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January 10, 2005

The Honorable Ronald M. George
Chief Justice, California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Michael Woolery Delgado, et al. v. Trax Bar & Grill
Court of Appeal Case No. 5 Civil F040180
Supreme Court Case No. S117287

Honorable Chief Justice George:

In response to the Court's request for supplemental briefing in the above-referenced matter, Appellant MICHAEL WOOLERY DELGADO (hereinafter DELGADO) respectfully submits the following material for the Court's consideration:

THE SCOPE OF A LANDOWNER'S DUTY TO PROTECT ITS PATRONS UNDER *ANN M.* AND THE "NEGLIGENT UNDERTAKING" DOCTRINE

A. Under *Ann M.*, If "Prior Similar Incidents" Of Violent Crime Have Occurred On A Landowner's Premises, The Duty Of Care A Landowner Owes Its Patrons May Include The Duty To Hire Security Guards To Guard Against Reasonably Foreseeable Criminal Activity

As a general rule, one is not liable in tort for failing to take affirmative action to protect another unless he has a special relationship that gives rise to a duty to act. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], citing Rest. (Second) Torts, § 314; 4 Witkin, Summary of Cal. Law (8th ed.) Torts, § 554, p. 2821.) In *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676-677 [25 Cal.Rptr.2d, 137, 869 P.2d 207], this Court held that the "duty to take affirmative action to control the wrongful acts of a third party" generally does not include a duty to hire security guards "in the absence of prior similar incidents of violent crime on the…premises." *Ann M.'s* rationale is economic – "the hiring of security guards…will rarely, if ever, be found to be a 'minimal burden'." (*Id.* at 679.) Without the "requisite degree of foreseeability," imposing a burden on landowners to hire security guards "would be to impose an unfair burden upon [landowners…." (*Id.*)

Under *Ann M.'s* rationale, in the event that prior similar incidents of violent crime have occurred on a landowner's premises, the scope of the landowner's duty of care can include the duty to hire security guards to protect against those violent crimes which are reasonably foreseeable *based on the nature of the prior similar incidents that occurred on the landowner's premises*. However, as the Court of Appeal wrote in *Claxton v. Atlantic Richfield Company* (2003) 108 Cal.App.4th 327 [133 Cal.Rptr.2d 425], review denied: "As set forth in *Ann M.* and *Sharon P.*, the test is prior 'similar' incidents…not prior identical incidents." (See, Appellant's Opening Brief, pp. 26-27.)

B. Even Without "Prior Similar Incidents" Of Criminal Activity, A Landowner May Still Owe A Duty To Protect Its Patrons By Voluntarily Assuming A Duty Of Care – The "Negligent Undertaking" Doctrine

In the event that no "prior similar incidents" of criminal activity have occurred on a premises, a landowner can still incur a duty under an alternative theory of liability - by voluntarily undertaking a duty to protect another from harm; e.g., hiring security guards. The "negligent undertaking" doctrine is embodied in Restatement (Second) of Torts, §§ 323, 324A, and has been "long recognized" as the law in California. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 607-608 [76 Cal.Rtpr.2d 479, 957 P.2d 1313].) As applied in California, the "negligent undertaking" doctrine "subsumes the well-known elements of any negligence action," and requires proof of the following:

> (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking.

(*Paz v. State of California* (2000) 22 Cal.4th 550, 559 [93 Cal.Rptr.2d 703, 994 P.2d 975], citing *Artiglio* at pp. 613-614.) (Emphasis in original.)

Numerous other jurisdictions also recognize the "negligent undertaking" doctrine as a basis for liability in premises liability actions. (*Wilson v. Texas Parks and Wildlife Department* (Tex. 1999) 8 S.W.3d 634 [Park district could be found liable under negligent undertaking theory for drowning incident where it advertised to visitors that it had early flood warning system which encouraged visitors' reliance that river conditions were being monitored]; *Stuckman v. Salt Lake City* (Utah 1996) 919 P.2d 568 [City that provided fence between river and park could be held liable for injuries sustained by child who gained access to river through a breach in fence of which city was aware]; *Feld v. Merriam* (1984) 506 Pa. 383 [485 A.2d 742] [Landlord may incur duty to protect tenants from criminal attack by third parties either voluntarily or by agreement by

providing program of security]; *Harris v. Pizza Hut of Louisiana, Inc.* (La. 1984) 455 So.2d 1364 [Restaurant owed duty of care to protect patrons from criminal attack by hiring security guard to police its premises].) Courts further recognize that the "negligent undertaking" doctrine is a wholly separate theory upon which to base a landowner's liability for the criminal conduct of third parties. (See, e.g., *Mullins v. Pine Manor College* (1983) 389 Mass. 47 [449 N.E.2d 331] [Liability against college for rape of student could be based either on public policy considerations or negligent undertaking doctrine since college employed security guards to safeguard its students].)

Under the "negligent undertaking" doctrine, once an individual undertakes to provide protection that the individual otherwise has no duty to provide, the individual "is obligated to use reasonable care in providing it." (*Stuckman* at 573.) In such cases, foreseeability based on "prior similar incidents" is not necessary to define the *existence of a duty* because the landowner has already appreciated the risk of harm and has undertaken the duty to hire security guards. (*Mata v. Mata* (2003) 105 Cal.App.4th 1121 [130 Cal.Rptr. 141], review denied, April 23, 2003, S114216. In upholding a jury verdict in favor of the plaintiff which had been reversed by the appellate court, the Louisiana Supreme Court in *Harris v. Pizza Hut* explained:

> It is unnecessary to decide how many prior criminal acts create a duty to hire a private guard because Pizza Hut had recognized that the risk of crime on these premises was sufficiently foreseeable to require special protection. Whether this Pizza Hut had a duty to hire security guards is irrelevant. There was a security guard. Since the Pizza Hut was furnishing security through the services of a trained police officer, the question is whether the security breached his duty…to protect those on the premises.

(*Harris* at 1372.)

(Accord with, *Trujillo v. G.A. Enterprises* (1995) 36 Cal.App.4th 1105 [43 Cal.Rptr.2d 36]; *Lopez v. Baca* (2002) 98 Cal.App.4th 1008 [120 Cal.Rptr.2d 281]; and *Marois v. Royal Investigation & Patrol* (1984) 162 Cal.App.3d 193[208 Cal.Rptr. 384].)

Because the duty of care is undertaken voluntarily, however, the law requires an additional showing by the plaintiff. "One who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking." (*Paz* at 558-559, citing *Williams* at 23.) Moreover, temporal limits exist on the assumption of a duty to protect another from harm by a third party, as was the case in *Weissich v. County of Marin* (1990) 224 Cal.App.3d 1069 [274 Cal.Rptr. 342] [Duration of a duty, assumed in 1975, to warn victim of assailant's release from prison did not last until assailant was released and killed victim in 1986]. However, as the following discussion illustrates, the facts of this case justify imposing a duty on Respondent TRAX BAR & GRILL (hereinafter TRAX) under either *Ann M.'s* "prior similar incidents" standard or the "negligent undertaking" doctrine.

PRIOR TO THE ATTACK ON DELGADO, TRAX HAD EXPERIENCED NUMEROUS FIGHTS BOTH INSIDE THE BAR AND IN THE PARKING LOT WHERE DELGADO WAS ATTACKED

To determine the existence of a duty on the part of TRAX to protect patrons like DELGADO from harm caused by third party crime, two questions must be asked. First, whether there had been sufficient, "prior similar incidents" on TRAX's premises to justify imposing a duty under *Ann M.* Alternatively, whether TRAX "undertook to perform a task that it is charged with having performed negligently" such that liability may be imposed under the "negligent undertaking" doctrine. (*Artiglio* at 614-615, citing *Blessing v. United States* (E.D.Pa. 1978) 447 F.Supp. 1160, 1188-1189.)

The facts justifying the imposition of a duty under either of the aforementioned theories are:

- TRAX served dinners early in the evening and then a younger crowd would come in for drinks. (Reporter's Transcript 16:17-25.) Problems were less likely to occur with the dinner crowd than with the younger crowd. (Reporter's Transcript 16:26-28.)
- Messrs. White, Nichols and Navarro were employed as bouncers at TRAX. There were two and sometimes three people (bouncers) working at TRAX on the weekends. (Reporter's Transcript 18:22-26.) The TRAX bouncers wore T-shirts that said "Security" on the back. (Reporter's Transcript 25:20-28; 26:1-10.)
- The bar had one security guard outside the bar to control patrons waiting in the parking lot area to get in the bar. (Reporter's Transcript 30:28; 31:1-5.)
- If security personnel saw people drinking in the parking lot, they would confiscate the container and ban the person from entering the bar. (Reporter's Transcript 29:5-15.)
- Paul Vercammen – the general manager of TRAX - felt that TRAX was responsible for the safety of its customers to see that they got to their cars in the parking lot. (Reporter's Transcript 21:13-17.)
- Mr. Vercammen recalls two or three fights in the parking lot while he was employed at TRAX. (Reporter's Transcript 22:14-27.)
- Mr. Vercammen hired Nichols as a bouncer – despite his lack of prior experience – because he was "very strong and very big young man" and that he could handle something if it happened. (Reporter's Transcript 32:4-22.)
- Jason Nichols worked for TRAX from March 1998 to January/February 1999, as the head security officer. (Reporter's Transcript 217:2-18.)
- John White was a bouncer at TRAX from around 1996, 1997 until about a month before the November 7, 1998, incident. (Reporter's Transcript 116:22-28; 117:1-10; Reporter's Transcript 115:2-5.) When he was hired, Mr. White was told TRAX wanted someone with experience to check IDs and to protect TRAX patrons and property. (Reporter's Transcript 117:18-27.)
- At TRAX, Mr. White worked as a bouncer inside and outside the bar. (Reporter's

Transcript 115:6-8.) On weekend nights, there would be 20 to 30 people in line in the parking lot waiting to get into TRAX. (Reporter's Transcript 30:19-22; 35:5-10; 118:9-

13.) When Mr. White was at TRAX, on weekend nights, they always had someone staffing an outside post in the parking lot area. (Reporter's Transcript 124:14-19.)

- Mr. White required anyone loitering or milling around the parking lot to leave. (Reporter's Transcript 115:26-28; 118:7-28.)
- Mr. White recalls a prior altercation at TRAX involving nine people. (Reporter's Transcript 114:6-24.)
- On the night of the incident, Mr. Nichols was working the front door of TRAX checking IDs and maintaining security in the front part of the bar. (Reporter's Transcript 217:28; 218:1-5.) Mr. Nichols was wearing a black shirt with white lettering that said "Security". (Reporter's Transcript 218:6-13.)

In the instant case, the evidence supports imposing a duty under *Ann M.* based on "prior similar incidents" in the TRAX bar and its parking lot. Before the incident that injured DELGADO, TRAX had experienced numerous fights in the parking lot, and at least one major altercation involving 9 people. (Reporter's Transcript 22:14-27, 114:6-24.) Under the rationale of *Claxton*, those prior incidents are sufficiently similar to justify imposing a duty of care on TRAX under *Ann M.* In other words, the assault on DELGADO in the TRAX parking lot was reasonably foreseeable because assaults at the bar had previously occurred, at least 1 of which was a group altercation.

On facts similar to the instant case, in *Butler v. Acme Markets, Inc.* (1982) 89 N.J. 270 [445 A.2d 1141], the New Jersey Supreme Court imposed a duty of care on a landowner. In *Butler*, a patron of a grocery store was suddenly and without warning attacked from behind by an assailant in the grocery store's parking lot. In the year prior to the plaintiff's attack, seven muggings had occurred on the grocery store's premises of which plaintiff was unaware. The grocery store had hired security guards on certain evenings, but only one officer was on duty at a given time. The guard's duties were to watch out for shoplifters, to see that no bad checks were passed, to patrol both inside and outside of the store, and to watch customers' parcels. No signs or warnings were posted advising patrons of the possibility of criminal attack. At the time plaintiff was attacked, the lone security guard was inside the store; there was no one on duty in the parking lot. (*Id.* at 274 – 275.)

Finding the foreseeability of criminal conduct "apparent," the New Jersey Supreme Court held that a landowner may "know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons *in general* which is likely to endanger the safety of the visitor *even though he has no reason to expect it on the part of any particular individual*." (*Id.* at 1146.) (Emphasis Added.) This knowledge on the part of the landowner may create "a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford reasonable protection." (*Id.*)

TRAX VOLUNTARILY HIRED SECURITY PERSONNEL AND CHARGED THEM WITH THE RESPONSIBILITY OF PATROLLING AND MAINTAINING ORDER IN THE PARKING LOT WHERE DELGADO WAS ATTACKED

The facts of this case also warrant a finding that TRAX undertook a duty to protect its patrons by employing security guards inside the bar and in the parking lot of the bar. TRAX hired security personnel who wore identifiable uniforms labeled "Security." (Reporter's Transcript 218:6-13.) Their duties included patrolling and maintaining order in the parking lot where DELGADO was attacked. (Reporter's Transcript 29:5-15, 30:28, 31:1-5, 115:26-28, 118:7-28.) Mr. Vercammen, the general manager at TRAX, testified that the scope of TRAX's duty of care toward its patrons included being responsible for the customers' safety and seeing that they got to their cars in the parking lot. (Reporter's Transcript 21:13-17.) Coupled with the fact that TRAX had experienced prior violent crimes on its premises, these facts evidence that TRAX undertook a duty of care to protect its patrons and that the scope of that duty included protecting its patrons from criminal attacks in the TRAX parking lot.

While it is true that, if a landowner hires a security guard for a limited purpose or a limited time period (e.g., checking IDs, weekend security only), the landowner is not necessarily assuming a duty to protect his patrons from all criminal activity at all times. In that case, a landowner may be said to have undertaken a duty, but the *scope of the duty* does not include protecting his patrons from all criminal attacks. (See, e.g., *Lopez v. Baca* (2002) 98 Cal.App.4th 1008 [120 Cal.Rptr.2d 281] [The scope of the duty of a proprietor who voluntarily hired security at a bar on weekends only did not include protecting a patron from a criminal assault that occurred on a weeknight when security was not present].)

In this case, however, TRAX undertook a specific duty to patrol and monitor the parking lot where DELGADO was attacked and to control any crowds that gathered in the parking lot. TRAX believed that the scope of its duty of care to its patrons included getting its patrons to their cars safely. Based on the facts and testimony in this case, TRAX could reasonably foresee that patrons might be victimized by criminal assaults both in its bar and its parking lot, including attacks by groups of patrons. Thus, raising the specter that a landowner who provides security might be liable for an unforeseeable 911-type airplane attack or an Iraqi-style car bombing –assertions made by TRAX and the Court of Appeal - is a "red herring."

Moreover, because TRAX could reasonably foresee the likelihood of group altercations in its parking lot, and because TRAX specifically undertook a program of security designed to control the actions of individuals who gathered in its parking lot, the holding of *Schwartz v. Helms Bakery, Ltd.* (1967) 67 Cal.2d 232 [60 Cal.Rptr. 510, 430 P.2d 68] does not negate TRAX's liability. (Respondent's Supplemental Brief, pages 6 – 7.) Likewise, the Ohio Court of Appeals opinion cited by TRAX, *Maier v. Serv-All Maintenance, Inc.* (1997) 124 Ohio App.3d 215 [705 N.E.2d 1268], does not apply given the facts of this case. In *Maier*, an employee was robbed and murdered by a janitor in the office building where the employee worked. The office building had hired security but only for limited purposes. Unlike the facts of the instant case, no prior incidents of violent criminal activity had occurred on the landowner's premises. (*Id.* at 218.) Because "no assaults had ever taken place in the building, and the building was not located in a high crime area," the Ohio Court of Appeals held that "a reasonable mind could not

conclude that the murder and robbery…were reasonably foreseeable." (*Id.* at 222.)

Furthermore, because the responsibilities of the security company hired by the landowner were limited by a security contract and did not include a contractual duty to protect the plaintiff against violent criminal activity, the plaintiff's "negligent undertaking" theory failed. (*Id.*, citing *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988) 36 Ohio St.3d 36 [521 N.E.2d 780; *Eagle v. Mathews-Click-Bauman, Inc.* (1995) 104 Ohio App. 3d 792 [663 N.E.2d 399].) Unlike *Maier*, TRAX undertook a duty to provide security which included patrolling the parking lot where DELGADO was attacked, controlling the activities of patrons who gathered in the parking lot, and ensuring that patrons reached their cars safely.

PROVIDING SECURITY GUARDS IS A SERVICE THAT TRAX REASONABLY SHOULD HAVE RECOGNIZED AS NECESSARY FOR THE PROTECTION OF ITS PATRONS

Under the "negligent undertaking" theory of liability, the analysis next must turn to whether or not TRAX undertook to render "services…of a kind [they] should have recognized as necessary for the protection of third persons." Hiring security guards is the quintessential service that is of a kind that one should recognize is for the protection of others. Thus, this second question must also be answered in the affirmative.

In *Feld v. Merriam* (1984) 506 Pa. 383, 394 [485 A.2d 742], the Pennsylvania Supreme Court wrote that "a program of security is not the usual and normal precautions…. It is, as in the case before us, an extra precaution, such as personnel specifically charged to patrol and protect the premises. Personnel charged with such protection may be expected to perform their duties with the usual reasonable care required under standard tort law for ordinary negligence." Similarly, the Louisiana Supreme Court in *Harris* noted that a "[security guard] is hired to deter crime." (Id. at 1372).

In this case, TRAX undertook a program of security which it concedes was for the protection of its patrons. (Respondent's Supplemental Brief, page 9.) However, the program of security included more than merely checking IDs and keeping patrons in a line. (Respondent's Supplemental Brief, page 9.) TRAX's security personnel monitored the parking lot where DELGADO was attacked, making sure that patrons did not loiter and drink in the parking lot. (Reporter's Transcript 29:5-15.) The general manager felt that TRAX was responsible for the safety of its customers ensuring that they got to their cars in the parking lot. (Reporter's Transcript 21:13-17.) According to Mr. Vercammen's testimony, TRAX hired bouncers such as Mr. Nichols because they were big and strong men who could handle something if it happened at the bar. (Reporter's Transcript 32:4-22.) These facts demonstrate that the undertaking TRAX assumed is of a kind that a reasonable person would regard as necessary for the protection of others.

THE RECORD IN THIS CASE REFLECTS THAT THE DELGADOS RELIED ON THE PRESENCE OF TRAX'S SECURITY GUARDS BOTH INSIDE AND OUTSIDE THE BAR

Contrary to the assertion by TRAX that DELGADO cannot establish detrimental

reliance, part of the fifth prong of the "negligent undertaking" doctrine (Respondent's Supplemental Brief, pages 11 – 12), there is evidence that the Delgados relied on the presence of TRAX security guards when they were inside the bar and as they were exiting the bar. According to former security guard, John White, TRAX always had someone staffing an outside post in the parking lot area on weekend nights. (Reporter's Transcript 124:14-19.) When the Delgados entered TRAX, DELGADO recalls that a person was stationed outside the bar entrance. (Reporter's Transcript 154:2-10.) Mr. Nichols, a TRAX security guard who was on duty the night of the attack, testified that Mrs. Delgado came up to him inside the bar that night and advised him that there was going to be a fight. (Reporter's Transcript 219:7-11.) Furthermore, as DELGADO was leaving the bar, he expected to see the person who had been stationed outside the bar and planned to contact that person if necessary. (Reporter's Transcript 160:12-18.) As the Delgados walked outside the door of the bar, the guard's station was to the left of the door and Lynette Delgado does not recall anyone stationed there. (Reporter's Transcript 56:20-27.)

THE HOLDING OF *TAYLOR V. CENTENNIAL BOWL, INC.* IS CONSISTENT WITH *ANN M.* AND CONSISTENT WITH IMPOSING A DUTY IN THIS CASE

This Court's decision in *Taylor v. Centennial Bowl., Inc.* (1966) 65 Cal.2d 114 [52 Cal.Rptr. 561; 416 P.2d 793] is consistent with a finding of duty in the instant case. In *Taylor*, the business establishment in question had a history of violent acts on the premises prior to plaintiff's assault. As a result of the violent acts or in anticipation of violent acts on the premises, the owner of the premises paid the city to assign off-duty police officers to the center. The owner hired two bouncers to take care of any difficulties that might arise among the patrons, a utility room at the center was used as a place to detain person involved in disturbances or law violations, and security officers frequently had to evict troublemakers from the premises. (*Id.* at 120.)

Addressing the issue of duty, the *Taylor* Court stated: "The general duty includes not only the duty to inspect the premises in order to uncover dangerous condition (Citations Omitted), but, as well, the duty to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." (*Id.* at 121.) In *Taylor*, the landowner argued that it had discharged its duty of care by warning the plaintiff about the attacker. Citing Restatement 2d (Torts) section 344, comment d, the Court further explained: "There are … many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the likelihood that third persons … may conduct themselves in a manner which will endanger the safety of the visitor." (*Id.* at 124.) The ruling by the *Taylor* Court is consistent with *Ann M.'s* "prior similar incidents" standard; i.e., once an occupant is aware of the potential for violence, as the landowner was in *Taylor*, action must taken to protect one's patrons.

Moreover, in addressing evidentiary rulings made by the trial court, the *Taylor* Court indicated that on retrial, the trial court should admit testimony from police officers that tended to establish that defendant had notice of violent acts on his property prior to plaintiff's assault.

Therefore, the property owner would have been put on notice of the potential threat to his patron from assault by third person, which is consistent with this Court's decision in *Ann M.* (*Id.* at 125.*)*

In the instant case, as in *Taylor,* evidence was introduced showing prior violent incidents on the premises of TRAX – both inside the bar and in the parking lot where DELGADO was attacked - which the Court of Appeal readily acknowledged in its opinion. Therefore, as in *Taylor,* TRAX could not have discharged its duty of care by merely providing a warning to its patrons. Under the rationale of both *Taylor* and *Ann M.,* because of the prior incidents of violence on its premises, TRAX had a duty to take affirmative action to protect its patrons by hiring security guards.

In analyzing *Taylor,* TRAX argues that *Taylor* requires knowledge of a specific and imminent threat of harm to a particular plaintiff before foreseeability can be established. (Respondent's Supplemental Brief, page 11.) This analysis mis-reads *Taylor* and is at odds with *Ann M.'s* "prior *similar* incidents" standard. (See, *Claxton* at 339; See also, *Kwaitkowsky v. Superior Trading Company* (1981) 123 Cal.App.3d 324, 328.)

IMPOSING A DUTY ON TRAX IN THIS CASE DOES NOT POSE AN UNREASONABLE BURDEN ON LANDOWNERS AND WILL NOT DISCOURAGE LANDOWNERS FROM HIRING SECURITY

Imposing a duty on TRAX – under either *Ann M.* or the "negligent undertaking" doctrine – does not pose an unreasonable burden on landowners. Because of the burden inherent in hiring security guards, *Ann M.* does not impose a duty to hire security guards until "prior similar incidents" of criminal activity have occurred on a landowner's premises. In this case, evidence was introduced at trial demonstrating that prior violent crimes had occurred on TRAX's premises. However, if a bar or other business has not experienced prior violent crimes on its premises, or perhaps it has experienced such crimes at certain times but not others, then the bar does not have a duty to hire security guards to protect against all crimes at all times. (See, e.g., *Lopez v. Baca* (2002) 98 Cal.App.4th 1008 [120 Cal.Rptr.2d 281].) Similarly, imposing a duty in this case under the "negligent undertaking" doctrine, does not unduly burden landowners because the scope – as opposed to the existence – of a duty under the "negligent undertaking" doctrine is limited. Although a landowner may be found to have undertaken a duty to his patrons, landowners who voluntarily hire security personnel will only be liable for a breach of a duty that is within the scope of the duty assumed. In other words, landowners may still freely hire someone merely to check IDs at the front door without fear that he is assuming responsibility to prevent all types of violent crime on his premises.

Thus, the concerns about unduly burdening a landowner that existed in *Wiener v. Southcoast Child Care* (2004) 32 Cal.4th 1138 [12 Cal.Rptr.3d 615, 88 P.3d 517] do not apply in this case. In *Wiener,* the plaintiff argued that a school that erects a fence around a playground had a virtually limitless duty to prevent all automobiles from crashing through the fence – including those driven intentionally through the fence – even though the school had no "prior similar incidents" of automobiles being driven intentionally through its fence. (*Id.* at 1149.) Under those circumstances, had the Court imposed a duty, the Court would have required schools (already financially strapped) to become a "fortress". (*Id.* 1151.) Here, the duty

DELGADO seeks to impose on TRAX is within the ambit of the evidence of "prior similar incidents" of violent crime that had occurred on TRAX's premises before DELGADO was attacked and is within the scope of the duty assumed as evidenced by the facts and testimony introduced at trial. (*Id.*)

Respectfully submitted,

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cc: California Supreme Court – 14 copies
Court of Appeal, Fifth Appellate District
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