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August 10, 2007

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Honorable Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: *McAdams v. Monier, Inc.*; No. S154088
(Petition for Review filed July 6, 2007)

Dear Chief Justice George and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, Intel Corporation respectfully submits this letter supporting the petition of Monier, Inc. for review of the Court of Appeal's decision in the above-captioned case.

Intel is the world's largest manufacturer of semiconductor chips. Intel's products include microprocessors, chipsets, motherboards and other semiconductor products that are incorporated into a broad range of consumer and business products such as desktop personal computers, notebook personal computers, and memory products for cellular telephones. Intel's products are sold throughout California, the United States and the world. Intel has a strong interest in the uniform interpretation and application of consumer protection laws that may apply to the sale of its products. Intel supports review here because the Court of Appeal drastically expanded the circumstances under which an "inference of common reliance," as opposed to a showing of "actual reliance," may be used to support certification of a class action under the Consumers Legal Remedies Act ("CLRA"), Civ. Code § 1750, et seq., and the Unfair Competition Law ("UCL"), Bus.& Prof. Code § 17200, et seq. Because the ruling conflicts with prior decisions of this Court, review should be

granted. In the alternative, the Court should grant and hold pending a determination in *In re Tobacco II Cases*, No. S147345, review granted November 1, 2006.

1. To pursue a misrepresentation cause of action under either the CLRA or the UCL, a plaintiff must establish, inter alia, that he or she suffered harm as a result of the alleged misrepresentation. See Civ. Code § 1781(a) (authorizing "[a]ny consumer who suffers any damages as a result of the use or employment" of a "method, act or practice" proscribed by the CLRA to pursue relief); Bus. & Prof. Code § 17204 (authorizing "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition" to pursue relief). This causation requirement applies to each member of a putative class. See Civ. Code § 1781 (stating that a CLRA plaintiff may "if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers"); Wilens v. TD Waterhouse Group, Inc. (2003) 120 Cal. App. 4th 746, 754 ("Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof."); Bus. & Prof. Code § 17203 (permitting private representative claims under the UCL "only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure"); Collins v. Safeway Stores, Inc. (1986) 187 Cal. App. 3d 62, 73 ("'Each class member must have standing to bring the suit in his own right.'") (citation omitted).

2. In a misrepresentation case, the plaintiff satisfies the causation element by showing that he or she actually relied upon the alleged misrepresentation to his or her detriment. See, e.g., Laster v. T-Mobile USA Inc. (S.D. Cal. 2005) 407 F. Supp. 2d 1181, 1194 ("Because Plaintiffs fail to allege they actually relied on false or misleading advertisements, they fail to adequately allege causation as required by [the UCL as amended by] Proposition 64"). A fortiori, each member of a putative class must also have relied on the alleged misrepresentation to justify class treatment. See Collins, 187 Cal. App. 3d at 72 ("If multiple plaintiffs fail to meet these elementary standards, no ascertainable class exists").

3. In limited circumstances, this Court has permitted an "inference" or "presumption" of reliance to arise with respect to putative class members. See Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 814 (permitting an inference of reliance "if the trial court finds material misrepresentations were made to the class members"); Occidental land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 363 (holding that the representation there in issue was communicated to each class member and was "manifestly" material and citing Vasquez for the proposition that "an inference of reliance arises if a material false representation was made to

persons whose acts thereafter were consistent with reliance upon the representation").

4. Subsequently, this Court has squarely rejected the expansive interpretation of Vasquez and Occidental Land given by the Court of Appeal in the case at bar. In Mirkin v. Wasserman (1993) 5 Cal. 4th 1083, 1095, the Court explained:

> Plaintiffs, who rely heavily on Vasquez and Occidental Land, misinterpret those decisions. Plaintiffs argue that "we held that pleading and proof of direct reliance by each victim of a fraud are not required where material misrepresentations are alleged" and that, in the absence of actual reliance, reliance may be pled "by the equivalent of the fraud-on-the-market doctrine, i.e., material misrepresentations to the class, plus action consistent with reliance thereon." In fact, we held no such thing. What we did hold was that, when the same material misrepresentations have actually been communicated to each member of a class, an inference of reliance arises as to the entire class.

Id. at 1095 (emphasis in original). The Court emphasized that in Vasquez and Occidental Land the plaintiffs "specifically pled that the defendants had made identical representations to each class member." Id. at 1094 (emphasis added).

5. The decision of the Court of Appeal here completely dispenses with the requirement that the same alleged misrepresentation must have been communicated to each member of the class. Instead, the Court held that the failure to disclose "a particular fact" concerning a product may support a classwide inference of reliance even though different representations concerning the product's characteristics were made to different class members at different times in differing mediums. Slip Op. at 2. If the Court of Appeal's method were adopted, all a class representative would need to do is conjure up any "particular fact" that was not disclosed, allege that the undisclosed fact was material to the entire class, and obtain class certification on the basis that an inference of common reliance arises as to the omitted fact. In short, the Court of Appeal replaced the requirement of an identical representation to the class with a common omission to the class. Mirkin has already explained why such a sleight of hand should not be permitted. See Mirkin, 5 Cal. 4th at 1093 n.4 (discussing the "serious practical problems" created by a presumption of reliance in omissions cases, including the fact that "through clever pleading, every fraud case based on material misrepresentation can be turned facilely into a material omissions case") (citations, internal quotation marks and brackets omitted).

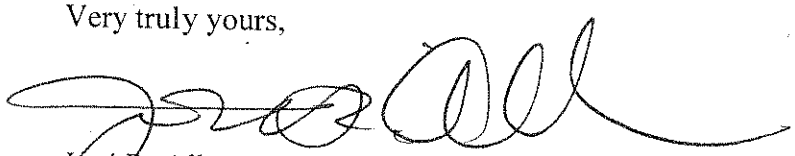
6. As indicated above, the Court of Appeal erroneously rested its expansive interpretation on this Court's decisions in Vasquez and Occidental Land. However, in both Vasquez and Occidental Land this Court was careful to note that the inference of reliance arises only where the same misrepresentation was made to every member of the class. In Vasquez all class members had received the same memorized sales pitch. Vasquez, 4 Cal. 3d at 811-12 ("the salesmen employed by [the defendant seller] memorized a standard statement containing the representations (which in turn were based on a printed narrative and sales manual) and . . . this statement was recited by rote to every member of the class.") (emphasis added). Similarly, in Occidental Land the alleged misrepresentations were contained in a public report and "[e]ach purchaser was obligated to read the report and state in writing that he had done so." Occidental Land, 18 Cal. 3d at 358. See generally Mirkin, 5 Cal. 4th at 1094-95 (analyzing the facts of Vasquez and Occidental Land). The Court of Appeal made no mention of Mirkin and accordingly did not acknowledge any limitation on the sweep of Vasquez and Occidental Land.

7. If the Court of Appeal's decision is allowed to stand, manufacturers now face class discovery and liability under the CLRA and the UCL whenever a plaintiff can point to some "fact" that was not disclosed about a product. The necessity of showing that the manufacturer made a common, material misrepresentation to the class upon which all class members presumptively relied will be rendered a nullity. Because there is no feasible way to disclose every known fact about a product, much less to predict beforehand whether an undisclosed fact would be of importance to a prospective purchaser, manufacturers would face virtually limitless exposure to lawsuits under the CLRA and the UCL. As the Fifth Circuit Court of Appeals has recently noted in similar circumstances: "We cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification decision[.]" Oscar Private Equity Investments v. Allegiance Telecom, Inc. (5th Cir. 2007) 487 F.3d 261, 267. Requiring proof that the same material representation was communicated to all class members before an inference of common reliance may be invoked is the only way to stem the wave of lawsuits likely to follow in the wake of the diminished pleading standard adopted by the Court of Appeal here.

Because the Court of Appeal's decision conflicts with this Court's decisions and would result in an unprecedented expansion of the circumstances under which an inference of common reliance may arise in putative class actions under the CLRA and the UCL, this Court should grant review. Alternatively, and at a minimum, even if this Court concludes that the case was correctly decided on its facts, the opinion contains unfortunate language which will create needless confusion

and uncertainty at the trial court level. Intel therefore urges, in the alternative, that the Court grant and hold pending a determination in *In re Tobacco II Cases* of the appropriate standard for pleading classwide reliance in UCL cases involving varying representations to consumers with varying degrees of knowledge and sophistication in light of the standing requirements recently imposed by Proposition 64.

Very truly yours,



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cc: All Parties
Third District Court of Appeal