S235357

IN THE SUPREME COURT OF CALIFORNIA

DOMINIQUE LOPEZ, by and through her guardian *ad litem*, Cheryl Lopez,

Plaintiff and Appellant,

v.

SONY ELECTRONICS, INC.,

Defendant and Respondent.

After a Decision by the Court of Appeal, Second Appellate District, Division Eight, Case No. B256792
Los Angeles County Superior Court, Case No. BC476544
The Honorable Frederick C. Shaller

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF WESTERN DIGITAL CORPORATION IN SUPPORT OF DEFENDANT AND RESPONDENT SONY ELECTRONICS, INC.

KELLER/ANDERLE LLP
Jennifer L. Keller (SBN 84412)
*Yen-Shyang Tseng (SBN 282349)
Michael A. Schachter (SBN 298610)
18300 Von Karman Avenue, Suite 930
Irvine, California 92612
Tel: (949) 476-8700
Fax: (949) 476-0900
ytseng@kelleranderle.com

Attorneys for *Amicus Curiae*
Western Digital Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

S235357

IN THE SUPREME COURT OF CALIFORNIA

DOMINIQUE LOPEZ, by and through her guardian *ad litem*, Cheryl Lopez,

Plaintiff and Appellant,

v.

SONY ELECTRONICS, INC.,

Defendant and Respondent.

After a Decision by the Court of Appeal, Second Appellate District, Division Eight, Case No. B256792
Los Angeles County Superior Court, Case No. BC476544
The Honorable Frederick C. Shaller

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Under California Rule of Court, rule 8.520(f), Western Digital Corporation (Western Digital) requests permission to file the attached *amicus curiae* brief to support Defendant and Respondent Sony Electronics, Inc. (Sony).

INTEREST OF *AMICUS CURIAE*; HOW THE *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT

Western Digital is the defendant in *Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522 (*Nguyen*), where the Sixth Appellate District held that tort actions alleging birth and pre-birth injuries caused by exposure to hazardous material or toxic substances are governed by the two-year statute of limitations in Code of Civil Procedure section 340.8. (See *id.* at pp. 1543-1551.) In doing so, the Sixth Appellate District rejected the argument that Section 340.4 was the applicable statute of limitations. This Court denied Western Digital's petition for review in 2014. (*Id.*, review den. Dec. 17, 2014, S222377.)

Here, the Second Appellate District, Division Eight disagreed with *Nguyen* and held that Section 340.4 applied to tort actions alleging birth and pre-birth injuries caused by exposure to hazardous material or toxic substances. (*Lopez v. Sony Electronics, Inc.* (2016) 247 Cal.App.4th 444.) This Court granted review to resolve the conflict among the Courts of Appeal.

Affirming the Second Appellate District's decision would be case dispositive for Western Digital in *Nguyen.* The proposed *amicus curiae* brief addresses the purpose of the statute of limitations and its application to *Nguyen.* This argument complements and is not duplicative of the briefs submitted by Sony and other *amici curiae* supporting Sony.

NO PARTY OR COUNSEL FOR A PARTY AUTHORED OR CONTRIBUTED TO THIS BRIEF

No party or counsel for a party in this appeal authored or contributed to the funding of this brief, and no one other than *amicus curiae* Western Digital or its counsel in this case made a monetary contribution intended to fund the preparation or submission of this brief. (See Cal. Rule of Court, rule 8.520(f)(4).)

CONCLUSION

Western Digital respectfully requests the Court permit the filing of the attached *amicus curiae* brief supporting Sony.

Dated: May 15, 2017

Respectfully submitted,

KELLER/ANDERLE LLP

By: _____

Yen-Shyang Tseng
Attorneys for *Amicus Curiae*
Western Digital Corporation

S235357

IN THE SUPREME COURT OF CALIFORNIA

DOMINIQUE LOPEZ, by and through her guardian *ad litem*, Cheryl Lopez,

Plaintiff and Appellant,

v.

SONY ELECTRONICS, INC.,

Defendant and Respondent.

After a Decision by the Court of Appeal, Second Appellate District, Division Eight, Case No. B256792
Los Angeles County Superior Court, Case No. BC476544
The Honorable Frederick C. Shaller

AMICUS CURIAE BRIEF OF WESTERN DIGITAL CORPORATION IN SUPPORT OF DEFENDANT AND RESPONDENT SONY ELECTRONICS, INC.

INTRODUCTION

In 1941, the Legislature faced a choice between allowing the statute of limitations for actions alleging pre-birth injuries to be tolled during the child's minority, or not. It concluded that the statute of limitations should *not* be tolled during minority, and that six years is enough time for a plaintiff to sue. In doing so, the Legislature balanced plaintiffs' interest in pursuing a meritorious claim and the burden upon defendants to locate witnesses and

produce evidence as time passes. In 1954, the discovery rule was held to apply to these actions, mitigating any harsh effects that an absolute statute of limitations might have had. Petitioner now argues, in part, that after over seventy years, the Legislature has decided to upend its careful balance and adopt what it rejected, even though it stated absolutely no intention to do so. That cannot be.[1]

The purpose of a statute of limitations is to ensure cases are resolved while evidence is fresh, witnesses are available, and memories have not faded. The importance of this purpose cannot be understated. Yet, adopting Petitioner's argument would contravene this purpose.

Nguyen is the perfect example why this Court should uphold the Second Appellate District's decision and allow the Section 340.4 statute of limitations to serve its purpose. In *Nguyen*, plaintiff Hahn Nguyen's allegations primarily concern her mother, who worked at a Western Digital manufacturing facility from 1987 to 1998. Specifically, Nguyen alleges her mother spoke with health service providers affiliated or employed by Western Digital during that time, and those health service providers concealed

---

[1] Western Digital Corporation (Western Digital) agrees with the majority's analysis in *Lopez v. Sony Electronics, Inc.* (2016) 247 Cal.App.4th 444 (*Lopez*), and with the arguments presented by respondent Sony Electronics, Inc. (Sony) and other *amici curiae* supporting Sony. Western Digital does not rehash those arguments, but instead addresses the purpose of the statute of limitations, and the practical impact this case has on at least one company defending against an action alleging birth or pre-birth injuries caused by exposure to hazardous materials or toxic substances.

and suppressed material facts from her. Nguyen's mother, the only known witness to these alleged conversations, died in 2011. The manufacturing facility at which she worked closed in 2001 – almost two decades ago. And Nguyen's mother never identified the health service providers she spoke with. Even if Western Digital could identify and locate those health service providers, their memories of specific conversations from over twenty years ago have most likely faded. The passage of time has impaired Western Digital's ability to locate, interview, depose, and cross-examine key witnesses.

Section 340.4 bars Nguyen's action and removes Western Digital's heavy and unfair defense burden. Nguyen's action is, however, potentially timely under Section 340.8.[2] The purpose of the statute of limitations is only served by applying Section 340.4 rather than Section 340.8. Had the Legislature intended to upset the delicate balance it had struck, and the longstanding expectations of defendants such as Western Digital, the Legislature would have expressly stated so. It did not. Western Digital respectfully requests the Court find that Section 340.4 applies to actions for birth and pre-birth injuries based on exposure to hazardous material or toxic substances, and affirm the decision of the Second Appellate District, Division Eight.

---

[2] Nguyen's action will nevertheless be barred if she cannot prove that her claims did not already expire before Section 340.8 took effect. (See *Nguyen*, *supra*, 229 Cal.App.4th at pp. 1542-1543.)

ARGUMENT

I.

Statutes of Limitations Ensure the Resolution of Cases While Evidence is Fresh, Witnesses are Available, and Memories Have Not Faded.

The "fundamental purpose underlying statutes of limitations" is "to protect defendants from having to defend stale claims by providing notice in time to prepare a fair defense on the merits." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1210 [quoting *Downs v. Department of Water & Power* (1977) 58 Cal.App.4th 1093, 1099].) Statutes of limitations "mark the point where, in the judgment of the legislature, the equities tip in favor of the defendant (who may be innocent of wrongdoing) and against the plaintiff (who failed to take prompt action)." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797 (*Pooshs*); see also *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1988) 18 Cal.4th 739, 755-756 [A statute of limitations "reflects the balance the Legislature struck between a plaintiff's interest in pursuing a meritorious claim and the public policy interests in prompt assertion of known claims."].)

In particular, statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898-899 (*Gutierrez*); *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [noting the goal of statutes of limitations "is the resolution of cases while the evidence is fresh, witnesses are

available, and memories have not faded."]; *Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 935 ["[Statutes of limitations] ensure that plaintiffs proceed diligently with their claims and mitigate the difficulties faced by defendants in defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation may present unfair handicaps."]; *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1117 [stating a statute of limitations "serves the important function of repose by allowing defendants to be free from stale litigation, especially in cases where evidence might be hard to gather due to the passage of time."]; *Pooshs, supra,* 51 Cal.4th at p. 797 [stating it is "unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available."]; see also *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.* (1987) 483 U.S. 143, 156 ["Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."] [quoting *Wilson v. Garcia* (1985) 471 U.S. 261, 271].)

II.

To Uphold the Purpose of the Statute of Limitations, This Court Should Find That Section 340.4 Continues to Apply to Actions Alleging Birth and Pre-Birth Injuries Caused by Exposure to Hazardous Material or Toxic Substances.

In 1941, the Legislature adopted a six-year statute of limitations for tort actions alleging birth or pre-birth injuries. (See *Olivas v. Weiner* (1954) 127 Cal.App.2d 597, 599.) In

rejecting the notion that an action for pre-birth injuries should be tolled during the child's minority, "[t]he Legislature undoubtedly concluded that to permit an action to be filed up to 22 years after the child's birth . . . placed an unreasonable burden upon the defendant to locate witnesses and to produce evidence in defense of the charges after the lapse of such a long period. The Legislature decided that six years was a reasonable time within which to bring such an action." (*Ibid.*) In 1954, the discovery rule was held to apply to these actions, mitigating any injustice that an absolute statute of limitations might have caused. (See *Myers v. Stevenson* (1954) 125 Cal.App.2d 399.)

For over seventy years, the six-year statute of limitations has applied to tort actions for birth or pre-birth injuries, including those allegedly caused by exposure to hazardous material or toxic substances, with few exceptions.[3] Petitioner argues that the Legislature's enactment of Section 340.8 in 2004 impliedly repealed Section 340.4's application to birth or pre-birth injuries allegedly caused by exposure to hazardous material or toxic substances. But given the purpose of the statute of limitations to promote "repose by giving security and stability to human affairs" (*Gutierrez, supra,* 39 Cal.3d at p. 899), and the balance the Legislature struck decades ago when it adopted the six-year statute of limitations and rejected tolling during minority, the argument that the Legislature impliedly repealed Section 340.4

---

[3] These exceptions include Sections 340.2 governing asbestos actions (see *Nelson v. Flintkote Co.* (1985) 172 Cal.App.3d 727, 730) and 340.5 governing medical malpractice actions (see *Young v. Haines* (1986) 41 Cal.3d 883, 891-894).

without a single mention that it intended to do so is untenable (see *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199).

The dissent in *Lopez* suggests that "the traditional justifications for statutes of limitations do not apply here since there is no real problem of loss of witnesses' memories. . . . [a] manufacturer's defense necessarily rests on documentary evidence which is typically kept in the course of business." (*Lopez, supra,* 247 Cal.App.4th at pp. 465-466 (dis. opn. of Rubin, J.) [quoting *Nelson v. Flintkote Co., supra,* 172 Cal.App.3d at p. 735].)[4] Not so. The Legislature's goals are just as important in these cases as in any other.

---

[4] The dissent in *Lopez* also suggests that "documents are now easier to store and retrieve than they were in 1985" when *Nelson v. Flintkote Co., supra,* 172 Cal.App.3d 727 was decided, because of "the advent of back-up hard drives, data storage clouds and other high tech devices" now commonly used. (*Lopez, supra,* 247 Cal.App.4th at p. 466 (dis. opn. of Rubin, J.).) Not only does this understate the importance of witness testimony and credibility, but many cases involve plaintiffs whose parents worked at manufacturing facilities during the 1970s, 1980s, and 1990s – not in 2017. (See, e.g., *Lopez, supra,* 247 Cal.App.4th at p. 447 [mother worked at facility from 1978 to 2000 and plaintiff born in 1999]; *Nguyen, supra,* 229 Cal.App.4th at pp. 1528-1529 [mother worked at facility from 1987 to 1998 and plaintiff born in 1994]; *Ovick v. National Semiconductor Corp.* (6th Dist. Sept. 25, 2014), No. H038108, 2014 WL 4783239, at *2 [mother worked at facility from 1976 to 1991, father worked at facility from 1980 to 1999, and plaintiff born in 1990] (*Ovick*); *Studendorff v. National Semiconductor Corp.* (6th Dist., Sept. 25, 2014), No. H037739, 2014 WL 4783253, at *2 [mother worked at facility from 1977 to 1987, father worked at facility from 1979 to 1989, and plaintiff born in 1987] (*Studendorff*).)

Nguyen is exactly the type of stale case that a statute of limitations (here, Section 340.4) is meant to bar, and a classic example where the statute's purpose would have been served. The plaintiff Hahn Nguyen alleges, for instance, that: (1) Western Digital provided health services, including nurses and physicians affiliated with or employed by Western Digital; (2) at least one health service provider falsely represented to Nguyen's mother that there was no causal connection between her occupational chemical exposure and Nguyen's injuries; and (3) Nguyen's mother relied on the advice and information provided by those health service providers. (See *Nguyen, supra,* 229 Cal.App.4th at pp. 1531, 1534.) These conversations would have occurred by 1998 at the latest, while Nguyen's mother still worked for Western Digital. (See *id.* at pp. 1553-1554.)

The only people with personal knowledge of these conversations would have been Nguyen's mother and the health service providers. Nguyen's mother died in 2011, over six years after the statute of limitations would have expired under Section 340.4. (See *Nguyen, supra,* 229 Cal.App.4th at p. 1542.) And Nguyen has never identified the health service providers her mother allegedly spoke with. To defend against Nguyen's allegations without her mother to testify or respond to discovery, Western Digital must now identify: (1) whom Nguyen's mother might have spoken with; (2) where they might now be; and (3) what they might remember from a conversation which might have occurred over twenty years ago. Further complicating matters, the manufacturing facility in which Nguyen's mother worked

closed in 2001, almost two decades ago. Finding unidentified individuals who might no longer be affiliated with Western Digital would be difficult, to say the least.

This is just the tip of the iceberg. Nguyen also alleged other representations made to her mother by various people, her mother's reliance on those representations, her mother's state of mind, and her mother's knowledge (or lack of knowledge) about certain facts and events. (See generally *Nguyen, supra,* 229 Cal.App.4th at pp. 1531-1532.) The *only person* with personal knowledge of many of these allegations died in 2011. Key evidence was lost forever, and other questions central to the case will never be answered. What other testimony might a deposition or cross-examination have uncovered? Would a trier of fact have found Nguyen's mother to be a credible witness?

The Sixth Appellate District's holding that Section 340.8 applied allows Nguyen to pursue her claims years after the Section 340.4 statute of limitations expired. (See *Nguyen, supra,* 229 Cal.App.4th at pp. 1542-1543, 1553-1554.) This has forced Western Digital to spend years defending a case in which "evidence has been lost, memories have faded, and witnesses have disappeared" (*Gutierrez, supra,* 39 Cal.3d at pp. 898-899) – the very problem the Legislature intended to avoid when it enacted the six-year statute of limitations.

Although not every case alleging birth or pre-birth injuries caused by exposure to hazardous material or toxic substances turns on the statute of limitations, *Lopez* and *Nguyen* are unlikely the only cases affected by the conflict between Section 340.4 and

Section 340.8. It potentially affects the many cases brought over the years alleging birth defects caused by (1) exposure to toxins at semiconductor manufacturing facilities;[5] (2) by ingestion of prescription drugs (see *Nelson v. Indevus Pharms., Inc.* (2006) 142 Cal.App.4th 1202; *Dillashaw v. Ayerst Labs., Inc.* (1983) 141 Cal.App.3d 35, 38);[6] and (3) other toxins in other industries.[7] This Court should find that Section 340.4, rather than Section 340.8, applies to these cases. That would uphold the Legislature's intent to allow plaintiffs six years from the day they discover their claims to sue, while not burdening defendants with decades-old cases in which evidence has become stale, witnesses have become unavailable, and memories have faded.

---

[5] See, e.g., *Ovick, supra*, 2014 WL 4783239; *Studendorff, supra*, 2014 WL 4783239; *Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451 [alleging birth defects caused by toxic exposure]; *Aguilar v. A.A. Circuit Tech., Inc.* (Super. Ct. L.A. County, No. BC467586) [same].

[6] See, e.g., *McClinton v. Smithkline Beecham Corp.* (Super. Ct. L.A. County, No. BC560920) [alleging birth defects caused by Paxil]; *M.S. v. McKesson Corp.* (Super. Ct. S.F. County, No. CGC-14-541121) [alleging birth defects caused by Prozac]; *C.A. v. Pfizer, Inc.* (Super. Ct. S.F. County, No. CGC-13-532573) [alleging birth defects caused by Zoloft]; *D.R. v. Pfizer, Inc.* (Super. Ct. Orange County, No. 30-2013-00628830-CU-PL-CXC [alleging birth defects caused by Effexor]; *Coleman v. Abbott Labs, Inc.* (Super. Ct. S.F. County, No. CGC-12-519757 [alleging birth defects caused by Depakote].

[7] See, e.g., *Alcantara v. Am. Honda Motor Co., Inc.* (Super. Ct. L.A. County, No. BC476543) [alleging birth defects caused by toxic exposure at Honda dealership and service facility].

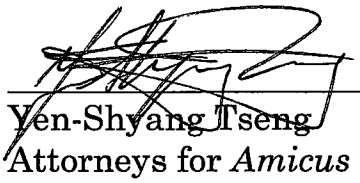
CONCLUSION

Western Digital respectfully requests this Court affirm the Second Appellate District, Division Eight's decision.

Dated: May 15, 2017

Respectfully submitted,

KELLER/ANDERLE LLP

By: 

Yen-Shyang Tseng
Attorneys for *Amicus Curiae*
Western Digital Corporation

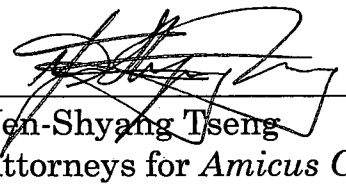
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 2,435 words as counted by the Microsoft Word program used to generate the brief.

Dated: May 15, 2017

KELLER/ANDERLE LLP



Yen-Shyang Tseng
Attorneys for *Amicus Curiae*
Western Digital Corporation

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

I, Lynda Gould, declare:

I am over the age of 18 and not a party to the within action. I am employed in the County of Orange, State of California. My business address is 18300 Von Karman Avenue, Suite 930, Irvine, California 92612.

On May 15, 2017, I served true copies of the foregoing document described as **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF WESTERN DIGITAL CORPORATION IN SUPPORT OF DEFENDANT AND RESPONDENT SONY ELECTRONICS, INC.** on the interested parties in this actions as follows:

BY OVERNIGHT NEXT DAY DELIVERY: On the above-mentioned date, I placed a true copy of the above mentioned document(s), together with this declaration, in a sealed envelope or package designated by the overnight delivery provider with delivery fees paid or provided for, at the addresses indicated on the attached service list and deposited same in a box or other facility regularly maintained by the overnight delivery provider or delivered same to an authorized courier or driver authorized by the overnight delivery provider to receive documents.

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

Executed on May 15, 2017.

Lynda Gould

Lynda Gould

SERVICE LIST

David Bricker
Michael B. Gurien
Waters Kraus & Paul
222 N. Sepulveda Blvd., Suite 1900
El Segundo, CA 90245
Tel: (310) 414-8146
Fax: (310) 414-8156
dbricker@waterskraus.com
lhalbany@waterskraus.com

Attorneys for Plaintiff and Petitioner

Steven J. Phillips
Phillips & Paolicelli, LLP
747 Third Avenue, 6th Floor
New York, NY 10017
Tel: (212) 388-5100
Fax: (212) 388-5200
sphillips@p2law.com

Attorneys for Plaintiff and Petitioner

David C. Strouss
Thornton Law Firm, LLP
100 Summer Street, 30th Floor
Boston, MA 02110
Tel: (617) 720-1333
Fax: (617) 720-2445
dstrouss@tenlaw.com

Attorneys for Plaintiff and Petitioner

William A. Bossen
Alejandro H. Aharonian
Cheryl A. Orr
Musick, Peeler & Garrett LLP
One Wilshire Blvd., Suite 2000
Los Angeles, CA 90017
Tel: (213) 629-7600
Fax: (213) 624-1376

Attorneys for Defendant and Respondent

Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102
Tel: (415) 865-7000

Supreme Court

Clerk of Court
Second Appellate District
Division Eight
300 South Spring Street, 3rd Floor
Los Angeles, CA 90013

Appellate Court

Clerk of Court
L.A. County Superior Court
Department 46
111 North Hill Street
Los Angeles, CA 90017

Superior Court