MAYER·BROWN

Mayer Brown LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, California 94306-2112

Main Tel (650) 331-2000
Main Fax (650) 331-2060
www.mayerbrown.com

Donald M. Falk
Direct Tel (650) 331-2030
Direct Fax (650) 331-4530
dfalk@mayerbrown.com

September 17, 2007

BY COURIER

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Hoffman v. American Express Travel Related Services Co.*, No. S155439

Dear Chief Justice George and Associate Justices:

The Chamber of Commerce of the United States of America, through its attorneys, submits this letter as *amicus curiae* in support of the petition for review filed on August 15, 2007, by American Express Travel Related Services, Inc. ("American Express").

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In fulfilling that role, the Chamber has appeared many times before this Court, both at the petition stage and on the merits.

The Chamber's members have a strong interest in further review. The decision of the Court of Appeal sets a harmful precedent that further limits the access of businesses and others to the arbitral processes for which they contracted. The Court of Appeal recognized that the question was straightforward: whether a party may "lose its contractual right to compel arbitration if, when negotiating and seeking approval of a class action settlement, it misrepresents the benefits of the proposed settlement to the court, opposing counsel, and others." Slip op. 1. The Court of Appeal has tread upon new and unsteady ground in concluding that American Express waived its right to arbitrate by failing to mention that it had already implemented voluntarily a practice that a settlement agreement would make compulsory. The decision below improperly

transmutes purported misconduct in the course of settling a dispute—one favored way of resolving a dispute without merits litigation—into a waiver of an entirely different dispute resolution mechanism, the right to arbitrate that is guaranteed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA").

The decision below parts ways with this Court's jurisprudence, which has narrowly confined the circumstances that could amount to a waiver of the right to arbitrate. The result below also is inconsistent with the FAA's strong preference for enforcing arbitration agreements, and its strict limits on the devices that can be used to deny enforcement. Finally, by revoking the right to arbitrate based on a misrepresentation about the voluntary implementation of one of the practices to be compelled under the settlement, the decision below undermines the strong public policy favoring settlements. See, *e.g.*, *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.* (1985) 38 Cal.3d 488, 498-499; *McClure v. McClure* (1893) 100 Cal. 339, 343. Review is warranted.

This Court has limited waivers of the right to arbitrate to conduct that either involves misconduct (such as deception) focused on arbitration itself, or uses the litigation process to advance the case on the merits in a way that prejudices the other side. See *St. Agnes Medical Center v. Pacificare of California* (2003) 31 Cal.4th 1187. By effectively nullifying an arbitration agreement based on conduct that relates solely to the negotiation and attempted confirmation of a settlement—a settlement that expressly preserved the right to arbitrate claims not settled—the Court of Appeal has provided would-be litigants with a whole new class of excuses to avoid performing their contractual obligations to arbitrate. Creation of a new loophole allows one side of a contract to avoid obligations that provided important consideration (affecting price and other terms) in the underlying agreements for goods or services, upsetting contractual predictability and stability for the wide range of businesses that have chosen to resolve disputes through arbitration.

This Court in *St. Agnes* disapproved all but the narrowest judicial invocation of waiver principles to decline enforcement of arbitration agreements. A party may waive its right to arbitrate if it engages in willful misconduct directed at the right to arbitrate. *St Agnes*, 31 Cal.4th at 1196 (citing *Engalla v. Permanente Med. Gp.* (1997) 15 Cal.4th 951, and *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425-426).[1] That may involve unreasonable delay within the arbitration process, as in *Engalla*, or deception about the availability of arbitration, as in *Davis*. And a party may waive arbitration if it chooses a litigation forum to resolve the underlying dispute, or if it uses the procedures

[1] The plaintiffs admit that the principal California cases on the topic dealt with concealments or misleading communications of arbitration rights. Ans. 14-15.

available in that forum to "litigate[] the merits or the substance of [the] arbitrable claims." *St. Agnes*, 31 Cal.4th at 1204.

But the waiver found below rests on nothing of the sort. To begin with, the Court of Appeals explained that it did not rely on "litigation conduct" in its ruling. Slip op. 20 n.12, 23 n.13. And, from all appearances, no such conduct could provide an alternate ground for affirmance. There was, apparently, some litigation on the merits. But that involved only California plaintiffs who had not agreed to arbitrate and were not the subject of the motion to compel. Slip op. 11 & n.4 (noting that motion to compel was addressed only to plaintiffs outside of California). The opinion below makes clear both that no nationwide class was alleged until the settlement, and that none was certified until after the settlement had fallen through. Thus, any early litigation on the merits could not prejudice the only plaintiffs who were subject to the motion to compel; they had not been involved in that litigation.

It is fundamentally wrong to contend that using a court to *settle* a case somehow waives the ability to use the agreed-upon arbitration procedure if the settlement fails. Again, the plaintiffs at issue here entered the California litigation only after the settlement was reached. No out-of-state plaintiffs were involved in the earlier proceedings, which hinged on a complaint brought under California law on behalf of the general public in California. See slip op. 2.

The narrow scope of the misrepresentation at issue highlights how far the lower courts in this case went to refuse enforcement to the arbitration agreement. There was no dispute that American Express would agree to alter several business practices, and that those alterations would be guaranteed by the prospect of court enforcement of the settlement. American Express had voluntarily implemented one of the changes—a particular use of a particular code in the computerized billing system—shortly before the settlement. Thus, viewing the statements of American Express' lawyers most critically, contrary to those statements, the settlement would not bring about the initiation of that practice, but would guarantee its continuation despite any second thoughts that American Express later might have had. The opinion below indicates that this litigation began in 2001, while the coding change occurred in late 2002. There can be no doubt that, had this case been litigated to a conclusion, in seeking attorneys' fees plaintiffs would have claimed credit for that change under a catalyst theory. See generally *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553. Thus, although American Express' lawyers may not have revealed (and may not have known) that the change had been implemented before the settlement, American Express' agreement to preserve the changed practice through an agreement enforceable in court secured the benefits of the change for consumers even if

American Express changed its mind about the coding change's relative costs and benefits.

Yet the court below held that the statements amounted to a misrepresentation, and that the misrepresentation was so severe that it waived enforcement of an arbitration agreement that was not squarely at issue when the misrepresentation was made—and indeed had been excluded from consideration in the settlement. Under the FAA, however, waiver questions (like other issues) must be resolved with a thumb on the scale that favors arbitration rather than impedes it. See *Moses H. Cone Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 24. That precludes a state court from relying on a general policy condemning wrongful behavior as a means of thwarting arbitration when the behavior had nothing to do with arbitration.

Indeed, the very novelty of the Court of Appeal's holding renders it unsustainable under federal law. Although states may apply established principles of contract law to refuse enforcement to arbitration agreements, "no state can apply to arbitration (when governed by the [FAA]) any novel rule." *Oblix, Inc. v. Winiecki* (7th Cir. 2004) 374 F.3d 488, 492. Yet it is quite novel to base waiver of the right to arbitrate on conduct unrelated to the arbitration agreement, and directed at resolving the underlying dispute without litigation (as arbitration would). Neither the court below nor the plaintiffs have identified an analogous waiver holding outside the arbitration context.

It was "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses Cone Hospital*, 460 U.S. at 22. That, by all appearances, is what American Express tried to do with the out-of-state plaintiffs here, who had been prospectively present in this litigation only for the purposes of settlement. Once it was clear that there would be no settlement, American Express tried to shift those plaintiffs' disputes into arbitration. For a court to reach back into failed settlement proceedings to find a basis to preclude arbitration violates the central policy of the FAA.

The decision below warrants review for another reason: it violates the public policy favoring settlement by raising the costs and risks of the settlement process so long as a court is involved. If using a court's offices to further a timely settlement may waive arbitration, then parties will be encouraged to shift forum first and explore settlement second. That is wasteful. Rather, parties that wish to explore settlement while a case is in court should not risk their ability to compel arbitration later.

In addition, the misrepresentation finding at the core of the decision below suggests that an agreement to continue a corrective practice cannot be a bona fide element of a class action settlement. That, too, is wrong. If a consumer benefit resulted from American Express's use of a certain set of data codes, as appears to be the case, American Express should have been encouraged to implement the change quickly rather than hold it back as a bargaining chip for settlement. The holding here effectively penalizes American Express for addressing and correcting the problem promptly after the litigation began. For that reason as well, the decision below should be reviewed and reversed.

Respectfully submitted,

Donald M. Falk

Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CERTIFICATE OF SERVICE

I, Kristine Surzynski, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On September 17, 2007, I served the foregoing document(s) described as:

AMICUS LETTER ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

I served the documents on the persons below, as follows:

The documents were served by OVERNIGHT DELIVERY to:

Clerk of the Court
Alameda County Superior Court
1225 Fallon Street, Room 109
Oakland, CA 94612

Clerk of the Court
First District, Court of Appeal
350 McAllister Street
San Francisco, CA 94102

The documents were served by OVERNIGHT DELIVERY and ELECTRONIC MAIL to:

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I enclosed the documents in an envelope provided by the overnight delivery carrier and addressed to the persons at the addresses listed on the attached service list. I placed the envelope for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 17, 2007, at Palo Alto, California.

Kristine Surzynski

SERVICE LIST

Max Folkenflik, Esq.
Folkenflik & McGuerity
1500 Broadway, 21st Floor
New York, NY 10036
Attorneys for Plaintiffs
max@fmlaw.net
(hard copy designee)

Theodore W. Phillips, Esq.
Phillips Greenbert & Hauser LLP
3080 Cedar Ravine
Placerville, CA 95667
Attorneys for Plaintiffs
tphillips@pghllp.com

Thomas F. Campbell, Esq.
Campbell Law
100 Concourse Parkway, Suite 115
Birmingham, AL 35244
Attorneys for Plaintiffs
tcampbell@campbelllitigation.com
lharper@campbelllitigation.com

Russell Jackson Drake, Esq.
Whatley Drake & Kallas, LLC
2001 Park Place North, Suite 1000
Birmingham, AL 35203
Attorneys for Plaintiffs
jdrake@whatleydrake.com

David M. Fried, Esq.
Law Office of David M. Fried
1975 Adams Avenue
San Leandro, CA 94577
Attorneys for Plaintiffs
dmfried@sbcglobal.net
(hard copy designee)

H. Tim Hoffman, Esq.
Hoffman & Lazear
180 Grand Avenue, Suite 1550
Oakland, CA 94612
Attorneys for Plaintiffs
hth@hoffmanandlazear.com

Kimberly S. Keevers, Esq.
Richardson, Patrick, Westbrook
& Brickman, LLC
174 East Bay Street
Charleston, SC 29401
Attorneys for Plaintiffs
kkeevers@rpwb.com
(hard copy designee)

John Bartko, Esq.
William I. Edlund, Esq.
Christopher D. Sullivan, Esq.
Bartko, Zankel, Tarrant
& Miller
900 Front Street, Suite 300
San Francisco, CA 94111
jbartko@bztm.com

Jerome B. Falk, Jr., Esq.
Steven L. Mayer, Esq.
Rebecca M. Kahan, Esq.
Howard Rice Nemerovski Canady
Falk & Rabkin
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4024
jfalk@howardrice.com

David W. Shapiro, Esq.
Fred Norton, Esq.
Boies, Schiller & Flexner LLP
1999 Harrison Street, Suite 900
Oakland, CA 94612
dshapiro@bsfllp.com