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February 20, 2015

BY COURIER

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

Re: *Petersen v. Bank of America*, S223941

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Chamber of Commerce of the United States of America ("U.S. Chamber") submits this letter as *amicus curiae* in support of Bank of America's petition for review. The petition should be granted because it presents an issue of exceptional importance to the business community and to the administration of justice in California:

> Whether Code of Civil Procedure section 378(a)(1) requires California courts to permit joinder of hundreds of actions based on factually distinct occurrences so long as the theories of liability asserted share "broad themes" (C.A. opn. 8).

Interests of the *Amicus Curiae*

The U.S. Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests 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 represents the interests of thousands of California businesses. 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.

Justice Fybel's dissent and the Petition explain in detail the flaws in the Court of Appeal's holding and its significance to the administration of justice in California. The Chamber and its members have a strong interest in further review because the decision

below would permit—indeed, require—joinder of a seemingly unlimited number of factually disparate actions against the same defendant so long as the asserted claims shared broadly similar legal theories of liability. This type of mass action, which the Court of Appeal aptly suggested was devised as a means of avoiding removal to federal court under the Class Action Fairness Act of 2005 (28 U.S.C. § 1332(d)) would permit the aggregation of claims that were too dissimilar to support class certification under Code of Civil Procedure section 382 and that would yield no efficiency benefits to the litigation process. Yet joinder of hundreds of claims in a single action, to be tried to a single jury, as a practical matter not only would deny defendants their Due Process Clause rights "to litigate the issues raised" (*United States v. Armour & Co.* (1971) 402 U.S. 673, 682) and to present "every available defense" (*Lindsey v. Normet* (1972) 405 U.S. 56, 69 (quoting *American Surety Co. v. Baldwin* (1932) 287 U.S. 156, 168)). Excessive joinder also would create extreme settlement pressure regardless of the merits. Indeed, any effort to resolve hundreds of factually disparate claims before a single jury almost certainly would result in a proceeding deficient in due process. Businesses should not be subjected to risks of that kind merely because they operate in California. Moreover, the adjudication of such unwieldy actions by already-overloaded trial courts will significantly delay resolution of other actions, injuring all businesses, including Chamber members, that rely on the California courts to resolve disputes.

Reasons Why Review Should Be Granted

Under the holding below, a trial court lacks discretion to deny joinder to hundreds of factually distinct individual actions against a defendant so long as the general theories of liability asserted in those actions share "broad themes." (Maj. opn., p.8.) If left in place, that decision will fundamentally reconfigure civil litigation in California, threatening to replace joinder for class certification under Code of Civil Procedure section 382. There is little incentive to try to satisfy the rigorous analysis needed to certify a class if hundreds or thousands of disparate actions can be joined together so long as there is some similarity in the conduct addressed and in the general theories of liability. Indeed, enterprising plaintiffs' lawyers will certainly seek mass joinder of the type approved below for many cases that could not possibly be certified as class actions, whether in financial services cases like this one, product liability cases like the decision under review in *Bristol-Myers Squibb Co. v. Superior Court*, S221038, or any number of consumer complaints directed at disparate activities of a defendant. And if that joinder practice is extended to permit bootstrapping exercises in the assertion of personal jurisdiction, as in *Bristol-Myers Squibb*, thousands more disputes with no meaningful nexus to California will clog the California courts because they cannot be aggregated in any other forum. This Court should grant review to forestall all of those results.

A. Review Should Be Granted to Articulate the Preconditions for Joinder Under Code of Civil Procedure Section 378 in a Way that Imposes Principled Limits On Statutory Interpretation and Avoids Burdening Trial Courts With Unmanageable Proceedings.

The majority acknowledged that its decision "tests the limits of California's permissive joinder statute, section 378 of the Code of Civil Procedure." (Maj. opn. 2.) But the decision did not "test[]" those limits; it shattered them.

Code of Civil Procedure section 378(a)(1) permits persons to "join in one action as plaintiffs" if (a) "[t]hey assert any right to relief ... arising out of the same transaction, occurrence, or series of transactions or occurrences," and (b) a "question of law or fact common to all these persons will arise in the action."[1]

The Court of Appeal turned this rule of permissive joinder into a rule that is mandatory on the trial court. The decision below denied the trial court any discretion in determining whether two, two hundred, or two thousand factually distinct cases may be joined into a single action. The majority construed the word "may" in the joinder statute—a word that, as petitioners point out (Pet. 13-14), also appears in the class action statute (Code Civ. Proc. § 382)—as a broad grant of authority to plaintiffs to structure their actions as they like without being subject to the superior court's discretion. If not corrected, that error in statutory interpretation could have broad ramifications given the prevalence of the word "may" throughout the Code of Civil Procedure and many other Codes.

Not only does the decision below deprive trial courts of any discretion in matters of joinder, but the decision also stretches the language of the joinder statute beyond the breaking point. Rather than limiting joinder to plaintiffs seeking relief for the same transaction or the same series of transactions, the decision below effectively replaces the common transaction requirement with a mandate to permit joinder of all actions against a common *defendant* so long as the underlying transactions share some "broad themes." (Maj. opn., p.8.)

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[1] The pertinent text of Code of Civil Procedure section 378 is nearly identical to the corresponding provision in Rule 20 of the Federal Rules of Civil Procedure, which permits joinder of actions "arising out of the same transaction, occurrence, or series of transactions or occurrences" that will present a "question of law or fact common to all plaintiffs." (Fed. R. Civ. P. 20(a)(1).) Justice Fybel fully explained the contrary holdings of the Ninth Circuit and federal district courts nationwide applying Rule 20 to attempts to use joinder in settings similar to the present case. (See dis. opn. pp.16-21, citing *Visendi v. Bank of America, N.A.* (9th Cir. 2013) 733 F.3d 863, 866, and other cases.)

The majority manufactured a "series" of transactions from a collection of distinct incidents united only by (1) their presentation in a single 3000-page complaint, and (2) the identity of the defendant (whose involvement in some incidents was not even pleaded, see Pet. 5-6). But calling an aggregation of events a "series" does not make it a series within the meaning of Section 378. The statute requires joinder to rest on an event, or series of events, common to *all* plaintiffs' claims. But no "transactions or occurrences" are common to all of the hundreds of claims asserted here. Nor does an allegation that disparate events were part of a common scheme magically transform factually disparate claims into the proper subjects of joinder. Such claims may be litigated together if they meet the more demanding requirements for class certification. But they cannot be yoked into a single action merely by pleading a "plan" or "scheme."

The decision below would impose an undue burden on the trial courts. Because the underlying transactions were not common to the hundreds of claims that the majority ordered to be joined together, each of "over 1,000 separate and distinct loan and loan modification transactions involving different borrowers, and many third party originators and lenders," (dis. opn., p.1) would have to be evaluated separately. The complaint does not allege uniform misrepresentations, but rather alleges a dizzying array of 21 categories of misrepresentations (see *id.* at 9-10), made through an equally dizzying array of sources and media: "securities filings, speeches, advertisements, public utterances, websites, brokers, loan consultants, branches, and communications with clients, and other media" (*id.* at 15 (quoting complaint)). For each plaintiff, each alleged misrepresentation would have to be evaluated both for its accuracy and for the plaintiff's reliance, an element of intentional and negligent misrepresentation and of misrepresentation-based individual claims under the Unfair Competition Law. (See *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 328 (UCL "plaintiff must plead and prove actual reliance").) Those issues do not become common merely because they all involve some type of alleged misrepresentation.

And what the majority viewed as a "pristine … common issue of law" for 90 of the 800-plus plaintiffs—whether "various individual foreclosures were all unlawful because the eventual trustees who foreclosed on the loan weren't the original agents designated in the loan papers"—is common only in the most abstract sense. Resolving each case requires examination of numerous individual facts about individual mortgages and subsequent notices and recordations to determine whether the supposedly common question is even properly presented in an individual case.

Under the majority's theory, every negligence action presents an issue of law in common with every other negligence action, and thus all negligence actions against a single defendant could be consolidated if there were factual similarities in the disparate underlying events. That cannot be the meaning of Section 378.

The majority construed statements by this Court adopting a broad interpretation of the joinder rules to mean that anything goes. The principle of broad construction is not a license to permit all distantly related claims to proceed in the same action. For its contrary view, the majority principally relied on this Court's decision in *Joerger v. Pacific Gas & Electric Co.* (1929) 207 Cal. 8, 19, favoring joinder that fosters "the expeditious disposition of litigation without working hardship to any party defendant." But the joinder of factually distinct claims into a single unwieldy proceeding does not promote "the expeditious disposition of litigation" except by increasing settlement pressure on a defendant facing not only "hardship" in defending itself but the likelihood that any defense will be severely and substantively compromised by any effort to "expedit[e]" the disposition of hundreds of claims that lack a factual nexus.

The majority perceived "a solicitude, if not an altogether outright preference, for the economies of scale achieved by consolidating related cases into a single, centrally-managed proceeding." (Maj. opn. p.9.) That misstates California law. The law authorizes such consolidation when statutory requirements are met and not otherwise. A court is not free to aggregate distantly related cases in the name of "economies of scale," regardless of the cost to sound judicial administration and due process.

B. Review Is Warranted Because of the Practical Significance of the Decision Below, Which Could Transform Joinder into a Means of Obtaining the Coercive Settlement Pressure of a Class Action Without Satisfying Class Certification Requirements.

The holding below would render class certification under Code of Civil Procedure section 382 unnecessary in many cases, because a common abstract issue nested in a theory of liability would support unlimited permissive joinder under Code of Civil Procedure section 378. The existence of a single common issue—or a single common "theme"—would be sufficient for joinder even if common issues did not predominate in a way that would support class certification.

The decision below creates a substitute for class certification that eases the path to a quick settlement because of the enormous expense imposed by litigating hundreds of separate cases within the same action. The majority recognized that this case was pleaded without class allegations because it otherwise would have been removed to federal court under the Class Action Fairness Act of 2005 (28 U.S.C. § 1332(d)). As the majority observed, "[h]ad this case been filed prior to 2005, in all probability it *would* have been filed as a class action." (Maj. opn., p.2.)

Yet, although the complaint does not even try to plead a class action, the majority proceeded as if the complaint had pleaded not only a class, but a certifiable one. The

majority relied on class certification authority (*e.g.*, Maj. opn., pp. 3, 4, 16, 19 (citing *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004)), and went so far as to suggest that the district court extract "sub-classes" (Maj. opn., p.18) from an aggregation of plaintiffs who had not pleaded (and likely could not plead) any kind of class at all. Indeed, the majority maintained, "the ability to organize class actions into appropriate subclasses" is "important for our purpose here." (C.A. opn., p. 19.)

Those statements reflect the reality that decision below creates an illegitimate shortcut to class-wide litigation—or class-wide settlement pressure—for cases that do not qualify for class certification. Review should be granted to prevent that result.

C. Review Should Be Granted Because of the Potential Synergistic Effect Between the Joinder Holding Here and the Question Under Review in *Bristol-Myers Squibb Co. v. Superior Court.*

The question presented here complements the question under review in *Bristol-Myers Squibb Co. v. Superior Court*, S221038. In *Bristol-Myers*, the Court is considering whether a California court may assert specific jurisdiction over actions lacking contacts with this State so long as those actions are joined with other actions by other plaintiffs addressing similar in-state conduct by the same defendant. The decision under review in *Bristol-Myers* rested in part on expansive notions of joinder. If applied to the jurisdictional rule under review in *Bristol-Myers*, the still-more-relaxed standards for joinder adopted by the court below would vastly expand specific jurisdiction over out-of-state litigation. Together, the decision below and the decision under review in *Bristol-Myers* would open the California courts to actions bearing no connection to the State other than "broad themes" of liability in common with some actions brought by California plaintiffs addressing conduct in California. Review is warranted to forestall that result as well.

Conclusion

The petition should be granted and the decision below reversed.

Respectfully submitted,

Donald M. Falk /Hmm.

Donald M. Falk

CERTIFICATE OF SERVICE
S223941

I, Kristine Neale, 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 February 20, 2015, I served the foregoing document(s) described as:

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

Executed on February 20, 2015, at Palo Alto, California.

Kristine Neale