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IN THE SUPREME COURT OF CALIFORNIA

NICOLLETTE SHERIDAN,
Plaintiff and Appellant,

v.

TOUCHSTONE TELEVISION PRODUCTIONS, LLC,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR
CASE NO. B254489

PETITION FOR REVIEW

HORVITZ & LEVY LLP
MITCHELL C. TILNER (BAR NO. 93023)
*FREDERIC D. COHEN (BAR NO. 56755)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
mtilner@horvitzlevy.com
fcohen@horvitzlevy.com

MITCHELL SILBERBERG & KNUPP LLP
ADAM LEVIN (BAR NO. 156773)
AARON M. WAIS (BAR NO. 250671)
11377 WEST OLYMPIC BOULEVARD
LOS ANGELES, CALIFORNIA 90067-1683
(310) 312-2000 • FAX: (310) 312-3100
axl@msk.com
amw@msk.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
TOUCHSTONE TELEVISION PRODUCTIONS, LLC

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ISSUE PRESENTED

Whether a party must exhaust all available statutory administrative remedies, including those couched in permissive language, before filing a court action asserting rights under the statute, as the Court of Appeal held in *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708 (*Williams*); or whether a party may disregard those remedies and proceed directly to court, as the Court of Appeal held in this case.

INTRODUCTION
WHY REVIEW SHOULD BE GRANTED

Under the exhaustion of remedies doctrine, "where a right is given and a remedy provided by statute, the remedy so provided must ordinarily be pursued." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 83 (*Rojo*); *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321 (*Campbell*) [same].) If an aggrieved party fails to pursue an available administrative remedy, a court action asserting rights under the statute will be dismissed as premature. (*Miller v. United Airlines, Inc.* (1985) 174 Cal.App.3d 878, 890.)

While the exhaustion of remedies doctrine is well settled, the lower courts disagree about how it applies in cases where the statutory language includes the word "may" or similar terms, which suggest that an aggrieved party is permitted, but not required, to first seek administrative relief. In this case, for example, Labor Code section 6310[1] prohibits employers from terminating employees for complaining about unsafe working conditions. Section 6312 provides that an employee who believes a violation of section 6310 has occurred "*may* file a complaint with the Labor Commissioner pursuant to Section 98.7." (Emphasis added.) Section 98.7, subdivision (a), in turn provides that a person discharged "in violation of any law under the jurisdiction of the Labor Commissioner *may* file a complaint with the division within six months after the occurrence of the violation." (Emphasis added.)

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[1] Unless otherwise indicated, all further statutory references are to the Labor Code.

Similar permissive language appears in many statutes, including the Fair Employment and Housing Act (FEHA). (See Gov. Code, § 12960, subd. (b) ["Any person claiming to be aggrieved by an alleged unlawful practice *may* file with the department a verified complaint" (emphasis added)].)

The Court of Appeal held that, because sections 98.7 and 6312 use permissive language, an employee is not required to exhaust the remedies provided by the statutes before filing a civil action seeking damages under section 6310:

> The plain language of sections 6312 and 98.7 before the 2013 amendments did not require exhaustion. Both stated that a person who believed that he or she had been discriminated against in violation of the relevant Labor Code provisions "may," not "shall," file a complaint with the Labor Commissioner or the Division of Labor Standards Enforcement.

(Typed opn. 6.) The court concluded that a party therefore "may bring a civil action for violation of the Labor Code without first exhausting the remedy provided by section 98.7, subdivision (a)." (Typed opn. 11.) Two previous opinions reached the same conclusion, finding that Labor Code claims could be pursued without exhausting the remedies provided in section 98.7. (*Satyadi v. West Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022 (*Satyadi*); *Lloyd v. County of Los Angeles* (2009) 172 Cal.App.4th 320 (*Lloyd*).)

But these holdings directly conflict with previous appellate court opinions. In *Williams*, for example, the court rejected the argument that administrative remedies were optional even though they were expressed in permissive terms:

> Williams asserts that "may" as used in section 108:0906 means "may," not "must" or "shall." This semantic argument, one we often find convincing in construing the plain meaning of statutes, initially has appeal but is refuted by several cases holding that *even though an administrative remedy is couched in permissive language, the administrative remedy must be exhausted before filing a civil action*.

(*Williams*, *supra*, 121 Cal.App.4th at p. 732, emphasis added.) In *Marquez v. Gourley* (2002) 102 Cal.App.4th 710, 713-714 (*Marquez*), the court similarly held that "[e]xhaustion of administrative remedies is a jurisdictional prerequisite to judicial review of an administrative decision, 'even though the administrative remedy is couched in permissive language.' " Numerous other courts have reached the same conclusion.

Decades ago, in *Alexander v. State Personnel Bd.* (1943) 22 Cal.2d 198 (*Alexander*), this Court appeared to have put the issue to rest. The Court held that a terminated state employee had to exhaust all available administrative remedies before filing a court action, including filing a petition for rehearing with the State Personnel Board that had already denied the employee's claim. (*Id.* at pp. 199-200.) The Court rejected the argument that, because the Civil Service Act made that remedy optional and not mandatory, the employee could dispense with the rehearing request. (*Id.* at pp. 200-201.) However, the precedential authority of *Alexander* was cast in doubt when the Court in *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489 (*Sierra Club*) overruled the opinion, holding that parties henceforth would be deemed to have exhausted their administrative remedies

without filing a rehearing petition. The Court's holding in *Sierra Club* had nothing to do with the fact that the provision for rehearing petitions was couched in permissive language. It was based on the fact that rehearing petitions did nothing to further the goals that the exhaustion doctrine was designed to serve. (*Id*. at p. 501.) *Sierra Club* nevertheless left room for courts to question whether this Court still subscribed to the view that administrative remedies that *do* serve the purposes of the exhaustion doctrine had to be exhausted notwithstanding permissive language. As the Court of Appeal observed in this case, "[t]he California Supreme Court [has] not settled the issue." (Typed opn. 12.)

This case provides the Court with an opportunity to do so. The question whether available administrative remedies must be exhausted is of widespread importance. While section 98.7 was amended in 2014 to eliminate the exhaustion requirements in future cases under the Labor Code, the same issue will arise in connection with numerous other statutes that likewise describe administrative procedures as permissive, not mandatory. In prior opinions, appellate courts have assumed, without expressly analyzing the issue, that such remedies had to be exhausted. Those opinions are thrown into doubt by the opinion in this case, and by the opinions in *Lloyd* and *Satyadi*. Guidance from this Court is necessary to avoid confusion about the continued validity of numerous prior opinions that assumed statutory administrative remedies had to be exhausted even when couched in permissive terms, and to avoid future conflicts among the lower courts about this important and recurring issue.

STATEMENT OF THE CASE

A. Background facts

Touchstone hired Sheridan to play the character Edie Britt on the first season of the television series "Desperate Housewives." (1 AA 23-24.) The agreement gave Touchstone the exclusive option to renew Sheridan's services annually for an additional six seasons. (1 AA 143-144; typed opn. 3.) If Touchstone exercised its option to renew the contract for a given season, it agreed to pay Sheridan through the end of that season. Touchstone renewed the agreement in 2005, 2006, 2007, and 2008 for seasons 2, 3, 4, and 5, respectively. (RA 18; typed opn. 3.)

Sheridan alleges that in September 2008, while rehearsing a scene, the show's creator and executive producer, Marc Cherry, struck her. (1 AA 25-26; typed opn. 3.) Touchstone investigated the incident, though Sheridan claims the studio merely went through the motions without giving serious consideration to her complaint. (1 AA 28.) At the end of its investigation, the studio concluded that Sheridan had not been mistreated and that Cherry had simply been giving her directions for the scene. (1 AA 30.)

In February 2009, Touchstone informed Sheridan that her character would die in a car accident during an upcoming episode. (1 AA 29; *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 679.) Sheridan performed in three more episodes, she was paid for the remainder of the season, and her

profit participation vested. (1 AA 25, 29; *Touchstone*, at p. 683.) Her contract was not renewed for Season 6.

B. Procedural History

Sheridan sued Touchstone for wrongful termination in violation of public policy, alleging that Touchstone fired her because she complained about the alleged battery. (1 AA 1.) The jury deadlocked on the claim, and the court declared a mistrial. (Typed opn. 3.) Touchstone then filed a motion for nonsuit, renewing an argument it previously made that Sheridan could not pursue a claim for wrongful termination because she had not been terminated. Instead, her contract simply had not been renewed. The Court of Appeal granted Touchstone's petition for writ of mandate and directed the superior court to grant Touchstone's motion for a directed verdict, but to permit Sheridan to file an amended complaint alleging a new cause of action under section 6310. (*Ibid*.)

Sheridan filed a second amended complaint against Touchstone that alleged a claim solely under section 6310. (1 AA 22.) Specifically, she alleged that Touchstone discharged or otherwise discriminated against her because she had complained about unsafe working conditions on the set. (1 AA 32.)

Touchstone demurred, arguing that Sheridan failed to exhaust her administrative remedies by filing a claim with the Labor Commissioner under sections 98.7 and 6312. The trial court overruled the demurrer, finding that exhaustion of administrative

remedies was not required before pleading a violation of section 6310. (Typed opn. 3.)

Touchstone filed a second petition for writ of mandate. While the writ was pending, in August 2013, the Third Appellate District held that an employee must exhaust the administrative remedy set forth in section 98.7 before filing a complaint for retaliatory discharge in violation of section 6310. (See *MacDonald v. State of California* (2013) 161 Cal.Rptr.3d 520, petition for review denied and opinion ordered depublished, November 26, 2013, S213450 (*MacDonald*).) The Court of Appeal denied Touchstone's petition for writ of mandate without prejudice to Touchstone filing a motion for reconsideration in the trial court in light of *MacDonald*.

Touchstone renewed its demurrer in the trial court. At a hearing, the trial court found that *MacDonald* controlled, sustained the demurrer, and dismissed Sheridan's complaint without leave to amend because she failed to exhaust her administrative remedies.

On November 26, 2013, this court denied a petition for review in *MacDonald* and ordered the opinion depublished.

Sheridan filed a motion for new trial and a motion for reconsideration, arguing that, in light of *MacDonald*'s depublication and a recent amendment to section 98.7 that dispensed with the exhaustion requirement, it was now clear she was not required to exhaust administrative remedies. The trial court denied Sheridan's motion for new trial. However, the court subsequently granted Sheridan's motion for reconsideration, overruled Touchstone's demurrer, and ordered that a case management conference be held.

Touchstone filed a third writ petition. The Court of Appeal issued an alternative writ of mandate, requiring the court to enter a new order denying Sheridan's motion for reconsideration on the ground that the trial court lacked jurisdiction to consider the matter. The trial court vacated the order granting Sheridan's motion for reconsideration and entered a new order denying the motion on the ground that it lacked jurisdiction to reconsider the matter. Sheridan appealed.

C. The Court of Appeal opinion

The Court of Appeal reversed the judgment on the ground that sections 98.7, subdivision (a) and 6312 each provide that an aggrieved employee "may," not "must," file a claim with the Labor Commissioner before filing suit. The court interpreted this language to mean that the administrative remedies were optional, not mandatory:

> The plain language of sections 6312 and 98.7 before the 2013 amendments [which eliminated the exhaustion requirement going forward] did not require exhaustion. Both stated that a person who believed that he or she had been discriminated against in violation of the relevant Labor Code provisions "may," not "shall," file a complaint with the Labor Commissioner or the Division of Labor Standards Enforcement. As provided in section 15, enacted in 1937, as used in the Labor Code, " 'Shall' is mandatory and 'may' is permissive." Thus, a straightforward reading of the statutes establishes an administrative claim is permitted, but not required.

(Typed opn. 6, fn. omitted.) The court held that its conclusion was supported by *Lloyd* and *Satyadi*, both of which held that Labor Code remedies were optional. (Typed opn. 10-11.) The court did not explain how its opinion could be reconciled with numerous other opinions holding that administrative remedies must be exhausted even when couched in permissive language.

LEGAL ARGUMENT

REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE LOWER COURTS ON THE ISSUE WHETHER STATUTORY ADMINISTRATIVE REMEDIES MUST BE EXHAUSTED EVEN WHEN COUCHED IN PERMISSIVE LANGUAGE.

A. The lower courts are divided.

The doctrine of exhaustion of administrative remedies is well established in California. "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292 (*Abelleira*).)

Until recently, it appeared equally well established that administrative remedies had to be exhausted even if they were described as permissive. In *Alexander*, the Court rejected the argument that courts should "distinguish between a provision in a statute which *requires* the filing of a petition for rehearing before an administrative board as a condition precedent to commencing proceedings in the courts . . . and a provision such as in the present act which it is claimed is permissive only." (*Alexander*, *supra*, 22 Cal.2d at p. 200, emphasis added.) In *Flores v. Los Angeles Turf Club* (1961) 55 Cal.2d 736, the Court held a statute that provided the aggrieved party " '*may* apply to the board for a hearing' " had to

be exhausted " 'even though the *terms* of the statute do not make the exhaustion of the remedy a condition of the right to resort to the courts.' " (*Id*. at pp. 739, 747, emphasis added.) Numerous appellate courts have reached the same conclusion, explicitly holding that administrative remedies must be exhausted even if they are described as permissive. (*Williams*, *supra*, 121 Cal.App.4th at p. 732; *Marquez*, *supra*, 102 Cal.App.4th at p. 713; *County of Los Angeles v. Farmers Ins. Exchange* (1982) 132 Cal.App.3d 77; *Morton v. Superior Court* (1970) 9 Cal.App.3d 977; *People v. Coit Ranch Inc.* (1962) 204 Cal.App.2d 52; *Woodard v. Broadway Fed. S. & L. Assn.* (1952) 111 Cal.App.2d 218.) Other courts, without discussing the fact that a remedy was described as permissive, have held the remedy must be exhausted. (*Abelleira*, *supra*, 17 Cal.2d at pp. 291-292; *Rojo*, *supra*, 52 Cal.3d at p. 83; *Park 'N Fly of San Francisco, Inc. v. City of South San Francisco* (1987) 188 Cal.App.3d 1201, 1207.)

Abelleira is the only one of these opinions the Court of Appeal discussed. The court held that *Abelleira* did not support the conclusion that remedies couched in permissive terms must be exhausted because it involved a provision of the California Unemployment Insurance Act that "explicitly required an employee to resort to administrative remedies." (Typed opn. 9.) The court misconstrued the issue in *Abelleira*. It involved a challenge *by employers* to a decision of the California Employment Commission's adjustment unit finding that their employees were entitled to unemployment insurance benefits. The relevant statute for challenging this decision was permissive, not mandatory. As this

Court explained, "[i]f payment is ordered, any employer whose reserve account is affected by the payment *may* intervene and appeal, and payment will be stayed pending said appeal." (*Abelleira*, *supra*, 17 Cal.2d at p. 283, emphasis added.) Despite this permissive language, the Court held the administrative remedy had to be exhausted before the employers filed a court action challenging the agency decision. "The employers have no standing to ask for judicial relief because they have not yet exhausted the remedies given them by the statute." (*Id.* at p. 291.)

The only other opinion the Court of Appeal discussed (apart from *Lloyd* and *Satyadi*) was *Campbell*. (Typed opn. 6-8.) It reasoned that *Campbell* did not support Touchstone's position that statutory remedies described as permissive must be exhausted because the Regent's internal review policy "*required* the plaintiff 'to resort initially to internal grievance practices and procedures' before filing suit." (Typed opn. 8.) In the quoted statement, the *Campbell* Court was simply pointing out that an aggrieved employee *had* an administrative remedy. Only at that point in the opinion did the Court turn to the question whether the remedy had to be exhausted. (*Campbell*, *supra,* 35 Cal.4th at p. 324 ["Campbell next contends that neither Government Code section 12653, subdivision (c), nor Labor Code section 1102.5 [the statutes Campbell alleged the Regents violated] requires her to exhaust her administrative remedies"].) Because neither statute included an explicit exhaustion requirement, the employee, who had failed to exhaust these remedies, argued the administrative remedies did not need to be exhausted. (*Id.* at pp. 325, 327, 329.) This Court

disagreed, holding that the Legislature's silence "makes the common law exhaustion rule applicable here and requires employees to exhaust their internal administrative remedies prior to filing a lawsuit." (*Id.* at pp. 328, 330.)

Abelleira and *Campbell* therefore support Touchstone's position that statutory administrative remedies must be exhausted even when the statute uses permissive language, such as the word "may." And the Court of Appeal failed to address numerous other cases in which courts explicitly held that remedies that use permissive language must be exhausted.

In her briefing, Sheridan agreed these opinions conflict with her position, but she argued either that the courts' reasoning "makes no sense" (ARB 6), or that the cases were distinguishable on their facts (ARB 6-7). Sheridan is wrong in both respects: the opinions make eminent sense and they are not distinguishable. For present purposes, however, the important point is that appellate courts have adopted diametrically opposite positions concerning whether remedies couched in permissive language must be exhausted, and the conflict needs to be resolved.

B. The Labor Code is not distinguishable from other statutes that also describe administrative remedies in permissive terms.

Below, Sheridan argued that sections 98.7 and 6312 can be distinguished from other statutes that use permissive language to describe administrative remedies because section 15 expressly

states " '[s]hall' is mandatory and 'may' is permissive." (ARB 5.) But this is no distinction; the same definitions appear in many statutory schemes. (See, e.g., Gov. Code, § 14 [same definition]; Veh. Code, § 15 [same definition]; Bus. & Prof. Code, § 19 [same definition].) Furthermore, section 15 is of marginal significance because it defines the words "may" and "shall" the same way they are used in everyday speech, and the way they would be understood in the statutes even without section 15. Courts that have held remedies must be exhausted *assumed* the terms were being used the way they are defined in section 15. As the Court of Appeal explained in *Williams*, "Williams asserts that 'may' as used in section 108:0906 means 'may,' not 'must' or 'shall.' This semantic argument . . . is refuted by several cases holding that even though an administrative remedy is couched in permissive language, the administrative remedy must be exhausted before filing a civil action." (*Williams*, *supra*, 121 Cal.App.4th at p. 732.)

In other words, the definitions of "may" and "shall," which are generally consistent across statutory schemes, do not determine whether administrative remedies must be exhausted. The determinative factors are the policies that weigh in favor of exhausting administrative remedies. Those policies include "easing the burden on the court system, maximizing the use of administrative agency expertise and capability to order and monitor corrective measures, and providing a more economical and less formal means of resolving the dispute." (*Rojo*, *supra*, 52 Cal.3d at p. 83.)

Sheridan also argued that section 98.7 does not require exhaustion because subdivision (f) of the statute provides that the rights and remedies provided in the statute "do not preclude an employee from pursuing any other rights and remedies under any other law." (AOB 14-15, quoting § 98.7, subd. (f).) The Court of Appeal in *Lloyd* reached the same conclusion. (*Lloyd*, *supra*, 172 Cal.App.4th at p. 331.) Contrary to Sheridan's position and the court's conclusion in *Lloyd*, section 98.7, subdivision (f) does not excuse the exhaustion requirement for claimants asserting rights under the statute. It provides that if "remedies [are provided] under any *other* law," the employee may pursue those other remedies. (§ 98.7, subd. (f), emphasis added.) In other words, a claim under the Labor Code is not necessarily an employee's exclusive remedy, and the employee is not required to exhaust her administrative remedies as a condition precedent to pursuing *non*-statutory claims. (*Rojo*, *supra*, 52 Cal.3d at p. 88 ["exhaustion is not required before filing a civil action for damages alleging nonstatutory causes of action"].) But if an employee wishes to pursue a *statutory* claim, the administrative remedies provided by section 98.7 must be exhausted.

Finally, again echoing *Lloyd*, Sheridan argued that, since the Labor Code Private Attorney General Act of 2004 (PAGA) allows employees to file private suits to obtain civil penalties against employers that previously could be obtained only by the Labor Commissioner, it would be anomalous to construe section 98.7 to require exhaustion of administrative remedies before an employee can file a private suit. (AOB 35-36; see *Lloyd*, *supra*, 172

Cal.App.4th at p. 332.) This logic is faulty because PAGA itself requires an employee to exhaust available administrative remedies before filing a civil action under PAGA to recover civil penalties. (§ 2699.3, subd. (a) ["A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following [administrative] requirements have been met"]; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1148 ["The PAGA 'was amended shortly after its effective date, as of August 11, 2004, to, among other things, require exhaustion of administrative procedures before an action may be filed' "].) *Lloyd*'s reliance on a statute that requires exhaustion of administrative remedies to support its conclusion that section 98.7 does *not* require exhaustion of administrative remedies is unsupportable.

C. Review is necessary even though section 98.7 has been amended, because numerous other statutory schemes describe administrative remedies in permissive language.

Effective January 1, 2014, the Legislature amended section 98.7 by adding subdivision (g), which provides that "[i]n the enforcement of this section, there is no requirement that an individual exhaust administrative remedies or procedures." At the same time, the Legislature enacted section 244, subdivision (a), which provides that an individual is not required to exhaust

administrative remedies before pursuing a civil action under *any* provision of the Labor Code, unless the code expressly requires exhaustion. As a result of these amendments, the question raised in this petition will have limited effect on future Labor Code actions. After January 1, 2014, exhaustion of Labor Code remedies is no longer required.

But the Court of Appeal's opinion has significance beyond Labor Code cases. Numerous statutes and regulations describe administrative remedies in permissive terms. (See, e.g., Bus. & Prof. Code, § 19573; Ins. Code, § 1858; Unemp. Ins. Code, § 1328; Gov. Code, § 12960; Veh. Code, §§ 8202, 13558, subd. (a); Fin. Code, § 50319; Pub. Util. Code, § 99581; Housing Authority of the City of Los Angeles Personnel Rules, Chapter 108, § 108:0906 http://goo.gl/yFcSbx [as of Nov. 24, 2015]; see also *Williams*, *supra*, 121 Cal.App.4th at p. 715.) Litigants claiming rights under those and similar statutes and regulations need to know whether to pursue their claims administratively before filing court actions. The current state of the law leaves that question in doubt. This Court should grant review and remove that doubt.

CONCLUSION

For the reasons explained above, this Court should grant Touchstone's petition for review.

November 25, 2015

HORVITZ & LEVY LLP
MITCHELL C. TILNER
FREDERIC D. COHEN
MITCHELL SILBERBERG & KNUPP LLP
ADAM LEVIN
AARON M. WAIS

By: _____
Frederic D. Cohen

Attorneys for Defendant and Respondent
TOUCHSTONE TELEVISION PRODUCTIONS, LLC

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 3,944 words as counted by the Microsoft Word version 2010 word processing program used to generate the petition.

Dated: November 25, 2015

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Frederic D. Cohen

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 November 25, 2015, I served true copies of the following document(s) described as **PETITION FOR REVIEW** 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 November 25, 2015, at Encino, California.

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Jo-Anne Novik

SERVICE LIST

Sheridan v. Touchstone Television Productions, LLC
Court of Appeal Case No. B254489

Counsel Name / Address	**Party Represented**
Robin Meadow Greines, Martin, Stein & Richland LLP 5900 Wilshire Blvd., 12th Floor Los Angeles, CA 90036	Counsel for Plaintiff and Appellant **Nicollette Sheridan**
David P. Crochetiere Baute Crochetiere & Gilford LLP 777 S. Figueroa Street, Suite 4900 Los Angeles, CA 90017	Counsel for Plaintiff and Appellant **Nicollette Sheridan**
Hon. Michael L. Stern Los Angeles County Superior Court 111 N. Hill Street, Dept. 62 Los Angeles, CA 90012	Trial Judge [LASC Case No. BC435248]
Clerk of the Court Second District, Division Four California Court of Appeal 300 South Spring Street 2nd Floor ● North Tower Los Angeles, CA 90013	Electronic Copy Submitted to the Second District Court of Appeal through the Appellate Court Case Management System (ACCMS).