Case No. S249923

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII,
Plaintiff and Respondent
v.

CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.,
Defendant and Appellant

Review of the Opinion of the Second District Court of Appeal,
Division Three (Case No. B272170)
Superior Court, County of Los Angeles, (Case No. BS149995)
(Honorable Randolph M. Hammock, Presiding)

APPLICATION BY PACIFIC RIM CULTURAL FOUNDATION FOR LEAVE TO FILE UNTIMELY AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII; PROPOSED BRIEF; DECLARATION OF BENSON K. LAU

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PACIFIC RIM CULTURAL FOUNDATION

APPLICATION TO FILE UNTIMELY AMICUS CURIAE BRIEF

Amicus curiae Pacific Rim Cultural Foundation ("Pacific Rim") respectfully requests permission to file the attached amicus curiae brief in support of respondent Rockefeller Technology Investments (ASIA) VII, pursuant to California Rules of Court, Rule 8.520, subd. (f)(2). A copy of the proposed brief is attached to this application. As explained below, this request is not timely, but good cause exists for granting permission to file the brief.

Pacific Rim is a California non-profit organization located in Calabasas, California. Founded nearly twenty years ago, Pacific Rim has focused on urban leadership development in Asia's urban centers. It also supports economic, cultural, artistic, medical, and media communications between and among the United States, China, and other Pacific Asian countries. The issue on which this Court has granted review -- whether private parties can contractually agree to legal service of process by methods not expressly authorized by the Hague Convention -- is of importance to Pacific Rim and will have significant effect on not only Pacific Rim's charitable endeavors abroad but also other non-profit organizations that similarly play an active role in U.S.-China relations.

As in all multinational transactions, disputes may arise between international parties. To non-profit organizations like Pacific Rim, the ability to resolve such disputes confidentially, clearly, and – most importantly – inexpensively, is critical towards the organizations' continued charitable endeavors which have been placed asunder by the Court of Appeal decision in the underlying case. Consequently, Pacific Rim is faced with the specter of a number of judgments from the past twenty years being voided by this decision.

Pacific Rim's proposed amicus curiae brief contributes meaningful argument and authority to assist this Court's review of the matter. As explained in the brief, the Court of Appeal erred in (i) holding that the Hague Service Convention (the "Convention") has been incorporated into the law of the United States so as to have municipal effect; (ii) failing to recognize that the term "postal channels" in Article 10(a) of the Convention includes private couriers such as Federal Express as well as electronic mail; and (iii) holding that the judgment against Sinotype was void as a violation of fundamental due process thereby allowing it to be set aside at any time.

This application is untimely, as amicus curiae briefs were due on August 26, 2019. However, good cause exists to grant Pacific Rim leave to file its proposed brief. (Cal. R. Ct. 8.520, subd. (f)(2).) Counsel was not retained by Pacific Rim to submit an amicus brief in this matter until August 19, 2019, which was a week before the due date for amicus briefs. (Declaration of Benson K. Lau ("Lau Decl.") ¶1.) That same day, Pacific Rim's counsel encountered an emergency issue in a separate matter that required him to being preparing an ex parte application for emergency relief instead. (*Id.*) As a result, Pacific Rim's counsel lost a significant amount of time to prepare Pacific Rim's amicus brief and have it timely reviewed and approved by Pacific Rim. (*Id.*)

On August 26, 2019, Pacific Rim's counsel electronically filed and served an Application for 15-Day Extension of Time to File Application for Leave to File Amicus Curiae Brief. (Lau Decl. ¶2.) The original application together with an additional hard copy was also sent out that same day to the Office of the Clerk for filing via U.S. Priority Mail pursuant to California Rules of Court, Rule 8.44(a)(6). (*Id.*) However, Pacific Rim's counsel was subsequently informed by the Clerk that if the extension request was received after the due date, it would not be accepted, and Pacific Rim

should prepare to file an untimely application for permission to file the brief. (*Id.*)

On September 6, 2019, the Office of the Clerk confirmed that Pacific Rim's original application for extension was received on August 29, 2019 thereby necessitating the within untimely application. (Lau Decl. ¶3.) Respondent has filed an application requesting permission to file a final version of its reply brief on the merits on August 15, 2019, which is still pending. (*Id.*) Pacific Rim is unaware of any detriment to any party that would arise from granting this application. (*Id.*)

No party, counsel for a party, or any person or entity other than Pacific Rim and its counsel has made a monetary contribution intended to fund the preparation or submission of the brief, and no party or counsel for a party has authored this brief in whole or in part.

Accordingly, Pacific Rim respectfully requests leave to file this untimely amicus brief in order to address the practical impact of the issue before the Court with respect to non-profit organizations engaging in international investment projects and arguments that neither party nor amici have addressed at length in their respective briefs.

Dated: September 9, 2019

Respectfully submitted,

By: _____
BENSON K. LAU
Attorneys for Amici Curiae
PACIFIC RIM CULTURAL
FOUNDATION

DECLARATION OF BENSON K. LAU

I, BENSON K. LAU, declare as follows:

I am an attorney duly licensed to practice law before the courts of the State of California and am attorney of record for amicus curiae Pacific Rim Cultural Foundation ("Pacific Rim"). The following statements are based upon my personal knowledge, and if called upon, I could and would competently testify hereto.

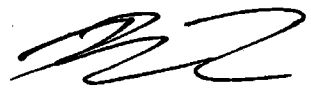
1. On August 19, 2019, I was engaged by Pacific Rim to prepare an amicus curiae brief on its behalf in the pending matter. Later that same day, I encountered an emergency issue in a separate matter that required me to begin preparing an *ex parte* application for emergency relief instead. As a result, I lost a significant amount of time to prepare Pacific Rim's amicus brief and have it timely reviewed and approved by my client.

2. On August 26, 2019, I electronically filed and served an Application for 15-Day Extension of Time to File Application for Leave to File Amicus Curiae Brief. That same day, I also mailed the original application for extension together with an additional hard copy to the Office of the Clerk for filing pursuant to California Rules of Court, Rule 8.44(a)(6) via U.S. Priority Mail. However, I was subsequently informed by the Clerk that if the extension request was received after the due date, it would not be accepted, and that I should prepare to file an untimely application for permission to file the brief.

3. On September 6, 2019, I confirmed with the Office of the Clerk that the extension request was received on August 29, 2019 thereby necessitating the within application. I am aware from the Court's docket that Respondent has filed an application requesting permission to file a final version of its reply brief on the merits on August 15, 2019, which is

still pending. I am not aware of any detriment to any party that would arise from granting this limited extension of time.

I declare under penalty of perjury and pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 9th day of September 2019 in Los Angeles, California.



Benson K. Lau, Esq.

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[PROPOSED] BRIEF OF AMICUS CURIAE PACIFIC RIM CULTURAL FOUNDATION

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I. INTRODUCTION

Amicus Curiae Pacific Rim Cultural Foundation ("Pacific Rim") agrees with and fully supports Respondent Rockefeller Technology Investments (ASIA) VII's ("Respondent") arguments that private parties should be allowed to contractually agree to legal service of process by methods not expressly authorized by the Hague Convention.

Pacific Rim respectfully submits this amicus curiae brief to elaborate on the practical impact of the issue before the Court with respect to non-profit organizations and to advance the following arguments that neither party nor amici have addressed at length in their respective briefs.

II. ARGUMENT

A. The Court of Appeal Erred in Holding that the Hague Service Convention Has Municipal Effect

The Court of Appeal erred in holding that the Hague Service Convention (the "Convention") has been incorporated into the law of the United States so as to have municipal effect. A ratified treaty has municipal force only if: (i) it is a self-executing document; or (ii) to the extent of enabling legislation passed by Congress and signed by the President. *Fujii v. State* (1952) 38 Cal.2d 718 ("*Fujii*"). However, the Court of Appeal in the underlying case simply concluded that the Convention has municipal effect "by virtue of the Supremacy Clause, United States Constitution, Article VI, the Convention preempts inconsistent methods of service prescribed by state law in all cases to which the Convention applies." *Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology Co., Ltd.* (2018) Cal.App.5th 115, 129 ("*Rockefeller*"). The Court of Appeal failed to apply *Fujii* to consider whether the Convention had municipal effect to begin with. No evidence on either point was presented and the Court of Appeal opinion fails to demonstrate any

language in the Convention that creates in individuals any right of private action in the state or federal courts of the United States. *See, Medellin v. Texas* (2008) 128 S.Ct. 1346, 1349-1350 (the right and remedy of an individual to enforce a treaty is governed by domestic procedural rules "absent a clear and express statement to the contrary").

B. The Court of Appeal Erred in Holding that Article 10(a) of the Hague Service Convention Includes Private Couriers and Electronic Mail

The Court of Appeal also erred in failing to show that the term "postal channels" in Article 10(a) includes private couriers such as Federal Express, as well as email. Some courts have interpreted China's reservation to Article 10(a) to mean that in China "service therefore cannot be effected by postal channels." *In re LDK Solar Secs. Litigation*, 208 WL 241586 (N.D. Cal. June 12, 2008.) However, the Convention does not define the term "postal channels" and nowhere does the Convention indicate that the term goes beyond public governmental services such as those offered by the U.S. Postal Service. Indeed, the objection of countries such as China, Germany, and India to postal channels may show concern with the operation within their country of an instrumentality owned by a foreign government that do not exist with a privately held business enterprise. Admittedly, this view did not affect the Permanent Bureau of the Hague Conference when it noted "It is difficult to see...what would prevent a private courier service from being treated as a postal channel within the meaning of the Convention." (Hague Conference on Private Int'l Law, Practical Handbook on the Operation of the Service Convention (4th ed. 2016) p. 70) ("Practical Handbook"). However, the Permanent Bureau's interpretation of postal channels does not have force of law in the United States.

With respect to U.S. law, the judicial decisions are split. *See, NSM Music, Inc. v. Villa Alvarez* 203 WL 685338 (N.D. Illinois Feb. 25, 2003) (Federal Express is not a "postal channel" as that term is used in the Hague Service Convention.) Several decisions applied similar reasoning in determining that Federal Express did not constitute mail under the Federal Rules of Civil Procedure ("FRCP"). *See, Audio Enterprises, Inc. v. B&W Loudspeakers* (1992) 957 F.2d 406, 409 ("Federal express is not first class mail"); *See, also Prince v. Poulous* (1989) 876 F.2d 30 (Federal express is not mail because "mail" is defined as "letters...conveyed under public authority" and Federal Express is a private, not public authority).

Other decisions have ruled that commercial couriers, such as Federal Express, are postal channels under the convention. *See, Casio Computer Co. Ltd. v. Sayo* 2000 WL 1877516 (S.D.N.Y. Oct. 13, 2000) (recognizing that service by private courier as a process made by postal channels under the Hague Convention). The confusion to international traders and investors caused by these diametrically opposed holdings is great, was vital to the case at hand, and was left unaddressed by the Court of Appeal.

In *Magnuson v. Video Yesteryear* (1996) 85 F.3d 1424 ("*Magnuson*"), Judge Dorothy Nelson, in recognition that the cases "are not consistent," provided an overview of whether service by Federal Express was the equivalent of service by mail. The court concluded that service by Federal Express was not the equivalent of service by mail for the purposes of the FRCP. Notably, Judge Nelson highlighted the necessity for uniformity in determining whether Federal Express was "mail." *See, Magnuson, supra,* 85 F.3d at 1431 ("It seems clear that in interpreting the term 'mail' differently for the purposes of different rules within the Federal Rules of Civil Procedure, courts are likely to cause great confusion.") In failing to determine if Federal Express constitutes "postal means," the Court of Appeal contributes to the confusion.

As to the issue of the proper consequences of actual delivery of service via unauthorized means, Judge Nelson adopted for the Ninth Circuit the rule in *Salley v. Board of Governors, Univ. of N.C.* (1991) 136 F.R.D. 417 ("*Salley*"). In *Salley*, the court allowed the use of unauthorized means that resulted in actual service upon a showing that the receiving party had explicitly consented to the unauthorized means of service. The court allowed the validity of the service because the consent of the receiving party demonstrated exceptional due cause as to the serving party. *Id.* at 420. In the underlying action, the Court of Appeal erred when it failed to recognize the Ninth Circuit rule that a party's use of unauthorized means of service may be sufficient to validate actual service if both parties had consented in advance. The Court of Appeal also failed to distinguish whether Federal Express or email constituted a "postal channel" under Article 10 of the Convention.

In light of the foregoing, Pacific Rim urges the Court to define the means of transmission (whether private courier, facsimile, or email) that are included in the term "postal channels" and whether the parties' prior consent to such means of service validates actual service through those means. Independently of whether such service falls within the Convention, Pacific Rim respectfully requests that the Court also consider whether Respondent's actual service on SinoType satisfies the U.S. due process requirement as being "reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306; *Rio Props, Inc. v. Rio Int'l Interlink* (2002) 284 F.3d 107. "Sticking one's head in the sand" must not be a strategic option under California law, however, the Court of Appeal's decision would certainly encourage bad actors to do so.

C. The Court of Appeal Erred in Holding that the Judgment Against SinoType was Void as Violating Fundamental Due Process

Regardless of whether or not the parties' agreed-upon means of service significantly exceeded those means expressly authorized by the Convention, the Court of Appeal erred in voiding actual service of Sinotype on fundamental due process grounds and utilizing its inherent equitable powers to override the statutory limits on challenges to default judgments. The Court of Appeal opinion relies heavily upon *County of San Diego v. Gorham* as its basis to avoid the six-month time limitations of *Code Civ. Proc.* § 473(b) (authorizing relief for a party for default judgment taken against a party as a result of the party's "mistake, inadvertence, surprise or excusable neglect") as well as the two-year time limitation of *Code Civ. Proc.* § 473(b) (authorizing relief from a void judgment). However, the Court of Appeal's reliance is misplaced as *Gorham* is both inapposite and distinguishable from the underlying action.

In *Gorham*, the court held that equitable relief pursuant to the court's inherent powers was warranted under the "exceptional circumstances" of the particular case. *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230 ("*Gorham*"). Specifically, the *Gorham* court held that equitable relief to set aside an almost 10-year old default judgment for paternity and child support was warranted when Gorham submitted uncontested evidence to the trial court that the proof of service filed by County of San Diego Department of Child Support Services (the "County") was fraudulent because he was incarcerated at the time that he was purportedly personally served. *Id.* at 1234.

Citing to *Mathews v. Eldridge* (1976) 424 U.S. 319, the *Gorham* court wrote that the County action had "essentially denied Gorham of the

'opportunity to be heard at a meaningful time and in a meaningful manner.'" *Gorham, supra,* 186 Cal.App.4th at 1234. The appellate court found that the false proof of service "in the absence of any mistake or excuse in doing so, constitutes evidence of an intentional false act that was used to obtain fundamental jurisdiction over [the defendant]" *Id.* at 1231-1232.

Accordingly, the *Gorham* court held that the trial court had abused its discretion by denying Gorham's motion to vacate on the basis that the motion was untimely and despite the trial court's finding that Gorham had never been served with the summons and complaint and that the default judgment had been obtained by a false proof of service. *Id.* at 1234. The *Gorham* court reversed the trial court decision because "jurisdiction was obtained [on Gorham] through an intentional fraud on the court." *Id.* at 1233.

The instant case lacks the essential element in *Gorham* -- namely, an intentional fraud on the court. The unique facts of Gorham are also not present in the underlying action in which the parties have explicitly submitted to the jurisdiction of the federal and state courts through their own private agreement. Kejian Huang, Sinotype's Chairman, admits that he received actual and complete service (i.e., notice and the opportunity to be heard) which he freely elected to ignore and not act upon. *Rockefeller, supra,* 24 Cal.App.5th at 125. In such case, service of process requirements are to be "liberally construed to effectuate service if actual notice has been received." *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773; *See also, Nat'l Equipment Rental, Ltd. V. Szukhent* (1964) 375 U.S. 311, 315 (no due process claim has been made where respondents did in fact receive complete and timely notice of the lawsuit pending against them). In contrast, Gorham did not receive any actual service which would

have provided him with notice and opportunity to be heard. Notably, *Gorham* presents no issue of strategic behavior.

As the *Gorham* opinion makes clear – under the due process clause of the U.S. Constitution, a court must have personal jurisdiction over the parties or the judgment is void. However, it has been long settled that a party's consent is a proper basis to confer personal jurisdiction. *Estate of Heil* (1989) 210 Cal.App.3d 1503. Moreover, consent can also be established through a pre-dispute contractual agreement in a commercial contract. *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462. n14. In the underlying action, the parties' consent to jurisdiction in California courts is explicitly stated in their executed contractual agreement. *Rockefeller, supra,* 24 Cal.App.5th at 121 ("The Parties hereby submit to the jurisdiction of the Federal and State courts in California...")

Therefore, the Court of Appeal erred not only in finding a violation of fundamental due process where there was none, but also in failing to identify the extreme and extraordinary factual elements present in *Gorham* that would support its exercise of its inherent equitable powers to override the statutory time limits under which default judgments may be challenged.

D. The Impact of the Court of Appeal Decision on Pacific Rim's Charitable Work

Pacific Rim and other non-profit organizations that frequently engage in international investment projects face similar problems and uncertainties commonly encountered by international for-profit enterprises and international investors, especially with regard to international disputes with foreign parties. Pacific Rim often engages in the same activities in foreign countries such as the purchase and sale of property, importing and exporting goods, engaging in employment relationships, or contracting for services. However, each of Pacific Rim's revenue-generating activities

relate back to its founding purpose and every dollar spent towards a dispute is a dollar not spent directly on its charitable mission. Accordingly, for such activities, Pacific Rim relies heavily on its ability to seek recourse through international arbitration in its commercial agreements and to negotiate at arms-length its choice-of-forum, choice-of-law, and means of service. If Pacific Rim and other non-profit organizations are prohibited from privately waiving the more time-consuming and costly service provisions of the Convention, they may be left without any practical recourse should a dispute with a foreign entity arise.

Indeed, Pacific Rim was recently involved in such a dispute when it hosted a touring Chinese art exhibit where many of the valuable pieces were damaged. As discussed in the within Application, Pacific Rim is now faced with the specter of a number of judgments from the past twenty years being voided by this decision. Moreover, Pacific Rim's accountants have informed the organization that if the Court of Appeal decision should stand, Pacific Rim may be required to establish balance sheet reserves for potential liabilities arising from such renewed judgments in amounts that exceed Pacific Rim's present assets. As such, the charitable endeavors of Pacific Rim and other similar non-profit organization engaging in multinational transactions will be significantly hindered if the Court determines that the cumbersome requirements of the Convention may not be waived by private agreement.

Furthermore, current events in China and elsewhere underscore the importance of party autonomy in allowing parties to agree contractually to the service of process methods applicable to resolution of their commercial disputes. Given the rise in disputes over trade, investment, and property rights between the governments of the United States and China as well as the public disruptions not unrelated to these issues, the courts should

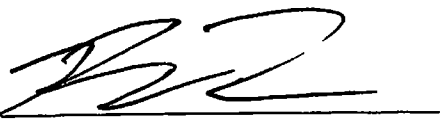
recognize and respect the reasoning of commercial parties in choosing broader and distinct service of process methods, such as private courier, email, and facsimile, rather than forcing parties to limit service methods only to those operated by government agencies such as the Central Authorities. The benefits in both efficiency and effectiveness of allowing parties' consent to additional channels of service is clearly within the intents and purposes of the Convention.

III. CONCLUSION

For the foregoing reasons, and those discussed in the briefs of Respondent, the California International Arbitration Council, and the Professors of International Litigation, Pacific Rim respectfully urges the Court to overturn the Court of Appeal decision and to hold that private parties may contractually agree to legal service of process by methods not expressly authorized by the Hague Convention.

Dated: September 9, 2019

Respectfully submitted,

By: 

BENSON K. LAU

Attorneys for Amici Curiae

PACIFIC RIM CULTURAL FOUNDATION

CERTIFICATION OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), the undersigned counsel certifies that this brief uses a proportionately spaced font of Times New Roman 13 points. The text of this Application consists of 3,674 words, excluding the caption pages and this Certificate of Compliance, as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: September 9, 2019

Respectfully submitted,

By: _____
BENSON K. LAU
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