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6 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 COUNTY OF LOS ANGELES

9 ANNE CARRADINE and KANSAS FLYER,
10 INC., a California corporation,

Plaintiffs,

11 vs.

12 MK2, S.A., *et al.*,

13 Defendants.

Case No. BC439007

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT MK2, S.A.'S MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION OF ISSUES**

Date: August 29, 2011

Time: 9:30 a.m.

Dept: 78 (the Hon. William F. Fahey)

Date action filed: June 3, 2010

Trial date: November 7, 2011



BY FAX

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LIST OF SUPPORTING EXHIBITS

Exhibit	Location
Complaint (courtesy copy)	Mosley Decl., Exhibit A
Contract between MK2, David Carradine, and Kansas Flyer ("Contract")	Vermorel Decl., Exhibit A
CV of Judy Melinek, M.D.	Melinek Decl., Exhibit A
<u>Deposition Transcript Excerpts</u> : Smith, Tiffany ("Smith Depo.")	Mosley Decl., Exhibit B
<u>Deposition Transcript Excerpts</u> : Anne Carradine, Volume I ("Carradine Depo., Vol. I")	Mosley Decl., Exhibit C
<u>Deposition Transcript Excerpts</u> : Anne Carradine, ROUGH, Volume II ("Carradine Depo., Vol. II")	Mosley Decl., Exhibit D
Preliminary Autopsy Report of Dr. Michael Baden	Vermorel Decl., Exhibit B
<u>Written Discovery Responses</u> : Requests for Admissions, Responses, and Further Responses (Anne Carradine)	Mosley Decl., Exhibits E, F and G
<u>Written Discovery Responses</u> : Form Interrogatories, Responses, and Further Responses (Anne Carradine)	Mosley Decl., Exhibits H, I and J
<u>Written Discovery Responses</u> : Special Interrogatories, Responses, and Further Responses (Anne Carradine)	Mosley Decl., Exhibits K, L and M

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1 I. INTRODUCTION

2 This lawsuit arises out of the death of David Carradine, a popular television and motion
3 picture actor, in Bangkok, Thailand. The plaintiffs are Anne Carradine, the actor's surviving
4 spouse, and Kansas Flyer, Inc., the actor's "loan-out corporation" (collectively, "Plaintiffs"). The
5 only named defendant is MK2, S.A. ("MK2"), a French motion picture company. David
6 Carradine was in Bangkok to shoot scenes for a motion picture called "Stretch," which MK2 was
7 producing at the time. Plaintiffs are suing MK2 for damages they claim they sustained as a result
8 of the actor's death.

9 Mr. Carradine died in the early morning hours of June 4, 2009, while he was off duty and
10 doing something unrelated to his acting contract with MK2. The actor suffocated in his hotel
11 room closet while engaged in autoerotic asphyxiation. Autoerotic asphyxiation is a dangerous
12 paraphilia that involves the deliberate application of pressure to the carotid artery in the neck to
13 reduce the blood supply to the brain during masturbation, which enhances the intensity of the
14 sexual experience in certain people.

15 Plaintiffs' Complaint for Breach of Contract and Wrongful Death – Negligence
16 ("Complaint"¹) alleges two causes of action. The first cause of action, for breach of contract, is
17 predicated upon two distinct claims that MK2 breached Mr. Carradine's written contract with the
18 production company ("Contract"). First, Plaintiffs allege that MK2 breached a contract term by
19 failing to provide an assistant to escort Mr. Carradine to dinner on the day before he died.
20 (Complaint, ¶¶ 10, 12.) Second, Plaintiffs claim the Contract required MK2 to purchase insurance
21 for Mr. Carradine and that, after Mr. Carradine's death, MK2 failed "to promptly provide
22 sufficient and accurate insurance information in order for Plaintiffs to receive their benefits in a
23 swift and timely manner, as required under" the Contract. (Complaint, ¶ 14.)

24 Plaintiffs' second cause of action is for general negligence. It alleges that MK2 was
25 "negligent in failing to follow industry standard [sic] and provide David Carradine, the performer,

26
27 ¹ For the Court's convenience, a courtesy copy of the Complaint is attached as Exhibit A to the
28 Declaration of Mark L. Mosley in Support of Motion by Defendant MK2, S.A. for Summary
Judgment or, in the Alternative, Summary Adjudication of Issues ("Mosley Decl.").

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1 with sufficient assistance during the course of the filming of Stretch in Bangkok, Thailand,” and
2 that “[a]s a result of the negligence of [MK2], David Carradine died while performing acting
3 services for MK2’s film, Stretch, in Bangkok, Thailand.” (Complaint, ¶¶ 19-20.) Plaintiffs’
4 negligence cause of action makes no allegation regarding the insurance policy.

5 Based on the uncontroverted material facts listed in the accompanying Separate Statement
6 and described in this brief, each of which is supported by the accompanying declarations and
7 exhibits, MK2 respectfully asks the Court to grant summary judgment against Plaintiffs on their
8 Complaint. If the Court is unable to grant summary judgment, then MK2 asks, in the alternative,
9 that the Court grant summary adjudication of each of the issues stated in the accompanying notice
10 of motion and the Separate Statement.

11 II. STATEMENT OF FACTS

12 A. The Formation And Terms Of David Carradine’s Contract

13 In February 2009, MK2 negotiated and entered into a written Contract with actor David
14 Carradine and his “loan-out company,” plaintiff Kansas Flyer, Inc., under which Mr. Carradine
15 agreed to perform in a motion picture to be called “Stretch.” (Declaration of Laura Vermorel in
16 Support of Motion by Defendant MK2, S.A. for Summary Judgment or, in the Alternative,
17 Summary Adjudication of Issues [“Vermorel Decl.”], ¶¶ 1-3 & Exh. A.²) During the Contract
18 negotiations, Tiffany Smith, the actor’s agent, demanded several changes to the Contract, and
19 MK2 agreed to include most or all of those changes. (Vermorel Decl., ¶ 3; *see also* Deposition of
20 Tiffany Smith [“Smith Depo.”], attached as Exhibit A to the Mosley Decl., at pages 18, 31-34
21 [admission by actor’s agent that multiple changes were made to Contract at the actor’s request].)

22 The Contract provided for David Carradine’s acting services on location in China,
23 Thailand, and France, but prior to the actor’s departure it was decided that his services would only
24 be needed for five days, and only in Bangkok, Thailand. (Vermorel Decl., ¶ 3 & Exh. A at ¶ 1.)

25 The Contract specified, again at David Carradine’s agent’s request, that the actor was to
26 receive several specified amenities in addition to his monetary compensation. These amenities
27

28 ² An alphabetized list of all exhibits referred to in this brief appears above at page iv.

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1 included an extra business class airline ticket for his wife if she decided to join him (or an
2 economy class ticket if he decided to bring along an assistant), “first class” accommodations in an
3 “American style” hotel in a suite if one was available, and “exclusive ground transportation to and
4 from the airports, and to and from his hotel and the sets.” (Contract at ¶ 7; Smith Depo., pp. 32-
5 34; Carradine Depo., Vol. II, at “rough” pp. 276-277 [official p. 141].³) However, David
6 Carradine’s Contract did *not* provide for a 24-hour-per-day personal assistant or a driver to take
7 him out to meals or social events. (*Id.*; *see also* Smith Depo., pp. 33 [admission by actor’s agent
8 that Contract does not contain any such requirement]; Carradine Depo., Vol. II, “rough” pp. 230-
9 231 [official pp. 117-118].⁴) Nor did the Contract provide for anyone to stay in Mr. Carradine’s
10 hotel room with him at nighttime, or to provide overnight security for the actor at his hotel while
11 he was off duty. (Vermorel Decl., Exh. A; Smith Depo., pp. 43-44.)

12 The Contract contained an integration clause. (Vermorel Decl., Exh. A, at ¶ 23.1.) David
13 Carradine’s agent admitted at deposition that she was aware of this clause and understood its
14 effect. (Smith Depo., p. 27.)

15 Paragraph 13 of the Contract provided for the purchase of “production insurance,” which is
16 often required by the Centre National de la Cinematographie (“CNC”) when actors are hired to
17 perform in motion pictures. (Vermorel Decl., ¶¶ 4-6 & Exh. A [Contract], ¶ 13; *see also* Smith
18 Depo., pp. 39-40 [admission by actor’s agent that this paragraph pertained to production
19
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22

23 ³ Page cites to Volume II of Anne Carradine’s deposition are to a “rough” transcript of that
24 deposition. The page numbers on the rough transcript (which appear at the bottom of each page
25 preceded by the word “page”) do not correspond to the official transcript pages (which appear at
various locations on the right-hand side of the pages). The official transcript page numbers are
included in brackets following the “rough” transcript page numbers.

26 ⁴ The Contract provided for the actor’s meals as follows: “Performer shall receive a per diem of
27 100 USD and one production meal per day on set.” (Vermorel Decl., Exh. A, ¶ 7.) This provision
28 is inconsistent with any argument that MK2 was contractually obligated to take David Carradine
out to dinners or other meals while he was in Bangkok.

1 insurance].⁵ This clause was not subject to any negotiation and was not even discussed by MK2
2 or by Mr. Carradine or his agent, and neither Mr. Carradine nor his agent ever requested any
3 changes to, or information about, this paragraph. (Vermorel Decl., ¶ 4; Smith Depo., pp. 39-40
4 [admitting that the clause referred to production insurance, that such insurance is “standard” in
5 motion picture contracts, and that this clause was neither modified nor discussed during the
6 Contract negotiations]; see Carradine Depo., Vol. II, at “rough” pp. 232-234 [official pp. 118-
7 120].)

8 MK2 also purchased a workers’ compensation insurance policy to cover David Carradine.
9 (Vermorel Decl., ¶¶ 7-8.) As explained by Laura Vermorel, MK2’s General Counsel, MK2 was
10 uncertain as to which country’s workers’ compensation laws might apply to MK2’s relationship
11 with Mr. Carradine. (Vermorel Decl., ¶ 8.) MK2 therefore purchased a general workers’
12 compensation policy with ample limits from the ACE Insurance Group, a large international
13 insurance carrier that operates in the U.S. and in all of the countries where the motion picture was
14 to be filmed. (*Id.*) MK2 purchased this policy to ensure that MK2 would at all times be in full
15 compliance with any and all potentially applicable workers’ compensation laws or regulations for
16 the duration of the Contract term. (*Id.*)

17 **B. The Unusual Circumstances Of David Carradine’s Death**

18 David Carradine arrived in Bangkok on May 31, 2009 to start work on the film.
19 (Declaration of Charles de Meaux in Support of Motion by Defendant MK2, S.A. for Summary
20 Judgment, Etc. [“De Meaux Decl.”], ¶ 2.) Mr. Carradine was provided deluxe accommodations in
21 a luxury suite at a hotel called the Swissotel Nai Lert Park. (*Id.*) The Swissotel Nai Lert Park is
22 one of the finest hotels in Bangkok. (*Id.*) Mr. Carradine was staying in a deluxe suite at the
23 Swissotel Nai Lert Park because his Contract required MK2 to furnish him with accommodations
24 that were “in American style hotel if available or any best available at location. Suite requested if
25

26 ⁵ Production insurance protects the movie producer against financial losses that arise when a
27 principal actor becomes unable to perform, necessitating costly delays in production while a
28 replacement actor is found or while the script is re-written to compensate for the missing
character.

1 available." (*Id.*; see Exh. A to Vermorel Decl., ¶ 7.) These terms were added to the Contract at
2 the insistence of Mr. Carradine's agent, Tiffany Smith. (Smith Depo., pp. 34, 53-54.) Because the
3 film was being produced on a limited budget, the director and the other cast and crew members
4 stayed at less expensive accommodations while in Bangkok. (De Meaux Decl., ¶ 2.)

5 There followed two or three days during which David Carradine and the other actors were
6 filmed performing various scenes for the motion picture. (De Meaux Decl., ¶ 3.)

7 On June 3, 2000 – the day before David Carradine died – the cast and crew spent the entire
8 day shooting various scenes for the motion picture. (De Meaux Decl., ¶ 4.) Mr. Carradine
9 performed in several of those scenes. (*Id.*)

10 Shortly after shooting the last scene for the day that involved David Carradine, at around
11 6:00 p.m. on June 3, Charles de Meaux (the director) met with the actor in the actor's set trailer.
12 (De Meaux Decl., ¶ 5.) Messrs. Carradine and de Meaux talked about a scene that they were
13 planning to film the following morning, which was to be shot at the Swissotel Nai Lert Park, the
14 luxury hotel where Mr. Carradine was staying. (*Id.*) They also decided to meet later that evening
15 for dinner with a few others at the restaurant at Mr. Carradine's hotel. (*Id.*)

16 After this conversation, Mr. Carradine left the set and returned to his hotel
17 accompanied by a crew member who had been assigned to drive Mr. Carradine between his hotel
18 and the movie sets. (De Meaux Decl., ¶ 6.) Mr. de Meaux stayed at the set and continued
19 working on the motion picture for another hour or so and then he returned to his own hotel,
20 showered, changed, and tried unsuccessfully to reach Mr. Carradine by cell phone. (De Meaux
21 Decl., ¶¶ 6-7.) Mr. de Meaux also called Mr. Carradine's crew member assistant and asked him if
22 he had been in contact with the actor. (De Meaux Decl., ¶ 7.) The assistant answered that he had
23 not spoken to Mr. Carradine since he had dropped him at his hotel earlier that evening, and he
24 related to Mr. de Meaux that David Carradine had complained that he was tired due to jet lag and
25 afraid he would fall asleep if he returned to his hotel room. (*Id.*)

26 At about 8:45 p.m., Mr. de Meaux left his hotel with the other dinner guests and began
27 driving toward Mr. Carradine's hotel, the Swissotel Nai Lert Park, where they anticipated joining
28 the actor for dinner. (De Meaux Decl., ¶ 8.) At the same time, David Carradine's assistant began

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1 trying to locate the actor by first looking for him in the hotel bar and then, upon not seeing him
2 there, phoning both his mobile and his hotel room phones. (Carradine Depo., Vol. II, "rough" p.
3 115 [official p. 59].) In spite of these efforts, the assistant was unable to find David Carradine.
4 (*Id.*)

5 As Mr. de Meaux and the others were approaching the Swissotel Nai Lert Park in their car,
6 Mr. de Meaux received a call on his cell phone from David Carradine's assistant. (De Meaux
7 Decl., ¶ 9.) The assistant informed Mr. de Meaux that he (the assistant) had been unable to find
8 Mr. Carradine at the hotel and believed Mr. Carradine had gone to sleep in his room and that he
9 would therefore not be joining them for dinner after all. (De Meaux Decl., ¶ 9.) Upon receiving
10 this news, Mr. de Meaux and the other dinner guests changed plans and went instead to a nearby
11 restaurant called Vertigo, which is a ten minute taxi ride from Mr. Carradine's hotel. (De Meaux
12 Decl., ¶ 10.) They had dinner at Vertigo without receiving any further news from either
13 Mr. Carradine or the assistant, and then they returned to their hotel rooms and went to bed. (*Id.*)

14 David Carradine died the following day, June 4, 2009, sometime before 10:00 a.m. (*See*
15 Complaint, ¶¶ 1, 10 [judicial admission that date of death was June 4, 2009].) The actor's body
16 was found in his hotel room when Mr. de Meaux arrived at Mr. Carradine's hotel and sent a crew
17 member to find Mr. Carradine and get him ready for the next shoot, which was to be in the hotel's
18 lobby. (De Meaux Decl., ¶ 11.)

19 In their Complaint and in a verified interrogatory response, Plaintiffs admit that
20 Mr. Carradine died in his hotel room during the early morning hours of June 4, 2009. (Complaint,
21 ¶¶ 1, 10 [judicial admission establishing date of death]; Mosley Decl., Exhs. L and M
22 [specifically, Plaintiff Anne Carradine's Response and Further Response to Special Interrogatory
23 No. 27].) Plaintiffs also assert that "during the time of his death, he was scheduled to be working
24 within the course and scope of his employment." (*Id.*) Plaintiffs cannot support this assertion
25 with evidence, however, because there was no meeting or shoot planned that involved David
26 Carradine on the morning of June 4, 2009 prior to the scene that was to be shot that morning at his
27 hotel at 10:00 a.m. (De Meaux Decl., ¶ 11.)
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1 Based on the police and autopsy reports, the toxicology report, the autopsy photographs,
2 and various related documents, a forensic pathologist retained by MK2 has determined that the
3 cause of David Carradine's death was "asphyxia due to hanging and that the manner of death was
4 an accidental result of auto-erotic asphyxiation." (Declaration of Judy Melinek, M.D., in Support
5 of Motion by Defendant MK2 for Summary Judgment, Etc., ¶ 8; see De Meaux Decl., ¶¶ 11, 14;
6 Vermorel Decl., ¶ 10.)

7
8 **C. Plaintiff Anne Carradine's Recovery Of Her Husband's Workers'
9 Compensation Death Benefits**

10 Following David Carradine's death, MK2 promptly advised Plaintiff Anne Carradine of
11 the death benefits available under the workers' compensation policy that MK2 had purchased for
12 her husband, and MK2 began assisting Ms. Carradine in recovering those benefits. (Vermorel
13 Decl., ¶ 9; Carradine Depo., Vol. II, at "rough" pp. 187-188 [official p. 96].) This process became
14 protracted, however, due to the unusual circumstances of David Carradine's death, which
15 indicated it might have been a suicide, which could have triggered one of the exclusions in the
16 actor's workers compensation policy. (Vermorel Decl., ¶ 11.)

17 This problematic situation was compounded because Plaintiff Anne Carradine's family
18 hired Dr. Michael Baden, a well-known forensic pathologist, to conduct a private autopsy on
19 David Carradine's body. On June 11, 2009, Dr. Baden published a "preliminary" report that was
20 inconclusive about the cause of death. (Vermorel Decl., ¶ 12 & Exh. B; Carradine Depo., Vol. II,
21 "rough" pp. 193-208 [official pp. 99-106].) After receiving this "preliminary" report, the workers'
22 compensation insurance adjuster began demanding to see Dr. Baden's "final" report, which
23 apparently he never prepared. (Vermorel Decl., ¶ 13.) At her deposition, Anne Carradine testified
24 that she had met and spoken on several occasions with Dr. Baden, and that she understood he
25 never prepared a final report because he "didn't get all of the information he needed to make a
26 complete determination." (Carradine Depo., Vol. II, "rough" pp. 207-208 [official p. 106].)
27 However, Ms. Carradine had no recollection of anyone ever explaining to the workers'
28 compensation insurance adjuster why Dr. Baden's final report was not forthcoming. (*Id.*)

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1 The adjustor also began requesting additional documents, such as toxicology reports and
2 the official Thai Royal Police incident report, and Ms. Carradine was either unwilling or unable to
3 provide those documents quickly, or at all. (Vermorel Decl., ¶¶ 13-14.)

4 After about five months, with the ACE insurance adjuster still demanding Dr. Baden's
5 "final" autopsy report and various other documents from Ms. Carradine, none of which had been
6 forthcoming, Ms. Carradine's lawyers became rude, accusatory, and threatening toward MK2's
7 general counsel. (Vermorel Decl., ¶ 16.) MK2's General Counsel concluded that Ms. Carradine
8 was more comfortable pursuing her husband's workers' compensation death benefits with the
9 assistance of her own lawyers, and that MK2's assistance was no longer appreciated or wanted.
10 (Vermorel Decl., ¶ 17.) MK2's counsel promptly invited Anne Carradine to contact (or have her
11 lawyers contact) the ACE insurance adjuster directly with regard to her workers' compensation
12 insurance benefits and provided her with the adjuster's contact information. (*Id.*) In her email,
13 MK2's counsel also told Anne Carradine that MK2 remained available to continue to assist her in
14 the presentation of her claim under the ACE insurance policy if she wanted further assistance from
15 MK2. (*Id.*)

16 MK2's General Counsel never heard anything further from Anne Carradine. (Vermorel
17 Decl., ¶ 18.)

18 Six months later, Plaintiff Anne Carradine recovered 300,000 euros (about \$345,000)
19 under the workers' compensation policy that MK2 had purchased for David Carradine. (Vermorel
20 Decl., ¶ 19; Carradine Depo., Vol. I [Exhibit B to the Mosley Decl.], pp. 57-58; Anne Carradine
21 responses to requests for admissions nos. 12-14 [Mosley Decl., ¶¶ C-E].)

22 One month after Anne Carradine received her husband's workers' compensation death
23 benefits, she filed this lawsuit.

24 **D. Plaintiff Anne Carradine's Deposition Testimony And Verified Discovery**
25 **Responses**

26 At her deposition, Ms. Carradine testified that she spoke first with her husband's talent
27 agent, and immediately thereafter with a woman at the United States Embassy in Bangkok, about
28 the circumstances of her husband's death. (Carradine Depo., Vol. II, at "rough" pp. 24-29, 88-90

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1 [official pp. 13-15, 46].) The woman at the U.S. Embassy initially told Ms. Carradine that her
2 husband's death appeared to be a suicide, but within a few hours she told Ms. Carradine that the
3 cause of death appeared consistent with accidental suffocation during autoerotic asphyxiation.
4 (*Id.*) Although Ms. Carradine claims she believes her husband was murdered, she admitted that
5 her investigation has never turned up any evidence to support her belief. (*Id.* at pp. 32-36 [official
6 pp. 16-19].)

7 Ms. Carradine alleges that MK2 was negligent and breached its contract with David
8 Carradine by failing to escort him to dinner the night before he died. (Complaint, ¶¶ 9, 12.)
9 Ms. Carradine admitted at her deposition that she has no reason to believe the purpose of meeting
10 for dinner was to work on the film as opposed to a purely social event. (Carradine Depo., Vol. II,
11 at "rough" pp. 121-122 [official pp. 61-62].) She also admitted that David Carradine's dinner
12 companions originally planned to meet the actor for dinner at his hotel, but when they were unable
13 to contact him after looking for him in the hotel bar and making several attempts to reach him on
14 both his cell phone and his hotel room phone, they changed plans and went to a nearby restaurant
15 instead. (Carradine Depo., Vol. II, "rough" pp. 113-114 [official pp. 58-59].⁶)

16 Finally, Ms. Carradine admits that *her only basis for alleging that MK2 was negligent is*
17 *the fact that David Carradine's assistant was unable to find her husband and escort him to a dinner*
18 *with the director and others the evening before he died.* (Carradine Depo., Vol. II, "rough" pp.
19 255-257 [official pp. 130-131].) She also admits – even more significantly – that she has no
20 factual basis for believing that, if the assistant *had* been able to find her husband and take him to
21 dinner, his death might not have occurred. (Carradine Depo., Vol. II, "rough" pp. 257-260
22 [official pp. 131-133].) Because of the importance of these two admissions, MK2 quotes them
23 here:

24 19 Q Okay. Now, let me ask you about your response
25 20 to Special Interrogatory No. 24. Special Interrogatory
26 21 No. 24 asks you to state every fact upon which you base

27 ⁶ Ms. Carradine also admitted that her husband did not want to meet anyone from the street or see
28 the sights of Bangkok, but only wanted to shoot the scenes and then go back to his hotel.
(Carradine Depo., Vol. II, "rough" pp. 126-127 [official p. 65].)

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22 an allegation in your Complaint. And I'll quote the
23 allegation. It says, "Defendants were negligent in
24 failing to follow industry standard and provide David
25 Carradine, the performer, with sufficient assistant

1 during the course of the filming of Stretch in Bangkok,
2 Thailand."

3 So that's the basis of your claim for
4 negligence. The answer to this Interrogatory is, "David
5 Carradine's assigned assistant, David LoSavio, failed to
6 follow common practice and his general employment duties
7 by failing to insure that Mr. Carradine appeared at
8 scheduled events."

9 Now, I understand from your testimony there's
10 one scheduled event you have in mind, which is a dinner
11 on June 3rd; is that right?

12 A Correct.

13 Q And is there any other act or omission by MK2
14 that you believe was negligent?

15 A I don't know.

16 Q At this point you don't have in mind anything
17 else that MK2 did or failed to do that you feel was
18 negligent?

19 A I can't think of anything at this time.

20 Q Okay. Now, the next question I've got is how
21 did -- in your mind, how did David LoSavio's failure to
22 get David Carradine to dinner on the night of June 3rd
23 cause him to die?

24 A Because he was negligent in going to pick him
25 up for his scheduled dinner.

1 Q If he had picked him up, he wouldn't have died?

2 A Circumstances would have been different.

3 Q How would they have been different?

4 A Well, he would have gone to dinner.

5 Q And he would have come home from dinner, or
6 back to his hotel from dinner, but he wouldn't have died
7 instead of dying. Why would it have been different?

8 A Well, circumstances are different.

9 Q How? How would they have been different? It
10 would be later, I guess a few hours later, because he
11 would have been to dinner. Is there any reason he
12 wouldn't have died if he had gone to dinner?

13 A I don't know quite how to answer that. I mean,

1 14 I could answer it many different ways. You could
2 15 speculate all kinds of things.
3 16 Q I guess that's the point. The only way you can
4 17 say that this act of negligence caused his death is to
5 18 speculate that had MK2 done something different, maybe
6 19 something would have happened different and he wouldn't
7 20 have died?
8 21 A That's one theory.
9 22 Q Is there any other basis for connecting the act
10 23 of negligence by MK2 and the actor's death?
11 24 A By David LoSavio not following through and
12 25 coming to get him for dinner, the circumstances changed.

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1 1 Depending on how David died.
2 2 Q Okay. But you don't know how David died?
3 3 A I was not there.

12 (Carradine Depo., Vol. II, at "rough" pp. 255-260 [official pp. 130-132].)

13 Plaintiffs have admitted, in their responses to MK2's written discovery, that they have no
14 evidence, other than what is set forth above, about the circumstances of David Carradine's death.
15 Specifically, Plaintiffs denied each of MK2's requests for admission asking them to admit that
16 David Carradine died of accidental suffocation during autoerotic asphyxiation, but in their
17 corresponding form interrogatory responses they offered no evidence to support any alternative
18 explanation for his death. (Mosley Decl., Exhs. C-H [Anne Carradine's Responses and Further
19 Responses to MK2's Requests for Admissions, Nos. 1-8, and corresponding response to form
20 interrogatory no. 17.1].) Indeed, in their response to a special interrogatory no. 7, which asked
21 Plaintiffs to "state every fact you know about the circumstances of David Carradine's death . . .,"
22 Ms. Carradine responded:

23 David Carradine died in Thailand on June 4, 2009. He was in Thailand because
24 he was employed by MK2 to act in the film "Stretch." This answering party's
25 investigation about the circumstances and facts surrounding Mr. Carradine's
26 death are ongoing.

26 (Mosley Decl., Exh. L [Anne Carradine Response to Special Interrogatory No. 7].)

27 Although Plaintiffs allege, in paragraph 20 of their Complaint, that MK2's negligence
28 caused David Carradine's death, in their interrogatory responses Plaintiffs admit that the only fact

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1 upon which they base this allegation is their own unsubstantiated claim that the actor's assistant
2 failed to take David Carradine to a dinner on the day before he died. (Mosley Decl., Exhs. L and
3 M, specifically, Anne Carradine's response and further response to Special Interrogatory No. 27.)
4 And although Plaintiffs assert in an interrogatory response that David Carradine was supposed to
5 be attending a work-related meeting during the early morning hours of June 4, 2009, they describe
6 no evidence of any such meeting. (Mosley Decl., Exhs. L & M [Anne Carradine's response to
7 special interrogatory no. 27]; see Complaint, ¶ 1 [judicial admission that June 4, 2009 was date of
8 death]; De Meaux Decl., ¶ 11 [no meeting planned with David Carradine on morning of June 4,
9 2009 prior to his 10:00 shoot].)

10 At her deposition, Ms. Carradine admitted that she has not learned anything new about her
11 husband's death since she verified her discovery responses. (Carradine Depo., Vol. II, "rough" p.
12 254 [official p. 130].)

13 14 III. LEGAL ANALYSIS

15 A. The Legal Standard For Summary Judgment.

16 Code of Civil Procedure section 437c permits any party to "move for summary judgment
17 in any action or proceeding if it is contended that the action has no merit . . ." (Code Civ. Proc.
18 § 437c, subd. (a).) Subdivision (f)(1) states:

19 A party may move for summary adjudication as to one or more causes of action
20 within an action, . . . one or more claims for damages, or one or more issues of
21 duty, if that party contends that the cause of action has no merit . . . , or that
22 there is no merit to a claim for damages, as specified in Section 3294 of the
23 Civil Code, or that one or more defendants either owed or did not owe a duty to
the plaintiff or plaintiffs. A motion for summary adjudication shall be granted
only if it completely disposes of a cause of action, an affirmative defense, a
claim for damages, or an issue of duty.

24 The purpose of these provisions is to "provide courts with a mechanism to cut through the parties'
25 pleadings in order to determine whether, despite their allegations, trial is in fact necessary to
26 resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 844.)

27 "A trial court properly grants summary judgment where no triable issue of material fact
28 exists and the moving party is entitled to judgment as a matter of law." (*Merrill v. Navegar, Inc.*

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1 (2001) 26 Cal.4th 465, 476-477.) To make this determination, “the moving party bears a burden of
2 production to make a *prima facie* showing of the nonexistence of any genuine issue of material
3 fact. If he carries his burden of production, he causes a shift: the opposing party is then subjected
4 to a burden of production of his own to make a *prima facie* showing of the existence of a genuine
5 issue of material fact.” (*Aguilar v. Atl. Richfield Co.*, *supra*, 25 Cal.4th at pp. 506-507.)

6 A defendant moving for summary judgment can satisfy its threshold burden by relying on
7 “affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which
8 judicial notice shall or may be taken.” (Code Civ. Proc., § 437c, subd. (b)(1).) However, a
9 defendant can also meet its initial burden by introducing the plaintiff’s factually devoid discovery
10 responses because such responses, in and of themselves, satisfy the defendants’ threshold burden.
11 (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1595; *Union Bank v. Superior Court* (1995) 31
12 Cal.App.4th 573, 590.)

13 Finally, a party opposing summary judgment “cannot avoid summary judgment based on
14 mere speculation and conjecture . . . , but instead must produce admissible evidence raising a
15 triable issue of fact.” (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524
16 [Citing *Pena v. W.H. Douthitt Steel & Supply Co.* (1986) 179 Cal.App.3d 924, 931 and *Craig*
17 *Corp. v. County of Los Angeles* (1975) 51 Cal.App.3d 909, 915.)

18 **B. MK2 Is Not Liable For The Breach Of Any Contractual Duty.**

19 Plaintiffs’ first cause of action is for breach of contract. Plaintiffs allege two distinct
20 breaches of the Contract. First, Plaintiffs claim that MK2 breached the Contract by failing to have
21 a crew member escort David Carradine to dinner on the day before he died. (Complaint, ¶¶ 10,
22 12-14.) Second, Plaintiffs allege that MK2 “further breached” the Contract “by failing to
23 promptly provide sufficient and accurate insurance information” about the workers’ compensation
24 insurance that MK2 had purchased to cover her husband’s Contract.

25 “A cause of action for damages for breach of contract is comprised of the following
26 elements: (1) the contract, (2) plaintiff’s performance or excuse for nonperformance,
27 (3) defendant’s breach, and (4) the resulting damages to plaintiff.” (*Careau & Co. v. Sec. Pac.*
28 *Bus. Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) If a valid contract exists and a breach can

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1 be proven, the plaintiff still is "entitled to recover *only* those damages, including lost future
2 profits, which are 'proximately caused' by the 'specific breach.'" (*Postal Instant Press, Inc. v.*
3 *Sealy* (1996) 43 Cal.App.4th 1704, 1709 [italics added]; see also *Metzenbaum v. R.O.S. Associates*
4 (1986) 188 Cal.App.3d 202, 211; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*
5 (1990) 226 Cal.App.3d 442, 457; 1 Witkin, Summary of California Law (9th ed.), Contracts § 815
6 ["It essential to establish a causal connection between the breach and the damages sought"].) In
7 short, the plaintiff has the burden of proving not only that a particular breach occurred, but also
8 that the breach proximately caused the damage claimed. (*Greening v. General Air-Conditioning*
9 *Corp.* (1965) 233 Cal.App.2d 545, 549.)

10 In this case, Plaintiffs have no substantial evidence to meet the elements of either of its
11 breach of contract theories.

12 **1. MK2 Did Not Breach Any Contractual Obligation That Could**
13 **Have Caused David Carradine To Die In His Hotel Room On**
14 **June 4, 2009.**

15 With respect to the first alleged breach, Plaintiffs must produce substantial evidence of two
16 facts. First, Plaintiffs must produce substantial evidence that the alleged failure of David
17 Carradine's assistant to take him to dinner on the day before he died, if it occurred, breached the
18 Contract. Second, Plaintiffs must produce substantial evidence that this breach proximately
19 caused David Carradine to die in his hotel room the following day.

20 Plaintiffs have no substantial evidence to prove either fact. First, the Contract did not
21 require MK2 to escort David Carradine to dinner. The Contract, which was extensively negotiated
22 by David Carradine's agent and included many provisions at the actor's request, did not require
23 MK2 to take David Carradine out to dinner. Instead it provided a meal per diem allowance of
24 \$100 per day plus "one production meal per day *on set*." (Contract at ¶ 7.) With respect to
25 transportation, the Contract stated only that "Performer shall be provided exclusive ground
26 transportation to and from the airports, and *to and from his hotel to the sets*." (Contract at ¶ 7
27 [italics added].) The Contract did not provide for a full time assistant or for someone to drive the
28 actor to and from dinners and other social events. (*Id.*) Plaintiffs make no allegation (and cannot
truthfully amend their Complaint to do so) that the June 3 dinner was supposed to take place on

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1 one of the movie sets. Therefore, plaintiffs cannot offer substantial evidence that MK2 breached
2 the Contract by failing to provide someone to escort David Carradine to dinner the day before he
3 died.

4 Second, and more fundamentally, even if Plaintiffs *could* prove that MK2 breached the
5 Contact by failing to take David Carradine out to dinner on June 3, their discovery responses
6 demonstrate that they have no substantial evidence that this breach caused David Carradine to
7 suffocate in his hotel room the following morning.

8 Again, Plaintiffs have the burden of furnishing substantial evidence that their alleged
9 damage was caused by MK2's breach in order to defeat this motion. (*Greening v. General Air-*
10 *Conditioning Corp., supra*, 233 Cal.App.2d at p. 549.) There is no logical connection between not
11 getting taken out to dinner one day and accidentally suffocating yourself while engaging in
12 autoerotic asphyxiation the next. Without substantial evidence showing how David Carradine
13 would not have suffocated on June 4 if MK2 had taken him out to dinner on June 3, the Court
14 must grant summary adjudication as to this portion of Plaintiffs' breach of contract claim.

15 **2. MK2 Did Not Interfere With Plaintiffs' Recovery Of Workers'**
16 **Compensation Benefits.**

17 Plaintiffs' second alleged breach is that MK2 failed to "provide sufficient and accurate
18 insurance information" about David Carradine's workers' compensation coverage, delaying their
19 receipt of benefits under the policy. (Complaint, ¶ 14) This allegation lacks merit for the same
20 reasons: lack of evidence of a contractual breach, and lack of evidence of damages proximately
21 caused by that breach.

22 First, and preliminarily, Anne Carradine was the "sole" beneficiary under David
23 Carradine's workers' compensation policy. (Carradine Depo, Vol. II, at "rough" p.266 [official p.
24 136].) However, Ms. Carradine is not a third party beneficiary under the Contract. For
25 Ms. Carradine to qualify as a third party beneficiary, the Contract would have to identify her and
26 expressly state one of the parties' specific intent to benefit her. (*Sofias v. Bank of America* (1985)
27 172 Cal.App.3d 358, 387 [citing cases].) This Contract does neither.

28 Moreover, paragraph 13 of the Contract, the provision Plaintiffs claim required MK2 to
"provide sufficient and accurate insurance information" to them, does not say that, and it cannot

1 logically be implied to infer that. This provision did not apply to David Carradine's workers'
2 compensation insurance. Paragraph 13 applied to MK2's *production* insurance. (Vermorel Decl.,
3 ¶¶ 4-6.) Tiffany Smith, the actor's agent who negotiated the Contract for him, admitted at her
4 deposition that she understood this paragraph had nothing to do with David Carradine's workers'
5 compensation insurance. (Smith Depo., pp. 39-40.) Plaintiffs are simply mistaken about the
6 purpose of the Contract term they allege MK2 breached.

7 Finally, even assuming that Paragraph 13 *did* apply to David Carradine's workers'
8 compensation insurance, and assuming further that Ms. Carradine was a third party beneficiary
9 under the Contract, Plaintiffs still have no substantial evidence either that MK2 breached that
10 provision or that such a breach, if it occurred, proximately caused them damage.

11 Accidental fatal suffocation during autoerotic asphyxiation is unusual and it is frequently
12 mistaken for suicide. (Vermorel Decl., ¶ 11.) It was therefore understandable that the adjuster
13 assigned by ACE Insurance Company would investigate thoroughly Ms. Carradine's claim for
14 benefits under her husband's workers' compensation policy, and that the adjuster would begin
15 asking both MK2 and Ms. Carradine for additional information (such as the toxicology reports and
16 the Royal Thai Police Reports) about the circumstances of David Carradine's death. (*Id.*)

17 Plaintiffs compounded this problem by hiring Dr. Michael Baden, a well-known forensic
18 pathologist, to conduct a private autopsy of David Carradine. (Vermorel Decl., ¶ 12.) Dr. Baden
19 prepared a "preliminary" report stating: "The autopsy findings and the evidence thus far available
20 demonstrate that Mr. Carradine's death was not the result of suicide. However, *to reach a final*
21 *determination as to the cause and manner of death we must wait for further information from*
22 *Thailand as to the scene findings and the completion of the crime laboratory and toxicology*
23 *studies that are being performed."* (Vermorel Decl., ¶ 12 & Exh. B [italics added].) This
24 "preliminary" report raised more questions than it answered with the ACE claims adjuster because
25 it implies a "final" report would be coming, and the adjuster (naturally) began demanding to see
26 that "final" report. (Vermorel Decl., ¶ 13.) The adjuster also started asking for copies of the
27 Royal Thai Police report, a toxicology report, and various other documents relating to the actor's
28 death. (Vermorel Decl., ¶ 13.)

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1 Ms. Carradine apparently never bothered to explain to the ACE adjuster why Dr. Baden
2 was not preparing his much-anticipated “final” report. (Carradine Depo., Vol. II, “rough” pp. 207-
3 208 [official p. 106].) Ms. Carradine was also either unwilling or unable to provide the other
4 requested documents quickly, or at all. (Vermorel Decl., ¶ 14.)

5 In spite of this, in May 2010 – less than one year after David Carradine’s death and a full
6 six months after Anne Carradine took over pursuing David Carradine’s workers compensation
7 benefits with her own lawyers – Ms. Carradine successfully recovered 300,000 euros under David
8 Carradine’s workers’ compensation policy. (*Id.*; see also Carradine Depo., Vol. I, pp. 57-58.)
9 This payment was the full amount of death benefits that were available to her under the ACE
10 workers’ compensation policy. (Vermorel Decl., ¶ 17.)

11 MK2 submits that these facts preclude Plaintiffs from showing that they have been
12 damaged, for two reasons. First, Plaintiffs cannot claim injury as to the *amount* of insurance
13 benefits they received, because they recovered the full amount of benefits to which they were
14 entitled. Second, Plaintiffs cannot prove they have been damaged as a result of any delay in
15 receiving those benefits. The delay involved here was under a year. Such a delay is not
16 unreasonable in light of the unusual circumstance surrounding David Carradine’s death, which
17 gave rise to the possibility that exclusions under the policy (such as the suicide exclusion) might
18 apply to defeat coverage. Moreover, they delay appears to have been substantially compounded
19 by Plaintiffs’ commissioning of a “preliminary” autopsy report by Michael Baden, a forensic
20 pathologist, and then their failure either to have him prepare a “final” report or explain to the
21 insurance adjuster why no final report was forthcoming.

22 Finally, even if the one-year delay were unreasonable under the circumstances, that fact
23 might only entitle Plaintiffs to pursue a bad faith claim against ACE Insurance Company. (*See*
24 *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1214.) However, the insurance
25 carrier’s delay is not actionable against MK2 because *MK2 never interfered with Ms. Carradine’s*
26 *pursuit of her claim with ACE Insurance.* To the contrary, *MK2 assisted* that effort. MK2’s
27 assistance lasted about than five months until Ms. Carradine’s lawyers took, and it took her
28 lawyers *six more months* to obtain the workers’ compensation benefits from ACE Insurance

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1 Company.

2 MK2 respectfully submits that, therefore, under these undisputed facts, even if
3 Paragraph 13 did give rise to a contractual obligation for MK2 to purchase David Carradine's
4 workers' compensation insurance, Plaintiffs still cannot recover because they cannot offer
5 substantial material evidence that MK2 proximately caused them damage by breaching that
6 provision.

7 **C. MK2 Is Not Liable For Violating Any Non-Contractual Duty.**

8 Plaintiffs' second cause of action is for negligence. Plaintiffs do not allege that MK2 was
9 negligent in connection with securing benefits under David Carradine's workers' compensation
10 coverage. Plaintiffs allege instead that MK2 was "negligent in failing to follow industry standard
11 [sic] and provide David Carradine, the performer, with sufficient assistance during the course of
12 the filming of Stretch in Bangkok, Thailand." (Complaint, ¶ 19.) At her deposition,
13 Ms. Carradine admitted that the only act of negligence she is seeking to recover for in this lawsuit
14 is MK2's alleged negligent failure to take David Carradine to dinner the day before he died.
15 (Carradine Depo., Vol. II, at "rough" pp. 255-260 [official pp. 130-132].)

16 "[N]egligence is conduct which falls below the standard established by law for the
17 protection of others." (Rest.2d Torts, § 282.) The threshold element of a cause of action for
18 negligence is the existence of a duty to use due care toward an interest of another that enjoys legal
19 protection against unintentional invasion. (Rest.2d Torts, § 281, subd. (a); 6 Witkin, Summary of
20 Cal. Law (9th ed. 1988), Torts, § 732, p. 60.) Whether this essential prerequisite to a negligence
21 cause of action has been satisfied in a particular case is a question of law to be resolved by the
22 Court. (6 Witkin, supra, § 748 at p. 83.)

23 "'[D]uty,' is not sacrosanct in itself, but only an expression of the sum total of those
24 considerations of policy which lead the law to say that the particular plaintiff is entitled to
25 protection." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734 [quoting Prosser, Law of Torts (3d ed.)
26 pp. 332-333].) "Courts, however, have invoked the concept of duty to limit generally 'the
27 otherwise potentially infinite liability which would follow from every negligent act . . .'"
28 (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750 [quoting *Dillon, supra*, 68 Cal.2d at

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1 p. 739; *see also Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 396-97.)

2 Simply stating this rule demonstrates its unavailability to Plaintiffs under the facts of this
3 case. The circumstances of David Carradine's death do not give rise to any duty which MK2
4 could have violated and thereby proximately caused the actor to die. MK2 had no duty to take
5 David Carradine to dinner the day before he died. But even if MK2 had such a duty and
6 negligently violated it, MK2's negligence did not proximately cause him to suffocate in his hotel
7 room closet the following day.

8 Plaintiffs' attempts to characterize the dinner as a "meeting" does not help them because
9 Plaintiffs admit David Carradine did not suffocate while the others were having dinner without
10 him. He suffocated *the following day*, during the morning hours, when his would-be dinner
11 companions were in their own hotel rooms sleeping. And at her deposition, Ms. Carradine was
12 unable to explain why she believe that, if MK2 taken her husband out to dinner on June 3, he
13 might not have died the following morning. (Carradine Depo., Vol. II, at "rough" pp. 255-260
14 [official pp. 130-132].)

15 The existence of a legal duty is a question of law for the Court to decide. (6 Witkin, *supra*,
16 § 748 at p. 83.) MK2 respectfully submits that the Court should rule that no potentially applicable
17 duty existed in this case and summarily adjudicate Plaintiffs' second cause of action for
18 negligence.

19
20 **IV. CONCLUSION**

21 This is an unfortunate lawsuit. MK2 has repeatedly and consistently demonstrated its
22 sympathy for Anne Carradine's loss. MK2 takes this opportunity to express its sympathy again
23 here.


24 However, in order to pursue this lawsuit further, Plaintiffs must produce substantial
25 material evidence that MK2 proximately caused David Carradine's death. They have no such
26 evidence. For the reasons set forth above, the Court should grant summary judgment against
27 Plaintiffs on their Complaint and enter judgment accordingly. In the alternative, the Court should
28

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SEILER EPSTEIN ZIEGLER &
APPLEGATE, LLP
101 Montgomery St. 27 Floor
SAN FRANCISCO, CA 94104
(415) 779 0200

1 grant summary adjudication on each of the issues presented in the accompanying Notice and
2 Separate Statement.

3 Dated: June 7, 2011

SEILER EPSTEIN ZIEGLER &
APPLEGATE, LLP

4
5 
6 MARK L. MOSLEY
7 Attorneys for Defendant MK2. S.A.



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1 **PROOF OF SERVICE**

2 I, Frances Kearney, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 within entitled action. My business address is Seiler Epstein Ziegler & Applegate, LLP, 101
5 Montgomery Street, 27th Floor, San Francisco, California 94104.

6 On June 7, 2011, I served the attached:

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT
8 MK2, S.A.'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE,
9 SUMMARY ADJUDICATION OF ISSUES**

10 on the interested parties in said action, by placing a true copy thereof in sealed envelope(s)
11 addressed as follows:

12 Shelley Kaufman, Esq.
13 Hagop Kuyumjian, Esq.
14 Geragos & Geragos, P.C.
15 644 South Figueroa Street
16 Los Angeles, CA 90017-3411
17 Tel: [REDACTED]
18 Fax: [REDACTED]
19 Email: [REDACTED]

20 and served the named document in the manner indicated below:

21 **BY MAIL:** I caused true and correct copies of the above document(s) to be served by mail
22 on the above date by personally placing and sealing said document(s) in an envelope or package
23 suitable for mailing, addressed to the addressee(s) and including this firm's return address, postage
24 pre-paid, and then, following ordinary office practice, placing said sealed envelope in the office's
25 usual location for collection and mailing with the United States Postal Service.

26 **BY NEXT-DAY OVERNIGHT SERVICE:** I caused true and correct copies of the
27 above document(s) to be placed within a sealed envelope or other package suitable for overnight
28 shipment, addressed to the addressee(s) and including this firm's return address, and delivered on
the date stated above to an overnight delivery service for delivery to the addressee(s) on the
following business day.

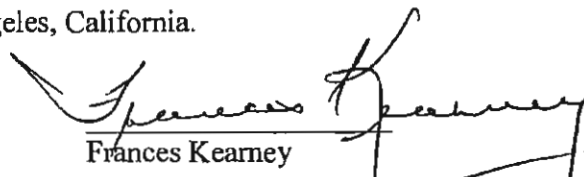
BY HAND DELIVERY: I personally handed a copy of the above document(s) to the
addressee(s) on this date.

BY FACSIMILE: I caused true and correct copies of the above document(s) to be sent
via facsimile to the addressee(s) on this date. The facsimile machine used complies with
California Rule of Court 2003(3) and no error was reported by the sending facsimile machine.
The transmission record for this facsimile complies with California Rule of Court 2003(6).

BY EMAIL: I caused true and correct copies of the above document(s) to be sent via
email to the addressee(s) on this date.

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

Executed on June 7, 2011, at Los Angeles, California.



Frances Kearney

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