KOSS FIRM www.kossfirm.com

100 Pine Street, Suite 1250
San Francisco, CA 94111
Telephone: (650) 753-1810
Facsimile: (650) 753-1831

July 13, 2018

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

Re: ***Pebley v. Santa Clara Organics, LLC***
Supreme Court Case No. S249399
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

In accordance with Rule 8.500(g) of the California Rules of Court, *amicus curiae* DRI–The Voice of the Defense Bar (www.dri.org) writes in support of the Petition for Review in this case.

This is the quintessential case deserving California Supreme Court review as it falls squarely within both requirements of Rule 8.500(b)(1). First, the issue of the proper measure of damages in a personal injury action arises in thousands of California cases every year, not to mention the plethora of out-of-state cases looking to California for guidance in the application of law. Second, the Court of Appeal's decision in *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266 widens a developing conflict among the various panels of the Court of Appeal regarding application of this Court's holding in *Howell v. Hamilton Meats and Provisions, Inc.* (2011) 52 Cal.4th 541. Review is thus necessary both "to settle an important question of law" and "to secure uniformity of decision." (Rule 8.500(b)(1).)

INTEREST OF DRI–THE VOICE OF THE DEFENSE BAR

DRI is an international membership organization that includes more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys; promoting appreciation of defense attorneys in

the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. DRI has long been a voice in making the civil justice system fairer, more efficient, and more consistent. To promote these objectives, DRI participates as *amicus curiae* in carefully selected cases raising issues important to its members, their clients, and the civil justice system. DRI's *amicus* participation focuses largely on matters before the U.S. Supreme Court, but occasionally participates as *amicus curiae* in state supreme court proceedings where, as here, the legal issues are extraordinarily important and have potential nationwide impact.

Pebley presents just such an issue. The California Supreme Court has been at the forefront of tort law for the better part of the past century. Cases such as *Dillon v. Legg* (1968) 68 Cal.2d 728, *Li v. Yellow Cab Co.* (1975) 13 Cal. 3d 804, and *Howell* itself, are cited throughout the country as persuasive authority. *Pebley* offers this Court the opportunity to resolve the law on an issue of immense public import regarding medical expenses and insurance and to resolve a budding and ever-expanding split among the District Courts of Appeal regarding how to apply the *Howell* standard set forth by this Court.

Undersigned counsel for DRI has reviewed the petition and answer, the briefing in the Court of Appeal, and the decision of the Court of Appeal, and believes that DRI can provide an important pragmatic perspective on this case. No party has funded this amicus letter, nor has any party drafted any part of it. It is solely the work of counsel representing DRI.

WHY REVIEW SHOULD BE GRANTED

A. *Pebley* is a drastic and far-reaching change in the public policy requiring that medical damages be both incurred and reasonable

1. *Pebley* erodes this Court's ruling in *Howell* that limited an injured plaintiff's damages to the amount paid by the insurance company

Seven years ago in *Howell*, this Court held that an injured party who receives medical treatment through his or her health insurance is limited to the lesser of the amount actually paid for the medical services or the reasonable value of those services, rather than the amount billed by the provider. (52 Cal.4th at p. 556.) Citing to a 2005 study, *Howell* noted that hospital billing was neither simple nor straightforward, and that the same treatment varied greatly in billed price between

facilities. (*Id.* at pp. 560-561.) Thus, *Howell* adopted the Restatement's market value approach to measure medical damages. (*Id.* at p. 556 [citing Rest.2d Torts, § 911].)

Since *Howell,* the lower courts have been called upon to decide its applicability in a number of situations, such as whether the full amount billed, as opposed to paid, is relevant to future medical damages (*see Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330-31 [holding that because "the full amount billed is not an accurate measure of the value of medical services," it is also "not relevant to a determination of the reasonable value of future medical services"]); and whether those same unpaid bills are admissible if an injured party is uninsured. (*See Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1330 [holding the amount billed was relevant in cases where the plaintiff was uninsured].)[1]

Howell was decided when the federal Affordable Care Act ("ACA") was still in its infancy, and the injuries in the subsequent cases cited above occurred before the ACA was fully implemented. Since *Howell,* the number of uninsured Americans has steadily dropped from 15.1% in 2011 to just 9% in 2017, a difference of almost 20 million people. States such as California, which operate their own exchanges (*i.e.*, Covered California) have even lower rates of uninsured residents than the country overall. Just 6.8% of Californians were not covered by health insurance in 2017. (*See* Health Insurance Coverage: Early Release of Estimates from the National Health Interview Survey, January–June 2017, https://www.cdc.gov/nchs/data/nhis/earlyrelease/insur201711.pdf [as of July 12, 2018].) Thus, the pool of truly uninsured personal injury plaintiffs who could be potentially subjected to fully billed rates from a medical provider is exceptionally small. And even those potential uninsured plaintiffs, as *Howell* noted, do not generally pay the full billed rates since medical providers are afforded wide latitude to offer uninsured patients with discounts and are required to do so for certain patients below the poverty line. (*Howell,* 52 Cal.4th at p. 561.)

Pebley did not involve one of those rare uninsured Californians. Rather, the plaintiff in *Pebley* was fully insured through Kaiser and treated at Kaiser immediately after the accident. Apparently, only after consulting with his lawyer did he decide to treat with a "lien doctor"–a doctor outside of his insurance who charged, but never collected, a rate many times higher than those generally paid by either insurance companies or uninsured individuals treating in a medical facility. Rather

[1] The conflict in the cases interpreting the relevance of amounts billed, as opposed to amounts paid, is discussed in further detail below.

than receiving payment when services are provided, a lien doctor obtains a lien on any potential recovery in the personal injury action, and expects payment after the case resolves. In most cases, a lien doctor will negotiate the amount of the lien down following resolution of the litigation.

The plaintiff in *Pebley* succeeded in convincing both the trial and appellate courts that he should be treated as an uninsured party, and thus not limited to the amount paid (or which would have been paid) by his insurer. (*Pebley*, 22 Cal.App.5th at p. 1277.) He was thus allowed to present evidence of the full amount billed despite the fact that it had not been paid.[2] (*Id.* at pp. 1278-1280.)

No one doubts a person's untethered right to treat with the doctor of his or her choosing. However, the law requires that damages be reasonable, and to that end requires that a plaintiff must mitigate his or her damages to the extent possible. In *Pebley*, the result was that the plaintiff was not required to mitigate his damages while the defense was precluded from presenting evidence of that failure to mitigate to the jury.

The plaintiff's decision in *Pebley* to treat with a doctor outside of his insurance plan, at a cost significantly higher than market rate and on a lien basis, begs the question of why. A look into the many publications before *Pebley*, including one by the plaintiff's own counsel, as well as several publications in the past two months since *Pebley*, shed light on those reasons.

2. Since *Howell*, plaintiffs' attorneys encourage use of "lien doctors" to inflate damages

Since the 2011 decision in *Howell*, plaintiffs' personal injury lawyers have searched for ways to circumvent its holding. Prior to *Howell*, and prior to the ACA when there were significantly more uninsured individuals, a lien doctor was a way for an injured party to receive medical care without having to pay for the services out of pocket. The lien doctor would treat the injured party, and bill for his or her services with an agreement not to collect unless and until there was a recovery in an ongoing lawsuit. Lien doctors served a desirable function by providing medical care to those that may not otherwise have been able to obtain it. For the small percentage

[2] The defense was effectively precluded from arguing for any other reasonable amount since the Court held in limine that the defense expert could not rely on what insurers typically pay in assessing the market value of the medical services.

of uninsured Californians who are personal injury plaintiffs, perhaps a lien doctor may still serve some utility; but that is not the case presented in *Pebley*.

Prior to *Howell*, there was no economic benefit to a plaintiff treating with a lien doctor rather than through his or her insurance, since the damages claimed would be the same. That all changed with *Howell*. While *Howell* did nothing more than limit damages to those actually incurred, the plaintiffs' bar viewed it as reducing overall recovery and effectively taking money out of their pockets. Plaintiffs' lawyers immediately sought out ways to circumvent this Court's ruling. For example, in an article cited by *Pebley*, the plaintiff's counsel from the case wrote that insured plaintiffs would be wise to forego use of their medical insurance, and instead treat with a lien doctor, which "effectively allows the plaintiff and his or her attorney to sidestep the insurance company and the impact of *Howell*, *Corenbaum*, and Obamacare." (*Pebley*, 22 Cal.App.5th at p. 1270.)

The plaintiff's counsel in *Pebley* was not the only member of the plaintiffs' bar proposing the use of lien doctors. An article in Plaintiff Magazine from April 2013 titled "Medical liens: Necessary evil or litigation advantage?" proposed the same thing. (Ellison, https://www.plaintiffmagazine.com/item/medical-liens-necessary-evil-or-litigation-advantage [as of July 12, 2018].) That article opens with the prescient statement: "Triggered in part by a 2011 California Supreme Court ruling, a trend is growing in plaintiffs' law practice within the state: seeking lien-based medical care for personal injury clients." The gamesmanship of lien doctors is evident, as one plaintiff's attorney quoted in the article succinctly put it:

> If I have a client who's on Medicare, and they have a $100,000 medical bill, Medicare pays $10,000. The only thing admissible at trial is that $10,000 … If I have a client who goes out and gets treated on a lien and is obligated to pay $100,000, then that's what they have to pay at the end of the case: $100,000. And I can introduce the entire $100,000 as a bill at the time of trial. (*Id.*)

Pebley allowed this deceptive tactic to be presented to the jury.

3. *Pebley* changes the landscape concerning how personal injury actions will be presented for trial

If any doubt remains as to the importance of *Pebley*, the Court need only look to the plethora or articles written on the case. Despite the case being published only

two months ago, a simple Google search for the phrase "Pebley v. Santa Clara Organics" turns up thousands of hits, including analysis from both the plaintiffs' and defense bars. Message boards on both sides of the aisle have lit up with analysis and guidance on how to use–or defend against–tactics sanctioned in the case. As mediator Floyd J. Siegal wrote: "Unless the decision is overturned by the California Supreme Court or abrogated by the legislature, the ruling in *Pebley* will almost certainly lead more plaintiffs to treat outside their insurance plans…" (Floyd, "Unmitigated" Success, http://www.fjsmediation.com/2018/06/unmitigated-success/ [as of July 12, 2018].)

In *Pebley*, the plaintiffs' bar achieved its goal when the Court allowed the plaintiff to ignore his insurance, with no explanation as to why he would do so, and present evidence of heavily inflated and unpaid bills from a lien doctor. At the same time, the defense was barred from presenting any evidence of the failure to mitigate. Allowing an insured person to forego insurance, for no ostensible reason other than to increase monetary damages in a lawsuit, is a drastic and far reaching policy change from the spirit of *Howell*.

It is not hard to predict the future of personal injury actions in a post-*Pebley* world. Despite the requirement that individuals maintain health insurance coverage, and the plain economic advantage of using that insurance, personal injury plaintiffs will be encouraged to forego their health insurance to seek treatment at much higher rates with lien doctors in hopes of substantially increasing their damages in a lawsuit. More than likely, those liens will then be negotiated down to a more reasonable rate, allowing the plaintiffs and their attorneys to recover more than they would otherwise be permitted. Any rule of law encouraging injured parties *not to use* their insurance benefits and allowing plaintiffs to circumvent the general rule requiring mitigation of damages, is of great import to the public at large. Accordingly, if such a broad and sweeping policy change is to be made, guidance from this Court is appropriate and, it is respectfully suggested, necessary.

B. A direct conflict now exists among different panels of the Court of Appeal regarding how to apply *Howell* for unpaid medical expenses.

The state of the law regarding the appropriate measure of medical damages in a personal injury action is murky, to say the least. *Howell* clarified the issue for a time. But the cases interpreting *Howell* have taken different paths, which lead to different-and irreconcilable-results. The trial judge in *Pebley* himself admitted as much, stating "I went to a class recently and in the class we discussed all this about

Corenbaum with judicial officers, and there's not a uniform opinion about what all this means, to be quite candid, and what to do about it." (Santa Clara Organics Petition for Review at p. 18.) The source of the confusion, for the trial judge, counsel, and the Courts of Appeal, stems from two competing lines of cases following *Howell*.

1. Under the *Corenbaum* line of cases, evidence of unpaid medical bills is irrelevant for any purpose

Howell left open the question of whether the full amount billed in unpaid medical expenses was relevant to future medical or noneconomic damages. In 2013, the Second District decided *Corenbaum*, answering that question in the negative and precluding expert testimony relying on the full amount billed as the basis for the reasonable value of future medical expenses. (215 Cal.App.4th at pp. 1330-1331.) Subsequent cases followed *Howell* and *Corenbaum* steadfastly and held they were not limited to cases involving parties covered by insurance.

Another Second District case, *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 138, involved a plaintiff who sought to introduce evidence of unpaid medical bills in support of his damages claim. (228 Cal.App.4th at p. 127.) Relying on *Howell*, *Corenbaum*, and *State Farm Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463,[3] *Ochoa* held: "[T]he full amount billed, but unpaid, for past medical services is not relevant to the reasonable value of the services provided. In our view, this rule is not limited to the circumstance where the medical providers had previously agreed to accept a lesser amount as full payment for the services provided." (228 Cal.App.4th at p. 135.) In explaining its analysis, *Ochoa* analyzed several pre-*Howell* cases regarding the introduction of medical liens into evidence, and specifically disagreed with many, including *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288 (pre-*Howell* case holding unpaid bills were admissible to show reasonable value of services).

In 2017, the First District followed the lead of *Corenbaum* and *Ochoa* in *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163. Citing *Corenbaum*,

[3] *State Farm* addressed a hospital's efforts to enforce a lien under the Hospital Lien Act, Civ. Code § 3045.1. Despite there being no pre-negotiated rate for services provided, *State Farm* held the amount billed was not substantial evidence supporting of the reasonable value of medical services provided. (216 Cal.App.4th at p. 1471.)

Cuevas held the trial court erred when it excluded medical payments made under the ACA and Medi-Cal. (*Id.* at pp. 179-180.)

Thus, the First and Second Districts (until *Pebley*) steadfastly applied *Howell* and held the full amounts billed by medical providers are inadmissible in any context. By contrast, the Third and Fourth Districts went in a different direction, limiting the holding of *Howell* to only those cases where there is a pre-negotiated rate. *Pebley*, out of the Second District, has extended that conflict to different divisions of the Second District.

2. Under the *Bermudez* line of cases, unpaid medical bills may be admitted in cases of uninsured parties.

Until 2015, the law regarding application of *Howell* appeared settled—unpaid medical bills were not relevant to show reasonable value of services in any context. However, in 2015, the Fourth District decided *Bermudez*, a case involving an uninsured plaintiff. *Bermudez* not only allowed evidence of unpaid medical bills to prove both past and future medical damages; it also criticized, and declined to follow, *Corenbaum* and *Ochoa*. (*Bermudez*, 237 Cal.App.4th at p. 1335, fn. 6, 1337.) *Bermudez* further relied upon the pre-*Howell* case of *Katiuzhinsky*, a case which *Ochoa* had held was no longer applicable in a post-*Howell* world.

Since *Bermudez*, the Third District has weighed in on the debate twice, both times siding with *Bermudez* and allowing evidence of the full amount of unpaid bills. (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996; *Moore v. Mercer* (2016) 4 Cal.App.5th 424.) In *Moore* specifically, the Court noted that *Ochoa* disagreed with *Katiuzhinsky*, but stated: "We need not delve into why *Ochoa*'s reasoning is faulty because defendant in the case before us did not object to the admission of the full amount of the bills at trial and therefore did not preserve the issue for review on appeal." (4 Cal.App.5th at p. 441.)

3. *Pebley* expands the conflict among the Districts and creates a new conflict between different Divisions of the Second District

Pebley is the latest in a line of decisions taking sides as to the meaning of *Howell*, including when, if ever, unpaid medical bills are admissible. In *Pebley*, the plaintiff had health insurance but chose not to use it. Both the Trial Court and Court of Appeal chose to treat him as uninsured and allowed him to present evidence of his full unpaid bills from the lien doctor. (22 Cal.App.5th at pp. 1275-1277.) At the same time, they refused the defense's attempt to present evidence of the plaintiff's

insurance, and thus his failure to mitigate his damages. (*Id.* at p. 1278.) In making its decision, *Pebley* acknowledged it was following *Bermudez*, and noted the *Bermudez* disagreement with *Ochoa*. (*Id.* at p. 1275.) By following *Bermudez* instead of *Ochoa*, *Pebley* perpetuated the conflict among Districts, and created a new conflict within separate divisions of the Second District.

C. Conclusion: The Court should Grant Review

Much has happened in the seven years since this Court's decision in *Howell*. The ACA, through Covered California, has been fully implemented, lowering the number of uninsured Californians to less than seven percent and thus lessening the likelihood of a truly uninsured plaintiff. The plaintiffs' bar has tried several ways to circumvent the *Howell* ruling, and increase their damages claims—some successful, some not. And Courts of Appeal have grappled with how to apply *Howell*'s standard in several contexts, reaching different conclusions. The issues presented by *Pebley* are ripe for review by this Court, so that the important public policy issues, as well as the direct split of authority, can be finally decided.

Review should be granted.

Respectfully submitted,

KOSS FIRM

By: 

Adam M. Koss
Attorney for *Amicus Curiae*
DRI-The Voice of the Defense Bar

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

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 San Francisco, State of California. My business address is 100 Pine Street, Suite 1250, San Francisco, CA 94111.

On July 13, 2018, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on July 13, 2018, at San Francisco, California.

Catherine Koss

SERVICE LIST
Pebley v. Estrada
B277893

Greyson M. Goody The Simon Law Group, LLP 34 Hermosa Ave. Hermosa Beach, CA 90254 (310) 372-7368 greyson@thesimonlawgroup.com	Attorneys for Plaintiff and Respondent DAVE PEBLEY
Jeffrey I. Ehrlich The Ehrlich Law Firm 237 W 4th Street Claremont, CA 91711-4710 (909) 625-5565 jehrlich@ehrlichfirm.com	Attorneys for Plaintiff and Respondent DAVE PEBLEY
Lisa Perrochet Steven S. Fleischman Horvitz & Levy LLP 3601 West Olive Avenue, 8th Floor Burbank, CA 91505 (818) 995-0800 lperrochet@horvitzlevy.com sfleischman@horvitzlevy.com	Attorneys for Defendants and Appellants JOSE PULIDO ESTRADA, NELSON SOMERS, BARBARA SOMERS and SANTA CLARA ORGANICS, LLC
Kevin M. McCormick Panda L. Kroll Benton, Orr, Duval & Buckingham 39 N. California Street Ventura, CA 93001 (805) 648-5111 kmccormick@bentonorr.com pkroll@bentonorr.com	Attorneys for Defendants and Appellants JOSE PULIDO ESTRADA, NELSON SOMERS, BARBARA SOMERS and SANTA CLARA ORGANICS, LLC
California Court of Appeal Second Appellate District Division Six Court Place 200 East Santa Clara Street Ventura, CA 93001 Case No. B277893 *Via TrueFiling*	Honorable Rocky J. Baio Superior Court of the State of California for the County of Ventura 800 South Victoria Avenue Ventura, CA 93009 Case No. 56-2013-00436036-CU-PA-VTA *Via U.S. Mail*