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Case No. S195031

In the Supreme Court of the State of California

SMRITI NALWA, M.D.,
Plaintiff and Appellant,

vs.

CEDAR FAIR, L.P.,
Defendant and Respondent.

APPLICATION OF THE CALIFORNIA SKI INDUSTRY ASSOCIATION AND THE NATIONAL SKI AREAS ASSOCIATION FOR LEAVE TO FILE ATTACHED AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT CEDAR FAIR, L.P.

On appeal from a Judgment of the California Court of Appeal, Sixth Appellate District, No. H034535, Reversing the Judgment of the Santa Clara Superior Court, Case No. 1-07-CV089189
The Honorable James P. Kleinberg

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STATEMENT OF INTEREST OF THE CALIFORNIA SKI INDUSTRY ASSOCIATION AND NATIONAL SKI AREAS ASSOCIATION AND REQUEST TO FILE ATTACHED AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Ski Industry Association and National Ski Areas Association request leave to file the attached amici curiae brief in support of Defendants/Respondents Cedar Fair, L.P.

INTEREST OF AMICI

Amicus Curiae, the California Ski Industry Association ("CSIA"), is a non-profit trade association representing 26 winter sports areas in California and Nevada, as well as a number of other businesses and individuals who earn their livelihood through the sports of skiing and snowboarding. The CSIA supports winter sports in California and Nevada by promoting the safety of skiers and snowboarders and by coordinating state and national legislative activities, risk management and technical training on behalf of the industry. The organization allows the California ski industry to speak with a single voice on important issues.

Amicus Curiae, the National Ski Areas Association ("NSAA"), is a non-profit trade association representing ski area owners and operators across the United States of America. NSAA represents 325 alpine resorts that account for more than 90 percent of the skier/snowboarder visits nationwide. Additionally, NSAA has 472 supplier members who provide

equipment, goods and services to the mountain resort industry. NSAA's primary objective is to support ski area owners and operators nationwide and to foster, stimulate and promote growth in the industry. The organization allows the nationwide ski industry to speak with a single voice on important issues.

Snow sports present risks of injury which are inherent in the activities and assumed by those who choose to participate in them. Due in part to this Court's landmark decisions in *Knight v. Jewett* (1992) 3 Cal.4th 296, *Ford v. Gouin* (1992) 3 Cal.4th 339, *Cheong v. Antablin* (1997) 16 Cal.4th 1063, *Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, and *Shin v. Ahn* (2007) 42 Cal.4th 482, CSIA and NSAA members have been able to operate their businesses under the settled rules of California's primary assumption of risk doctrine, without the specter of liability for injuries arising from inherent risks of snow sports and other recreational activities that they host. The issues involved in this case - the primary assumption of risk doctrine and the duty owed by operators to participants in recreational activities - are issues of great importance to CSIA and NSAA members. Many CSIA and NSAA members routinely are defendants in personal injury cases involving the defense of primary assumption of risk. The continued importance of these issues to CSIA in particular is evidenced by the fact that the organization has previously

appeared as amici curiae before this Court in the *Knight*, *Ford*, *Cheong*, *Kahn*, and *Shin* cases.

Counsel for CSIA and NSAA have read and are familiar with the briefs on the merits filed by the parties. CSIA and NSAA believe there is a necessity for additional briefing regarding the following points:

(1) Whether California's primary assumption of risk doctrine is limited to "sports" or if it applies to all activities with inherent risks;

(2) Whether activity providers have a duty not to increase the inherent risks of the activity as stated in *Knight v. Jewett*, or whether there is a further duty to minimize the inherent risks; and

(3) Whether the fact that an activity or its provider is regulated has any bearing on the application of primary assumption of risk.

IDENTITY OF PERSONS PREPARING THE BRIEF

Pursuant to Rule 8.520(f)(4) of the California Rules of Court, CSIA and NSAA also state that only CSIA and NSAA and their attorneys of record in this matter prepared the attached brief, and that no other person, including no party or counsel for a party in the pending appeal, authored the attached brief, in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief.

CSIA and NSAA respectfully request permission to file the attached amici curiae brief.

Dated: April 9, 2012

Duane Morris LLP

By: _____

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INTRODUCTION

A. Identity and Interest of the CSIA and NSAA

Amicus Curiae, the California Ski Industry Association ("CSIA"), is a non-profit trade association representing 26 winter sports areas in California and Nevada, as well as a number of other businesses and individuals who earn their livelihood through the sports of skiing and snowboarding. The CSIA supports winter sports in California and Nevada by promoting the safety of skiers and snowboarders and by coordinating state and national legislative activities, risk management and technical training on behalf of the industry. The organization allows the California ski industry to speak with a single voice on important issues.

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Snow sports present risks of injury which are inherent in the activities and assumed by those who choose to participate in them. Due in part to this Court's landmark decisions in *Knight v. Jewett* (1992) 3 Cal.4th 296, *Ford v. Gouin* (1992) 3 Cal.4th 339, *Cheong v. Antablin* (1997) 16 Cal.4th 1063, *Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, and *Shin v. Ahn* (2007) 42 Cal.4th 482, the CSIA and NSAA members have been able to operate their businesses under the settled rules of California's primary assumption of risk doctrine, without the specter of liability for injuries arising from inherent risks of snow sports and other recreational activities that they host. The issues involved in this case - the primary assumption of risk doctrine and the duty owed by operators to participants in recreational activities - are issues of great importance to CSIA and NSAA members. Many CSIA and NSAA members routinely are defendants in personal injury cases involving the defense of primary assumption of risk. The continued importance of these issues to CSIA in particular is evidenced by the fact that the organization has previously appeared as amici curiae before this Court in the *Ford, Cheong, Kahn,* and *Shin* cases.

If recreational facility operators are opened up to liability for injuries inherent in the activities their guests undertake, the public policy behind the primary assumption of risk doctrine will be undermined. (*Knight, supra,* 3 Cal.4th at pp. 318-319.) Such a result would fundamentally alter the nature

of snow sports – indeed all sports – by deterring participants from vigorously engaging in their activities and by threatening the viability of winter sports operators and related businesses. This brief is submitted to voice the ski industry's perspective on the issues central to this appeal.

B. Issues On Review

The issues on review, as set forth in the Petition for Review, are as follows:

1. Is the primary assumption of the risk doctrine limited to active sports, i.e. activities done for enjoyment or thrill, requiring physical exertion as well as elements of skill, involving a challenge containing a potential risk of injury, and entailing some pitting of physical prowess (be it strength based or skill based) against another competitor or against some venue?

2. Does the fact that amusement parks are subject to regulation mean that public policy entirely bars the application of the primary assumption of the risk doctrine to amusement park rides?

3. Are the owners of amusement parks (and other purveyors of recreational activities) subject to a special version of the primary assumption of the risk doctrine that imposes a duty on those owners to take steps to eliminate or decrease any risks inherent in their rides?

ARGUMENT

I. The *Nalwa* Majority's Decision Fundamentally Conflicts With California's Assumption of Risk Doctrine.

The Court of Appeal held that as a matter of public policy, the primary assumption of risk doctrine should not apply to an amusement park ride. (*Nalwa v. Cedar Fair, LP* (2011) 196 Cal.App.4th 566, 576-578). On at least five points, the *Nalwa* decision runs counter to this Court's seminal assumption of risk holding in *Knight v. Jewett* (1992) 3 Cal.4th 296, and the body of precedent following *Knight* that has developed in the intervening two decades.

First, the *Nalwa* majority held that although "bumping is part of the experience of a bumper car ride, head-on bumping is not." (*Nalwa, supra,* 196 Cal.App.4th at p. 582.) Because Cedar Fair had enforced rules at other parks requiring unidirectional travel, the court found that while unidirectional bumping was an inherent risk, head-on bumping could be eliminated and therefore was not an inherent risk. (*Ibid.*)

But defining a risk as "non-inherent" simply because it can be eliminated is contrary to *Knight.* As this Court held in *Knight*, an otherwise "dangerous" condition that is an integral part of the activity (such as moguls in skiing) need not be eliminated or minimized, even if elimination of the risk is possible. (*Knight, supra*, 3 Cal.4th at p. 315; *Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1004.)

Second, the *Nalwa* majority held that Cedar Fair, as the ride operator, had a duty to minimize the inherent risks of the ride. (*Nalwa, supra,* 196 Cal.App.4th at p. 581.) "Holding owners responsible for minimizing risk is just good policy." (*Ibid.*) The court found that Cedar Fair "was aware of the perils of allowing head-on collisions, and, as the owner of the park, [Cedar Fair] had a duty to take reasonable steps to minimize those risks without altering the nature of the ride." (*Ibid.*)

Under *Knight*, however, a recreational provider owes no duty to "minimize the risks" in an inherently risky activity. Instead, its duty is "to use due care not to increase the risks to a participant over and above those inherent in the sport." (*Knight, supra*, 3 Cal.4th at p. 316; *Kahn, supra,* 31 Cal.4th at p. 1004; *Avila v. Citrus Community College District* (2006) 38 Cal.4th 148, 166; *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262, 269-270; *Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 13.)

Third, the *Nalwa* majority stated that "common sense dictates" that a patron would not expect to suffer a broken bone while riding an amusement park ride. (*Nalwa, supra,* 196 Cal.App.4th at 576.) The court theorized that amusement park patrons seek the "illusion of danger," but have the expectation of complete safety. (*Ibid.*) *Knight* makes clear, however, that a court cannot consider a plaintiff's subjective expectations of the risk of an

activity in deciding whether primary assumption of risk applies to bar her claims. (*Knight, supra,* 3 Cal.4th at pp. 312-313.)

Fourth, the *Nalwa* majority held that a bumper car ride was not the type of activity to which primary assumption of risk under *Knight* should apply. (*Nalwa, supra,* 196 Cal.App.4th at p. 578.) The court stated that "riding as a passenger in a bumper car is too benign to be subject to *Knight*. On a common sense level, we simply cannot conclude that riding in a bumper car as a passenger implicates a *sport* within any understanding of the word." (*Id.* at p. 579.)

Knight, however, did not limit application of primary assumption of risk to "sports," but broadly analyzed the doctrine with reference to any "activity" "where, by virtue of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury...." (*Knight, supra*, 3 Cal.4th at pp. 314-315; see also *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650 [fall into a fire at "Burning Man" festival]; *Domenghini v. Evans* (1998) 61 Cal.App.4th 118 [participating in a cattle roundup]; *Rosenbloom v. Hanour Corp.* (1998) 66 Cal.App.4th 1477 [handling a shark while cleaning an aquarium]; *McGarry v. Sax* (2008) 158 Cal.App.4th 983 [scrambling for a skateboard give-away tossed into a crowd]; *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [peace officer training]; *Hamilton v. Martinelli & Associates* (2003) 110

Cal.App.4th 1012 [training on physical restraint methods]; *Aaris v. Las Virgines Unified School Dist.* (1998) 64 Cal.App.4th 1112 [cheerleading routine]; *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [injury to a nurse's aide by a patient].)

Finally, the *Nalwa* majority also found that, although there was no allegation that Cedar Fair had violated any applicable regulation, the existence of a "protective regulatory scheme" for amusement park rides administered by the Department of Occupational Safety and Health (Cal. Code Regs., tit. 8, § 3900) abrogated the application of *Knight* to such activities. (*Nalwa, supra,* 196 Cal.App.4th at pp. 576-577.) As the *Nalwa* decision put it: "This is exactly the type of regulation which imposes a duty on the operators of such rides irrespective of *Knight's* no-duty rule." (*Id.* at p. 577.)

But California courts have long held that the mere existence of statutes or regulations governing an activity in question is not a bar to the application of primary assumption of risk. (*Ford v. Gouin* (1992) 3 Cal.4th 339, 350-351 [Cal. Harb. & Nav. Code sections governing operation of boat did not bar application of primary assumption of risk to claim by plaintiff waterskier against boat operator]; *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1066-1067 [county skier safety ordinance setting skier's duties did not preclude application of primary assumption of risk]; *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1254 [defendant's

alleged violations of Vehicle Code did not preclude application of primary assumption of risk]; *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1226 [defendant's alleged violations of Vehicle Code did not preclude application of primary assumption of risk]; *Whelihan v. Espinoza* (2003) 110 Cal.App.4th 1566, 1575 [Cal. Harb. & Nav. Code sections prohibiting operating a jet ski toward "any person" did not preclude application of primary assumption of risk to claim arising from jet ski collision].) Merely because an activity is regulated does not preclude application of assumption of risk.

The *Nalwa* majority concluded that primary assumption of risk did not apply and reversed summary judgment for defendant, holding that the trier of fact must determine whether Cedar Fair breached a duty to plaintiff. That result fundamentally conflicts with California's assumption of risk doctrine.

II. Sound Public Policy Supports *Knight's* Holding That There Is No Duty to Protect Participants From Risks Where Doing So Fundamentally Alters The Nature Of The Activity.

In *Knight*, this Court held that primary assumption of risk operates as a complete bar to a plaintiff's recovery where the nature of the activity and the parties' relationship to the activity foreclose any duty owed by the defendant:

> In cases involving 'primary assumption of risk' – where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the

> plaintiff from the particular risk of harm that caused the injury – the doctrine continues to operate as a complete bar to the plaintiff's recovery.

(*Knight, supra*, 3 Cal.4th at pp. 314-315.) "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks[.]" (*Connelly, supra,* 39 Cal.App.4th at p. 11.)

Under the primary assumption of risk doctrine, a participant is held to accept the inherent risks of an activity by virtue of his or her choice to participate, and the facility operator owes no duty to protect the participant from injury sustained through exposure to the activity's inherent risks. (See *Knight, supra*, 3 Cal.4th at p. 315; *O'Donoghue v. Bear Mountain Ski Resort* (1994) 30 Cal.App.4th 188, 193; *Connelly, supra*, 39 Cal.App.4th at pp. 13-14.) In the recreational context, there is no legal duty for the recreation provider to protect participants from an otherwise unreasonable risk of harm where that condition is an "integral part of the sport itself." (*Knight, supra*, 3 Cal.4th at p. 315.) Because no duty exists in such situations, there can be no negligence liability for the defendant.

Knight reflects sound public policy that tort liability should not be imposed for ordinary negligence on those engaged in certain inherently risky activities. "[I]mposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by deterring participants from

vigorously engaging in [the] activity..." (*Knight, supra*, 3 Cal.4th at p. 319 [emphasis original].)

For example, even though baseball rules forbid the pitcher from intentionally hitting the batter with a pitch, this Court noted that "[f]or better or for worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball." (*Avila, supra*, 38 Cal.4th at p. 165). Consequently, imposition of legal liability for such conduct "might well alter fundamentally the nature of the sport" and is therefore contrary to public policy. (*Id.* at p. 165, citing *Knight, supra*, 3 Cal.4th at pp. 318-319). "It is not the function of tort law to police such conduct." (*Id.* at p. 165).

California courts have developed a body of precedent regarding the proper analysis of whether a particular risk is inherent in a given activity. This inquiry has alternatively been described as whether the risk involved "some feature or aspect of the game which is inevitable or unavoidable in the actual playing of the game" (*Lowe v. California League Professional Baseball* (1997) 56 Cal.App.4th 112, 123), or whether the risk was within the "range of ordinary activity" involved in the activity. (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1393-1394.) Put another way, a risk is deemed to be inherent if its elimination would chill vigorous participation in the activity, and thereby alter its fundamental nature. (*Knight, supra*, 3

Cal.4th at pp. 318-319.) This is a critical public policy underpinning for the assumption of risk doctrine.

Determining what risks are inherent in a given activity does not involve measuring the degree of reasonableness in a given risk. Rather, it is the relationship of the risk to the activity that defines it as "inherent." Under *Knight*, there is no duty of a recreational provider to protect participants from an "unreasonable risk of harm" where that risk is an "integral part" of the activity. As to those risks that constitute an integral part of the activity, a recreational provider has only the duty to use due care not to expose participants to risks that are *over and above* those inherent in the activity:

> Although defendants generally have no duty to use due care to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well-established that defendants generally do have a duty to use due care not to increase the risks to a participant *over and above* those inherent in the sport.

(*Knight*, *supra*, 3 Cal.4th at pp. 315-316 [emphasis added].)

Thus, recreational providers cannot be held liable for failing to make "safer" a condition that is an inherent risk in the sport or activity under consideration. (*See Allan v. Snow Summit Inc.* (1996) 51 Cal.App.4th 1358 [ski area had no duty to protect plaintiff, who was taking a ski lesson, from the inherent risks of falling in icy conditions]; *Kane v. National Ski Patrol System* (2001) 88 Cal.App.4th 204 [skiing skills clinic provider had no duty to protect plaintiff skiers from risks of icy and steep terrain]; *Ferrari v.*

Grand Canyon Dories (1995) 32 Cal.App.4th 248 [river rafting company had no duty to protect plaintiff from risk of striking head on unpadded portion of raft]; *Connelly, supra,* 39 Cal.App.4th 8 [ski area had no duty to protect skier from risks of unpadded lift tower].)

As these cases illustrate, the proper focus of an inherent risk analysis under *Knight* is on whether a particular risk is an integral part of the activity, and whether the defendant increased the risks of the activity over and above those risks which are inherent (and therefore need not be eliminated or reduced.) Requiring patrons to refrain from bumping, or bumping vigorously, or bumping head-on, would change the very nature of a bumper car ride. This appears to be exactly what this Court meant in *Knight* by "chilling vigorous participation."

III. Under Assumption of Risk, An Activity Provider Has No Duty to Minimize Inherent Risks, Only A Duty Not To Increase Risks Over And Above Those Inherent In The Activity.

Plaintiff argues that Cedar Fair had a "duty to minimize" the inherent risks of bumper cars by requiring patrons to travel in only one direction. (Appellant's Answer Brief on the Merits at p. 31.) The *Nalwa* majority, citing the "minimize the risk" language in *Knight*, agreed, explaining that "[h]olding owners responsible for minimizing risk is just good policy." (*Nalwa, supra*, 196 Cal.App.4th at p. 581.)

The holding of *Knight*, however, is that "defendants generally do have a duty to use due care *not to increase the risks* to a participant *over*

and above those inherent in the sport." (*Knight, supra*, 3 Cal.4th at p. 316 [emphasis added]; see, e.g., *O'Donoghue, supra*, 30 Cal.App.4th at p. 192 [no duty to minimize risk of skiing into a ravine by providing a warning]; *Connelly, supra,* 39 Cal.App.4th at p. 14 [no duty to minimize skier's risk of being injured by impacting lift tower by padding the tower]; *Souza, supra,* 138 Cal.App.4th at p. 270 [no duty to minimize skier's risk of hitting snow making equipment by locating it off the ski run].)

While the *Knight* opinion uses the language "minimize the risks" while discussing prior cases, the discussion of the underlying policy in *Knight* makes clear that the "minimize the risk" language does not represent the holding with respect to risks inherent in an activity. (*Knight, supra,* 3 Cal.4th at p. 317.) As the Court observed in *Knight,* "conditions or conduct that otherwise might be viewed as dangerous often are an integral part" of the activity. (*Id.* at p. 315.) For example, although moguls on a ski run pose a risk of harm to skiers that might not exist if they were removed, the "challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them." (*Ibid.*)

The *Nalwa* majority cited this Court's decision in *Kahn*, *supra*, in support of its imposition of a duty on Cedar Fair to "minimize the risk" associated with bumping in bumper cars. But like *Knight*, *Kahn* specifically rejected a "minimize the risk" standard:

> Although persons generally owe a duty of due care not to cause an unreasonable risk of harm to others (Civ. Code, § 1714, subd. (a)), some activities – and, specifically, many sports – are inherently dangerous. *Imposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation.*
>
> ****
>
> Accordingly, defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport, although they generally do have a duty *not to increase the risk of harm beyond what is inherent in the sport.*

(*Kahn, supra,* 31 Cal.4th at p. 1004 [emphasis added].)

The same point was made again in *Avila v. Citrus Community College District* (2006) 38 Cal.4th 148. There, the Court rejected the plaintiff's contention that the defendant college district should have provided umpires to minimize the risk of plaintiff being hit by an intentional "beanball" pitch:

> Avila argues that providing umpires would have made the game safer...the argument overlooks a key point. The District owed 'a duty not to increase the risks inherent in the sport, not a duty to decrease the risks.'

(*Avila, supra*, 38 Cal.4th at p. 166 [internal citations omitted].)

As this Court's decisions in *Knight*, *Kahn,* and *Avila* make clear, there is no duty of an operator to affirmatively minimize a risk of harm arising from a condition that is an integral part of the activity. (*Knight, supra*, 3 Cal.4th at pp. 309, 315; *Kahn, supra,* 31 Cal.4th at p. 1004; *Avila, supra*, 38 Cal.4th at p. 166.)

California courts have applied these principles in a number of circumstances. For example, in *Souza*—which involved a skier injured in a collision with snow-making equipment—the plaintiff argued that a recreation provider had a duty to minimize any risks that theoretically could be reduced. The Third District rejected this argument, explaining that "[i]f this were the rule, '[t]hen, obviously, such risks would not be…"inherent",' and the primary assumption of risk doctrine would be undermined because the critical inquiry would become whether the defendant had a feasible means to minimize the dangers." (*Souza, supra*, 138 Cal.App.4th at pp. 269-270, quoting *Connelly, supra*, 39 Cal.App.4th at p. 13.)

Similarly, in *Connelly* plaintiff fell while skiing, slid, and collided with a metal lift tower. (*Connelly, supra*, 39 Cal.App.4th at pp. 10-11.) Although Mammoth had padded the tower, the pad was not at snow level and therefore did not cushion the impact. Connelly argued that Mammoth had increased the inherent risks of skiing over and above those inherent in the sport by inadequately padding the tower. (*Id.* at p. 12.) The trial court rejected this argument and granted summary judgment for defendant. (*Id.* at p. 11.) The Court of Appeal affirmed, holding that Mammoth had no duty to eliminate the inherent risk of colliding with a lift tower. (*Id.* at pp. 12-13.) In fact, Mammoth had no duty to pad the towers at all. (*Ibid.*) Therefore, the court found that the allegedly inadequate lift tower padding

did not increase the risks of skiing over and above those inherent in the sport. (*Id.* at 12-13.)

Likewise, in *Mosca v. Lichtenwalter* (1997) 58 Cal.App.4th 551, a sport fisherman was injured when another fisherman's line, which had been entangled in kelp, "slingshotted" back over the rail and struck plaintiff in the eye. (*Mosca, supra,* 58 Cal.App.4th at p. 552.) Plaintiff submitted an expert declaration indicating that the risk of such an injury could have been minimized by using a different technique to extricate the line. (*Id.* at pp. 552-553.) Nonetheless, the trial court granted summary judgment for defendant. The Court of Appeal affirmed, noting that although a deckhand allegedly failed to ensure defendant used a preferred technique, there was no evidence that defendant had "affirmatively increased the risk of harm" associated with retrieving an entangled line. (*Id.* at p. 555.)

In *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, a Little League player was injured when he was struck in the face by a wild pitch. (*Balthazor, supra*, 62 Cal.App.4th at p. 49.) The trial court granted summary judgment for defendant Little League based on *Knight*, and plaintiff appealed. (*Ibid.*) Plaintiff argued that summary judgment should have been denied, because the League failed to end the game at sunset; failed to remove the pitcher from the game prior to the injury; and failed to provide him a helmet with a faceguard. (*Id.* at pp. 51-52.) But the Court of Appeal affirmed the judgment, noting that "the defendant has a

duty not to increase the risks inherent in the sport, not a duty to decrease the risks." (*Id.* at p. 52.) Because the risk of a carelessly thrown ball was an inherent risk of baseball, the League had no duty to end the game, remove the pitcher, or affirmatively provide safety equipment to minimize the risk of an errant ball. (*Id.* at pp. 52-53; see also *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430 [college had no duty to minimize risk of injury by providing a helmet to non-contact football players]; *Staten v. Superior Court (Bafus)* (1996) 45 Cal.App.4th 1628, 1633 [defendant ice skater owed no duty to protect co-participant against inherent risk of being cut by a skate blade, but only the duty not to increase the risks beyond those inherent in the sport]; *Dilger v. Moyles* (1997) 54 Cal.App.4th 1452 [golfer's failure to yell "fore" did not increase the inherent risk of being struck by a golf ball].)

Most of the cases cited by the *Nalwa* majority applied *Knight's* "duty not to increase the risks above and beyond those inherent in the activity" standard, and simply found that summary judgment for defendant was inappropriate, either because there was a triable issue of fact as to whether the risk encountered was inherent or because the defendant had affirmatively *increased* the inherent risks of the activity. (*Van Dyke v. S.K.I. Ltd.* (1998) 67 Cal.App.4th 1310, 1317 [question of fact as to whether an allegedly inadequately marked signpost was an inherent risk of skiing]; *Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 364-365

[question of fact as to whether ski area increased the inherent risks of skiing by building jumps on open ski run without warning to skiers]; *Giardino v. Brown* (2002) 98 Cal.App.4th 820, 837 [question of fact as to whether defendant increased the inherent risks of horseback riding by knowingly providing a horse with a disposition unsafe to beginning riders at a Girl Scout camp]; *Luna v. Vela* (2008) 169 Cal.App.4th 102, 113 [question of fact as to whether homeowner increased the inherent risks of volleyball by failing to place flagging on tie lines]; *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 853 [triable issue of fact as to whether horseback rider's trainer increased the inherent risks of cross-country horseback riding by encouraging decedent to ride an unfit horse].)

In *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, plaintiff suffered a seizure after running a marathon where the race organizer failed to provide adequate water and sports drinks to the marathon runners. (*Saffro, supra,* 98 Cal.App.4th at p. 176.) The court found that providing adequate drinks to the participants did not in any way alter the nature of the activity, and therefore the race organizer had a duty to provide them along the course. (*Id.* at p. 179.)

In *Branco v. Kearney Moto Park, Inc.* (1995) 37 Cal.App.4th 184, the court held that primary assumption of risk did not bar plaintiff's claim in a case where the recreation provider had, in effect, increased the inherent risks of the activity of BMX motocross racing by building a man-made

jump which posed an "extreme risk of injury." (*Branco, supra*, 37 Cal.App.4th at p. 193.)[1]

Here, Cedar Fair had a duty not to increase the risks of the bumper car ride "over and above those inherent" in the ride. (*Knight, supra*, 3 Cal.4th at p. 316.) Bumping would appear to be an inherent risk of a bumper car ride. As Justice Duffy observed in the dissent, bumping and jostling is the "entire point" of the Rue Le Dodge ride. (*Nalwa, supra,* 196 Cal.App.4th at p. 598, fn. 16 [dis. opn. of Duffy, J.].) Cedar Fair did not have a duty under *Knight* to minimize or eliminate the risks associated with bumping, for example by enforcing rules regarding the allowed type, direction, or vigorousness of bumping. Plaintiff's attempt to split hairs and call "unidirectional bumping" an inherent risk, but "head-on bumping" a non-inherent risk (simply because it could be prohibited), ignores the fact that bumping, in general, is an inherent risk of a bumper car ride.

If the bumper car riders were not subject to bumps, the ride would no longer be a "bumper car" ride. Requiring a bumper car operator to minimize the risk of bumping would alter the essential nature of the activity – riding in a bumper car while being bumped, and bumping into, other cars.

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[1] One case cited by the *Nalwa* majority, *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, appears simply not to have followed the holding of *Knight*, in concluding that a golf course operator had a duty to minimize the risk of a golfer being hit by an errant shot by designing the golf course to minimize such risks. (*Morgan, supra*, 34 Cal.App.4th at pp. 134-135.)

(*Knight, supra*, 3 Cal.4th at p. 315; *Kahn, supra*, 31 Cal.4th at p. 1004.) Cedar Fair had no more of a duty to minimize or eliminate risks associated with bumping from its bumper car ride, than a ski resort has a duty to groom away moguls on a ski run.

IV. Because California's Doctrine of Primary Assumption of Risk Presents a Legal Question Of Duty, It Does Not Turn On An Individual Plaintiff's Subjective Appreciation Of The Risk.

The term primary assumption of risk "embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk..." (*Knight, supra*, 3 Cal.4th at p. 308.) The existence and scope of a defendant's duty of care is a legal question to be decided by the court. (*Id.* at p. 313.)

Because it involves a duty question, application of assumption of risk does not turn on a particular plaintiff's subjective knowledge or appreciation of the potential risk. "Even where the plaintiff, who falls while skiing over a mogul, is a total novice and lacks any knowledge of skiing whatsoever, the ski resort would not be liable for his or her injuries." (*Knight, supra*, 3 Cal.4th at p. 316; see *O'Donoghue, supra,* 30 Cal.App.4th at p. 193 ["plaintiff's continued insistence that he did not personally see the hazard is irrelevant to the issue whether the risk was one inherent in the sport of skiing..."].)[2]

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[2] The focus on duty, and the fact that a particular plaintiff's subjective knowledge or appreciation of a particular risk is irrelevant in the

Thus, when the *Nalwa* majority states that assumption of risk depends on what the individual participant expected to encounter in the activity—whether they expected to confront true risk or the "illusion of risk"—it raises an issue that has no place in the application of the assumption of risk doctrine.

V. Primary Assumption of Risk Applies to All Activities With Inherent Risks, Not Just Traditional "Sports."

While *Knight* involved an injury sustained in a sport (touch football), its holding applied broadly to any "activity" that involved inherent risk: "[T]he question of the existence and scope of a defendant's duty of care is a *legal* question which depends on the nature of the sport *or activity* in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." (*Knight, supra*, 3 Cal.4th at 313 [second emphasis added]].)

Guided by *Knight* and this Court's subsequent decisions, California courts have applied assumption of risk to a wide spectrum of activities, many of which defy labeling as a traditional "sport," including: a fall into a fire at the "Burning Man" event (*Beninati, supra*, 175 Cal.App.4th 650); participating in a cattle roundup (*Domenghini, supra,* 61 Cal.App.4th 118); handling a shark (*Rosenbloom, supra,* 66 Cal.App.4th 1477); a product toss

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determination of the existence or non-existence of a duty, makes the question of assumption of risk particularly amenable to resolution by summary judgment. (*Knight, supra*, 3 Cal.4th at p. 313.)

into a crowd (*McGarry, supra,* 158 Cal.App.4th 983); peace officer training (*Saville, supra,* 133 Cal.App.4th 857); training on physical restraint methods (*Hamilton, supra,* 110 Cal.App.4th 1012); practicing a cheerleading routine (*Aaris, supra,* 64 Cal.App.4th 1112); and an injury to a nurse's aide by a nursing home patient (*Herrle, supra,* 45 Cal.App.4th 1761.)[3]

Despite the breadth of the doctrine developed by this Court in *Knight*, some courts of appeal (including the *Nalwa* court), have nonetheless attempted to confine the doctrine to only traditional sports applications, engaging in changing and often arbitrary definitions of a "sport" to which assumption of risk might be applied.

For example, in *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, decided shortly after *Knight*, the court found that even if there was a potential risk of injury, recreational dancing "is not a sport within the ambit of *Knight*." (*Bush, supra*, 17 Cal.App.4th at p. 328.) The

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[3] Of course, assumption of risk finds its most robust application in the area of traditional sports. (See, e.g., baseball (*Avila v. Citrus Comm. College Dist.* (2006) 38 Cal.4th 148); swimming (*Kahn v. East Side Union H.S. Dist.* (2003) 31 Cal.4th 990); golf (*Shin v. Ahn* (2007) 42 Cal.4th 482); horseback riding (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534); skiing (*Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262); off-road riding (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249); skateboarding (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108); figure skating (*Staten v. Superior Court* (1996) 45 Cal.App.4th 1628); rock climbing (*Regents of the University of California v. Superior Court* (1996) 41 Cal.App.4th 1040); sailboat racing (*Stimson v. Carlson* (1993) 11 Cal.App.4th 1201); and bicycle riding (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211.)

court stated that dancing is not "a dangerous activity or sport" akin to skydiving. (*Ibid.*)

In *Record v. Reason* (1999) 73 Cal.App.4th 472, the court analyzed whether inner tubing behind a motor boat was an activity subject to the doctrine of primary assumption of risk. The court defined a "sport" as an activity "done for enjoyment or thrill, [that] requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." (*Record, supra,* 73 Cal.App.4th at p. 482.) Under this analysis, the court found inner tubing to be a "sport" to which assumption of risk was applicable. (*Ibid.*)

In *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, the court was faced with the question of whether riding as a passenger in a motor boat was an activity subject to primary assumption of risk. The court interpreted *Knight* as requiring "some pitting of physical prowess (be it strength based [i.e. weight lifting], or skill based, [i.e. golf]) against another competitor or some venue." (*Shannon, supra*, 92 Cal.App.4th at p. 797.) The court ultimately found that riding as a passenger in a motor boat was "too benign to be subject to *Knight*." (*Id.* at p. 798.) Yet at the same time, crewing on a sailboat or riding as a passenger on a jet ski have both been held to be activities subject to primary assumption of risk. (*Stimson v. Carlson* (1993) 11 Cal.App.4th 1201, 1205; *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 887.)

Most recently, in *Childs v. County of Santa Barbara* (2004) 115 Cal.App.4th 64, the court found a triable issue of fact as to whether a plaintiff injured while riding a scooter was involved in a "sport," and reversed summary judgment for the defendants. (*Childs, supra*, 115 Cal.App.4th at p. 75.) In its analysis, the Court of Appeal cited both the *Record v. Reason* and *Shannon v. Rhoades* tests of whether an activity can be considered a "sport." (*Id.* at p. 70.) The court found that there was a triable issue of fact as to whether plaintiff was riding her scooter "in an adventuresome and thrill-seeking manner" or, on the other hand, engaging in "the diversion of getting from one place to another through the use of a child's toy with wheels." (*Id.* at p. 71.)

If the application of primary assumption of risk turns on whether a particular plaintiff has an "adventuresome" attitude toward her activity, or any other arbitrary definition of whether plaintiff is engaging in a "sport," the doctrine will be unworkable and the underlying public policy will be defeated. Cases employing such an analysis have strayed far from the test articulated by this Court in *Knight*, which focuses on the nature of the activity and whether it involves inherent risks that cannot be eliminated without chilling vigorous participation or changing the nature of the activity itself. (*Knight, supra*, 3 Cal.4th at pp. 312-313.) As the First District summed up the doctrine in applying it to a plaintiff burned when he fell

while trying to place a deceased friend's picture in the burning remnants of the effigy at the Burning Man festival:

> it is clear from the [*Knight*] opinion that the doctrine applies not only to sports, but to other activities involving an inherent risk of injury to voluntary participants...where the risk cannot be eliminated without altering the fundamental nature of the activity.

(*Beninati, supra,* 175 Cal.App.4th at p. 658; see also *McGarry, supra,* 158 Cal.App.4th at pp. 999-1000 [plaintiff injured scrambling for skateboard tossed into the crowd as part of a product give away was held to assume the risk; "That a competitor might fall and others land around and on him in an effort to secure the prize is an inherent risk of the competition."].)

Attempting to confine assumption of risk only to traditional "sports" also overlooks that the doctrine provides the underpinning of the "firefighter's rule" and "veterinarian's rule," which bars persons in those occupations from recovering under tort law for hazards which are inherent in their occupations. "The undergirding principle of the [firefighter's] rule is assumption of the risk..." (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1061.) *Knight* cited the firefighter's rule as a good example of the primary assumption of risk doctrine. (*Knight, supra,* 3 Cal.4th at p. 309, fn. 5; see also *Rosenbloom, supra,* 66 Cal.App.4th at pp. 1480-1481 [plaintiff hired to drain an aquarium and move a shark precluded from recovering for a shark bite under the assumption of risk doctrine because shark bites were an "occupational hazard" of plaintiff's activity].)

As Justice Duffy stated in her dissent in *Nalwa*, "rather than attempting to pigeonhole the activity as a sport, courts should make a more focused evaluation of whether (1) the integral conditions of the activity make obvious the possibility of injury, (2) imposing a duty would vastly alter the purpose or nature of the activity, and (3) imposing a duty would chill vigorous participation in the activity and thereby alter its fundamental character." (*Nalwa, supra*, 196 Cal.App.4th at p. 364 [dis. opn. of Duffy, J.].)

In concluding that a bumper car riding was "too benign" to be a "sport," the *Nalwa* majority read *Knight* too narrowly. Under *Knight*, application of primary assumption of risk turns not on whether the plaintiff's activity fits the definition of a "sport," but whether the activity in which plaintiff engaged was one with inherent risks that could not be eliminated without fundamentally changing the nature of the activity itself. (*Knight, supra,* 3 Cal.4th at pp. 315-317.) Because a bumper car ride is a recreational activity with inherent risks – the risks associated with bumping into other cars – and those risks cannot be eliminated without fundamentally changing the nature of the activity, the Court of Appeal should have concluded that the plaintiff's claim was subject to primary assumption of risk under *Knight*.

VI. Application Of Assumption of Risk Does Not Turn On Whether An Activity Is Regulated; The Doctrine Applies Equally to Regulated And Non-Regulated Activities

The *Nalwa* Court held that as a matter of public policy, the very existence of state regulation over an activity negates the application of the primary assumption of risk doctrine. (*Nalwa, supra*, 196 Cal.App.4th at pp. 576-578.) The Court of Appeal stated that "[i]t would be inconsistent with the duties imposed by regulation...to find that respondent has no duty to protect the appellant who entrusted her life to respondent from the risks associated with its rides." (*Id.* at p. 578.) According to the *Nalwa* majority, it did not matter that there was not even an allegation that Cedar Fair had in fact violated any applicable regulation, contending it "missed the point." (See *Nalwa, supra,* 196 Cal.App.4th at pp. 578, see also p. 600 [dis. opn. of Duffy, J.].)

If this Court were to adopt the *Nalwa* majority's approach, however, it would completely undermine the doctrine of primary assumption of risk. The Court of Appeal's holding is inconsistent with the case law that has developed over the past twenty years since *Knight* was decided.

This Court has applied the doctrine of primary assumption of risk to waterskiing and skiing, despite the application of governing state regulations. (*Ford, supra,* 3 Cal.4th at pp. 350-351; *Cheong*, *supra*, 16 Cal.4th at pp. 1069-1071.) In fact, the Court has specifically rejected the *Nalwa* majority's position that the existence of state regulation means that

the doctrine of primary assumption of risk, as a matter of public policy, does not apply.

In *Ford,* the companion case to *Knight*, plaintiff was injured while waterskiing, and brought a negligence action against the driver of the boat. (*Ford, supra,* 3 Cal.4th at pp. 342-343.) In affirming the trial court's summary judgment based on assumption of risk, this Court noted that Harbors and Navigation Code section 658(d), regarding the safe operation of vessels, appeared to bear on the question of defendant's duty to plaintiff. (*Id.* at p. 346.) The Court ultimately held that the statute did not impose a duty of care on defendant that was inconsistent with *Knight*, and affirmed summary judgment for defendant. (*Id.* at pp. 350-351.) The mere existence of the governing statute in *Ford* did not preclude the application of the doctrine of primary assumption of risk.

Similarly, in *Cheong,* this Court considered the question of whether a Placer County "skier safety" ordinance created a duty of care for skiers that might allow the Court to impose liability on a skier, irrespective of the holding in *Knight*. In that case, two men were skiing together at Alpine Meadows when they collided, resulting in injury to Cheong. (*Cheong, supra*, 16 Cal.4th at p. 1066.) Cheong brought a negligence action against his friend, based in part on a Placer County ordinance which required skiers "to ski in a safe and reasonable manner." (*Ibid.*) The trial court granted

summary judgment in favor of defendant, and the Court of Appeal affirmed. (*Id.* at pp. 1066-1067.)

On review, this Court also affirmed. In reaching its conclusion, the Court decided that it did not need to rule on the applicability of the regulation, because the "ordinance evinces no clear intent to modify common law assumption of risk principles. It does state 'skier duties,' but in context these duties do not govern tort liability between skiers." (*Cheong*, *supra*, 16 Cal.4th at p. 1069.)

This Court never suggested in *Cheong* that the simple fact of government regulation of an activity demonstrated a public policy that the primary assumption of risk doctrine should not apply. Although the Justices held differing views on the potential effect of a negligence *per se* finding under Evidence Code section 669(a) (see *Cheong*, *supra*, 16 Cal.4th at pp. 1072-1073, 1076-1080 [conc. opns. of Mosk, J., Werdegar, J. and dis. opn. of Chin, J.]), no Justice concluded that the very existence of the Placer County ordinance reflected a public policy that *Knight* should not apply. To the contrary, the *Cheong* court found that the ordinance's requirements and the skier's duty under *Knight* were the same, and therefore it did not need to decide whether a local ordinance could impose a higher duty than *Knight*. (*Id.* at p. 1069.)

Since *Ford* and *Cheong* were decided, the Courts of Appeal have similarly held that, in the absence of a clearly expressed intent by the

Legislature that a statute was intended to supersede *Knight,* the doctrine of primary assumption of risk will still apply despite governing state statutes.

For example, in *Distefano v. Forester*, an off-road motorcyclist injured in a collision with an oncoming dune buggy argued that the dune buggy driver violated Vehicle Code sections 38305 and 38316, including the "basic speed law," and therefore assumption of risk did not apply. (*Distefano, supra*, 85 Cal.App.4th at pp. 1253-54.) The trial court granted summary judgment for defendant pursuant to *Knight*, noting that the "very nature of the sport of 'off-roading' is driving activity that would not be countenanced on streets and highways...It is a sport which may readily be characterized by the phrase: 'Thrills, chills, and spills.'" (*Id.* at pp. 1257-1258.)

The Court of Appeal affirmed, holding that although the defendant's "conduct was negligent and may have constituted a violation of section 38305 or section 38316, it is not actionable in tort." (*Distefano, supra*, 85 Cal.App.4th at p. 1254.) Because even a proven violation of the Vehicle Code sections would constitute at most negligence, *Knight's* no-duty rule would still apply to bar the plaintiff's claim. (*Id.* at p. 1275.)

Similarly, in *Moser v. Ratinoff*, plaintiff was injured while participating in an organized bicycle ride, when defendant's bicycle collided with her bicycle. (*Moser, supra,* 105 Cal.App.4th at p. 1216.) Defendant moved for summary judgment based on primary assumption of

risk, and in opposition plaintiff argued that defendant had violated the Vehicle Code, thus precluding the application of the doctrine. (*Id.* at p. 1223.) After analyzing *Ford*, *Cheong*, and *Distefano*, the Court of Appeal held that "[a]lthough the facts show that [defendant] violated provisions of the Vehicle Code designed to protect persons using public roads...such violations do not nullify [plaintiff's] assumption of the risk." (*Id.* at p. 1226).

Likewise, in *Whelihan v. Espinoza*, the Third District rejected the argument that primary assumption of risk is superseded by the mere existence of a statute governing the activity. There, plaintiff was injured in a personal watercraft accident, and the trial court granted summary judgment for defendant based on primary assumption of risk. (*Whelihan, supra,* 110 Cal.App.4th at p. 1571.) Plaintiff argued to the Court of Appeal that, by enacting statutes addressing the safe operation of personal watercraft (Harbor & Nav. Code section 655(a) and 655.7(c)), the Legislature had "trumped" the doctrine of primary assumption of risk with respect to the activity of personal watercraft riding. (*Id.* at pp. 1573-1574.) The Court of Appeal rejected this argument, holding that:

> the enactment of statutes...should not be construed to abrogate the doctrine of primary assumption of risk unless the language of the statute explicitly demonstrates a "clear intent" to do so.

(*Id.* at p. 1575 [citing *Cheong, supra*, 16 Cal.4th at p. 1069; *Moser, supra,* 105 Cal.App.4th at p. 1226; *Distefano, supra,* 85 Cal.App.4th at p. 1274]; see also *O'Donohue, supra,* 30 Cal.App.4th at p. 193 [United States Forest Service use permit requirements did not create a legal duty to plaintiff].)

In sum, the *Nalwa* majority's conclusion that the existence of a regulatory scheme over amusement rides is "exactly the type of regulation which imposes a duty on the operators of such rides irrespective of *Knight's* no-duty rule" is without support under California law.

CONCLUSION

This Court was correct in *Knight* that the primary assumption of risk doctrine deters litigation and promotes vigorous participation in recreation. The duty-based analysis, the application of primary assumption of risk to all inherently risky activities, and the requirement that defendants not be liable unless they are found to have affirmatively increased the risks of a given activity, have combined to make the law both predictable and just.

The California Ski Industry Association and the National Ski Areas Association request that the Court of Appeal's Decision be reversed and that this Court reaffirm that:

(1) California's assumption of risk doctrine applies to all activities which involve an inherent risk of injury which cannot be eliminated without changing the nature of the activity or chilling participation therein;

(2) a recreation provider has a limited duty not to increase risks over and above those inherent in the activity, but no duty to minimize the inherent risks; and

(3) the existence of a statute or regulation governing the activity shall not, without a clear stated intent to supersede *Knight*, preclude the application of primary assumption of risk.

Dated: April 9, 2012

Duane Morris LLP

By: _____
John E. Fagan
Paul J. Killion
Jill Haley Penwarden

Attorneys for *Amici Curiae*
California Ski Industry
Association and National Ski
Areas Association

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that this amicus curiae brief contains approximately 7,867 words, not including the Table of Contents and Authorities, the caption page, signature blocks, or this certificate .

Dated: April 9, 2012

By: _____
Paul J. Killion

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is Spear Tower, One Market Plaza, Suite 2200, San Francisco, CA 94105-1127. I am a citizen of the United States and am employed in the City and County of San Francisco. On April 9, 2012, I caused to be served the following document(s):

APPLICATION OF THE CALIFORNIA SKI INDUSTRY ASSOCIATION AND THE NATIONAL SKI AREAS ASSOCIATION FOR LEAVE TO FILE ATTACHED AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT CEDAR FAIR, L.P.

Upon parties in this action by placing true and correct copies thereof in sealed envelopes as follows:

FOR COLLECTION VIA HAND DELIVERY:

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Original + 14 Copies

FOR COLLECTION VIA REGULAR U.S. MAIL:

Clerk of the Court
Court of Appeal
Sixth Appellate District
333 W. Santa Clara St., Suite 1060
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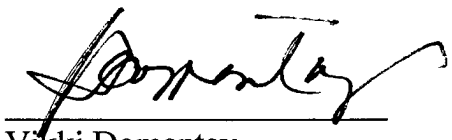
The Hon. James P. Kleinberg Santa Clara County Superior Court 191 N. First Street San Jose, CA 95113	*Courtesy Copy*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 9, 2012, at San Francisco, California.



Vikki Domantay