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October 13, 2017

By True Filing

The Chief Justice and the Associate Justices
of the State of California
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *Orange County Water District v. Sabic Innovative Plastics US, LLC, et al.*
California Supreme Court Case No. S244295
Amicus Curiae Letter in Support of Petition for Review

To the Honorable Chief Justice and Associate Justices:

Pursuant to Rule 8.500, subdivision (g) of the California Rules of Court, the National Association of Manufacturers (the "NAM") submits this letter as *amicus curiae* in support of the petitions for review filed in this action.

INTEREST OF AMICUS CURIAE

The NAM is the largest association of manufacturers in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private sector research and development in the nation.

The Court of Appeal's erroneous decision in this case sows substantial uncertainty for the NAM's members and other businesses who seek to engage in, are in the midst of, or already have completed contamination remediation in California. For over three-and-a-half decades since the Hazardous Substance Account Act ("HSAA") was enacted, California businesses have been able to rely on state agency direction and expertise in remediating contaminated sites with the goal of eventually obtaining "No Further Action" letters signifying that their sites are safe for productive economic use and that, in all but the exceedingly rare case, they will not face liability for additional remediation. The

Court of Appeal's decision below erroneously undermines this cooperative relationship between businesses and expert government regulators and creates perverse incentives contrary their shared interests.

Under the Court of Appeal's decision and two related decisions from the same court,[1] private parties have now been granted a private right of action to seek to impose liability for remediation irrespective of prior remediation and regulatory action. (*Orange County Water District v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 371.) Whether potentially responsible parties will ultimately be held liable under this private right of action will be determined by a trier of fact – not the expert regulators entrusted by the State of California to make such determinations. (*Id.* at 375-76.) Additionally, private-party plaintiffs are now able to bring their private right of action years or even decades after learning of the contamination (despite both the HSAA's statute-specific and California's general three-year statutes of limitations) and against *all* current site operators and *any* historical site operators in control when *any* hazardous substance was disposed, even if their actions did not contribute to the environmental harm alleged. (*Id.* at 386-87, 393.)

Both individually and collectively, these new rules erroneously adopted by the Court of Appeal undermine businesses' and regulators' cooperative partnership to address contamination on their sites by discouraging both voluntary remediation and swift compliance with regulators' Remedial Action Plans. As a result, remediation may not commence, if at all, for years or decades following a site's initial contamination, thereby preventing effective clean up. And where cooperative remediation does occur, the efforts of businesses and government regulators may be second-guessed and undone by subsequent private litigation that can occur many years after the fact. These perverse results are contrary to the interests of both the NAM's members and the people of California.

Accordingly, review of the Court of Appeal's decision is warranted.

REASONS WHY REVIEW SHOULD BE GRANTED

The Court of Appeal's published decision reaches four erroneous conclusions that conflict with long-standing precedent, depart from three-and-a-half decades of settled

[1] *Orange County Water District v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252 ("*Alcoa*"); *Orange County Water District v. MAG Aerospace Industries, Inc.* (2017) 12 Cal.App.5th 229 ("*MAG*").

understandings regarding environmental remediation and HSAA liability, and perversely discourage potentially responsible parties from engaging in voluntary remediation or otherwise cooperating with the expert regulators entrusted by the State of California to guide remediation.

A. HSAA Liability Before the *Sabic* Line of Cases

Enacted in 1981, the HSAA – like the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") – imposes cleanup costs on entities following the contamination of sites of operation. Before the decisions in this case and the two related cases, the HSAA imposed liability for only "responsible parties," as defined in and adopted from CERCLA. (Health & Safety Code § 25323.5(a)(1).) This included owners and only those operators using sites in a manner specifically related to the contamination at issue. (*United States v. Bestfoods* (1998) 524 U.S. 51, 66-67.)

When either California's Department of Toxic Substances Control ("DTSC") or a Regional Water Quality Control Board discovers that a site has been contaminated, the agency issues a Remediation Action Plan. (Health & Safety Code § 25356.1(e).) In response, the subject entity has the option of complying with the plan, litigating, or entering binding arbitration. (*Id.* §§ 25356.3, 25356.4, 25356.6.) Entities that voluntarily report contamination enter into Voluntary Cleanup Program agreements, functionally similar to Remediation Action Plans. (DTSC, The Voluntary Cleanup Program Guidelines, https://www.dtsc.ca.gov/SiteCleanup/Brownfields/upload/BF_FS_VCP.pdf.)

Compliance with a Remediation Action Plan or a Voluntary Cleanup Plan can earn the subject entity a "No Further Action" letter. While such letters may not categorically preclude future liability, they have – until the Court of Appeal's decision – bestowed upon recipients "a good faith reason to believe . . . that there was little possibility of future clean-up costs." (*Palmtree Acquisition Corp. v. Neeley* (N.D. Cal. 2011) 771 F. Supp. 2d 1186, 1193.) To this end, owners, operators, and lenders of remediated sites regularly rely on No Further Action Letters to provide assurances that the site "is ready for productive economic use." (DTSC, Voluntary Cleanup Program Guidelines, *supra*.)

If a responsible party elects to neither comply with the regulating agency's Remediation Action Plan, litigate, nor enter binding arbitration, the regulating agency may conduct the cleanup on its own and collect its costs from the responsible parties. (Miller & Starr, *Cal. Real Estate* (4th ed. 2016) § 39:44, at p. 39-124.) Under the HSAA, the regulating agency is subject to a three-year statute of limitations – which mirrors

California's general three-year statute of limitations (Code of Civil Procedure §338(b)) – for seeking recovery of such costs. (Health & Safety Code § 25360.4(a).)

Acknowledging that contamination at a site may be the responsibility of more than a single entity, the HSAA includes a contribution-and-indemnity provision, the key provision at issue in the Court of Appeal's decision. (Health & Safety Code § 25363.) Under the provision's text, any person or entity who has "incurred removal or remedial action costs in accordance with [the HSAA] or the federal act" may seek contribution or indemnity from any person or entity who is also liable under the HSAA. (*Id.*) As the leading California real estate treatise explains, "[u]nlike CERCLA," neither the HSAA's contribution-and-indemnity provision nor any other HSAA provision creates a private right of action for enforcement under the statute. (Miller & Starr, *Cal. Real Estate* (4th ed. 2016) § 39:44, at p. 39-127.)

B. The Court of Appeal's Erroneous Decision in *Sabic*

Contrary to each of the settled rules under which potential HSAA liability has been measured and litigated for over 35 years, the Court of Appeal erroneously held:

- The HSAA's contribution-and-indemnity provision creates a private right of action that "allows any plaintiff 'who has incurred response or corrective action costs'" – not just joint tortfeasors – "to seek reimbursement of those costs from a liable person." (*Sabic*, 14 Cal.App.4th at p. 370-71.)

- Such "liable person[s]" include *all* current site operators and *any* historical site operators in control when *any* hazardous substance was "dispos[ed]" – even if the hazardous substance did "not actually reach the environment" – because "the identity of the person who caused" the disposal, the particular hazardous substance disposed, and whether it "actually reach[ed] the environment" are "irrelevant." (*Id.* at 372-73.)

- Whether such a broadly defined potentially responsible party is ultimately liable will be determined by a "reasonable trier of fact," including in cases in which the appropriate regulatory agency has determined that "no further action was necessary at the site." (*Id.* at 375-76.)

- Under the "continuous accrual" theory for statutes of limitations, the applicable three-year statute does not begin to run upon a plaintiff's "knowledge or constructive knowledge of . . . contamination" so long as the plaintiff alleges

> that a potentially responsible party was negligent with respect to "the initial handling and use of hazardous substances . . . , their disposal, release, *and remediation*" and the negligent remediation occurred or continued within the statute of limitations. (*Id.* at 394, 397 (emphasis added).)

As the petitions explain, the Court of Appeal's private-right-of-action holding cannot be squared with the HSAA's text, its legislative history, or the then-contemporary understanding of the terms "contribution or indemnity." (Soco Pet. at *23-30.) Nor, as the petitions explain, can the Court of Appeal's broad definition of potentially liable parties be squared with federal courts' interpretation of the terms "operator" and "disposal" as they appear in CERCLA, which the California legislature specifically adopted when it enacted the HSAA. (Universal Circuits, Inc. Pet. at *14-24.) Similarly, the Court of Appeal's decision to allow "reasonable" fact-finders to effectively overrule the prior determinations of expert regulatory agencies is inconsistent with the HSAA's regulatory scheme and the deference that courts traditionally afford agencies when performing their core remedial functions. (Soco Pet. at *30-34.) Finally, as the petitions explain, the "primary rights" theory – not the "continuous accrual" theory applied by the Court of Appeal here – properly applies to the statute of limitations for environmental property damage claims. (Soco Pet. at *39-48.)

This Court should grant review to correct the fundamental errors made by the Court of Appeal in this critically important area.

C. The Court of Appeal's Decision Discourages Cooperative Remediation Between Businesses and Regulators

This Court's review is particularly warranted because the Court of Appeal's statutory and common law rulings effectively remove the current incentives for businesses and regulators to cooperatively remediate environmental contamination.

"Timely investigations and cleanups" of environmental contamination is in both businesses' and the public's best interests because it "promotes economic development and reinvestment . . . through post-cleanup development and sustainable reuse." (California Department of Toxic Substances Control: Brownfields, http://www.dtsc.ca.gov/SiteCleanup/Brownfields/.) Remediation that begins years later may be less effective and is contrary to those interests.

The Court of Appeal's decision in this case undermines the statutory incentives for remediation under the HSAA. Under that framework, businesses benefit by voluntarily

reporting contamination on their sites and working with government regulators in developing and implementing Remediation Action Plans. With the guidance of expert regulators, businesses can efficiently attempt to remediate and, if successful, receive a No Further Action letter and thereby have "a good faith reason to believe . . . that there was little possibility of future clean-up costs." (*Palmtree Acquisition Corp.*, 771 F. Supp. 2d at p. 1193.) Under the Court of Appeal's decision, however, those incentives are removed.

By recognizing a private right of action for HSAA liability, the Court of Appeal has given non-expert triers of fact an effective veto over the remediation determinations of expert regulators. And by applying the continuous accrual theory to the statute of limitations, such that a plaintiff's claim will be timely so long as they allege that the site operator negligently remediated or failed to remediate within the statute of limitations, the Court of Appeal has made the trier of fact's veto available at effectively any time.

The court's resolution of the plaintiff's claims against Petitioner Emerson Electric Co. is illustrative. From 1973 to 1991, Emerson operated an electrical equipment manufacturing site in Santa Ana – the first fifteen years as an owner-operator, the next three as a lessee. (*Sabic*, 14 Cal.App.4th at p. 373.) In connection with Emerson's sale of its site, it discovered volatile organic compound ("VOC") contamination of its soil and groundwater. (Emerson Pet. at p. 10.) Emerson voluntarily reported the contamination to the appropriate regulatory agencies and began remediation under the regulators' supervision. (*Id.*) Following years of review and costly remediation, in 1997, Emerson received a letter advising it that no further investigation or remediation of soil at the site was required and, in 1999, received a letter advising it that no further investigation or remediation of groundwater at the site was required. (*Id.* at 10-13; *see also Sabic*, 14 Cal.App.4th at p. 374.)

In 2008 – nearly a decade after Emerson received its No Further Action letters – the plaintiff filed the suit underlying this appeal, which the Court of Appeal found timely under its application of the continuous accrual theory to statutes of limitations. (*Sabic*, 14 Cal.App.4th at p. 361, 394, 397.) On the merits, the Court of Appeal held that "a reasonable trier of fact could find that concentrations of [VOCs remaining after Emerson's remediation efforts] posed a threat to human health or the environment,

notwithstanding the [Regional Water Quality Control Board's] conclusion that no further action was necessary." (*Sabic*, 14 Cal.App.4th at p. 375.)[2]

Whereas Emerson undertook lengthy and costly voluntary remediation with the goal of obtaining finality with respect to its remediation obligations, similarly situated site operators subject to the Court of Appeal's precedential decision may no longer hold any such aspiration. Under those circumstances, operators like Emerson have little incentive to commence remediation and to work cooperatively with government regulators if those efforts may be second-guessed years after the fact. In fact, the Court of Appeal's decision discourages remediation under the HSAA.

The disincentives to remediate on-site contamination through cooperation with regulators are also obvious for operators like Petitioners Universal Circuits, Inc., Sanmina, and GE Aviation, who learn of contamination on their sites that they played no part in causing. Under the Court of Appeal's broad definition of "liable parties" as including operators who "disposed" of any hazardous substance even if that substance did not lead to contamination, such operators face the specter of HSAA liability that they had little or no reason to expect. Moreover, in light of the Court of Appeal's other holdings, such operators will face suit for that potential liability whenever the plaintiff chooses and have their liability determined by triers of fact without technical expertise in environmental contamination or its remediation.

For example, UCI leased and operated a circuit board printing facility in Santa Ana from 1981 to 1990. (*Sabic*, 14 Cal.App.4th at p. 383.) It was undisputed in the trial court that the only release of VOCs into the groundwater at the former UCI site was a 1979 fire that occurred before UCI occupied it. (*Id.* at 384-85, 393-94, 400.) Nonetheless, the Court of Appeal held that UCI is a potentially responsible party under the HSAA because (i) UCI had been an operator of the site, (ii) operators who dispose of hazardous substances may be liable even if the hazardous substance did "not actually reach the environment," and (iii) UCI had "discharged" water that previously contained "a small amount of solvent" from its clarifier into the public sewer. (*Id.* at 373, 386-87.)

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[2] Moreover, the Court of Appeal so held despite the concession of the plaintiff's own expert that Emerson's remedial measures were effective, that he "could not conclude" that "releases of contaminants at the Emerson facility pose a threat to water supply wells," and that "it was reasonable for the [Regional Water Quality Control Board] to close its review of the site" and determine that no further action was necessary. (Emerson Pet. at 14; *Sabic*, 14 Cal.App.4th at p. 375.)

From 1987 to 1998, Sanmina owned and operated a circuit board manufacturing facility in Santa Ana. (*Sabic*, 14 Cal.App.4th at 380.) In the trial court, the plaintiffs introduced no evidence that Sanmina released any VOCs at the site. (*Id.*) Nonetheless, applying the same definition of disposal that it applied to UCI, the Court of Appeal held that Sanmina was a potentially responsible party because (i) it was an owner-operator that used a VOC solvent in its manufacturing process, (ii) the same solvent was found in the environment at the site, and (iii) "a trier of fact could reasonably conclude that Sanmina . . . disposed of [the solvent] during [its] occupancy of the site." (*Id.* at 380-82.)

Since 1999, GE Aviation has leased and operated an aircraft part and equipment manufacturing facility in Santa Ana. (*Sabic*, 14 Cal.App.4th at 376.) In the trial court, the plaintiff's expert conceded that he could not conclude that "any hazardous substance releases" occurred at the site during GE Aviation's tenancy. (*Id.*) Nonetheless, the Court of Appeal held that GE Aviation was "strictly liable" "[a]s a current operator . . . for *any* . . . releases" of hazardous substances leading to remediation expenditures by the plaintiff "*regardless when* [*the releases*] *occurred*." (*Id.* at 377 (emphases added).)

Cooperation between businesses that cause or discover contamination on their sites and expert government regulators is key to efficient and effective remediation. The expectations of finality that accompany remediation deemed successful by regulators is critical to post-cleanup development and sustainable reuse. This Court should grant review, reverse the Court of Appeal's decision below, and restore the previously settled incentives for vindicating those goals.

CONCLUSION

For these reasons and those offered in the petitions, the Court should review the Court of Appeal's decision below.

Respectfully submitted,
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I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and am not a party to this action. My business address is 555 W 5th Street, Suite 4000, Los Angeles, California 90013.

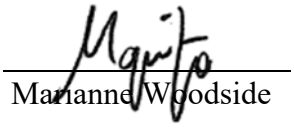
On October 13, 2017, I served the foregoing document described as **NATIONAL ASSOCIATION OF MANUFACTURERS AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on all interested in the action as indicated below or on the attached service list as follows:

SEE ATTACHED SERVICE LIST

☒ (VIA E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person at the e-mail address listed. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on October 13, 2017, at Los Angeles, California.



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