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VIA TRUE FILING

May 8, 2023

The Honorable Frances Rothschild, Presiding Justice, and
The Honorable Associate Justices of the Court of Appeal
for the Second Appellate District of the State of California
Ronald Reagan State Building
300 South Spring Street
2nd Floor, North Tower
Los Angeles, California 90013

Re: Letter of U.S. Chamber of Commerce as *Amicus Curiae* in Support of Petitioner, *Lockton Cos., LLC – Pac. Series v. Super. Ct.*, No. B328408

To the Honorable Presiding Justice and Associate Justices of the Court of Appeal:

Along with my colleagues at Katten Muchin Rosenman LLP, I represent the United States Chamber of Commerce as *amicus curiae* in support of petitioner in the above-referenced case.

This case presents an important and recurring question of law: Whether a California court may refuse to enforce a forum-selection clause, not because the selected forum is unreasonable, but because that forum *might* ultimately apply substantive law that is perceived less favorable than California law to the party resisting the clause's enforcement. The Superior Court held that a clause selecting a federal court in Missouri was valid and mandatory, but refused to enforce that clause because it speculated that the Missouri court would apply Missouri law to resolve the parties' dispute, and Missouri law *might* be less favorable to the party resisting the clause's enforcement.

It is impossible to reconcile the Superior Court's approach with long-standing California law. Under the approach adopted by the California Supreme Court three decades ago, a forum-selection clause is presumptively valid, and the party resisting a forum-selection clause's enforcement therefore must show that the parties' selected forum is unavailable, biased, or has no reasonable connection to the parties' dispute. *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1679. Issues of substantive law are not relevant to this determination. Indeed, once a court determines that a clause passes this test, it is the province of the selected forum to

decide the merits of the parties' dispute. In contrast, the test adopted by the Superior Court requires the party who is seeking to enforce the clause to jump to a choice-of-law analysis and prove that the selected forum will apply substantive law that is no less favorable than California law to the party resisting the clause's enforcement. As a result, under the Superior Court's approach, a forum-selection clause is presumptively invalid.

The decision below, if widely adopted, would upend the use of forum-selection clauses. Rather than determine whether the chosen forum is procedurally reasonable, California courts would sit in judgment of the substantive policy choices of their sister States by first engaging in a comparative choice-of-law analysis. That approach disregards the parties' right to select a forum other than California to adjudicate the merits of their dispute; threatens thousands, if not millions, of contracts with such clauses; and would embroil California courts into weighing the policy judgments of sister States. As explained below, this Court should grant the petition and reverse the judgment of the Superior Court.

A. Interests of *Amicus Curiae*

The United States Chamber of Commerce is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

The Chamber and its members include organizations and entities that enter into contracts that include a forum-selection clause. Here, the Superior Court declined to enforce a forum-selection clause because it believed Missouri was more likely to enforce restrictive covenants than California. Although the Chamber takes no position on the use of these restrictive covenants, the rule announced by the Superior Court threatens to invalidate forum-selection clauses based on *any* disagreement over the merits of another State's policy choices. The Chamber and its members have a strong interest in seeing that forum-selection clauses are enforced consistently by courts inside and outside of California, and ensuring that each State respects the policy choices of its sister States.

B. The Court Should Grant the Petition and Reverse the Superior Court's Judgment.

This Court should grant the petition for a writ of mandate and reverse the Superior Court's judgment—for at least three reasons: (1) the Superior Court's decision would result in the invalidation of thousands, if not millions, of forum-selection clauses and would result in unpredictability; (2) the decision below is contrary to long-standing law; and (3) the Superior Court's approach results in the extraterritorial application of California law, which violates the United States Constitution, and is contrary to principles of comity.

1. The Lower Court's Decision Would Result in the Invalidation of Thousands, if Not Millions, of Contracts and Would Result in Unpredictability.

Californians have entered into thousands, if not millions, of contracts that are, or may be, governed by non-California law and are subject to litigation in some other jurisdiction. The provisions of these contracts are now in jeopardy any time the parties' chosen forum might eventually apply substantive law that a California court deems less favorable to the party resisting the contract's enforcement. That is so even though all parties agreed, beforehand, that a non-California court would resolve the merits of the parties' dispute, and the parties' chosen forum is available, unbiased, and bears a reasonable connection to the parties' dispute.

Parties enter into contracts with forum-selection clauses because they provide certainty and reduce costs. These laudable goals are in jeopardy if the Superior Court's approach gains widespread adoption. That's because, under the Superior Court's approach, parties will not know until a dispute arises whether a California court will allow their chosen forum to decide the merits of their dispute—and only after the California court sits in judgment of the policy choices of a sister State.

Moreover, under the Superior Court's approach, the enforceability of a forum-selection clause will not only vary by forum, but also by the nature of the parties' underlying dispute. Under the Superior Court's approach, a California court asks whether the chosen forum will apply law that is at least as favorable as California law to the party resisting the forum-selection clause's enforcement. But that inquiry will vary depending on the nature of the party's dispute. For example, most of the time, California courts might deem New York's law as protective as California's. But perhaps New York has a slightly shorter statute of limitations, and perhaps that

difference is relevant to the parties' dispute. Or perhaps there is no issue under the statute of limitations, but New York will enforce a pre-dispute waiver of a jury trial, and California will not. In these scenarios, a California court's decision to enforce a forum-selection clause would vary depending on the nature of the parties' underlying dispute. The permutations of this merits-based approach to enforcement are endless. And for these reasons, the Superior Court's approach is inherently unpredictable.

2. The Decision Below is Contrary to Long-Standing State Law.

California law already recognizes the importance of forum-selection clauses, *see Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491—and for good reason. As the Supreme Court of the United States has recognized, courts should be loath to set aside forum-selection clauses:

> When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. *In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain.*

Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex. (2013) 571 U.S. 49, 66 (emphasis added). For similar reasons, the authors of the Restatement (Second) of Contracts recognize that choice-of-law provisions offer "the best way of insuring that [contracting parties'] desires [regarding choice of law] will be given effect." Restatement (Second) of Contracts § 187 cmt. a.

Here, the parties' decision to adopt a Missouri forum-selection clause should have ended the Superior Court's inquiry. Once the court recognized the validity of that clause, it was up to the selected Missouri court to resolve any remaining disputes about the contract.

Instead, the Superior Court looked beyond the forum-selection clause and resolved choice-of-law issues going to the merits of the parties' dispute. Specifically, the Superior Court held the party resisting the clause's enforcement was entitled to have California law govern the parties' dispute—because California law might be

more favorable to her on the merits. This cart-before-the-horse approach was erroneous.

The Superior Court invoked California's policy disfavoring restrictive covenants, but the parties agreed that their contract was subject to Missouri law, and that a Missouri court was to decide their dispute. Missouri gets to decide whether to favor or disfavor the restrictive covenants at issue, and a California court cannot override that policy determination.

There is simply no valid reason to decline to enforce the forum-selection clauses under California law. As the California Supreme Court noted nearly fifty years ago, Californians may "freely and voluntarily negotiate[ ] away [their] right to a California forum." *Id.* at 495. The Superior Court's approach, in contrast, "'reflects something of a provincial attitude regarding the fairness of other tribunals.'" *Id.* (quoting *The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 12). That approach must be rejected.

3. The Decision Below Results in the Extraterritorial Application of California Law and is Contrary to Principles of Comity.

By refusing to enforce the contract's forum-selection clauses because of a perceived disagreement with the policy choices of a sister State, and without even considering Missouri's strong interest in this matter, the Superior Court also violated the federal constitutional prohibition against the extraterritorial application of State law and common-law principles of comity.

As the Supreme Court of the United States recognized long ago, "[n]o State can legislate except with reference to its own jurisdiction." *Bonaparte v. Tax Court* (1881) 104 U.S. 592, 594. Breaches of State territorial limitations raise grave concerns for the Union: "[I]t would be impossible to permit the statutes of [one State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co. v. Head* (1914) 234 U.S. 149, 161. The "Constitution's special concern" for both economic harmony and State autonomy, *Healy v. Beer Inst., Inc.* (1989) 491 U.S. 324, 335, is meaningless if one State can effectively "impose its own policy choice on neighboring States," *BMW of N. Am. v. Gore* (1996) 517 U.S. 559, 571.

In the present case, the Superior Court adopted an essentially categorical rule that it would not enforce a forum-selection clause where it thought the sister State might apply a law that it viewed as less protective, regardless of the sister State's interest in the matter. Yet both parties had agreed by contract that their dispute was to be litigated in Missouri under Missouri law. And Missouri law bears a rational connection to the parties and their dispute. After all, the Lockton Companies are headquartered in Missouri and organized under Missouri law, and Ms. Giblin held an ownership stake in these Missouri businesses. The Superior Court's refusal to abide by the terms of the parties' contracts meant that a California court overrode the role of the Missouri court in determining the enforceability of these covenants.

Moreover, the decision below fails to respect basic principles of comity and full faith and credit. Those principles compel the courts of one State to respect the proper application of another State's laws. *See Franchise Tax Bd. of Cal. v. Hyatt* (2016) 136 S. Ct. 1277, 1283 (explaining "that, in devising a special—and hostile—rule for California, Nevada has not 'sensitively applied principles of comity with a healthy regard for California's sovereign status'").

* * * * *

This Court should not allow the Superior Court's dubious decision to stand. It should grant the petition for a writ of mandate and reverse the Superior Court's judgment.

Respectfully submitted,

Tami Kameda Sims

Tami Kameda Sims

CC: Attached Service List

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am employed with the law firm of Katten Muchin Rosenman LLP, whose address is 2029 Century Park East, Suite 2600, Los Angeles, CA 90067-3012. I am over the age of 18 and am not a party to the within action.

On May 8, 2023, I served the foregoing document described as: **Letter of Amicus Curiae in Support of Petitioners in *Lockton Cos., LLC – Pac. Series v. Super. Ct.*, No. B328408** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

BY E-SERVICE VIA TRUEFILING: All participants in this case who are registered TrueFiling users will be served by the TrueFiling system.

BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California 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 1 day after date of deposit for mailing in affidavit.

Executed on May 8, 2023, at Los Angeles, California.

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

/s/ Tami K. Sims
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