ARNOLD & PORTER LLP

Suzanne V. Wilson
Suzanne_Wilson@aporter.com

213.243.4255
213.243.4199 Fax

44th Floor
777 South Figueroa Street
Los Angeles, CA 90017-5844

August 17, 2007

VIA FEDERAL EXPRESS

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

Re: *Timothy McAdams v. Monier Inc.* (No. S154088)
Letter in Support of Petition for Review

Dear Honorable Chief Justice Ronald M. George
and Honorable Associate Justices:

Pursuant to California Rules of Court, rule 8.500(g), amici curiae VeriSign, Inc. and DENTSPLY International Inc. respectfully request that the Court grant the petition for review filed by Monier Inc. in *McAdams v. Monier, Inc.* (2007) 151 Cal. App. 4th 667.

VeriSign is an Internet communications, information and security services company that operates digital infrastructure, enabling and protecting billions of interactions every day across the world's voice and data networks. VeriSign has been required to defend against class action claims based on the Unfair Competition Law ("UCL") and Consumer Legal Remedies Act ("CLRA") in California.

Dentsply is a large professional dental products company. The Company distributes its dental products in over 100 countries under some of the most well established brand names in the dental industry, providing equipment to dental professionals that has become essential to high quality dental care for patients in California and elsewhere. Dentsply, like VeriSign, has been targeted in UCL actions by purchasers of its products, and is vitally interested in the development of the law relevant to pending and future consumer protection class action litigation after Proposition 64.

Counsel for VeriSign and Dentsply have reviewed Monier's Petition and agree that review should be granted for the reasons stated therein. Amici wish only to add the following observations in support of the Petition.

I.
The Court Should Issue a "Grant and Hold" Order On the Scope of Class Standing Requirements under Proposition 64.

The first issue presented in the *McAdams* Petition is whether every class member must meet the causation requirements established under Proposition 64 for standing to assert a UCL action. This court is considering the same issue in two pending cases: *In re Tobacco II Cases*, review granted November 1, 2006, No. S147345 ("*Tobacco II*"), and *Pfizer, Inc. v. Superior Court (Galfano)*, review granted November 1, 2006, No. S145775 ("*Pfizer*"). In its petition, Monier asks that the Court issue a "grant and hold" order with respect to the first question for review in light of the Court's pending review of this question. (Pet. at 9-11.)

Issuing the requested order will promote uniformity and certainty in the courts of California until this Court issues its decision in *Tobacco II*. Because the *McAdams* decision squarely addressed the need for unnamed class members to establish their individual standing, and because that question is foundational to the remaining issues that must be decided in determining whether class treatment is appropriate in the *McAdams* case (and the many other currently pending cases in which certification of UCL claims is subject to dispute), this court should accept *McAdams* for review on a grant-and-hold basis, just as it did with cases that were likely to be affected by the decision in *Mervyns*, decided last year.

In particular, if this Court concludes, as the appellate courts did in *Tobacco II* and *Pfizer*, that Proposition 64's amendments to the UCL require all members of a proposed class show a *direct causal connection* between the challenged advertising statements and their alleged injury in order to have proper standing, then the *McAdams'* court's finding that a class could properly be certified will be subject to serious challenge. The same is true as to certification orders in any other matter in which lower courts feel compelled to follow *McAdams*. The potential for confusion and wasteful class proceedings if *McAdams* remains as precedent pending the outcome of *In re Tobacco II* is tremendous.

II.
This Court Should Grant Review to Decide When a Class-wide Inference or Presumption of Reliance May Support Class Certification in CLRA and UCL Actions Based on Alleged Advertising Misrepresentations

The second issue in the Petition addresses when a trial court may presume or infer class-wide reliance in order to certify a class of plaintiffs in a false advertising case under either the CLRA or UCL. This issue also overlaps with the issues already pending before this Court in *Tobacco II*, as related to the UCL. There, as in *McAdams*, the parties dispute the extent to which the standing requirements imposed by Proposition 64 can be satisfied by evidence that some or many of the potential class members (but not all) saw similar (but not identical) representations, evidence that class members may or may not have had access to information from other sources about the defendant's product, and evidence that they may or may not have had similar motivations in purchasing the product.

Assuming each class member must establish standing to participate in a class action, the availability of presumptions or inferences of the causation element needed for standing will be the determining factor in whether to certify a great many of the pending UCL actions. Moreover, that very question is discussed in the briefing by the parties and amici curiae in *In re Tobacco II*, and this court will not be able to assess the propriety of the decertification order in that case without addressing the presumption/inference question. A grant-and-hold order with respect to *McAdams* – in which the Court of Appeal justified certification on the basis of certain inferences that allowed plaintiffs a short-cut to proving causation – is therefore critically important pending the outcome of *Tobacco II*.

Moreover, the question of when a trial court may appropriately infer reliance on a class-wide basis in a CLRA action is not encompassed within *Tobacco II* or *Pfizer* and thus warrants an independent grant of review in *McAdams*.

Leaving *McAdams* on the books while litigants and lower courts are awaiting guidance in *Tobacco II* is extremely inadvisable because the decision in *McAdams* on this issue conflicts sharply with this Court's prior decisions. Because *McAdams* does not merely track existing law, the appellate decision will create uncertainty among the trial courts regarding the appropriate standard to be applied on this critical issue.

In *McAdams*, the appellate court ordered certification of a class alleging false advertising even though the class includes purchasers who were exposed to different advertisements and representations over the class period, individuals who purchased the product at issue under varied factual circumstances and from varied sources, and many who never even saw the challenged representations. The Court of Appeal nonetheless found that plaintiffs' UCL and CLRA claims should be certified for class treatment based on an allegation that "Monier made a single, material misrepresentation to class members that consisted of a failure to disclose a particular fact regarding its roof tiles." (*McAdams*, 151 Cal. App. 4th at 677.)

The court acknowledged that an actionable omission may exist only under the following limited circumstances: (1) when a party suppresses a fact that it is legally required to disclose; or (2) when a party provides affirmative information that is likely to mislead the recipient of the information absent disclosure of the omitted fact. (*Id.* at 678.) It also affirmed that, in the case before it, the plaintiff's allegation that defendant had failed "to disclose a material fact" must be considered "in light of other facts (affirmative representations) that Monier did disclose." (*Id.*) However, the court avoided any analysis of whether the admitted, differing affirmative representations made to the class members created individual issues with respect to whether or not an actionable omission claim exists on behalf of *all* class members. Instead, the *McAdams* court concluded that the alleged facts permitted an "inference of common reliance among the class on the material misrepresentation comprising the alleged failure to disclose." *Id.* at 678.[1]

The *McAdams* court's conclusion contradicts prior decisions of this Court, as we explain below. Absent review, the *McAdams* decision will leave trial courts and parties

[1] The Court of Appeal appeared to acknowledge that the inference it was recognizing would not avoid the need for the trial court to eventually consider the differing representations received by individual class members. The court noted that, at the end of the case, "[t]o obtain damages, each class member will have to show the representation made to him or her that accompanied this failure to disclose . . . ." (*Id.* at 680.) As a result, the *McAdams* court created a litigation structure that requires the trial court to determine *after trial* whether or not the representations received by the individual class member supported the alleged actionable omission. With regard to the UCL claim, this would apparently mean that the trial court would determine the class member's standing *after* trial.

uncertain regarding when a class-wide inference of reliance may arise. Moreover, its ill-considered determination that a trial court may rely on a common omission to avoid the differences among the representations made to class members over the class period is analytically unsound. Review should be granted to maintain the consistency of this Court's prior decisions on this issue: a class-wide inference of reliance requires evidence that the *same* alleged misrepresentation was communicated to *every* class member.

For example, in *Vasquez v. Superior Court* (1971) 4 Cal.3d 800 (*Vasquez*), this Court considered a putative class action in a consumer fraud case involving the purchase of freezers and meat. This Court reversed an order sustaining a demurrer to the class allegations because it was *possible* the plaintiffs could demonstrate a factual foundation for a class-wide inference of reliance at the class certification stage. The plaintiffs had alleged that the defendant made the *exact* same, word-for-word, misleading sales pitch to each member of the class. (*Id.* at pp. 811-812 [complaint alleged the same misrepresentation was "recited by rote to every member of the class"].) The Court found that, *if* plaintiffs could prove their allegations regarding these facts at trial, a class-wide inference may arise that all class members received the same representations and acted upon them. (*Id.* at p. 812.)

Five years after *Vasquez*, this Court decided *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, in which defendants challenged a trial court's refusal to decertify a class of home purchasers suing a housing developer. Relying principally on *Vasquez* in a relatively brief discussion, this Court held that where each class member was required to sign a report containing the defendant's alleged misrepresentation, the court could not reject as a matter of law an inference that each class member had received the misrepresentation. (*Id.* at pp. 362-363.) Moreover, where it appeared the only individualized factor that might affect the purchase independent of the report was each plaintiff's financial condition, the trial court could find an inference of reliance from purchases that were consistent with reliance on the report. (*Id.* at p. 363 & fn. 6.) However, this Court contrasted plaintiffs' claims based on the written reports (containing the same representation to each class member) with the plaintiffs' other claims based on the defendant's alleged verbal statements, which may have differed among some or all of the plaintiffs. (*Id.* at p. 361.) This court did not find that a class-wide inference could be supported by the alleged oral representations due to the differing factual circumstances surrounding them.

Finally, confronted with efforts to expand *Vasquez* and *Occidental Land* beyond the peculiar facts of those cases, this Court in *Mirkin* clarified 17 years later that, while "actual reliance *can* be proved on a class-wide basis *when each class member has read or heard the same misrepresentation*, nothing in either [*Vasquez* or *Occidental Land*] so much as hints that a plaintiff may plead a cause of action for deceit without alleging actual reliance," and reliance cannot be inferred unless each plaintiff can affirmatively demonstrate that he or she "read or heard the alleged misrepresentations." (*Mirkin*, supra, 5 Cal.4th at pp. 1094-1096, emphasis added.) Thus, in *Mirkin*, this Court held that demurrers to plaintiffs' class claims in the case before it were properly sustained.

This Court's prior decisions do not support an inference of reliance absent evidence that the plaintiffs all engaged in a uniform type of transaction with the defendant based on uniform representations, devoid of individualized motivations, knowledge, access to additional information, or other factors, including differences in the factual backdrop against which the plaintiffs made their purchase decisions. The *McAdams* court's approach – allowing certification based on a single alleged *omission* without evidence that the same representation was made to and seen by all class members – will confuse the trial courts and undermine this Court's ruling in *Mirkin*.

Moreover, the McAdams court's simplistic attempt to meld disparate class members' claims into one as a means of satisfying the burden of proof imposed on each class member threatens to violate the defendant's due process rights. Due process demands that a defendant be given the opportunity to rebut any inferences of common facts through individualized discovery, cross-examination at trial, and so forth. To hold otherwise would be to run afoul of this Court's admonition that "it is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen." (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749; see also *City of San Jose v. Superior Court, supra,* 12 Cal.3d at 462; *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 461 [class action is merely a "procedural device for collectively litigating substantive claims"].) Indeed, the United States Supreme Court has explained that due process requires a civil defendant to be given "an opportunity to present every available defense." (*Lindsey v. Normet* (1972) 405 U.S. 56, 66 [92 S.Ct. 862, 31 L.Ed.2d 36].)

Review should be granted to preserve this Court's prior rulings on this issue. Because purchasing behavior is driven by complex motivations and disparate

circumstances, it is only in the simplest, most uniform case of obvious direct cause-and-effect that an inference of class-wide causation or reliance may arise.

III.
Conclusion

As set forth above, VeriSign and Dentsply request that this Court grant review of defendant Monier Inc.'s Petition because this Court's pending determination of the issues presented in *Tobacco II* will likely resolve the propriety of class certification of a UCL claim based on the facts presented in *McAdams*. Moreover, review of the second issue pertaining to classwide inferences of causation will eliminate the confusion necessarily created by the *McAdams* decision regarding when such an inference may be permitted.

Sincerely,

ARNOLD & PORTER, LLP
Suzanne V. Wilson

HORVITZ & LEVY, LLP
Lisa Perrochet
John A. Taylor, Jr.

By: Suzanne V. Wilson
Suzanne V. Wilson

PROOF OF SERVICE

I, Christine Hilliard, hereby declare:

I am a resident of the State of California and over the age of eighteen years, and am not a party to the within action. My business address is 777 S. Figueroa Street, 44th Floor, Los Angeles, California 90017. I served the within document(s):

Letter to California Supreme Court Requesting Review of Timothy McAdams v. Monier, Inc. (No. S154088)

(x) By mail, by placing said document(s) in an envelope addressed as shown below. I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing on the date stated below to the addresses stated below, following the firm's ordinary business practices.

Steven Weinmann
Berding & Weil LLP
3240 Stone Valley Road West
Alamo, CA 94507

Attorney for Plaintiff and Appellant

Jay-Allen Eisen
Jay-Allen Eisen Law Corporation
980 Ninth Street, Suite 1900
Sacramento, CA 95814

Attorneys for Plaintiff and Appellant

Erica L. Craven
Levy Ram & Olson LLP
639 Front Street, 4th Floor
San Francisco, CA 94111

Attorneys for Plaintiff and Appellant

Richard Dorman
Cunningham, Bounds, et al.
1601 Dauphin Street
Mobile, Alabama 36604

Attorneys for Plaintiff and Appellant

Bradford R. Fennochio
Placer County District Attorney
11562 B. Avenue
Auburn, CA 95603

Clerk
Court of Appeal
Third Appellate District
900 N. Street, Room 400
Sacramento, CA 95814

Court Clerk
Placer County Superior Court
Unlimited, Complex Civil Jurisdiction
101 Maple Street, Fourth Floor
Auburn, CA 95603

Hon. Larry D. Gaddis
Department 2
Placer County Superior Court
101 Maple Street
Auburn, CA 95603

Edmund G. Brown, Jr.
Office of the Attorney General
Consumer Law Division
455 Golden Gate Ave., 11th Floor
San Francisco, CA 94102

Attorney General as Amicus Curiae

William A. Robles
Ranjani Ramakrishna
Law Offices of Robles & Castles
540 Pacific Avenue
San Francisco, CA 94133

I declare under the penalty of perjury, under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Los Angeles, California on August 17, 2007.

Christine Hilliard