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June 30, 2014

VIA FEDEX

Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: ***Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.***
California Supreme Court Case No. S218922
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to rule 8.500(g) of the California Rules of Court, amicus curiae the Chamber of Commerce of the United States of America (the Chamber) writes in support of the petition for review filed by Mitsubishi Electric & Electronics USA, Inc. (Mitsubishi), which challenges the Court of Appeal's remand for a new trial regarding damages despite plaintiff Grail Semiconductor, Inc.'s failure to present sufficient evidence of damages in the first trial.

The Chamber agrees with the arguments in Mitsubishi's petition for review and submits this letter to highlight the importance of the issue presented for review. The Court of Appeal's decision creates a new rule allowing a plaintiff to have a new trial limited to the issue of damages after that plaintiff failed to present substantial evidence to support this essential element of its claim despite having the opportunity to do so. The decision conflicts with established case law mandating that, where a plaintiff submits insufficient evidence at trial after a full and fair opportunity to present its best case, the defendant is entitled to judgment notwithstanding the verdict (JNOV) under Code of Civil Procedure section 629 (section 629) and the policy of finality it embodies. The confusion the Court of Appeal's novel approach has sown warrants this Court's review. Without clarity from this Court, the specter of multiple damages-only retrials and "an unending roundelay of litigation" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 214 (*Silberg*)) looms, threatening serious harm to businesses, consumers, the court system, and the public.

The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size. The Chamber has many members located in California and others who conduct substantial business in the state. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community. In fulfilling that role, the Chamber has appeared multiple times before this Court and the California Courts of Appeal.

The Chamber urges this Court to grant review in this matter because a decision by this Court holding that appellate courts must direct entry of JNOV in cases such as the present one—where the plaintiff had a full and fair opportunity to present evidence supporting its claim but nevertheless failed to present sufficient evidence regarding the essential element of damages—would further the Chamber's mission of reducing the amount of needless litigation that vastly increases the cost of doing business in California and clogs the state's severely overburdened trial courts with needlessly wasteful repeat proceedings. This case presents an issue of vital concern not only to the Chamber's members, but to all companies and individuals who may become involved in civil disputes in the California courts, as well as to the public, which ultimately bears the costs of needless trials and inflated judgments and settlements. Granting new damages trials to plaintiffs who present only speculative and unsupported damages claims at a first trial exacerbates what is already a crisis in our civil justice system, which lacks the resources to provide prompt and equal justice to all litigants. That serves no legitimate public interest and will undermine the ability of the courts and litigants alike to resolve civil disputes fairly and expeditiously.

In this case, plaintiff Grail Semiconductor, Inc. (Grail) sued defendant Mitsubishi for breach of a nondisclosure agreement. (Typed opn. 1-4.) Prior to trial, Mitsubishi filed an unsuccessful motion in limine seeking to bar Grail from seeking to recover speculative damages under methodologies proffered by Grail's expert during discovery. (See AOB 22, fn. 9.) At trial, Grail was allowed to present evidence through its damages expert of three alternative measures of its alleged damages over Mitsubishi's objection. (Typed opn. 5-7; see PFR 1-2.) After the jury found in Grail's favor and awarded it damages in accordance with one of Grail's proffered methodologies, Mitsubishi moved for JNOV and for a new trial on both liability and damages. (Typed opn. 7.) The trial court denied Mitsubishi's JNOV motion in its entirety and denied its new trial motion as to liability, but granted Mitsubishi's new trial motion on the ground of excessive damages. (*Ibid.*) The trial court's analysis

made clear, however, that it found Grail had failed to present sufficient evidence under any legally correct theory of damages. (AA 724-728.) Mitsubishi appealed from the denial of its JNOV motion as to damages. (Typed opn. 7 & fn. 6.) The Court of Appeal affirmed the trial court's denial of Mitsubishi's JNOV motion as to damages, reasoning that the trial court did not find that Grail had presented insufficient evidence of damages but rather that the jury had applied an incorrect measure of damages. (Typed opn. 9-12.) According to the Court of Appeal, this circumstance justified a new trial so that Grail would have another opportunity to present evidence that could support an award of damages. (*Ibid.*)

The Court of Appeal's failure to direct entry of JNOV in Mitsubishi's favor conflicts with section 629 and highlights confusion regarding when that statute applies. Section 629 states in pertinent part: "If the motion for judgment notwithstanding the verdict be denied and if a new trial be denied, the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict." (Code Civ. Proc., § 629, par. 3.) The statute further states: "Where a new trial is granted to the party moving for judgment notwithstanding the verdict, and the motion for judgment notwithstanding the verdict is denied, the order denying the motion for judgment notwithstanding the verdict shall nevertheless be reviewable on appeal from said order by the aggrieved party." (*Id.* § 629, par. 4.) Thus, section 629 mandates entry of JNOV when meritorious motions seeking JNOV and a new trial are erroneously denied, but also confirms the existence of appellate jurisdiction to review an order denying a motion for JNOV even when a new trial motion is granted. The statutory provision authorizing appellate review of orders denying JNOV in cases where the trial court has granted a motion for new trial would serve no meaningful purpose unless the Court of Appeal must direct entry of JNOV where it has been erroneously denied.

The current language used in section 629 is the result of a series of amendments aimed at promoting finality of litigation. Section 629 was initially enacted in 1923. (See Stats. 1923, ch. 366, § 1, p. 750.) In 1937, the Legislature amended the statute by adding a provision stating that: "Where a new trial is granted to the party moving for judgment notwithstanding the verdict, the order denying the motion for judgment notwithstanding the verdict shall not be reviewed on appeal, unless the adverse party appeal from the order granting a new trial, in which case the order denying judgment notwithstanding the verdict may be reviewed on appeal." (Historical and Statutory Notes, 16 West's Ann. Code Civ. Proc. (2011 ed.) foll. § 629, p. 427.) Because the denial of JNOV was not reviewable on appeal in cases where the trial court granted a new

trial, the provision of the statute authorizing the Court of Appeal to direct entry of JNOV for the defendant applied only where both a JNOV motion and a new trial motion were denied (in cases where the defendant also moved for a new trial). (*Ibid.*)

In 1961, the Legislature amended the statute to authorize appellate review of orders denying JNOV in cases where a new trial was granted. The amended statute stated in pertinent part: "Where a new trial is granted to the party moving for judgment notwithstanding the verdict, and the motion for judgment notwithstanding the verdict is denied, the order denying the motion for judgment notwithstanding the verdict shall nevertheless be reviewable on appeal from said order by the aggrieved party." (Code Civ. Proc., § 629; Historical and Statutory Notes, 16 West's Ann. Code Civ. Proc., *supra*, foll. § 629, p. 428; see also Code Civ. Proc., § 904.1, subd. (a)(4) [an appeal may be taken "[f]rom an order granting a new trial or denying a motion for judgment notwithstanding the verdict"].) The 1961 amendment also changed the wording of the statute to impose a mandatory duty on a Court of Appeal to order entry of JNOV for the defendant where the trial court erroneously denied the defendant's JNOV motion; previously, this had been a matter within the appellate court's discretion. (Historical and Statutory Notes, 16 West's Ann. Code Civ. Proc., *supra*, foll. § 629, pp. 427-428.)

Accordingly, as section 629 currently reads, a Court of Appeal has jurisdiction to review an order denying JNOV even where a new trial is granted. Until the decision in this case, California's appellate courts have construed section 629 and applied its policy favoring finality of litigation in a common-sense fashion and required the entry of JNOV for defendants where the plaintiff had a full and fair opportunity to present its case but failed to proffer substantial evidence supporting an essential element of its claim. In the petition for review, Mitsubishi explained how *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919-920 (*Kelly*) exemplifies this sensible approach. (PFR 19-21.) The Court of Appeal in *Kelly,* relying on a long line of earlier cases, held that entry of JNOV is required when the plaintiff failed to present substantial evidence supporting an essential element of the claim. (*Kelly*, at pp. 919-920.)

Bank of America v. Superior Court (1990) 220 Cal.App.3d 613, 624-626 (*Bank of America*) is the first in the line of cases relied upon by *Kelly*. In *Bank of America*, the Court of Appeal issued a writ of mandate compelling the trial court to reverse its order allowing the plaintiff to present its case in a new trial after the appellate court in a previous appeal had reversed a judgment for the plaintiff based on insufficiency of the evidence regarding liability. (*Id.* at p. 615.) Even though the Court of Appeal's earlier reversal had been unqualified (i.e., without directions), the court in the later writ

proceeding held that the plaintiff was not entitled to a new trial because parties are required to put on their best evidentiary case in the first trial, and to the extent that case falls short, a second bite at the apple would be unfair. (*Id.* at pp. 625-626.) Although it acknowledged that the third paragraph of section 629 mandating entry of JNOV did not apply to that writ proceeding, the Court of Appeal held that the policy of that statute must apply to all cases where the plaintiff fails to present sufficient evidence after receiving a full and fair opportunity to do so but the trial court nevertheless failed to grant JNOV. (*Id.* at p. 624 ["The effect of section 629 is that a reversal on appeal for insufficiency of the evidence concludes the litigation just as it would have been concluded if the trial court had correctly entered judgment notwithstanding the verdict"].) The *Bank of America* court explained that this result was justified by the policy underlying section 629, which is "to prevent application of the general rule permitting retrial after an unqualified reversal by ensuring the entry of judgment in favor of a party whose motion for judgment notwithstanding the verdict was erroneously denied at trial." (*Id.* at pp. 625-626.)

Similarly, in *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1658-1659 (*McCoy*), the Court of Appeal held that the plaintiffs in a defamation action were not entitled to a new trial after this Court reversed a judgment in their favor for insufficiency of the evidence regarding liability. The Court of Appeal stated the controlling rule as follows: "When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence." (*Id.* at p. 1661; see also *id.* at pp. 1662-1663 [describing amendments to section 629 that imposed mandatory duty on appellate court to direct entry of JNOV for defendant where insufficient evidence supports judgment on jury's verdict].)

This Court has also ordered JNOV to be entered for the defendant where the plaintiff had a full and fair opportunity to present its case but failed to present sufficient evidence of liability. In *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1052, this Court reversed the trial court's denial of the defendant's nonsuit motion in a disability discrimination case in which the plaintiff alleged the defendant had discriminated against her based on her excessive weight, which she claimed constituted a cognizable disability under the Fair Employment and Housing Act. After rejecting the plaintiff's theory of liability and concluding that she had received a full and fair opportunity to present evidence in support of her case, this Court (citing *McCoy*) held that the plaintiff was not entitled to a new trial. (*Id.* at p. 1066.)

Numerous Courts of Appeal have applied this rule and directed entry of JNOV where the plaintiff failed to present substantial evidence of liability. (See, e.g., *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 833-834 (*Frank*) [reversing judgment for plaintiffs in race discrimination action for insufficiency of the evidence and directing entry of judgment for defendant without retrial]; *Viner v. Sweet* (2004) 117 Cal.App.4th 1218, 1232-1233 [after this Court's reversal of prior Court of Appeal opinion upholding denial of defendant's JNOV motion in legal malpractice action, Court of Appeal held plaintiff failed to present sufficient evidence of causation and was not entitled to retrial to introduce new or different evidence]; *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1810 [reversing judgment for plaintiff in ejectment action for insufficiency of the evidence and ordering entry of judgment for defendant without retrial].)

The Courts of Appeal have also applied the no-new trial rule where the plaintiff failed to present sufficient evidence regarding the essential element of damages. For example, in *Avalon Pacific—Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183 (*Avalon Pacific*), the Court of Appeal recently confronted a case with facts strikingly similar to those in this case but reached the opposite result from that which the Court of Appeal reached here. HD Supply leased land from Avalon Pacific in order to redevelop it. (*Id.* at p. 1189.) When economic conditions deteriorated, HD Supply ceased developing the property and allowed it to fall into disrepair. (*Ibid.*) Even though the lease was still in effect and HD Supply was still paying rent, Avalon Pacific sued HD Supply for breach of the lease and for waste, recovering damages based on the cost to repair the property. (*Ibid.*) The Court of Appeal reversed on the ground that, in such circumstances, the lessor is entitled to recover damages only for diminution in the value of its reversion interest in the property, rather than for present cost of repairs to the property. (*Ibid.*) Since Avalon Pacific presented evidence only of cost of repairs and not of diminution in value of its reversion interest, the Court of Appeal held it was not entitled to a new trial: "The only damages sought by Avalon and awarded on its breach of contract claim were for cost of repairs. *Avalon is not entitled to a new trial to prove some other measure of damages* because it had ' " 'full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support [Avalon]'s cause of action . . . .' " ' " (*Id.* at p. 1210, emphasis added.) Thus, the Court of Appeal in *Avalon Pacific* held that, where the plaintiff presents evidence of damages at trial using a legally incorrect measure of damages (as Grail did here), the plaintiff is not entitled to another trial in order to present evidence using a correct measure of damages. Other courts have similarly recognized that a failure to introduce sufficient evidence of damages falls under the same no-new trial rule as all other insufficiency of the evidence cases. (See, e.g., *Kim v.*

Westmoore Partners, Inc. (2011) 201 Cal.App.4th 267, 289 [reversing default judgment due to insufficiency of plaintiff's evidence of damages and directing entry of judgment for defendant without retrial]; *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 153-154 [reversing award of future damages in breach of warranty case for insufficiency of plaintiff's evidence and striking that portion of damages award from judgment without retrial].)

The Court of Appeal's opinion in this case directly conflicts with the holding of *Avalon Pacific*, which alone warrants this Court's review. (Cal. Rules of Court, rule 8.500(b)(1).) The Court of Appeal in this case posited a distinction between an incorrect measure of damages (which it maintained the jury used) and insufficient evidence of damages, and based its affirmance of the trial court's denial of Mitsubishi's JNOV motion on this purported distinction. (Typed opn. 9-11.) But as *Avalon Pacific* makes clear, where a plaintiff presents evidence using one or more improper measures of damages that cannot support a judgment in its favor, the plaintiff is not entitled to a second trial so it can offer evidence based on a legally correct measure of damages. (*Avalon Pacific*, *supra*, 192 Cal.App.4th at pp. 1189, 1210.)

The Court of Appeal's opinion in this case casts doubt on the decades of precedent discussed above holding that, if a plaintiff has had a full and fair opportunity to put on its case but has presented insufficient evidence at trial, it is not entitled to a new trial, and judgment must be entered in the defendant's favor. The Court of Appeal here diverged from this line of authority enforcing the policy reflected by section 629, and instead directed the trial court to give the plaintiff one more chance to present evidence supporting a damage award.

To the extent the result reached by the Court of Appeal here stems from confusion regarding the meaning and application of section 629, this case presents an excellent opportunity for this Court to settle this important issue of law that has wide application beyond the parties to this case. The Legislature has not revisited the statute since its last amendment in 1963 (see Historical and Statutory Notes, 16 West's Ann. Code Civ. Proc., *supra*, foll. § 629, p. 428), meaning that it falls to this Court to provide clarity in explaining how section 629 operates on appeal. The history of the development of the statute's language and consideration of the policy behind it demonstrate a need for this Court's review to clarify that section 629 applies to prohibit a new trial in any case where the plaintiff presents insufficient evidence at trial despite having a full and fair opportunity to do so. This is yet another reason why review by this Court is warranted. (Cal. Rules of Court, rule 8.500(b)(1).)

If the decision of the Court of Appeal in this case is allowed to stand, it will have significant adverse consequences for litigants, for the court system, and for California as a whole. Under this new rule allowing potentially endless trials, defendants who succeed in demonstrating the evidentiary shortfalls of their opponents' cases during an initial trial will have to endure the burdens (including time and enormous expense) of a second—and potentially a third or even fourth—trial at which the plaintiff will get additional unwarranted opportunities to prove its case. Where the plaintiff has had one full bite of the apple, it should not get a second one.

This unwelcome prospect of multiple trials will pose particularly harmful consequences in cases where the claimed damages are speculative because it will undermine the salutary rule this Court recently announced in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747. In *Sargon*, this Court empowered trial courts to act as gatekeepers to exclude speculative expert testimony (especially regarding damages) before trial (*id.* at p. 753), explaining that this rule would ensure that a plaintiff "could not obtain a massive verdict based on speculative projections of future spectacular success" (*id.* at p. 781). In cases where a defendant's pretrial *Sargon* motion is erroneously denied, the new disposition rule fashioned by the Court of Appeal in this case will nevertheless allow the plaintiff to proceed to a new trial despite having presented precisely the sort of speculative expert testimony regarding damages that *Sargon* condemned.

As this Court stated in another context, "For our justice system to function, it is necessary that litigants assume responsibility for the complete litigation of their cause during the proceedings." (*Silberg*, *supra*, 50 Cal.3d at p. 214; see also *Frank*, *supra*, 149 Cal.App.4th at p. 834 [quoting *Silberg* for this purpose]; *Kelly*, *supra*, 145 Cal.App.4th at p. 919 [same]; *Bank of America*, *supra*, 220 Cal.App.3d at p. 626 [same].) Furthermore, the prospect of multiple trials to progressively hone and perfect their damages cases will likely cause plaintiffs to take increasingly intransigent stances in pretrial settlement negotiations. The resulting increase in the number of trials will further clog the already severely overburdened trial courts of this state with needlessly wasteful repeat proceedings. The interests of the justice system, of business litigants throughout the state, and ultimately of consumers and the general public—who will bear the increased costs of this new rule via higher prices, increased taxes and court costs, and slower access to justice—are not well served by the Court of Appeal's opinion in this case.

For the foregoing reasons, the Chamber respectfully requests that this Court grant review to clarify the meaning and application of Code of Civil Procedure section

629, to resolve the confusion the Court of Appeal created regarding the circumstances in which trial and appellate courts must enter JNOV for the defendant, and to hold that a plaintiff who presents insufficient evidence of damages during a first trial (including by presenting evidence reflecting a legally incorrect measure of damages), despite having a full and fair opportunity to do so, is not entitled to a second one.

Respectfully submitted,

HORVITZ & LEVY LLP
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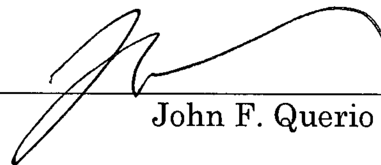
By: 
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cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

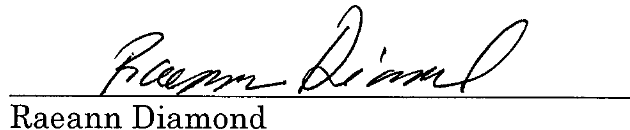
On June 30, 2014, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on June 30, 2014, at Encino, California.



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Grail Semiconductor v. Mitsubishi Electric & Electronics USA, Inc.
Supreme Court Case No. S218922

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