SHOOK
HARDY & BACON

September 16, 2024

Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102-4783

Re: Letter of *Amici Curiae* Supporting the Petition for Writ of Mandate *Nestle USA, Inc. et al. v. Superior Court of San Mateo County et al.*, First Appellate District Case No. A171249

Dear Honorable Justices of the First Appellate District:

Amici curiae, Chamber of Commerce of the United States of America (U.S. Chamber), the California Chamber of Commerce (CalChamber), Consumer Brands Association (CBA), and National Association of Manufacturers (NAM), urge this Court to grant the petition for writ of mandate filed by Nestle USA, Inc. et al., on September 9, 2024, in the above referenced matter. We respectfully ask permission to file this letter on behalf of *amici*.

The writ petition seeks review of the Superior Court's adoption of a novel, inexplicable theory of liability that would subject Defendants to public-nuisance liability merely for participating in the State's recycling initiatives by properly labeling the recyclability of their plastic products. The petition correctly emphasizes that elements of a public-nuisance claim under California law—wrongful conduct and causation—are absent from the Complaint and not properly addressed in the ruling below. The Court should grant the petition, reinforce the necessary elements of a public nuisance claim in California, and correct this ruling.

Amici also submit this letter to explain that Plaintiff's Complaint raises a matter of public policy, not tort liability. The Complaint takes issue with the effectiveness of the State's recycling program for plastic materials. The appropriate means for Plaintiff to raise these concerns is to engage in the legislative and regulatory process to improve the recycling program, not target a few of the companies participating in the State's recycling program and sue them for doing so. This lawsuit, therefore, contravenes both California public-nuisance law and the Legislature's directives to Defendants and others to facilitate plastic recycling. It should be dismissed.

Authority for Permitting this *Amici* Letter

California Rules of Court, Rule 8.487(e)(1) expressly permits the filing of amicus briefs after an appellate court issues an alternative writ or order to show cause. The Advisory Committee comment to the rule makes clear that

amicus letters are also permissible before a court issues an alternative writ or order to show cause. Specifically, the Advisory Committee comment states:

> Subdivisions (d) and (e). These provisions do not alter the court's authority to request or permit the filing of amicus briefs or amicus letters in writ proceedings in circumstances not covered by these subdivisions, such as before the court has determined whether to issue an alternative writ or order to show cause or when it notifies the parties that it is considering issuing a peremptory writ in the first instance.

Accordingly, California Courts of Appeal have considered the filing of amicus letters in connection with a writ petition in deciding whether to issue an order to show cause. *See, e.g., Regents of Univ. of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557-558 ["based on the amicus curiae submissions we have received," the matter "appears to be of widespread interest" warranting writ review]; *Los Angeles County Board of Supervisors v. Superior Court* (2015) 235 Cal.App.4th 114 [noting the filing of amicus curiae letters "in support of issuance of the writ"], *rev'd. on other grounds* (2016) 2 Cal.5th 282; and *Gilead Sciences, Inc. v. Superior Court* (2024) 98 Cal.App.5th 911 [*amici* filed in support of writ].

We ask the Court to respectfully consider this *amici* letter in support of granting the petition for writ of mandate filed by Defendants in this case.

Interest of *Amici Curiae*

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country—including throughout the State of California. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and federal and state courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community. The U.S. Chamber routinely files *amicus curiae* briefs in cases pending before California courts, including cases involving pharmaceutical and labor and employment matters.

The CalChamber has more than 13,000 members, both individual and corporate, representing virtually every economic interest in the State. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. 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 CBA represents the world's leading consumer-packaged goods companies, as well as local and neighborhood businesses. The consumer-packaged goods industry is the largest U.S. manufacturing employment sector, delivering products vital to the wellbeing of people's lives every day. The industry contributes $2 trillion to U.S. gross domestic product and supports more than 20 million American jobs. CBA's industry members are committed to empowering consumers to make informed decisions about the products they use and have long felt a unique responsibility to ensure their products align with the evolving expectations of consumers.

The NAM is the largest manufacturing association in the U.S., representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.87 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the U.S.

No party or counsel for a party in the pending case authored the proposed *amici curiae* letter in whole or in part or made a monetary contribution intended to fund the preparation or submission of this proposed letter. No person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed letter.

Reasons this Court Should Grant the Petition

The Court should grant the petition to reinforce the boundaries of public-nuisance law in the State. Plaintiff, Earth Island Institute, opposes the use of certain plastics. It filed this litigation in an effort to change the State's acceptance of these plastic products and to oppose the State's plastic-recycling program, which it views as ineffective. Rather than direct these concerns to the State Legislature or appropriate regulatory body, Plaintiff targeted Defendants for this public-nuisance lawsuit among the many companies that use plastic packaging and label them in accordance with the State's recycling initiatives.

To be clear, the conduct at issue in this litigation is lawful, is encouraged by the State, and did not cause any public nuisance. Plaintiff alleges that Defendants can be liable solely for (1) labeling plastic packaging properly as recyclable, and (2) encouraging consumers to recycle the packaging when discarding it. Further, the remedies Plaintiff seeks are legislative in nature:

stopping the use of plastic packaging and pursuing funds to clean up plastic packaging that is *not* recycled.

The trial court erred in allowing this claim to proceed. Under California law, a manufacturer can be liable for a public nuisance *only* if it promotes a product "with the requisite knowledge of the hazard that such a product could create" *and* instructs consumers "to use the product in [that] hazardous manner." Order at p. 8. The court inexplicably held that labeling packaging as recyclable and encouraging consumers to participate in the State's recycling initiatives—which help *mitigate* impacts of the packaging—somehow qualifies as instructing consumers to use the packaging in a "hazardous manner." *Id*. It is self-contradictory to hold that *promoting* recycling could subject one to liability for products that are *not* recycled. Yet, that is what the court ruled.

The California Supreme Court has cautioned strongly against such unprincipled theories of liability in public-nuisance lawsuits, explaining that there must be "a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a *standardless* notion of what constitutes a 'public nuisance.'" *People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1107 [emphasis added]. Public-nuisance liability must be limited to only those who participate or *actually instruct someone to participate* in a hazardous activity that creates a public nuisance.

The importance of this petition cannot be understated. Businesses across economic sectors engage in corporate social responsibility programs to mitigate public risks associated with the use, misuse, and abuse of products and services. These efforts, as here, are often supported or required by the State. If companies can be penalized for engaging in these efforts, they would be discouraged from engaging in them. Such an outcome would not be in the public interest.

The Trial Court's Ruling Allows the Tort of Public Nuisance to Impose Liability for Lawful, Beneficial Conduct that Did Not Cause a Public Nuisance

The ruling below is anathema to the tort of public nuisance, which has a long history and distinct purpose in California and around the country: to stop someone from engaging in disruptive activities that unreasonably interfere with rights common to the general public. *See* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 U. Cin. L. Rev. 741, 743-47. It is settled law that public-nuisance liability extends only to those who engage in such unlawful conduct and, in doing so, cause a public nuisance. *See In re Firearms Cases* (2005) 126 Cal.App.4th 959, 988 [stating the elements of a public-nuisance action, including causation].

In California, public-nuisance liability against a manufacturer or seller of a product requires the plaintiff to show that the defendant engaged in "far more egregious" misconduct than merely selling and promoting a product that may cause harm. *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 309. Many products come with risks of harm. Culpability requires conduct "quite similar to instructing the purchaser to use the product in a hazardous manner." *Id.*; *see also City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 43 [requiring "affirmative steps" that promote, encourage, or instruct consumers to "use [a] product in a hazardous manner"]. This type of misconduct, which is akin to instructing consumers to illegally dump chemicals into a river, has no redeeming qualities.

Thus, when a business sells a product that can be used, misused, or disposed of in a hazardous manner, that sale alone cannot trigger public-nuisance liability. The additional step of instructing consumers to dispose the product in a way that causes a hazard is also required before such liability can be *potentially* triggered. *City of Modesto*, *supra*, 119 Cal.App.4th at 42. If the seller did not affirmatively promote the third-party misconduct that causes the hazard or public nuisance, then the seller is not complicit in causing the hazard or public nuisance. *See id.* Remaining silent on the "proper methods of disposal," or providing *useful* information about how consumers can properly dispose of the products, cannot trigger public-nuisance liability. *Id.*

Here, the focus of the trial court was on Defendants labeling their products as "recyclable" and encouraging "consumers to send used plastic containers to recycling facilities." Order at p. 9. They chose to provide consumers useful information for disposing of the products, which would be akin to instructing the dry cleaners in *City of Modesto* how to *responsibly* dispose of chemicals. *See City of Modesto*, *supra*, 119 Cal.App.4th at 42. Yet, the trial court equated this positive conduct with the level of reprehensibility of "instructing dry cleaners to dump solvents into the sewers without consideration of those solvents' impact upon the municipal sewer system." Order at p. 9. The trial court's reasoning makes no sense. Defendants did not instruct people to litter, much less to litter in any way that might give rise to a hazard within the ambit of potential public nuisance liability. They neither engaged in public-nuisance conduct nor caused any alleged public-nuisance hazard.

Cases like this one have led courts across the country to caution against jettisoning the elements of a public-nuisance claim. *See* Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" The Emperor's New Clothes of Modern Litigation?*, 31 Mealey's Emerging Toxic Torts 15 (Nov. 1, 2022). Courts have appreciated that effectively removing wrongful conduct and causation from public-nuisance law is as extreme as eliminating breach and causation from a negligence claim. Doing so leads to rudderless,

potentially unlimited liability. The Court should grant the writ to reinforce the elements and limitations of the tort of public nuisance in this State.

The Trial Court's Ruling Directly Contradicts Government Recycling Initiatives to Manage the Public Risks Associated with the Sale of Plastic Products

The ruling below also violates the long-standing California rule that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." *City of Norwalk v. City of Cerritos* (2024) 99 Cal.App.5th 977, 986 ["[S]ection 3482 confers a statutory immunity that is a complete defense to a nuisance claim."]. This safe harbor recognizes that governments often manage public risks associated with products and services and that individuals, businesses, and other parties must not be deterred from following these government risk-avoidance measures.

Therefore, when governments authorize, permit, or require certain conduct, that conduct—by definition—cannot be *unreasonable* for purposes of public-nuisance liability. Such conduct cannot be a public nuisance.

Take, for example, the traditional public nuisance of blocking a public road. If someone puts up jersey barriers to block a public road in protest, he or she may be causing a public nuisance. But if that same person puts up the same jersey barriers to repair the road under a government contract, the person is not causing a public nuisance and should not have to face public-nuisance lawsuits from those seeking to use the road. The same is true when companies follow government guidance on social, environmental, safety, and other public-risk matters.

Here, the State Legislature, in managing public risks associated with plastic packaging, provided the guidelines under which Defendants labeled their products as "recyclable" and promoted recycling to consumers. California law authorizes Defendants to label their packaging as recyclable, identifies the factors that make packaging recyclable, and provides symbols or statements that may be displayed on the packaging to indicate recyclability. *See* Pub. Res. Code, § 42355.51, subd. (b),(c),(e). The State Legislature also found and declared that "[f]acilitating the recycling of plastics is in the best interests of the state." Pub. Res. Code, § 18000, subd. (a); *see also* Pub. Res. Code, § 42355.5, subd. (b) ("Consumers deserve accurate and useful information related to how to properly handle the end of life of a product or packaging.").

Therefore, all of the actions at issue in this litigation are *per se* reasonable in a public-nuisance case. Public-nuisance law does not impose liability on Defendants for participating in California's recycling initiatives, regardless of whether these initiatives meet Plaintiff's subjective goals for effectiveness.

The trial court's ruling that following these initiatives can create public-nuisance liability requires this Court's immediate correction.

Plaintiff Should Direct Its Public Policy Concerns to the Political Branches

Finally, the Court should grant the writ to protect the State's judiciary, its citizens, and the companies operating here from litigation such as this one that seeks to use liability to impose policy preferences outside the checks and balances of the legislative process. Here, undermining the State's recycling initiatives is decidedly against the public's interest.

If Plaintiff wants different recycling standards, funds to remediate packaging that is not recycled, or even to ban plastic, it should direct these grievances to the State Legislature or appropriate regulatory agencies. *See Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 366 [noting that resolving the issues there "lies in the political sphere"].

Conclusion

Litigation seeking to impose liability on companies properly following the State's initiatives undermines the rule of law. It circumvents the political process. If the Court does not grant the petition, many companies that sell products where government agencies have provided guidance on managing public risks will undoubtedly be sued for following those directives.

The Court also should not force Defendants to litigate this case through trial before hearing this appeal. The trial court's ruling is clearly out of step with California law and harms the public interest. For these reasons, the Court should grant the petition and reverse the ruling below.

Respectfully submitted,

/s/ Patrick J. Gregory
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PROOF OF SERVICE

Nestle USA, Inc. et al. v. Superior Court of San Mateo County et al., Case No. A171249.

I am a citizen of the United States, over 18 years of age, and not a party to the within action. I am employed by the law firm of Shook Hardy & Bacon, LLP at 555 Mission Street, Suite 2300, San Francisco, CA 94105.

On September 16, 2024, I served the within AMICI CURIAE LETTER BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, CONSUMER BRANDS ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITION FOR WRIT OF MANDATE on the parties interested in this proceeding, as addressed below, by causing true copies thereof to be distributed 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 Shook Hardy & Bacon LLP's practice for collecting and processing correspondence for mailing. On the same day that 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.

BY 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 via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

I am familiar with my firm's practice for collecting and processing correspondence for mailing and/or electronic service. Under that practice, any copies placed in the mail would be deposited with the service carrier that day in the ordinary course of business.

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

Executed September 16, 2024, at 555 Mission Street, Suite 2300, San Francisco, CA 94105.

/s/ Patrick J. Gregory
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