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February 20, 2018

Honorable Justice Sandy R. Kriegler
Division 5
California Court of Appeal
300 S. Spring Street
Los Angeles, CA 90012

**Via True Filing**

Re: *Inversiones Papaluchi, etc. v. Superior Court*
Case No. B285092
Opinion Issued February 14, 2018
**Request for Publication of Opinion [Rule 8.1120(a)]**

Honorable Justice Kriegler:

Pursuant to Rules 8.1120(a) and 8.1105(c), Petitioners respectfully request that the opinion in *Inversions Papaluchi, etc., et al v. Superior Court* issued February 14, 2018 be certified for publication, as publication will provide substantial guidance to the bench and the bar in addressing the means and manner required under California law to effect service of process in a foreign country that has adhered to the Hague Service Convention, and for each of the following reasons:

Rule 8.1105(c) provides: "Except as provided in (e), an opinion of the Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court." Subsection (c) provides the standards for certification. Petitioners believe that paragraphs (4), (5), (6) and (7) are applicable to this request.

8.1105(c)(3): "Modifies, explains, or criticizes with reasons given, an existing rule of law" and (4): "Advances a new interpretation, clarification, criticism or construction of a provision of a constitution, statute, ordinance or court rule;":

*Inversiones* is the first California appellate court to apply the U.S. Supreme Court's June 12, 2017 holding in *Water Splash v. Menon*, 137 S.Ct. 1504, 1507 (*Water Splash*). Applying *Water Splash*, this court held: "The forum state (California) must

affirmatively authorize service by international mail." The *Inversiones* decision clarifies, for the first time, that California litigants and courts must follow *Brockmeyer v. May,* 383 F.3d 798, 808-809 (9th Cir, 2004); that *Brockmeyer* is not a rule applicable solely to federal courts and litigants in the Ninth Circuit; that it applies to California litigants attempting service of process in countries bound by The Hague Service Convention. Moreover, *Inversiones* clarifies that California law concerning service of process must be followed even in Hague Convention cases.

Publication of this case will provide a necessary update to California case law, particularly *Denlinger v. Chinadotcom Corp.* (2003) 110 Cal.App.4th 1396. Although *Denlinger* held that Hague Service Convention allowed service of summons by mail, it was silent as to type of mail service permitted. Read alone, *Denlinger*'s silence could be understood as *allowing* service of a summons without regard to the requirements of, for instance, C.C.P. sections 415.30 and 415.40. It is the ambiguities in the prior cases that gave to the Real Parties in Interest in this case, the arguments that those sections were inapplicable if Colombian law on service of process was satisfied.

This court wrote: "the Hague Service Convention was intended to provide a simpler way to serve process abroad." Yet the simple way contained ambiguity. This court observed that *Water Splash* resolved "a question that has divided both federal and California courts." The U.S. Supreme Court took up the *Water Splash* case to resolve a 30-year split among the circuits over whether "send" meant "serve" under Article 10(a) such that summons could be served by mail. On December 12, 2017, a New Jersey federal court, applying *Water Splash,* noted its prior incorrect interpretations that Hague Service Convention Article 10(a) itself authorized mail service. *Trzaska v. L'Oreal USA, Inc.* (D. N.J. Dec. 12, 2017) 2017 WL 6337185, fn 5. This court issued its writ of mandate to correct a California trial court's misinterpretation.

Rule 8.1105(c) (6): "Involves a legal issue of continuing public interest" and (7): "Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history o a provision of a constitution, statute or other law":

Absent published direction from a California court post-*Water Splash,* confusion will continue among California litigants. Case law states The Hague Service Convention itself does not expressly authorize service by mail. Yet California service statutes like Code of Civil Procedure §413.10(c) state they are subject to the Hague Convention. Litigants looking to standard California practice guides find: "Interpretation of the Hague Convention is a question of *federal law.*" (emphasis in original). Weil & Brown, Cal. Practice Guide: *Civil Procedure Before Trial* (The Rutter

Group 2016) ¶¶ 4:329, p. 4-56. At the same time, California state court litigants may not believe the *Brockmeyer* approach is applicable to them as it is a Ninth Circuit Court of Appeals case, and the California Supreme Court held "lower federal court decisions may be entitled to great weight but they are not binding on this court." *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 835. Publishing *Inversiones* will remove that confusion.

It cannot be gainsaid that California is a leader in the global economy. California citizens and businesses are increasingly involved in business and consumer transactions with foreign corporations and citizens. Litigation often arises from these transactions. The combined ports of Los Angeles and Long Beach, California are perhaps the busiest in the United States. They handle two-thirds of all ocean cargo volume on the West Coast, and more than one-third of all volume in the U.S. The Port of Los Angeles currently ranks as the 19th busiest port in the world in terms of container volume and Long Beach ranks 21st. Combined, they would rank 9th in the world.[1] This opinion is of great importance to all who might be caught up in California based litigation with persons or entities located abroad.

A published opinion, which may be relied on by such litigants and courts, will clarify compliance with mandatory Hague and California service procedure.

The *Inversiones* opinion provides an ideal vehicle for procedural direction, because the issues it decided are generally applicable to all Hague Service Convention litigants. *Inversiones* also clarified:

- "[T]he validity of. . .service by Federal Express must come from California law."
- "...in order to fully comply with the Hague Service Convention, the forum state (California) must *affirmatively* authorize service by international mail."
- Code of Civil Procedure "Section 413.10, subdivision (c), does not affirmatively authorize service by mail, let alone Federal Express."
- Service made under Article 19 of The Hague Service Convention must comply with the foreign country's service procedures, and proof of service filed must strictly comply with Code of Civil Procedure, section 417.20. This holding is vital to the public as *there is a paucity of case authority concerning Article 19.*
- A trial court cannot extend the 3-year service of summons deadline by a garden variety extension application, but only upon a showing of the express exceptions under C.C.P. section 583.240.

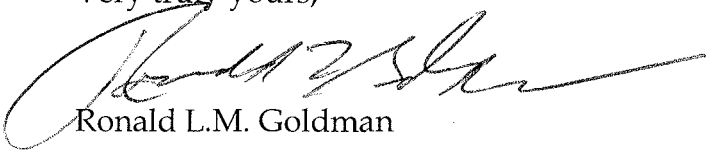
[1] http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports

- Although estoppel might be available to excuse late service, it is rarely available as an exception to timely service under C.C.P. section 583.240 when the party is represented by counsel.

*Water Splash* arose from a Texas state court case. The U.S. Supreme Court remanded the case to the Texas court to determine if the service methods used, including Federal Express, were affirmatively authorized under Texas law. Upon remand, in a published opinion issued January 9, 2018, the Texas court in the *Water Splash* case, applied the Supreme Court's *Brockmeyer* approach to Texas law and found the service method was not affirmatively authorized under Texas law. It ruled that service was "defective under both the Texas Rules of Civil Procedure and under the Hague Service Convention." *Menon v. Water Splash* (2018 WL 344040 *5). In *Inversiones*, this court made that determination for California law.

Courts do not often issue a civil opinion so universally, and critically, applicable to such an important and fundamental subject of civil procedure: the steps necessary to effectively serve process on foreign defendants. For all the reasons discussed, it is respectfully requested that this court certify the *Inversiones* opinion for publication.

Very truly yours,



Ronald L.M. Goldman

RLMG:mdc

**PROOF OF SERVICE**

**[C.C.P. §1013(c)]**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 12100 Wilshire Blvd., Suite 950, Los Angeles, CA 90025.

On February 20, 2018, I served the following document(s):

**REQUEST FOR PUBLICATION OF OPINION [RULE 8.1120(A)]**

on the Respondent and Real Parties in Interest in this Writ Petition by email, mail, and this Court of Appeal's True Filing electronic filing and service system.

Executed on February 20, 2018, at Los Angeles, California.

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

Michael Cornwell

Typed/Printed Name

M. Cornwell

Signature

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