S239510

IN THE SUPREME COURT OF CALIFORNIA

PITZER COLLEGE,
Petitioner,

vs.

INDIAN HARBOR INSURANCE COMPANY,
Respondent

QUESTIONS CERTIFIED BY THE NINTH CIRCUIT COURT OF APPEALS
CASE NO. 14-56017

RESPONDENT INDIAN HARBOR INSURANCE COMPANY'S MOTION FOR LEAVE TO FILE ATTACHED RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE RESPONSE TO SUPPLEMENTAL BRIEF

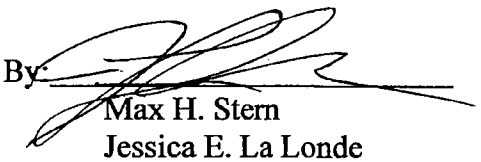
Pitzer's supplemental brief is not limited to identifying new authorities, pursuant to California Rule of Court 8.520(d)(1), and is not simply a list of new authorities, as set forth in the Court's Notice to Counsel (para. 4), circulated on May 15, 2019. Instead, Pitzer's supplemental brief consists of over 6 pages of discussion and argument, which it did not seek leave to file.

The Court's Notice to Counsel (para. 4) states: "When appropriate, the Chief Justice may grant opposing counsel an opportunity to serve and file a reply to the newly cited authorities." Indian Harbor respectfully submits that it is appropriate for the Court to allow Indian Harbor an opportunity to respond to Pitzer's supplemental brief, and therefore seeks leave to do so.

Indian Harbor's proposed response is attached hereto.

Dated: May 28, 2019

DUANE MORRIS LLP

By: 

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RESPONSE TO SUPPLEMENTAL BRIEF

I. *SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP V. J-M MANUFACTURING COMPANY* (2018) 6 CAL.5TH 59

Sheppard Mullin does not bear upon the correctness of this Court's (and other courts') current framework for analyzing choice of law provisions under *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, on which the trial court relied in rendering judgment for Indian Harbor. *Sheppard Mullin* addresses when a contract is invalid and unenforceable *in toto* for violating public policy – a very different scenario than the consideration of when California's "strong public policy" in favor of enforcing choice of law provisions can be overridden by some other California policy (like the contractual covenant of good faith and fair dealing or the tort remedy for breach of fiduciary duty, as in *Nedlloyd*, or the notice-prejudice rule, as here).

In *Sheppard Mullin*, this Court concluded that the public policy that can operate to invalidate a contract *in toto* as illegal does not need to be "enshrined in a legislative enactment." (*Sheppard Mullin*, 6 Cal.5th at 79.) That decision is entirely consistent with the current approach followed by California courts in the context of the enforceability of choice of law provisions. As discussed by Indian Harbor in its briefing: all contracts are subject to public policy principles of unconscionability and illegality, which can be judicially created (or created by something less than a constitution or statute). In this respect, *Sheppard Mullin* is no different than those cases that have declined to enforce a choice of law provision because to do so would enforce a contract provision that California courts have determined is unconscionable. (*See, e.g., Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (class action waivers in consumer contracts of adhesion are unenforceable as unconscionable, so choice of law provision was not

enforced), abrogated by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.)

Indian Harbor does not contend (and has never contended) that California's public policy cannot be formed by something less than a constitution or statute in other contexts. But the public policy necessary to overcome California's "strong" public policy in favor of choice of law provisions must necessarily and logically be something more than "strong" – it must be "fundamental," as stated repeatedly in *Nedlloyd* and subsequent cases. Nowhere in *Sheppard Mullin* does the Court use the phrase "fundamental policy" or even consider *Nedlloyd.* Thus, *Sheppard Mullin* does not bear on what can constitute a fundamental policy in the context of the enforceability of a choice of law provision.

Sheppard Mullin is part of an entirely different line of cases. That case does not bear upon the issue here of whether this Court will – for the first time – conclude that any judicially-created "strong" policy can be sufficient to trump California's long-standing and also "strong" public policy of enforcing parties' choice of law.

II. CLAIMS-MADE-AND-REPORTED CASES

Centurion Medical Liability Protective Risk Retention Group Inc. v. Gonzalez (C.D. Cal. 2017) 296 F.Supp.3d 1212 is entirely consistent with California law, so Pitzer's attempts to disparage it are not compelling. As Indian Harbor referred to in its briefing (and as the court in *Centurion* noted), California courts have consistently strictly applied the reporting requirements of claims-made policies. (*See, e.g., Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1357 (holding that the notice-prejudice rule does not apply to claims-made policies); *see also Burns v. International Ins. Co.* (9th Cir. 1991) 929 F.2d 1422, 1425 (rejecting, in the claims-made policy context, the argument that the notice-prejudice rule has been universally adopted in California as a matter of

public policy).) That the policy in *Centurion* provided for a shorter notice period than the full policy period is of no consequence.

Further, *Centurion* is consistent with *Venoco, Inc. v. Gulf Underwriters Ins. Co.* (2009) 175 Cal.App.4th 750. In *Venoco*, the court enforced a 60-day notice requirement in a pollution buy-back endorsement of a general liability occurrence policy, without requiring a showing of prejudice. Therefore, notice requirements like those in *Centurion* are regularly enforced by California courts.

Pitzer has identified no reason why this Court should consider and rely on a federal trial court decision from Washington applying Washington law (*Providence Health and Services v. Certain Underwriters at Lloyd's London* (W.D. Wash. 2019) 358 F.Supp.3d 1195). *Providence Health* is not consistent with the California law discussed above.

At a minimum, neither one of these cases supports an argument that the notice-prejudice rule is a fundamental policy of California that should override California's strong policy of enforcing choice of law provisions.

Dated: May 28, 2019

DUANE MORRIS LLP

By: _____

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Jessica E. La Londe

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CERTIFICATE OF COMPLIANCE

This certifies that this brief complies with the type-volume limitation set forth in California Rules of Court Rule 8.204. Specifically, this brief uses a proportional typeface and 13-point font and contains 754 words.

Dated: May 28, 2019

DUANE MORRIS LLP

By: _____
Max H. Stern
Jessica E. La Londe

Attorneys for INDIAN HARBOR INSURANCE COMPANY

CERTIFICATE OF SERVICE

Pitzer College v. Indian Harbor Insurance Company
California Supreme Court, Case No. S239510

I am a resident of the state of California, I am over the age of 18 years, and I am not a party to this lawsuit. I am an employee of Duane Morris LLP and my business address is Spear Tower, One Market Plaza, Suite 2200, San Francisco, California 94105. I am readily familiar with this firm's practices for collecting and processing correspondence for mailing with the United States Postal Service and for transmitting documents by FedEx, fax, email, messenger and other modes. On the date stated below, I served the following documents:

RESPONDENT INDIAN HARBOR INSURANCE COMPANY'S MOTION FOR LEAVE TO FILE ATTACHED RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF

X	BY U.S. MAIL: ☒ I enclosed the documents in a sealed envelope or package addressed to the person(s) set forth below, and placed the envelope for collection and mailing following our ordinary business practices, which are that on the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California, in a sealed envelope with postage fully prepaid.
X	BY ELECTRONIC SERVICE: I hereby certify that based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Michael J. Murtaugh Thomas N. Fay Murtaugh Treglia Stern & Deily,LLP 2603 Main Street, Penthouse Irvine, CA 92614-6232 Tel: (949) 794-4000 Fax: (949) 794-4099 Email: mmurtaugh@murtaughlaw.com tfay@murtaughlaw.com	Attorneys for Petitioner-Plaintiff PITZER COLLEGE
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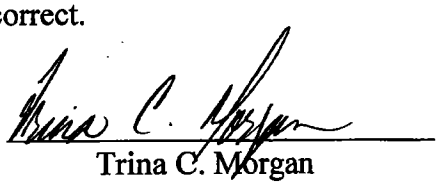
Original and 8 Copies via Courrier Office of the Clerk Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797	

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

Dated: May 28, 2019



Trina C. Morgan