CALIFORNIA CHAMBER of COMMERCE

November 20, 2006

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

RE: *Edwards v. Arthur Andersen LLP*
California Supreme Court No. S147190
Court of Appeal Case No. B178246

Dear Chief Justice George and Associate Justices:

The California Chamber of Commerce and the Chamber of Commerce of the United States of America respectfully submits this letter as *amici curiae* pursuant to rule 28 (g) of the California Rules of Court in support of the Petition for Review filed by defendant Arthur Andersen, LLP ("Arthur Andersen") in the above-captioned matter.

1. Nature of Applicant's Interest

The California Chamber of Commerce ("CalChamber") 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. The CalChamber acts on behalf of the business community to improve the State's economic and employment climate by representing business on a broad range of legislative, regulatory and legal issues. The CalChamber often advocates the interest of the California business community in the courts by filing *amicus curiae* briefs in cases involving issues of paramount concern to the business community. The decision rendered by the Court of Appeal in the above-captioned action is but one example.

1215 K Street, Suite 1400 P.O. Box 1736 Sacramento, California 95812-1736
Facsimile (916) 325-1268 Accounting (916) 444-6685 Chamber Relations (916) 325-1284 Corporate
Telephone (916) 444-6670 www.calchamber.com

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents a membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the U.S. Chamber is to represent the interests of its members in the federal and state courts in cases addressing issues of widespread concern to the American business community.

The CalChamber and the U.S. Chamber urge this court to grant review in this action in order to resolve a highly unsettled area of law affecting many businesses throughout the state: the enforceability of commonly used general release clauses and the enforceability of narrowly tailored covenants not to compete. The decision of the Court of Appeal calls into question when and under what circumstances employers may use general release clauses and narrowly tailored non-compete clauses in business transactions. More significantly, the lower court's decision adds more uncertainty and confusion to California's already complex labor and employment laws. Therefore, in order to rectify the confusion created by conflicting court decisions, we urge the court to grant review.

2. Why this Court Should Grant Review

Businesses throughout the state rely on a firm interpretation of the law to help guide their daily decisions. However, because of divisiveness among the courts, businesses become victims to inconsistent interpretations of the law, resulting in increased litigation, increased costs, and great uncertainty as to whether their actions are within the parameters of the law. This uncertainty is compounded when, as in many cases, businesses operate across multiple state jurisdictions.

The lower court's decision in this case expands the chasm of ambiguity that is already pervading our state's business climate. The court's holding turns commonly relied upon principles of contract interpretation upside down, leaving businesses wondering whether frequently used general release clauses will be held invalid. Additionally, the court's decision stirs an already brewing pot of controversy over when covenants not to compete are enforceable.

A. Review should be granted to clarify that general releases are valid even when they do not expressly exclude non-waivable rights.

The lower court in this case turned contract interpretation on its head, leaving businesses unsure of whether they could rely on well-settled rules of contract interpretation. The court held that commonly used, broad, standard release clauses purported to require a release of statutory indemnity rights, rights

which by statute could not be waived. The court reached this conclusion even though the release did not so much as mention the indemnity right.

Broad release clauses are commonly used in contracts because it is impossible, in light of California's complex and intricate business, employment and tort law, to anticipate every possible exception to a release. Parties, including businesses, rely on standard release clauses to adequately protect themselves. Similarly, parties to standard release clauses also rely on existing statute, which requires interpretation that will make a contract "...lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intent of the parties." (Cal. Civ. Code § 1643). Reading a contract to include matters which are not addressed by the parties, and which are against statute or public policy, not only contravenes this requirement of contract interpretation, but also the intent of the parties.

The appellate court's holding creates divisiveness in California's contract interpretation law, affecting both intrastate and interstate commerce. The holding will result in increased costs and litigation as businesses litigate to defend the very clauses they've used to protect themselves from litigation. Moreover, the holding will call into question every single contract clause that does not expressly state what items and issues are *not* covered under the contract – an impossible task at best.

While all businesses will be harmed by the ruling, there is no doubt that small businesses, many of which rely on standard contract provisions, will be impacted the hardest. Most small businesses do not have the resources to support a legal staff that can navigate the business through California's sea of laws. As a result, many businesses turn to simple contract forms that provide the basic provisions necessary to provide some level of protection. The idea that small businesses may have to spell out every single item the release does and does not cover will consume significant time, cost and resources that small businesses simply do not have.

B. Review should be granted to bring a final resolution to the circumstances when covenants not to compete are permissible and enforceable in California.

The appellate court's holding exacerbates the conflict in the state of the law over when covenants not to compete are enforceable. While California indisputably has a strong public policy against restraints on trade, as codified in Business and Professions Code § 16600, our state also indisputably has a strong public policy supporting fair competition, recognizing the benefits of fostering a

marketplace where innovation and creativity prosper. This policy favoring fair competition necessitates the need to balance the interests of promoting competition and protecting employment opportunities. There is no dispute that statute and common law recognizes several exceptions to § 16600. However, what is in dispute is which of these exceptions are valid and under what circumstances.

While some California appellate courts have held that the only non-statutory exception to § 16600 is the "trade secrets" exception, these courts have failed to recognize that that the fundamental policy supporting an exception is the need to balance the employer's interest in protecting its business with the employee's interest in being able to secure employment. Some courts have recognized this, holding that the statute does not prohibit an agreement that limits the manner in which an employee may unfairly compete with his or her former employer by misusing confidential information obtained from the employer. (*John F. Matull & Associates, Inc. v. Cloutier*, 194 Cal. App.3d 1049 (1987)). This policy of promoting fair competition allows reasonably limited restrictions that tend to promote, rather than restrain, trade. These restrictions, which do not penalize a former employee for competing but instead affect how he can compete, do not violate the statute. (*Loral Corp. v. Moyes*, 174 Cal. App.3d 268 (1985)).

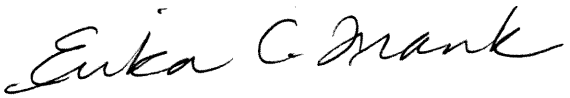
The Ninth Circuit followed this reasoning in *General Commercial Packaging v. TPS Package,* when it held that narrowly tailored non-compete clauses may not run afoul of § 16600. (*General Commercial Packaging v. TPS Package*, 126 F.3d 1131 (9th Cir. 1997)). The court relied on both state court and Ninth Circuit rulings to hold that a narrow restraint exception promotes the purpose underlying § 16600 of protecting a former employee's ability to pursue his profession while at the same time protecting the business's ability to remain competitive. The narrow restraint exception articulated in *General Comm. Packaging* furthers the state's policy of fostering competition and the free market by recognizing that employees should not be allowed to unfairly compete with former employers; the narrow restraint exception recognizes that in some situations narrowly tailored non-compete clauses are necessary to protect employers from unfair competition.

The lower court's decision in this case, rejecting the narrow restraint exception, widens the conflict in the law on covenants not to compete. Businesses are left to speculate as to the correct interpretation and application of state law, a result that is and will continue to be increasingly costly and time consuming for businesses as they struggle to remain competitive.

3. Conclusion

On behalf of the California business community, the CalChamber and the U.S. Chamber echo the urgent need for resolution of the conflict. We respectfully urge the Court to grant this petition for review.

Respectfully submitted,



Erika C. Frank
General Counsel
California Chamber of Commerce

Robin S. Conrad
Shane Brennan
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

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 November 20, 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 November 20, 2006 at Sacramento, California.

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

Cathryn Mesch

SERVICE LIST

Edwards v. Arthur Andersen LLP

California Supreme Court No. S147190
Court of Appeal Case No. B178246

Richard A. Love
Beth A. Shenfeld
LAW OFFICE OF RICHARD A. LOVE
11601 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90025-1756
Counsel for Plaintiff Raymond Edwards
VIA U.S. MAIL

Wayne S. Flick
Yury Kapgan
LATHAM & WATKINS LLP
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
Counsel for Defendant Arthur Andersen LLP
VIA U.S. MAIL

Sharon A. McFadden, Esq.
ARTHUR ANDERSEN LLP
33 West Monroe Street, Floor 18
Chicago, IL 60603-5385
Counsel for Defendant Arthur Andersen LLP
VIA U.S. MAIL

Kristin L. Wilkes
Colleen C. Smith
Shireen M. Becker
LATHAM & WATKINS LLP
600 West Broadway, Suite 1800
San Diego, CA 92101-3375
Counsel for Defendant Arthur Andersen LLP
VIA U.S. MAIL

California Court of Appeal
Second Appellate District, Division Three
Ronald Reagan State Building
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013
VIA U.S. MAIL

Andria K. Richey, Judge
Los Angeles Superior Court
Stanley Mosk Courthouse, Department 31
111 North Hill Street
Los Angeles, CA 90012
VIA U.S. MAIL

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