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BY FEDERAL EXPRESS

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

Re: *State of California ex rel. Hindin v. Hewlett-Packard Co. et al.*, No. S155583

To the Honorable Chief Justice and Associate Justices:

Pursuant to California Rule of Court 28(g), the Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this letter supporting the petition for review filed by Hewlett-Packard Company and Agilent Technologies, Inc. in the above-referenced case. As set forth in the petition, this case is of significant interest to the business community. The Court of Appeal's erroneous interpretation of the California False Claims Act ("CFCA"), if not corrected, would allow qui tam plaintiffs to avoid the statute of limitations that applies to the government on whose behalf they act and thereby threaten businesses with the prospect of stale claims brought a decade after the plaintiff learned of them. The Chamber therefore urges the Court to grant review.

INTEREST OF AMICUS CURIAE

The Chamber is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographical region of the country. Many of its members do business in California and a significant number of them have business or other relationships with the State of California. One of the principal functions of the Chamber is to represent the interests of its members by filing amicus briefs in cases involving issues of vital concern to the nation's business community.

Many members of the Chamber are potentially subject to the terms of the CFCA. In its decision below, the Court of Appeal held that the CFCA three-year statute of limitations, which begins to run at the date of discovery of the alleged wrongdoing, does not apply to qui tam plaintiffs who assert claims on behalf of the State of California. Thus, under the Court of Appeal's reasoning, a qui tam plaintiff can wait as long as ten years after an alleged violation of

the CFCA occurred before filing a complaint on behalf of the government, regardless of when he learned of the alleged violation. As explained below, because qui tam complaints are filed under seal, and in light of common practices in false claims litigation, a company may even have to wait much longer than ten years before it is ever informed that it is a defendant in a CFCA action. The business community is therefore concerned that, if the Court of Appeal's decision stands, companies will as a matter of course be forced to defend against stale claims brought pursuant to the CFCA. Statutes of limitations are fundamental to the promotion of justice, and, as the United States Supreme Court has recognized, "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them." *American Pipe & Constr. Co. v. Utah* (1974) 414 U.S. 538, 554 (citation omitted).

The important policies served by the limitation period, and by the CFCA's qui tam provisions generally, would be undermined if a qui tam plaintiff is not subject to the same limitation rules as the government on whose behalf the qui tam plaintiff acts. Companies potentially exposed to CFCA claims would no longer know the temporal limit of their possible liability. Stale claims would be allowed to proceed. As a result, the statute's goal of encouraging those with knowledge of government fraud to come forward and report the fraud would be thwarted, because putative plaintiffs would have incentives to sit on their rights and ***not*** come forward with potential claims.

Because most CFCA cases are initiated by qui tam plaintiffs, the Court of Appeal's decision, if not corrected, will have a dramatic impact on how most CFCA cases will be initiated. And because the applicability of the three-year statute of limitations to cases initiated by qui tam plaintiffs would be an issue of first impression, review by this Court is necessary to settle this important question of law. The Chamber therefore respectfully requests that the Court grant the petition for review in this important case.

REASONS FOR GRANTING REVIEW

I. THE COURT OF APPEAL'S RULING IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE.

The decision below is incorrect as a matter of fundamental statutory interpretation. The Court of Appeals concluded that the three-year statute of limitations does not apply to a qui tam plaintiff because he is not an "*official* of the state or political subdivision charged with responsibility to act in the circumstances." Opinion ("Op.") at 6 (quoting Gov't Code § 12654) (emphasis by the court). Relying on what it characterized as the "plain" and "commonsense" meaning of this language, the court reasoned that the statute "refers to a public official such as the Attorney General, not a private individual such as Hindin." *Id.* The court, however, ignored that the plain meaning of the term "official" includes any "person authorized to act for a government." *Webster's Third New Int'l Dictionary* 1567 (1986). "Charge" can likewise mean to "command or exhort with authority." *Id.* at 377. Under a plain reading of the statute, therefore, the statutory term "official of the state . . . charged with responsibility to act" can

include anyone who is authorized and commanded with authority to act for the government, a definition that easily encompasses a qui tam plaintiff.

The term "qui tam" is itself an abbreviation of the Latin phrase "*qui tam domino rege quam pro se in hac parte sequitur*," which translates as "he who pursues this action on our Lord the King's behalf as well as his own." 1 John T. Boese, *Civil False Claims and Qui Tam Actions*, 1-7 (3d ed. 2007). Thus, when a CFCA lawsuit is filed, a qui tam plaintiff "stands in the shoes of the state or political subdivision . . . ." *Wells v. One2One Learning Found.* (2006) 39 Cal. 4th 1164, 1214. He acts unilaterally. He is authorized to file suit with no initial oversight from or need for approval by the government. *See* Gov't Code § 12652(c)(1). For purposes of filing the initial complaint (and therefore for purposes relevant to the statute of limitations), a qui tam plaintiff is an official of the state or political subdivision charged with responsibility to act in the circumstances, and he—just like the government in whose name he proceeds—must file his complaint within three years of his discovery of an alleged violation. The Court of Appeal's conclusion to the contrary is in error.

Applying the three-year "discovery" statute of limitations to qui tam plaintiffs is also consistent with the statutory scheme as a whole. In no other part of the CFCA are qui tam plaintiffs provided with procedural or substantive advantages over the government for whom they act. It is contrary to the fundamental nature of qui tam actions, the plain meaning of the CFCA, and the statutory scheme to apply a more generous statute of limitations to qui tam plaintiffs than to the government itself.

II. THIS CASE PRESENTS AN IMPORTANT ISSUE.

Review is also warranted because this case involves an important issue. The Court of Appeal largely dismissed any consideration of policy in its decision below, stating that "[p]olicy arguments . . . do not change the plain language of the statute the Legislature did enact, or rewrite the legislative history evincing what the Legislature intended." Op. at 12. The Court of Appeal then engaged in a one-paragraph analysis of "policy" issues, emphasizing that it is public officials who are ultimately "responsible for safeguarding public funds" and who are "politically responsible to the electorate," and concluding that "it would be incongruous for the knowledge of a private individual, obtained while the individual was *not* even acting as a public official, to preclude the government from bringing a claim." Op. at 13.

The Court of Appeal failed to recognize that, under its interpretation of the statute, the CFCA would allow prospective qui tam plaintiffs to ***withhold*** information from the government, rather than encourage such individuals to bring information forward in a timely manner to effectively aid state officials in protecting the public fisc. The passage of time can defeat enforcement of the statute because businesses are not static—companies merge and fail, divisions are created and eliminated, documents are lost, personnel come and go. The annual turnover rate for all industries in the United States for the period ending August 2006 was 40.4%. *See* NOBSCOT Corporation, *US Annual Employment Turnover Rates by Industry and Geographic Region Through Aug/06* (www.nobscot.com/survey/us_total_separations_0806.cfm). The longer a potential qui tam plaintiff waits to file a complaint, the greater risk that

evidence critical to the government's case will be lost. The problems engendered through such delay are far from hypothetical, as this case demonstrates. *See* Petition at 31.

The Appellant suggests a number of reasons why qui tam plaintiffs may need more time to investigate potential violations of the CFCA. *See* Appellant's Answer to Respondent's Petition for Review at 8-9. But the problems and limited resources facing qui tam plaintiffs argue in favor of earlier, not later, disclosure of claims to the government:

> Ordinarily a *qui tam* plaintiff has limited access to documents, even if the information comes from a "whistleblower" within the organization. Moreover, the *qui tam* plaintiff may have a limited view of the wrongdoing, failing to provide other documentation casting the activity in a different light. The wrong alleged in the complaint is often seen by the *qui tam* plaintiff in the light of a long experience with the organization. The hard, cold documentation incontrovertibly proving the wrong is not always contained in the complaint or disclosure statement.

James W. Taylor & Brian Taugher, *The California False Claims Act*, 25 Pub. Cont. L.J. 315, 331 (1996). Allowing a qui tam plaintiff up to ten years to "investigate" and decide whether to come forward with his claim, when the government will inevitably have to redouble the qui tam plaintiff's efforts once the complaint is filed, will result in nothing but additional delay and diminished returns.

The Chamber and its members are particularly concerned about the impact a presumptive ten-year statute of limitations for qui tam plaintiffs will have on the ability of businesses to defend against CFCA claims. The passage of time is particularly problematic in qui tam actions, because the defendant is not put on notice of the lawsuit when it is originally filed. A qui tam complaint is filed under seal, and a copy is not served on the defendant until after the complaint is unsealed. *See* Gov't Code § 12652(c)(2). The seal lasts for an initial period of sixty days, and can be extended for good cause shown. *See* Gov't Code § 12652(c)(2), (c)(5). The purpose of the seal is, among other things, to ensure that the "qui tam action does not alert wrongdoers, prior to intervention by the government, that they are under investigation." *Wells*, 39 Cal. 4th at 1215 (citations omitted) (discussing federal FCA). In his amicus brief submitted below, the Attorney General reported that the seal has been extended for more than 2½ years in CFCA cases and as long as nine years under the federal False Claims Act. In this case, the defendants were not served with a copy of the complaint until ***thirteen*** years after their alleged wrongdoing occurred. *See* Petition at 31.

Such egregious delay is unjust to defendants:

> Statutory limitation periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary

> on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

American Pipe, 414 U.S. at 554 (citation omitted). Because most CFCA lawsuits are initiated by qui tam plaintiffs on behalf of the government, a ten-year statute of repose with additional time under seal for investigation will be the rule, not the exception. This will unfairly disadvantage defendants, because the qui tam plaintiff will be able to sit on his or her purportedly incriminating evidence, thereby making it increasingly difficult for the prospective defendant to locate and marshal the evidence refuting it.

History tells us that qui tam statutes invite abuse. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000) ("For obvious reasons, the informer statutes were highly subject to abuse . . . ."); *The History and Development of Qui Tam*, 1972 Wash. U.L.Q. 81, 84-85 ("[P]arties that sued to recover a part of a penalty . . . were . . . a class of bounty hunters. . . . [A]n informer was motivated by the chance of gain, not by the need for recovery. This distinction, combined with the overzealous pursuit of bounty, eventually lead to a general distrust of the informer."). Indeed, "[t]he history of the [federal] FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) (discussing "original source" provisions of FCA).

One method for controlling abuses by qui tam plaintiffs is "subjecting such suits to relatively short statutes of limitations." *Vermont Agency*, 529 U.S. at 776 (citations omitted); *see also The History and Development of Qui Tam*, 1972 Wash. U.L.Q. at 97 ("Short statutes of limitations for informers . . . helped control abuses.") (citing *Commonwealth v. Frost*, 5 Mass. 53 (1809); *Pike v. Madbury*, 12 N.H. 262 (1841)). The reasonable three-year statute of limitations for the CFCA, which requires parties to institute actions in a timely manner when they have knowledge of fraud, also protects against possible abuse in the CFCA qui tam context. It will not be effective, however, unless the three-year discovery rule is applied equally to qui tam plaintiffs. That will advance the fundamental purposes of the CFCA by encouraging prospective qui tam plaintiffs to share information with the government, which in turn will be in a better position to investigate and resolve claims of alleged wrongdoing.

Accordingly, in light of the errors in the Court of Appeal's decision and the significance of this case to the business community, the Chamber urges the Court to grant review.

CONCLUSION

For the foregoing reasons and those in the petition, the petition should be granted and the judgment of the Court of Appeal reversed.

Respectfully submitted,

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