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January 16, 2015

Via Federal Express

Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: ***Apple Inc. v. Superior Court (Felczer)***
California Supreme Court Case No. S222973
Amici Curiae Letter in Support of Petition for Review
(Cal. Rules of Court, rule 8.500(g))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Chamber of Commerce of the United States of America and the California Chamber of Commerce (collectively, amici) respectfully urge this Court to grant defendant Apple Inc.'s petition for review in *Apple Inc. v. Superior Court* (*Felczer*), California Supreme Court Case No. S222973. This Court should either (1) grant review and transfer this case so the Court of Appeal can in the first instance decide Apple's writ petition challenging the trial court's class certification ruling, or (2) in the alternative, grant plenary review.

"That the use of the device of a class action is subject to abuse in a number of ways is a well-known fact." (*Anthony v. Superior Court* (1976) 59 Cal.App.3d 760, 771.) "[C]lass actions may create injustice" because they can "preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458.) Given the "dangers of injustice" and "the limited scope within which these suits serve beneficial purposes," this Court has imposed carefully formulated limits on the grounds for certifying a lawsuit as a class action and "admonished trial courts" to observe those limits. (*Id.* at p. 459.) Because the "potential for misuse of the class action mechanism is obvious" (*Deposit Guaranty Nat. Bank, etc. v. Roper* (1980) 445 U.S. 326, 339 [100 S.Ct. 1166, 63 L.Ed.2d 427]), it is imperative that courts abide by these limitations.

In this case, the plaintiffs filed claims alleging that Apple violated meal break, rest break, and other wage-and-hour laws, and sought to certify these claims for class treatment. As we explain below, the trial court here significantly deviated from the limitations on class certification in several respects. The trial court erroneously

certified a class action based on mere allegations about the existence of uniform workplace policies. The trial court also improperly treated critical individualized liability issues, that could preclude class certification, as nothing more than damages questions that the trial court considered to be irrelevant to the class certification inquiry. Moreover, the trial court failed to follow this Court's directive requiring an evaluation at the class certification stage of whether individual issues would be manageable. By doing so, the court substantially lowered the bar for class certification of wage-and-hour lawsuits and its flawed analysis threatens to serve as an erroneous blueprint that is likely to encourage an avalanche of new class actions unrestrained by the balanced limitations on class certification imposed by appellate courts. Immediate appellate review is warranted.

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size. The U.S. Chamber has many members located in California and others who conduct substantial business in the state. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community.

The California Chamber of Commerce (CalChamber) is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community.

The question of whether courts must adhere to the stringent requirements for class certification in class action lawsuits is of exceptional importance to the business community. An order erroneously granting class certification "dramatically affects the stakes for defendants" since it "magnifies and strengthens the number of

unmeritorious claims," "makes it more likely that a defendant will be found liable," "results in significantly higher damage awards," and "creates insurmountable pressure" to settle. (*Castano v. American Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746.)

WHY REVIEW SHOULD BE GRANTED

A. The trial court's class certification decision is at odds with California law because it erroneously allows class treatment based on mere allegations about Apple's purported policies.

"[T]he party seeking [class] certification must show that issues of law or fact common to the class predominate." (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28 (*Duran*).) *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) establishes that, "in the absence of evidence of a uniform policy or practice," lawsuits alleging violations of California's wage-and-hour laws cannot satisfy the predominance requirement and are therefore not susceptible to class treatment. (*Id.* at p. 1052.) *Brinker* also confirms that even evidence of a uniform policy does not alone suffice to justify class treatment. The critical inquiry is whether the "uniform policy [was] consistently applied to a group of employees." (*Id.* at p. 1033.)

Accordingly, "the existence of a uniform policy does not necessarily *mandate* certification" and is therefore "not the sole deciding factor in a certification analysis." (*Koval v. Pacific Bell Telephone Co.* (Dec. 31, 2014, A139570) ___ Cal.App.4th ___ [2014 WL 7447715, at pp. *6-*7 & fn. 10] (*Koval*).) The Courts of Appeal have thus recognized in multiple cases that wage-and-hour claims, including meal and rest break claims, cannot be certified for class treatment where the plaintiff failed to demonstrate a uniform policy was consistently applied to the class. (See, e.g., *id.* at pp. *7-*8 [affirming denial of class certification where defendant maintained uniform policies concerning meal and rest breaks but those policies were not consistently applied to employees]; *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 997 (*Dailey*) [court properly denied class certification based on defendant's "substantial evidence disputing the uniform application of its business policies and practices"]; *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, 1364-1365, 1371 [affirming denial of class certification notwithstanding uniform policies since "liability does not rest on proof of a companywide policy" and instead turns on conduct "beyond the written policies themselves"].)

The trial court's class certification ruling is at odds with this precedent. The trial court concluded that the plaintiffs satisfied the predominance requirement based on little more than their allegations about the existence of Apple's policies. (See, e.g., vol. 40, exh. 69, pp. 10409-10411.) For example, the court certified the meal break claims for class treatment because, according to the plaintiffs, Apple had a policy that failed to inform its employees "they had the right to take a meal period within the first five hours" of their shifts and also "made taking meal and rest breaks extremely difficult." (*Ibid.*) The order did not examine whether there was evidence that Apple consistently applied this alleged policy in a fashion that failed to relieve class members of all duty for an uninterrupted meal break and failed to relinquish its control over the class members—which is all that California law requires an employer to do to reasonably permit employees to take a meal break (see *Brinker, supra*, 53 Cal.4th at p. 1040). Instead, in a sharp departure from class action standards, the order decided that the mere allegations of the existence of a policy by the plaintiffs satisfied the predominance requirement.

California law precludes such overreliance on the existence of an alleged policy because courts must also examine whether there is evidence the policy was consistently applied to the proposed class. (See, e.g., *Koval, supra*, ___ Cal.App.4th ___ [2014 WL 7447715, at pp. *7-*8] [refusing to assess propriety of class certification based exclusively on existence of uniform meal and rest break policies and instead concluding class treatment was inappropriate since the policies were not consistently applied].) By focusing exclusively on the mere existence of the alleged policy, the trial court failed to undertake this crucial inquiry into whether the meal break policy was uniformly applied in practice.

The trial court believed it could rely on nothing more than this policy because, according to the plaintiffs, the policy "did not inform" the employees "they were permitted to take their meal period within the first five hours of every shift" and, in the trial court's view, this alone could violate an employer's legal obligations under *Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129. (See vol. 40, exh. 69, pp. 10410-10411.) But *Bradley* said nothing of the sort and does not permit a trial court to certify a class based simply on the manner in which an employer makes employees aware of breaks. (See *Bradley,* at pp. 1149-1154.) Rather, *Bradley* held that meal and rest break claims were amenable to class treatment because the defendant there had no policy or practice whatsoever permitting employees to take breaks and thus uniform proof demonstrated the defendant completely failed to authorize all employees to take breaks. (See *ibid.*) *Bradley* provides no guidance here because, in

contrast to the defendant there, Apple *did* (and still does) have a policy permitting its workers to take meal breaks. (See vol. 40, exh. 69, p. 10410.)

The trial court also indicated that several other cases—this Court's decision in *Brinker* as well as the Court of Appeal opinions in *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286 (*Jaimez*), *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524 (*Ghazaryan*), and *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193 (*Bufil*)—supposedly warranted the certification of a meal break class based on nothing more than the plaintiffs' allegations about the existence of a policy. (See vol. 40, exh. 69, p. 10410.) As with the trial court's misplaced reliance on *Bradley*, none of these authorities support the trial court's approach to class certification.

Brinker did not say that class treatment is warranted simply because the plaintiff alleges a defendant has a uniform policy. Rather, the defendants there "conceded" the "existence of, a common, uniform rest break policy" and the plaintiffs presented evidence that this policy on its face uniformly failed to authorize all of the second rest breaks mandated by the law for work shifts longer than six, but shorter than eight, hours. (*Brinker*, *supra*, 53 Cal.4th at pp. 1020, 1033.) *Brinker* concluded that those circumstances permitted class treatment for a rest break class because the plaintiffs' theory of liability turned solely on whether the plain language of the defendants' policy "never authorized" the second rest breaks required by the law and this theory could be resolved based on common proof across the entire class pursuant to a "uniform policy consistently applied to a group of employees." (*Id.* at p. 1033.) *Brinker* also explained that the Court of Appeal decisions in *Jaimez*, *Ghazaryan*, and *Bufil* likewise stood for such a proposition. (See *ibid.*)

In contrast, where (as here) an employer *does* permit employees to take meal breaks, the fact employees were allegedly "never told they were entitled to meals and rest breaks" (much less told when the breaks should be scheduled) does not violate the law or warrant class certification. (*Dailey*, *supra*, 214 Cal.App.4th at pp. 1001-1002.) This is so because "the absence of a formal written policy explaining" employees' "rights to meal and rest periods does not necessarily imply the existence of a uniform policy or widespread practice of either depriving these employees of meal and rest periods or requiring them to work during those periods." (*Id.* at p. 1002.) In this case, the trial court did not hold that the plaintiffs demonstrated the employer had a uniform policy or practice of "*prohibit*[*ing*] class members from taking uninterrupted meal and rest breaks" or of "*requir*[*ing*] 'on-duty' meal and rest breaks." (*Id.* at p. 1001.) In the absence of such evidence, class certification was improper. (See *id.* at pp. 1001-1002.)

B. The trial court wrongly concluded that whether Apple permits employees to take meal breaks was nothing more than a damages issue that could never defeat class certification. To the contrary, this was a critical, individualized liability issue precluding class treatment.

The distinction between liability and damages "is important" to class certification and "decisions about the *fact* of liability" should not be "reframed as questions about the *extent* of liability." (*Duran, supra,* 59 Cal.4th at pp. 30, 37.) Courts must therefore avoid "conflat[ing] liability and damages." (*Id.* at p. 37.) "[C]lass treatment is not appropriate 'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment" ' on common issues." (*Id.* at p. 28.)

Whether an employer actually provided meal breaks in compliance with the law is a liability issue that determines if an employee has a right to recover for a meal break claim. *Brinker* holds that an employer "satisfies [its meal break] obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break." (*Brinker, supra,* 53 Cal.4th at p. 1040.) *Brinker* confirms that the question of whether an employer complied with this obligation is an issue of liability rather than a damages issue: "Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, *and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay . . . .*" (*Id.* at pp. 1040-1041, emphasis added.)

Because the mere "fact of a missed break does not dictate the conclusion of a violation (and thus employer liability)," meal break claims are less amenable to class treatment since such claims require an assessment of "*why* the worker missed the break *before you can determine whether the employer is liable.*" (*In re Walgreen Co. Overtime Cases* (2014) 231 Cal.App.4th 437, 442, second emphasis added.) "If the worker was free to take the break and simply chose to skip or delay it, *there is no violation and no employer liability.*" (*Ibid.*, emphasis added.) Rather, liability attaches only if workers missed their meal breaks because their employer failed to make those breaks available to them. (See *id.* at pp. 441-442.) This is an "individual question" of "liability" and not "a question of damages, as it goes to the heart of the liability inquiry: whether each employee was required to work through breaks at all, rather than to how much additional compensation any given employee is entitled." (*Villa v. United Site*

Services of California, Inc. (N.D.Cal., Nov. 13, 2012, No. 5:12-CV-00318-LHK) 2012 WL 5503550, at p. *9 (*Villa*) (Koh, J.) [nonpub. opn.].)

Here, the trial court maintained that individualized inquiries into whether the "application of [Apple's meal break] policy to specific employees" actually permitted each employee to take meal breaks in compliance with California law did no more than "establish individual issues of *damages, which would not preclude certification.*" (Vol. 40, exh. 69, p. 10410.) But this view deviates from, and cannot be squared with, this Court's precedent or the decisions of the Courts of Appeal, which, as explained above, recognize this is a liability issue that can preclude class treatment.

According to the trial court, *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701 (*Benton*), *Bluford v. Safeway Inc.* (2013) 216 Cal.App.4th 864 (*Bluford*), and *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220 (*Faulkinbury*) permitted it to treat this inquiry as an irrelevant damages issue. (See vol. 40, exh. 69, p. 10410.) But none of those cases authorized such an approach.

Those cases simply indicated that meal or rest break claims could be certified for class treatment where an employer failed to adopt any policy or practice whatsoever authorizing meal and rest breaks, or adopted a uniform policy that, as consistently applied to all employees, violated the law on its face. (See *Benton*, *supra*, 220 Cal.App.4th at pp. 724-727 [class certification could be appropriate where, unlike here, defendant violated meal and rest break law by completely failing to adopt *any* policy or practice authorizing meal and rest breaks]; *Bluford*, *supra*, 216 Cal.App.4th at pp. 870-873 [claims were amenable to class treatment because, unlike here, common proof demonstrated defendants' policies, as consistently applied to all employees, uniformly violated the law on their face]; *Faulkinbury*, *supra*, 216 Cal.App.4th at pp. 232-235 [same].)

But that is not the case here. For example, Apple did adopt a policy permitting employees to take meal breaks. (See vol. 40, exh. 69, p. 10410.) Although the plaintiffs contend this policy failed to disclose certain information about employees' meal break rights and that employees' job demands or schedules made it harder for them to take meal breaks, these allegations do not obviate the need for individualized liability inquiries into whether Apple actually prohibited employees from taking meal breaks or otherwise required them to work through meal breaks and do not justify the certification of a meal break class. (See, e.g., *Dailey*, *supra*, 214 Cal.App.4th at pp. 1000-1002; *Villa*, *supra*, 2012 WL 5503550, at pp. *9-*10.)

C. The trial court failed to determine if the plaintiffs' claims were manageable, as it was required to do before certifying a class action.

"Although predominance of common issues is often a major factor in a certification analysis, it is not the only consideration." (*Duran*, *supra*, 59 Cal.4th at p. 28.) Plaintiffs seeking class certification must also demonstrate "substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) This superiority requirement encompasses consideration of "the manageability of individual issues." (*Duran*, at p. 29.)

Duran held that "[i]n wage and hour cases where a party seeks class certification based on allegations that the employer consistently imposed a uniform policy or de facto practice on class members, the party must still demonstrate that the illegal effects of this conduct can be proven efficiently and manageably within a class setting." (*Duran*, *supra*, 59 Cal.4th at p. 29.) Consequently, "[t]rial courts must pay careful attention to manageability when deciding whether to certify a class action. In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class." (*Ibid.*)

In concluding that the plaintiffs satisfied the superiority requirement here, the order granting class certification failed to comply with *Duran*'s directive because it never addressed whether (or how) individualized issues could be managed. (See vol. 40, exh. 69, p. 10414.) Perhaps the order ignored *Duran* because, at the hearing on class certification, the trial court dismissed *Duran* as little more than "a critique of a statistical methodology that was a nightmare." (Vol. 40, exh. 68, pp. 10388-10389.)

But *Duran*'s mandate cannot be swept aside so easily. Before examining the sampling methodology, this Court's opinion in *Duran* spent several pages emphasizing the significance of the manageability criterion in the class certification analysis, and this part of *Duran*'s discussion never even mentioned sampling. (See *Duran*, *supra*, 59 Cal.4th at pp. 28-30.) It was in the course of this discussion, outside the context of any analysis of sampling, that *Duran* held "[t]rial courts must pay careful attention to manageability when deciding whether to certify a class action" in order to "make[ ] a reasoned, informed decision about manageability at the certification stage." (*Id.* at p. 29.) By failing to analyze the manageability of individual issues altogether, the order granting class certification here improperly disregarded this directive.

D. Immediate appellate review is necessary.

As explained above, the trial court significantly departed from existing class certification standards when it granted class certification here. Although one might in other contexts think that one anomalous trial court ruling need not concern this Court, that is the not the case in this action. Absent immediate review by either the Court of Appeal or this Court, these deviations threaten to appreciably lower the bar for class certification in other pending and future putative class actions.

As Apple points out, this is a closely watched class action that has garnered significant national attention. (PFR 4 & fn. 1.)[1] This is unsurprising because the ramifications of the trial court's decision here could be enormous. Unless this Court grants review and either transfers this case to the Court of Appeal for a decision on the merits or itself takes up in the first instance the important class action issues raised by this case, the trial court's class certification ruling will likely lead to a proliferation of wage-and-hour actions that seek class certification on the same grounds. That is what has happened with other novel wage-and-hour issues that suddenly became the class action "flavor of the month." (See, e.g., Judicial Council of Cal., Admin Off. of Cts., Findings of the Study of Cal. Class Action Litigation, First Interim Rep. (2009) pp. 7-8 [indicating that claims alleging wage-and-hour violations of California meal and rest break law were not a popular basis for class actions until 2003, when the success of class actions asserting such claims against Wal-Mart "may have contributed to the increased popularity" of such suits "in California in and after 2003"].)[2]

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[1] Accord, e.g., Carey, *Apple faces class-action lawsuit over work breaks* (July 25, 2014) San Jose Mercury News <http://goo.gl/D8Xivj> (as of Jan. 16, 2015); Kendall, *Judge OKs Wage-and-Hour Class Against Apple* (July 23, 2014) S.F. Recorder <http://goo.gl/Ug58tJ> (as of Jan. 16, 2015); Elder, *Apple Facing Another Class-Action Suit by Employees* (July 22, 2014) Digits: Tech News & Analysis From the WSJ <http://goo.gl/SmXZmC> (as of Jan. 16, 2015); Greene, *Apple Retail Workers Nab Class Cert. In Wage-And-Hour Suit* (July 22, 2014) Law360 <http://goo.gl/FeBmD5> (as of Jan. 16, 2015); Ribeiro, *Apple hit with class action lawsuit for alleged labor rule violations* (July 22, 2014) PCWorld <http://goo.gl/AP6aem> (as of Jan. 16, 2015).

[2] This report is available at the California Courts website. (See *Study of California Class Action Litigation* <http://www.courts.ca.gov/12230.htm> [as of Jan. 16, 2015].)

This is not a hypothetical threat. "Apple is not the first technology company to be targeted by plaintiffs' attorneys in California, and it likely will not be the last." (Schaefer et al., *Apple Class Certification Will Affect All Tech Companies* (Sept. 17, 2014) Law360 <http://goo.gl/Wwmfgp> [as of Jan. 16, 2015].) Simply put, the "high-tech industry" has begun, and will continue, to face "[a]n unrelenting wave of wage and hour suits," and the class certification ruling against Apple threatens to "embolden other lawyers to sue technology companies and try to use this case"—with its deeply flawed approach to class certification—"as a blueprint" by insisting that their lawsuits should equally be certified for class treatment "for the same reasons" that "the claims against Apple" were certified. (*Ibid.*) In fact, this threat is not limited to the technology industry, since the trial court's erroneous rationale for certifying a class action is not confined to high-tech companies and its class certification ruling therefore threatens to generate an avalanche of new class actions against employers in a broad range of industries if the order remains intact.

The trial court's class certification ruling should not be permitted to survive as a blueprint for this new wave of wage-and-hour lawsuits without an appellate court first assessing whether or not the order's many deviations from class action standards are foreclosed by precedent. This Court need not undertake that assessment itself in the first instance. Rather, this is a particularly appropriate vehicle for an order granting review and transferring this case to the Court of Appeal to decide the merits of Apple's writ petition. (See, e.g., *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 911-913 [where order granting class certification was based on an "erroneous analysis of factors relevant to certification," this Court granted review after defendant's writ petition was summarily denied and "transferred the case back to the Court of Appeal with instructions to issue an alternative writ"].)

The only remaining option—waiting for appellate review following the entry of a final judgment—is not an adequate remedy under the circumstances here, either for Apple or the innumerable businesses that could now face class actions based on the trial court's impermissibly lax approach to class certification. (See *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1453 ["Appeal from a judgment in this class action suit provides an inadequate remedy"].) Given the potential exposure to enormous class liability, many businesses " 'are unwilling to bet their company that they are in the right in [such] big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. . . . This interaction of procedure with the merits justifies an earlier appellate look. By the end of the case it will be too late—if indeed the case has an ending that is subject to appellate review.' " (*Ibid.*)

CONCLUSION

For all of the foregoing reasons, the amici urge this Court to grant Apple's petition for review.

Respectfully submitted,

HORVITZ & LEVY LLP
JEREMY B. ROSEN
FELIX SHAFIR

By:
Felix Shafir

Attorneys for Amici Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and CALIFORNIA CHAMBER OF COMMERCE

FS:rfw
Enclosure
(Attached Proof of Service.)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

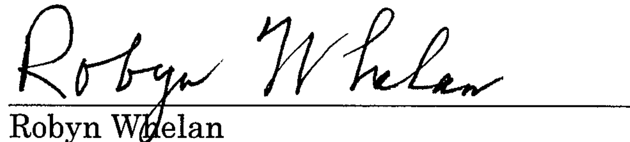
On January 16, 2015, I served true copies of the following document(s) described as **LETTER TO SUPREME COURT JUSTICES, dated JANUARY 16, 2015** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on January 16, 2015, at Encino, California.



Robyn Whelan

SERVICE LIST

Apple Inc. v. Superior Court of San Diego County (Felczer)
Supreme Court Case No. S22973

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