

**C. ATHENA ROUSSOS**  
**ATTORNEY AT LAW**

*Certified Specialist, Appellate Law*  
*The State Bar of California Board of Legal Specialization*

Office Address:  
9281 Office Park Circle, Suite 140  
Elk Grove, CA 95758  
Phone: (916) 670-7901  
Fax: (916) 670-7921

Mailing Address:  
9630 Bruceville Road  
Suite 106-386  
Elk Grove, CA 95757

Website: [www.athenaroussoslaw.com](http://www.athenaroussoslaw.com)  
Email: [athena@athenaroussoslaw.com](mailto:athena@athenaroussoslaw.com)

Via Electronic Filing

April 15, 2016

Hon. Vance W. Raye, Presiding Justice  
and Associate Justices  
Court of Appeal  
Third Appellate District  
914 Capitol Mall  
Sacramento, CA 95814

Re: *Nidiver v. Lifehouse Health Services, LLC*  
Case No. C077803

Dear Presiding Justice Raye and Associate Justices:

Appellants Eugene Nidiver by and through his Successor-in-Interest Bonnie Nidiver, Bonnie Nidiver, and Scott Nidiver submit this letter in opposition to the requests of Respondent Lifehouse Health Services, LLC and the California Association of Health Facilities (“CAHF”) requests to publish this Court’s opinion issued on March 25, 2016. The opinion is contrary to the Corporations Code itself, existing case law, well-settled principles of tort law, and public policy on the issues of direct and agency liability. Publishing the opinion will encourage abuse of the limited liability company (“LLC”) form by permitting people to avoid liability for their own torts simply by forming a LLC. There is no statutory support for this notion, nor for the idea that, as a matter of law, a LLC may not be considered an agent of its member. The opinion is also contrary to *Mesler v. Bragg* (1985) 39 Cal.3d 290, 303-304, because Appellants’ settlement with the nursing facility did not prove or disprove Respondent’s alter ego liability.

The Court’s opinion contravenes well-settled principles of law on the issue of direct liability. The Court’s opinion holds that Respondent may not be held directly liable for elder abuse under Corporations Code<sup>1</sup> section 17703.04, subdivision (a)(1) and (2), because it was acting as the member-manager of the nursing facility. (Slip op., at p.12.) This holding is directly contrary to the language in section 17703.04 subdivision (c), which states, “*Nothing in this section shall be construed to affect the liability of a*

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<sup>1</sup> Further statutory citations shall be to the Corporations Code unless otherwise specified.

*member of a limited liability company to third parties for the member's participation in tortious conduct*, or pursuant to the terms of a written guarantee or other contractual obligation entered into by the member, other than an operating agreement.” (Emphasis added.) Under the Court’s opinion, Respondent cannot be held liable to third parties for its participation in tortious conduct.

Over ten years ago, the Second District rejected the notion that a manager is immune from liability for his participation in tortious conduct on behalf of a LLC, even when performing duties as the manager. In *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1207 (“*Pacific Landmark*”), the court affirmed a preliminary injunction against a LLC and its manager in a red light nuisance abatement action. The court held that “whereas managers of limited liability companies may not be held liable for the wrongful conduct of the companies *merely* because of the managers’ status, they may nonetheless be held accountable under [former section 17158, subdivision (a)] for their personal participation in tortious or criminal conduct, even performing their duties as manager.” (*Id.* at p. 1213, court’s emphasis.)

Notably, *Pacific Landmark* is not limited to personal participation in criminal conduct, as Respondent argues, but extends to *tortious* conduct, consistent with the language of section 17703.04, subdivision (c). The court approved of the Iowa Supreme Court’s reasoning in a similar case: “A manager who takes part in the commission of a tort is liable even when the manager acts on behalf of a corporation. [Citations.] The [Iowa limited liability company act] does not insulate a manager from liability for participation in tortious conduct merely because the conduct occurs within the scope and role as a manager.” (*Pacific Landmark, supra*, 129 Cal.App.4th at p. 1214, quoting *Estate of Countryman v. Farmers Co-op. Assn.* (Iowa 2004) 679 N.W.2d 598, 604.) “[T]here is no indication that the Legislature intended to confer more protections for managers of limited liability companies than for corporate officers and directors.” (*Pacific Landmark, supra*, 129 Cal.App.4th at p. 1216.) The Court’s opinion here does exactly that. (See Slip op., at p. 12.)

The facts of *Pacific Landmark* are similar to those here. As the court stated, “the preliminary injunction was not imposed on [the manager] solely because of his status as manager of Pacific, but because of his personal involvement in allowing the nuisance to persist.” (*Pacific Landmark, supra*, 129 Cal.App.4th at p. 1216.) He “occupied a prominent and influential position at Pacific,” and had “extensive knowledge and control over Pacific’s affairs.” (*Ibid.*) He selected and hired the attorney, “had full responsibility for and authority over the property where the nuisance occurred” and leased the premises. He retained the right to inspect the premises, and served a notice to quit, yet he failed to inspect to determine compliance. (*Id.* at pp. 1216-1217.) All of these acts were arguably performed in the course of his duties as the LLC member. The facts set forth in the Nidivers’ complaint are remarkably similar. Like the manager in *Pacific Landmark*, Respondent was prominently involved and influential in all of the nursing facility decisions, was directly involved in the day-to-operations, and had personal involvement

for the wrongdoing that ultimately resulted in Mr. Nidiver's death. (See, e.g., 2 CT 316 ¶¶ 5, 7; 2 CT 318-319 ¶ 15(b); 2 CT 320 ¶¶ 17-18; Motion to Augment, Ex. 1 ¶ 7.). The alleged conduct is not merely passive participation based solely on Respondent's member status. Reading the complaint liberally, as a whole, the allegations are more than sufficient to establish direct liability of LHS, similar to that in *Pacific Landmark*.

Publishing the opinion would effectively immunize member-managers of LLCs from liability for their own tortious conduct when a third party manager would be liable for that same conduct under *Pacific Landmark*.

The Court's opinion is contrary to public policy because it encourages tortfeasors to simply form a LLC to insulate themselves from personal liability. For example, a truck driver could form a LLC, be the sole member-manager, and insulate himself from personal liability for any accidents he causes on the highway. As evidenced by CAHF's request to publish the opinion, the nursing home industry is already taking note and will form LLCs *en masse*, so that the owners will never be held liable for their participation in tortious conduct if that conduct was performed on behalf of the LLC. There is no indication the Legislature ever intended such a result. Allowing such a result would violate the principles of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code §§ 15600, *et seq.*, intended "to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect" including "the protection of residents of nursing homes and other health care facilities." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33, 37.)

If section 17703.04, subdivision (c) is to be negated, it should be done by the Legislature and not by this Court.

The portion of the opinion holding that a LLC cannot be the agent of its member when it takes over the LLC's day-to-day operations is likewise without support in the law. (See Slip op., at pp. 10-11.) Section 17703.01, subdivision (a) does not immunize LLC members for agency liability at all. It is silent as to whether a LLC may be an agent of its member. The Court's holding contravenes other statutes, including section 17701.04, subdivision (a) (a LLC "is an entity distinct from its members"); section 17701.05, subdivision (k) (a LLC has the power to be an "agent of any person"); and Civil Code section 2295 (defining an agent, without any restriction as to certain types of entities). The Court's holding would also deprive a LLC of the right to be an agent of its member, in direct contravention of these statutes.

Section 17703.01 does not provide that a member-manager of a LLC acts within the normal scope of its duties by controlling all day-to-day operations of the LLC. It does not address that issue at all, other than mentioning execution of instruments. This statute does not provide any reason to treat LLCs differently than corporations for purposes of agency liability.

Finally, the Court's decision is contrary to *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 303-304, which held that a settlement with an entity does not prove or disprove liability of a parent entity as an alter ego, and "release of the subsidiary does not release its alter ego." "The statute must be interpreted to allow the plaintiff full recovery to the extent that others are responsible for his injuries." (*Id.* at p. 304.) "The Legislature could not have intended that a settlement with one defendant which partially compensates the plaintiff for injuries sustained would effectively block the road to complete recovery." (*Ibid.*, citations and quotations omitted.) Here, as Respondent plainly argues, publishing the decision will "block the road" to full recovery for the Nidivers' damages and allow parent entities to escape alter ego liability if there is a settlement with the subsidiary. Notably, the Nidivers have alleged extensive damages, including punitive damages (see 2 CT 332-334, 337) which cannot be paid by any insurance policy held by the nursing facility.

Appellants respectfully request that the Court decline to publish the opinion, and to consider *sua sponte* modifying the decision to conform with the well-settled law on these issues. (See Cal. Rules of Court, rule 8.268, subd. (a)(1).)

Very truly yours,

/s/ C. Athena Roussos

cc: see attached proof of service

**PROOF OF SERVICE  
(CCP Sections 1013a, 2015.5)**

I, C. Athena Roussos, declare:

I am an active member of the State Bar of California. I am over the age of eighteen years and not a party to the within cause. My business address is 9630 Bruceville Road, Suite 106-386, Elk Grove, CA 95757.

On **April 15, 2016**, I served the within **Letter Opposing Request for Publication** on the interested parties in said action by the method checked. For those marked "Served Electronically," I transmitted a PDF version of the **Letter Opposing Request for Publication** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. Transmission occurred before 5:00 p.m. on this date. For those marked "Served by Mail," I deposited true copies, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows:

<p><b>Joseph M. Earley, III</b> <b>James Schacht</b> <b>Law Offices of Joseph M. Earley, III</b> <b>5778 The Skyway, P.O. Box 1809</b> <b>Paradise, CA 95967</b> <a href="mailto:joe@josephearley.com"><u>joe@josephearley.com</u></a> <a href="mailto:james@josephearley.com"><u>james@josephearley.com</u></a> <input checked="" type="checkbox"/> Served Electronically <input type="checkbox"/> Served by Mail</p> <p><b>Sanford I. Horowitz</b> <b>Law Offices of Sanford I. Horowitz</b> <b>101 Maple Street, Suite 303</b> <b>Sonoma, CA 95476</b> <a href="mailto:horowitzelderlaw@gmail.com"><u>horowitzelderlaw@gmail.com</u></a> <input checked="" type="checkbox"/> Served Electronically <input type="checkbox"/> Served by Mail</p> <p><b>[Co-Counsel for Appellants]</b></p>	<p><b>Daniela P. Stoutenburg</b> <b>Kirk G. Neiberger</b> <b>Dummit, Buchholz &amp; Trapp</b> <b>1661 Garden Highway</b> <b>Sacramento, CA 95833</b> <a href="mailto:daniela.stoutenburg@dbtlaw.org"><u>daniela.stoutenburg@dbtlaw.org</u></a> <a href="mailto:kirk.neiberger@dbtlaw.org"><u>kirk.neiberger@dbtlaw.org</u></a> <input checked="" type="checkbox"/> Served Electronically <input type="checkbox"/> Served by Mail</p> <p><b>David S. Ettinger</b> <b>Mark A. Kressel</b> <b>Horvitz &amp; Levy LLP</b> <b>15760 Ventura Boulevard, 18th Floor</b> <b>Encino, CA 91436-3000</b> <input checked="" type="checkbox"/> Served Electronically <input type="checkbox"/> Served by Mail <a href="mailto:dettinger@horvitzlevy.com"><u>dettinger@horvitzlevy.com</u></a> <a href="mailto:mkressel@horvitzlevy.com"><u>mkressel@horvitzlevy.com</u></a></p> <p><b>[Counsel for Respondent Lifehouse Health Services, LLC]</b></p>
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