February 27, 2006

The Honorable Ronald M. George, Chief Justice
The Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

RE: ***Peregrine Litigation Trust v. Superior Court of the State of Cal., County of San Diego; Fourth Appellate District, Division One, Case No. D046348; California Supreme Court Case No. S141028.***

Dear Chief Justice George and Associate Justices:

The California Chamber of Commerce, the California Business Roundtable and the Chamber of Commerce of the United States of America respectfully submit this *amicus curiae* letter pursuant to Rule 28(g) of the California Rules of Court in support of the Petition for Review filed by John J. Moores, et al., in the above-captioned matter.

1. Nature of the Applicant's Interest

The California Chamber of Commerce ("the Chamber") is the largest, voluntary business association within the state of California, with more than 15,000 members, both individual and corporate, representing virtually every economic interest in the state. While the Chamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. The Chamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. The Chamber only participates as *amicus curiae* on matters that have a significant impact on California businesses; the above-captioned matter is but one example.

The California Business Roundtable (the "Roundtable") is a non-partisan organization composed of chief executive officers of California's leading corporations. Established in 1976, the mission of the Roundtable is to apply the knowledge, expertise and insights of its members to help identify and solve complex problems affecting California's economic vitality. Like the Chamber, the Roundtable submits *amicus* filings

in matters affecting the Roundtable's core concerns of the economic health and growth of the State of California.

The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the nation's largest business federation. With substantial presence in all fifty States and the District of Columbia, the U.S. Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The U.S. Chamber regularly advocates the interests of its members in state and federal courts throughout the country on issues of national concern.

Attracting and retaining businesses, and the much-needed jobs and revenue they provide, are important policy objectives for *amici*. As businesses become less constrained by geographic boundaries, the issues raised in this case – whether plaintiffs may use California law to sue directors of a foreign corporation – will become increasingly prevalent. *Amici* therefore respectfully urge this Court to grant review in order to provide definitive guidance on this issue.

2. Why This Court Should Grant Review

This Court should grant review because the appellate court's decision in this case substantially increases ambiguity in the law applied to foreign corporations conducting business in California. More importantly, *amici* believe the lower court's ruling, if allowed to stand, will promote forum shopping and increase litigation in California. Finally, review is necessary in light of the conflicting decision rendered in *Grosset v. Wenaas*, for which the court has accepted review. *See Grosset v. Wenaas*, S139285, formerly 133 Cal. App.4th 710 (4th Dist. 2005) (relying in part on the constitutional underpinnings of the internal affairs doctrine, *Grosset* applied that doctrine to preclude the application of California law to derivative claims brought on behalf of a Delaware corporation).

A. This Court Should Grant Review to Uphold Long-Standing Precedent on Which Corporations Rely.

The appellate court's ruling, if let stand, will erode the long-standing precedent that a single law governs a corporation's relationship with its directors, officers and shareholders. In this case, a corporation and its directors and officers agreed that Delaware law would apply by organizing the corporation under the laws of Delaware; now third parties who have acquired the company's claims seek to ignore that agreement and instead invoke California's insider trading law because of, among other things, its treble damages remedy.

As the U.S. Supreme Court noted, "uniform treatment of directors, officers, and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law."

Kamen v. Kemper Fin. Serv., 500 U.S. 90, 106 (1991) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmt. e, 309 (1971)).

The Chamber, Roundtable, and the U.S. Chamber are concerned about the effect the lower court's ruling may have on a company's desire to do business in or with California. Applying the law of the state of incorporation does not deny plaintiffs an adequate legal remedy. However, a failure to respect the principles that govern the state of incorporation's right to direct the relations of officers and directors is a red flag to corporations seeking to do business in this state. Allowing local laws to trump the laws of the state of incorporation is "apt to produce inequalities, intolerable confusion, and uncertainty, and intrude on the domain of other states that have a superior claim to regulate the same subject matter." *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1114 (Del. 2005).

The court of appeal's decision would set a precedent that could apply to any foreign corporation that conducts any transaction within the state. Should other states follow California's precedent, directors or officers could be subject to the conflicting laws of potentially all fifty states.

For multinational corporations, the certainty and predictability provided by the internal affairs doctrine is critical. Knowing what law will govern their conduct is essential to current and potential directors of multi-state corporations. Exposing directors to liability under different standards will have a significant negative effect on businesses, and individuals will be less inclined to serve as directors. Similarly, by expanding the reach of California law, the likely result of the court of appeal's ruling will be more lawsuits in California brought by nonresident plaintiffs "on behalf of" foreign corporations against officers and directors for alleged misconduct. Fewer businesses will want to do business in California, and California residents will feel the long-term effects in the form of fewer choices, fewer jobs, and higher prices.

B. This Court Should Grant Review to Confirm that Section 2116 and the Internal Affairs Doctrine Apply to a Foreign Corporation's Claims Against its Officers and Directors.

Through California Corporations Code section 2116 and the "internal affairs" doctrine, California for many years has applied the law of the state of incorporation to disputes between foreign corporations and their directors and officers. The court of appeal nonetheless concluded that neither section 2116 nor the internal affairs doctrine applies to a foreign corporation's claims against its own officers and directors under section 25502.5.

The rationale given by the court of appeal is that section 25502.5 is part of the California securities regulatory scheme and, as such, it serves broad public interests of protecting investor confidence and punishing what is perceived as immoral conduct. Op. at 23-24. The opinion fails to take into account, however, the important public interests

served by giving respect to the parties' choice of law and maintaining legal certainty and predictability by ensuring that a single law governs a corporation's relationship with its officers and directors.

Consistent with the internal affairs doctrine, the California legislature enacted Corporations Code section 2116, which mandates that disputes between corporations and their directors over "official duties" are determined according to the laws of the state of incorporation. Although such disputes may be heard in California, the law of the state of incorporation applies. California has codified statutory exceptions to this rule, but no one contends that those exceptions are applicable in this case. *See* Cal. Corp. Code § 2115 (exceptions to applying law of the state of incorporation (1) where shares of the foreign corporation are not listed or traded on a national exchange; and (2) where more than one-half of the outstanding voting shares are held by California residents).

The internal affairs doctrine, like section 2116, is integral to the legal and regulatory landscape governing corporate behavior. Under the "internal affairs" doctrine, the law of the state of incorporation governs the liability of officers and directors to a corporation and its shareholders. *State Farm Mutual Automobile Ins. Co. v. Superior Court*, (2003) 114 Cal. App. 4th 434, 445-47; *CTS Corp. v. Dynamics Corp. of Am.* (1987) 481 U.S. 69; *In re Sagent Tech., Inc. Deriv. Litig.* (N.D. Cal. 2003) 278 F. Supp. 2d 1079; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 309, cmt. (a). This doctrine provides certainty, uniformity, and predictability, which are critical to the corporate environment, by ensuring that a single state's law will govern the corporation's relationship with its directors, officers, and shareholders. The doctrine is vital in protecting the interests of the parties, providing stability, and controlling costs, particularly for corporations doing business in multiple states. The predictability afforded by the doctrine is also important to those who serve as directors of corporations so that they may assess the risks involved in service to a corporation and its shareholders.

In spite of the plain language of the statute, the court of appeal concluded that section 2116 should not apply to claims brought by a corporation against its officers and directors under Corporations Code sections 25402 and 25502.5. In support, the court relied on three cases involving third party claims against a corporation, which obviously would not be covered by section 2116. *See* Op. at 10-12. However, none of those cases involved a corporation's claims against its officers or directors.

Finally, this Court should grant review in order to define the scope of the internal affairs doctrine. This Court has already agreed to hear *Grosset*, which presents concerns related to this case, but reaching a different result. Although the precise issues in *Grosset* differ from those in *Friese,* each case concerns whether the law of the state of incorporation or California law should apply to claims by a foreign corporation against its own officers and directors for alleged insider trading. That both cases reached different conclusions on this important issue, although decided in the same jurisdiction, makes this case worthy of review by this Court.

3. Conclusion

Review is proper in order to provide a fair and consistent interpretation of the law. Especially in today's global market, with the exchange of goods, services and information rapidly crossing all borders and jurisdictions, businesses must know to what standard they will be held.

The appellate court's decision in this case will have a significant negative effect on foreign corporations doing business in our state and opens the door to plaintiffs seeking to circumvent the law of the state of incorporation. In order to provide an interpretation of the law upon which businesses can rely, we respectfully urge this court to grant appellants' petition for review.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

I am employed by CALIFORNIA CHAMBER OF COMMERCE in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 1215 K Street, Suite 1400, Sacramento, California 95814.

On February 27, 2006 I served the foregoing document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as stated on the attached service list as follows:

By placing true copies thereof enclosed in sealed envelope(s) addressed as stated on the attached service list

BY U.S. MAIL: I placed a true copy in a sealed envelope addressed as indicated above. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

BY OVERNIGHT MAIL (VIA FEDERAL EXPRESS): I caused such envelope to be deposited at a station designated for collection and processing of enveloped and packages for overnight delivery service by **FEDERAL EXPRESS**. I am "readily familiar" with the company's practice of collection and processing of documents and other papers to be sent by overnight delivery service by **FEDERAL EXPRESS**. Pursuant to that business practice, envelopes in the ordinary course of business are that same day deposited in a box or other facility regularly maintained by such overnight service carrier or delivered to an authorized courier or driver authorized by such overnight service carrier to receive documents in an envelope or package with delivery fees provided for or paid.

Executed on February 27, 2006 at Sacramento, California.

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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