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February 23, 2022

The Honorable Stuart R. Pollak, Presiding Justice,
and the Honorable Associate Justices
California Court of Appeal
First Appellate District, Division Four
350 McAllister Street
San Francisco, CA 94102-7412

Re: *JPMorgan Chase Bank, N.A. v. Superior Court of California, County of San Francisco* (Respondent); *Ken Elder* (Real Party in Interest), Case No. A164519

Dear Presiding Justice Stuart R. Pollak and Associate Justices,

We write on behalf of amici curiae the Chamber of Commerce of the United States of America ("Chamber"), the California Chamber of Commerce ("CalChamber"), and the California Bankers Association ("CBA") to urge this Court to grant the petition for writ of mandate filed by Petitioner JPMorgan Chase Bank, N.A. ("JPMorgan"). The trial court's decision conflicts with three decisions of the Courts of Appeal and threatens to impose serious confusion on the interpretation of California's Unclaimed Property Law ("UPL") and to embroil California and its courts in an interstate conflict.

As explained in the writ petition and in this amici letter, the Superior Court's decision contravenes multiple Court of Appeal decisions. Not once, but three times have the Courts of Appeal concluded that a private party may not pursue a California False Claims Act ("CFCA") lawsuit for an alleged violation of the UPL unless the California State Controller provided the defendant with notice of the alleged violation and the chance to correct any errors. These rulings make eminent sense, because financial institutions that operate nationally have complicated legal responsibilities under the UPL and the parallel laws of other states, and California law makes clear that they are entitled to notice of any claims to escheat property before they may face statutory penalties. Yet the Superior Court dismissed these statements as dicta and allowed a CFCA action, which by its very nature is punitive, to move forward despite the absence of any notice from the Controller. In doing so, the Superior Court threw considerable uncertainty over the UPL, allowing private parties to enforce the UPL by large-scale actions threatening treble damages and penalties when national financial institutions have had neither notice nor the right to respond to a claim.

That upside-down result is why the Controller, not self-interested private parties, should first determine whether there is an alleged violation in the first place.

The lower court's decision to ignore binding precedent threatens heavy penalties on any defendant in an area of the law where substantial complexity reigns. Each of the fifty states has its own unclaimed property statute, not to mention the federal statutory and common law that govern unclaimed property. Holders of unclaimed property need certainty and clear notice as to when to remit property to California. That is why the UPL requires notice from the Controller and the opportunity to correct errors before a bank may be subject to a penalty. Yet the trial court's decision threatens confusion and surprise based on massive potential liabilities for property that the bank or other holder may have already turned over to another state.

This Court should grant the petition for writ of mandate to reinforce binding precedent and to provide clarity. The petition presents a textbook case for immediate review because it seeks resolution of a legal question of widespread importance. Far from presenting a narrow or arcane question, the trial court's decision has the potential to affect holders of claimed property nationwide by encouraging private parties to seek CFCA bounties and aggressively expand California's UPL. All holders of unclaimed property who have a connection with California would benefit greatly from this Court's guidance at this stage, before resources are wasted litigating claims that do not belong in court. And holders of unclaimed property need to know whether private parties can suddenly sue under the CFCA, or whether notice from the Controller is needed before such suits can continue. This Court should grant the petition to answer that question.

Authority for Permitting This Amici Letter

California Rules of Court 8.485-8.493 govern petitions for writs of mandate. Rule 8.487 addresses amici briefs in support of a petition. However, as the Advisory Committee comment to Rule 8.487 makes clear:

> 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.

(Emphasis added). The Courts of Appeal have regularly permitted amici letters in connection with a petition for writ of mandate. (*Regents of University of California v.*

Superior Court (2013) 220 Cal.App.4th 549, 557-558; *Los Angeles County Bd. of Supervisors v. Superior Court of Los Angeles County* (2015) 235 Cal.App.4th 1154, rev'd on other grounds in (2016) 2 Cal.5th 282.) Indeed, at least one court has explicitly cited the amici letters received in deciding whether to issue an order to show cause. (*Regents of University of California*, *supra*, 220 Cal.App.4th at pp. 557-558 [noting that amici letters were filed in support of a writ petition and that "based on the amici curiae submissions we have received," the matter "appears to be of widespread interest" such that writ review was appropriate].) Therefore, we respectfully ask the Court to consider this amici letter in deciding whether to grant JPMorgan's petition for writ of mandate.

Interest of Amici Curiae

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amici curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber routinely files amici briefs in cases in the California courts.

CalChamber is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. 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 jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

The CBA is one of the largest banking trade associations in the United States, advocating on legislative, regulatory, and legal matters on behalf of banks doing business in California. The CBA routinely files amici curiae briefs in the California courts on issues of concern to the banking industry. The Superior Court's decision directly impacts CBA's members who are holders of unclaimed property. In fact, among property holders, the banking industry is likely the largest segment of entities that are subject to statutory requirements under the UPL.

The trial court's decision would directly affect many of amici's members, which include financial institutions and other holders of unclaimed property with ties to

California. That decision threatens to greatly expand the liabilities of holders and impose daunting penalties without prior notice. Given that all fifty states have unclaimed property laws, amici's members need clarity on how to comply with California law when dealing with unclaimed property, lest they face overlapping claims from different states. Amici thus have a substantial interest in the Court's review of this petition.

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

Argument

The trial court's decision threatens considerable confusion in an area of the law that cries out for clarity. Fifty states have unclaimed property laws, and financial institutions that operate nationally must constantly reconcile potential competing state claims on the same property. Given the complex and overlapping panoply of state laws, it is imperative that financial institutions and other holders have clear rules regarding their responsibility to report and remit property in a given state. That is one reason why California's UPL requires that the Controller provide notice before imposing any penalties on a property holder.

Private parties should not be able to use the CFCA to make an end-run around that deliberate scheme and to impose penalties without any notice. But that is precisely what the Superior Court's decision would allow. Under the trial court's decision, a private party can do indirectly what the California government could not do directly: impose penalties on national financial institutions for alleged violations of the UPL, without first giving those institutions notice or the chance to correct any errors. That is particularly egregious because the CFCA threatens treble damages and penalties in any lawsuit, only underscoring the need for clarity before allowing such a lawsuit to proceed.

Three Courts of Appeal have already explained that the UPL's notice requirement applies in CFCA actions. Yet the Superior Court's decision invites private parties to seek penalties under the UPL without notice from the Controller, thereby increasing the risk for overlapping claims, particularly as private parties have every incentive to push interpretations of the UPL to justify their bounties under the CFCA. That is simply not the law. The trial court disregarded the decisions of those three Courts of Appeal as mere dicta. If allowed to stand, the decision will threaten to greatly expand the UPL's penal liability, create confusion for holders, and impose overlapping claims on banks and other holders that are doing their best to comply with the law.

I. The Need for Clarity is Paramount.

Like the laws of every other state, the UPL regulates a wide range of financial products, bank accounts, and other types of unclaimed property. (See Cal. Civ. Code §§ 1510-13.) And the UPL similarly requires holders of unclaimed property to affirmatively examine their records, make reports to California, and remit a wide range of unclaimed property to California. (See *id.* §§ 1510-13, 1530-32.) Any financial institution or other entity that fails to comply with those requirements faces significant penalties, including $100 per day that the entity fails to file a required report and up to $50,000 for failing to remit property. (See *id.* § 1576.) But the UPL tempers those penalties by requiring notice from the Controller, thus ensuring that any penalty will not be imposed before a holder has the chance to comply with the Controller's claim, as entities navigate the complex requirements of not only California, but forty-nine other states. (*Ibid.*)

That notice requirement is necessary because of the intricate web of regulations that govern unclaimed property. Each of the fifty states, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, have enacted their own abandoned property statutes. (See John A. Biek, *Jurisdictional Limitations on State Claims to Abandoned Property* (2000) 5 State & Local Tax L. 1, at p. 1.) Those 53 laws "differ substantially with respect" to numerous issues, from "what types of property are covered" to the level of "due diligence the holder must undertake" to report property. (*Id.* at p. 18.) Holders of unclaimed property thus face an "onerous multistate compliance issue" when trying in good faith to report and remit property in accordance with those fifty-plus sets of laws. (*Ibid.*)

Adding to the complexity, "for over thirty years," state unclaimed property laws "have been greatly expanded . . . for the purpose of generating revenue for states." (Ethan D. Miller et al., *Building a Better Unclaimed Property Act* (2018), 73 Bus. L. 711, at p. 761.) That expansion comes "at the expense of both owners and putative holders of unclaimed property." (*Ibid.*) And it is not only the states. The federal government has also stepped in to regulate this area as well: Federal common law provides standards on when states may demand unclaimed property. (See, e.g., *Texas v. New Jersey* (1965) 379 U.S. 674.) And Congress has enacted laws such as the Disposition of Abandoned Money Orders and Traveler's Checks statute to regulate certain forms of unclaimed property. (See 12 U.S.C. ch. 26.) But that only adds to the layers of potential legal requirements that holders must navigate. Given "[t]he increase in abandoned property audits and the desire for additional state revenue," there is a real risk of multiple states asserting competing claims to the same property—a risk that implicates constitutional concerns. (Biek, *Jurisdictional Limitations*, *supra*, 5 State & Local Tax L. at p. 18; see also, e.g., *Western Union Tel. Co. v. Commonwealth of Pa.* (1961) 368 U.S. 71.)

That risk becomes only more real if private parties can assert violations of unclaimed property laws in the first instance. California, like other states, protects good faith holders by requiring the Controller to provide notice under the UPL before seeking penalties. This ensures that the Controller, and not private parties, may determine whether to assert California's claim to the property at issue and whether to expose financial institutions or other holders to potential penalties. Yet the trial court's decision would remove that protection and permit private parties to make an end-run around that scheme, potentially expanding California's UPL to cover property that other states could rightfully claim—or that may have already been claimed by California itself. The Court of Appeal has disavowed that result: "The CFCA does not deputize private attorneys general to compel government officials to do their jobs." (*State of California ex rel. McCann v. Bank of Am., N.A.* (2011) 191 Cal.App.4th 897, at p. 914 (hereinafter *McCann*), internal quotations and citation omitted.)

That end-run around the UPL's notice requirement is especially egregious given the CFCA's penal structure. Under the CFCA, defendants who allegedly violate laws like the UPL are faced with treble damages and statutory penalties—which can easily lead to millions of dollars in penalties for even minor violations. (See Cal. Gov't Code § 12651.) The U.S. Supreme Court has therefore recognized that statutes like the CFCA "reveal[] an intent to punish," and that their treble damages and statutory penalties "are essentially punitive in nature." (*Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens* (2000) 529 U.S. 765, 786.) When threatening such penalties, the law must be clear. Financial institutions and other holders cannot operate under the specter of such imposing liabilities unless they have clear notice of when California will claim unclaimed property. And they certainly should not be forced to navigate overlapping laws in fifty different states with such strong liabilities threatened without notice and the chance to comply.

Indeed, the lawsuit here threatens the defendant with potentially overlapping claims in both California and Ohio. Under the trial court's decision, that result would become only more likely across the many holders of unclaimed property with ties to California. Unlike the California Controller, private parties are not elected by the citizens of California and owe no duty or loyalty to the people of the state. If those private parties can use the UPL (or the laws of other states) to bring claims without notice or input from the State Controller—while being incentivized to do so by the CFCA's treble damages remedies—they will seek to expand California's UPL in ways that conflict with other states' laws. And what private parties do in California, they may reference in support of interpreting the parallel laws of other states, further promoting confusion for national financial institutions. Such conflicting liabilities on holders would threaten widespread confusion and disruption, leading to costly and time-consuming litigation as courts sort out the proper extent of the UPL. This Court should grant the writ of mandate now to prevent that turmoil and to clarify that the Controller must give notice before any CFCA lawsuit to enforce the UPL may proceed.

II. Regulated Parties Must Be Able To Rely on Decisions by the California Courts of Appeal.

This petition should not be necessary because the California Courts of Appeal have *already* made clear that the Controller must give notice for any CFCA suit under the UPL. In at least three other cases, the Court has stated that a CFCA plaintiff may pursue claims for UPL violations only if the Controller had already given notice and the opportunity to correct a mistake. (See *McCann*, *supra*, 191 Cal.App.4th at p. 914; *State of California ex rel. Grayson v. Pacific Bell Tel. Co.* (2006) 142 Cal.App.4th 741, at p. 746 (hereinafter *Grayson*); *State of California ex rel. Bowen v. Bank of Am. Corp.* (2005) 126 Cal.App.4th 225, at pp. 245-46 (hereinafter *Bowen*).) Yet the trial court disregarded those published cases as mere dicta, casting confusion on a previously settled legal regime. Given the penal nature of the CFCA and the potential for overlapping state claims in this complex area of law, financial institutions must be able to rely on the decisions of the Courts of Appeal. This Court should weigh in now to reinforce that clarity.

Indeed, the Courts of Appeal could not have been clearer: "Penalties for willful failure to report under the UPL may only be imposed *after* the Controller has given notice by certified mail of the violation and the violator has failed to respond." (*Bowen*, *supra*, 126 Cal.App.4th at p. 235.) If a plaintiff seeks "to use the UPL as the hook for imposing [CFCA] liability," the claim cannot proceed if the plaintiff fails to allege "that defendants received such notice from the Controller." (*Id.* at p. 246.) Without that requirement, the plaintiff would be trying to establish "liability for violations that are not even punishable under the UPL unless the violator is given notice and an opportunity to correct the alleged violations." (*Ibid.*) Such an obvious end-run around the UPL, the court held, could not be permitted. (*Ibid.*)

The fact that *Bowen* phrased this as an alternative holding is of no moment. The Court was clear that the lack of notice alone was fatal to the CFCA plaintiff's claims. (*Ibid.*) Moreover, other Courts of Appeal have relied on *Bowen*'s language as a holding, explaining that "the Second District Court of Appeal *aborted* the plaintiff's attempt to use the [CFCA] to enforce the UPL" because the alleged violator had not been "given notice and an opportunity to correct the alleged violations." (*Grayson*, *supra*, 142 Cal.App.4th at p. 746, emphasis added, citation omitted.) Thus, in *McCann*, the same result obtained: "As in *Bowen*, [the plaintiffs] 'sought to use the UPL as the hook for imposing reverse false claims liability for violations that are not even punishable under the UPL unless the violator is given notice and an opportunity to correct the alleged violations.'" (*McCann*, *supra*, 191 Cal.App.4th at p. 914, quoting *Bowen*, *supra*, 126 Cal.App.4th at pp. 245-46.) Accordingly, *McCann* squarely stated that plaintiffs "fail to state a cause of action under either the UPL or CFCA" when the Controller had not given notice. (*Ibid.*)

Before this case, the law was clear. In three separate published decisions from three separate Districts, the Courts of Appeal have explained that CFCA plaintiffs may not seek to enforce the UPL unless the holder first receives notice from the Controller and an opportunity to correct the alleged violations. California law tasks the Controller with determining whether California will assert a right to unclaimed property, including property that may also be claimed by other states. California law does not delegate this authority to private parties who are well incentivized to develop creative legal theories to seek hefty CFCA bounties and to drive settlements with defendants. And in the face of such a multi-layered legal regime with the potential overlap of the laws of dozens of jurisdictions, holders should have notice and the chance to correct any errors before facing the harsh prospect of treble damages and penalties under the CFCA. This Court's intervention now is appropriate to reinforce controlling precedent and to avoid needless regulatory conflict caused by private relators.

Respectfully, this Court should grant the writ of mandate to clarify that notice requirement and to avoid the substantial disruption threatened by the trial court's decision.

Respectfully,

<u>/s/ *Steven A. Engel*</u>

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