriate level. *Id*. at pp. 1157-1159.)

Greer got the admissibility issue dead wrong. There is no logical connection between the nature and extent of plaintiff's injuries and medical bills. Medical bills for someone killed instantly are minimal. It costs much less to amputate an arm or a hand than to reconstruct one back to functionality. Medical bills for a hard to diagnose but relatively minor inconvenience can be substantial. Medical bills may well vary from county to county and even within a county. That does not mean that the nature and extent of injuries or their value in noneconomic terms should vary by locale. There simply is no logical connection between medical charges and compensation for noneconomic injuries.

Evidence of an amount of medical bills that, in fact, are not payable simply is not relevant to any issue in a personal injury case and should not be considered. (See Evid. Code, § 350 [only relevant evidence admissible].) The pernicious effect of allowing the admission of such irrelevant evidence is well illustrated by *Nishihama*, *Hanif*, *Greer* and like cases. The result of the erroneous admission of such evidence is that there has to be further – under *Greer*, Byzantine – measures to identify and strike the nearly inevitable improper jury use of such evidence to inflate medical expense economic damage amounts.[3]

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[3] Of course, even if such evidence met some bare standard of relevance – as discussed it does not – it can be excluded, as trial judges in some locales consistently rule, under Evidence Code section 352.

The proper solution is not to allow irrelevant, likely-to-mislead evidence in the first place, evidence which later requires attempts to filter out its improper effects. Rather, the proper solution is to limit the admission of medical expense evidence to that which comports with the proper standard for recovery – charges actually incurred and paid or payable.

CONCLUSION

This Court should hold that evidence of illusory "usual and customary" or other charges that are not the basis on which the services rendered, in fact, are paid both does not suffice to prove a plaintiff's actual economic medical expense damages *and* has no place in being admitted in the personal injury litigation in the first place.

Dated: May 4, 2009

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
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By: _____
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CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204, subdivision (c)(1) & (4), I certify that this **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS CO.; PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS CO.**, contains **4,161** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: May 4, 2009

Robert A. Olson

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.

On May 4, 2009, I served the foregoing document described as **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS CO.; PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT AND RESPONDENT HAMILTON MEATS & PROVISIONS CO.** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with this office's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on May 4, 2009, at Los Angeles, California.

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

_____

ANITA F. COLE

HOWELL
v.
HAMILTON MEATS & PROVISIONS, INC.
[Case No. D053620]

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