No. S097308

Unfair competition case. (See Business and Professions Code § 17209 and California Rules of Court, rule 16(d))

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ADVANCED BIONICS CORPORATION and MARK R. STULTZ,

Plaintiffs and Respondents,

v.

MEDTRONIC, INC.,

Defendant and Appellant.

MEDTRONIC, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

ADVANCED BIONICS CORPORATION and MARK R. STULTZ,

Real Parties in Interest.

After a Decision by the Court of Appeal
Second Appellate District, Division One
Case Numbers B144465 and B144920
Los Angeles Superior Court Case No. BC231335

APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND TO DO SO AFTER THE RULE 29.3 DEADLINE, AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS AND RESPONDENTS ADVANCED BIONICS CORPORATION AND MARK R. STULTZ

JAMES P. STONEMAN II (State Bar Number 94523)
100 West Foothill Boulevard
Claremont, California 91711
(909) 621-4987

Attorney for California Employment Lawyers Association

Amicus Curiae in support of Plaintiffs and Respondents
ADVANCED BIONICS CORPORATION AND MARK R. STULTZ

TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND HONORABLE ASSOCIATE JUSTICES:

On behalf of the California Employment Lawyers Association ("CELA"), I, James P. Stoneman II, respectfully request permission to file a brief as *amicus curiae* in support of Plaintiffs and Respondents Advanced Bionics Corporation and Mark Stultz. This application is made more than 30 days after the filing of the Reply Brief on the Merits by Defendant and Appellant Medtronic, Inc., but, for the reasons set forth herein, CELA respectfully requests leave from the Honorable Chief Justice to submit this later filing.

Identity of Amicus Curiae

CELA is a statewide organization of attorneys primarily representing plaintiffs in employment termination and discrimination cases. CELA is active in legislative matters and has appeared as *amicus curiae* in numerous cases involving important employment rights before federal and state courts.

CELA, through its *amicus* activity, has participated in a number of landmark employment decisions before this court, including *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, *Fermino v. Fedco* (1994) 7 Cal.4th 701, *Scott v. Pacific Gas & Electric* (1995), *Lazar v. Superior Court* (1996) 12 Cal.4th 631, *City of Moorpark v. Superior Court* (1998) 18 Cal.4th

1143, *Green v. Ralee Engineering* (1998) 19 Cal.4th 66, *White v. Ultramar* (1999) 21 Cal.4th 563, and *Armendariz v. Foundation Health Psychare Service, Inc.* (2000) 24 Cal.4th 83.

Interest of Amicus Curiae

Through the cases they handle, hundreds of CELA members represent thousands, if not tens of thousands, of employees in wrongful discharge and discrimination litigation throughout the state. Dealing with the proliferation of so-called "noncompete" agreements is a common occurrence for our members, and a matter of great concern to our clients who frequently call upon us for advice relative to the enforceability of such agreements after their employment has been terminated. CELA members have noted that employers have become more aggressive in pressuring employees to sign such agreements, and more creative in their efforts to avoid the effect of *Business and Professions Code* § 16600.

Issues to be Addressed

CELA, through the undersigned attorney, is familiar with the questions involved in this case, and the scope of their presentation and believe that there is necessity for additional argument on the following point:

- The extent to which *Business and Professions Code* § 16600 protects employees who lawfully compete with their former employers by working on "competitive products" or in the same industry after signing noncompete agreements. This is the so-called "narrow restraint" exception to Section 16600.

Reasons for Later Filing

CELA's interest as an *amicus curiae* relates primarily to the circumstances under which *Business and Professions Code* section 16600 will be used to invalidate "noncompete" agreements. At first, it appeared that this case dealt primarily with conflict of law issues. However, on February 27, 2002, this court granted review and deferred briefing in *Walia v. Aetna, Inc.* (2001) 93 Cal.App.4th 1213, pending resolution of a related issue in this case. *Walia* is a case dealing specifically with *Business and Professions Code* § 16600, and more specifically, the extent of its application to situations in which employees sign agreements which prevent them from working in the same industry after their employment terminates. Subsequently, we learned that the Attorney General had been granted an extension of time until March 14, 2002, within which to file an *amicus* brief in this matter.

If this request is granted, the following brief in support of Plaintiffs and Respondents Advanced Bionics Corporation and Mark Stultz is respectfully submitted.

Dated: March 14, 2002.

Respectfully submitted,

By _____
James P. Stoneman II, Attorney for California Employment Lawyers Association, *Amicus Curiae* in support of Plaintiffs and Respondents ADVANCED BIONICS CORPORATION AND MARK. R. STULTZ

No. S097308

Unfair competition case. (See Business and Professions Code § 17209 and California Rules of Court, rule 16(d))

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ADVANCED BIONICS CORPORATION and MARK R. STULTZ,

Plaintiffs and Respondents,

v.

MEDTRONIC, INC.,

Defendant and Appellant.

MEDTRONIC, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

ADVANCED BIONICS CORPORATION and MARK R. STULTZ,

Real Parties in Interest.

After a Decision by the Court of Appeal
Second Appellate District, Division One
Case Numbers B144465 and B144920
Los Angeles Superior Court Case No. BC231335

***AMICUS CURIAE* BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS AND RESPONDENTS ADVANCED BIONICS CORPORATION AND MARK R. STULTZ**

JAMES P. STONEMAN II (State Bar Number 94523)
100 West Foothill Boulevard
Claremont, California 91711
(909) 621-4987

Attorney for California Employment Lawyers Association

Amicus Curiae in support of Plaintiffs and Respondents
ADVANCED BIONICS CORPORATION AND MARK R. STULTZ

INTRODUCTION

An employee gives the best years of his or her life to the development and advancement of the business of a corporation. When such employees are terminated, they frequently are left with few viable employment options. In many cases, these people have no employment skills other than those acquired in their chosen trade or profession. To compound the problem, many of them are in their forties, fifties, or sixties, ages at which, for many reasons including age and the onset of medical problems, they are perceived to be less desirable to prospective employers outside their chosen trade or business. Discrimination against job applicants is an unfortunate reality in the modern economy. The only attribute of real value many older employees bring to their employment interview is their experience in their chosen line of work.

Should employees in this position be prevented from continuing to work in their chosen line of work just because their former employers wish to protect their business from competition? More fundamentally, is it consistent with the public policy of the State of California to deny them the opportunity to lawfully compete with their former employers? Does California's sovereignty allow it to protect its citizens from interference with their personal and economic liberties?

The purpose of *Business and Professions Code* § 16600, as stated in clear statutory language and demonstrated by many cases over the last century, is to ensure that termination of employment does not mean termination of one's livelihood and contribution to economic progress. California has essentially deemed it fundamental to allow individuals to move freely from job to job, unshackled by pro forma restrictive covenants. This policy will be significantly undermined if California allows its citizens to be subject to suit in other states, where overly zealous employers seek to impede competitive development within the State of California. The real question in this case does not involve questions over sovereignty of California law versus Minnesota law. It involves questions about Medtronic's sovereignty to dictate the legal rights of individuals across the country, regardless of the laws of the states in which their former employees reside. While Minnesota may have its own incentives for protecting and promoting this type of corporate sovereignty, California does not. California's exercise of jurisdiction over this case is not only warranted, but justified, if its laws are to have any meaning.

THIS COURT SHOULD ADOPT A BRIGHT LINE TEST TO DETERMINE PERMISSIBLE RESTRAINTS ON COMPETITION BY FORMER EMPLOYEES

In recent years, large companies have drafted noncompete agreements using clever means by which to circumvent *Business*

and Professions Code § 16600. The two most prevalent have been based on the use of the "inevitable disclosure" doctrine, and the "narrow restraint" exception. The "inevitable disclosure" doctrine espouses the theory that the former employee will "inevitably" misappropriate trade secrets in his or her new job with a competitor, irrespective of whether there is any showing of actual misappropriation of protectable secrets. A number of courts have recognized, however, that application of this logic results in a *de facto* noncompetition agreement, because such an injunction restrains employees from working for competitors **without any showing of actual misappropriation**. (See, *e.g., Globespan v. O'Neill* 151 F. Supp. 2d 1229 (C.D. Cal. 2001); *Bayer Corp. v. Roche Molecular Sys., Inc.* 72 F. Supp.2d 1111 (N.D. Cal. 1999). In fact, the "inevitable disclosure" doctrine is based on the fundamental fallacy that employees are incapable as a matter of law of refraining from unlawful use of trade secret information.

The "narrow restraint" exception provides essentially that, despite the statutory language, employers can impose trade restraints on a "minor part of the market" in which an employee or business operates. *Boughton v. Socony Mobil Oil Co., Inc.* (1964) 231 Cal.App.2d 188.

This exception is perhaps the more dangerous of the two, because it is used to stifle or prevent the precise competition Section 16600 was intended to promote. The

"minor part of the market" addressed will usually be the precise market in which the employee has knowledge and experience. Enjoining competition on "competitive products" or in the same industry in which one was formerly employed is the only kind of competition that is meaningful and which produces the economic benefits of competition. This competition should be permitted so long as the employee does not use his former employer's protectable property (actual trade secrets) to compete. Allowing employers to use this exception in effect eviscerates the intent of Section 16600. It also stifles competition. Employees who would otherwise contribute in a productive manner by lawfully competing will be intimidated by employer threats of lawsuits.

For these reasons, we submit that this court should determine that the "narrow restraint" exception is either unlawful or does not apply if the former employee has to move or change the nature of his or her work to get another job, a situation which would clearly violate Section 16600.

If the exception is abolished, employers are protected from unlawful competition by a substantial body of law providing that Section 16600 is not violated by restraints attaching to the use of the employer's property.

If the exception is permitted, it should be very narrow. The Legislature has held that employee mobility is more important than the selfish business interests of former employers.

For these reasons, CELA respectfully submits that this Court affirm the rights of employees to lawfully compete with their former employers, the public policy of our state as expressed by the Legislature in Section 16600.

Dated: March 14, 2002.

Respectfully submitted,

By _____
James P. Stoneman II, Attorney for California Employment Lawyers Association, *Amicus Curiae* in support of Plaintiffs and Respondents ADVANCED BIONICS CORPORATION AND MARK. R. STULTZ