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February 24, 2010

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

Re: **Amicus Letter Supporting Review**
***Weinstat v. Dentsply Internat., Inc.*, No. S180179**

Dear Chief Justice George and Associate Justices:

Amici curiae American Financial Services Association ("AFSA") and California Bankers Association ("CBA") urge the Court to grant review in this case on the petition's second issue; namely, whether a court may decertify a previously certified class without new facts or new law.

The issue is important. Every certified class action in this State's trial courts potentially raises the issue. Even uncertified, putative class actions are affected by its resolution. In a doubtful case, a trial court may be less willing to certify a class if its authority to decertify the case later is circumscribed.

The Court of Appeal opinion gives the wrong answer to this important question. Restricting trial court discretion to revisit class certification rulings serves no public policy purpose, and the Court of Appeal cited none. To the contrary, as this Court has repeatedly emphasized, trial courts exercise particularly broad discretion in certifying and managing class actions.

Also, the Court of Appeal opinion is inconsistent with other California law. As a general rule, in this state, interlocutory orders are not final and may be modified by the trial court at any time. This general rule is especially suitable for class certification orders which are often entered early in a case before discovery is completed, before the likely contours of the trial are known, and before rulings are made on often important evidentiary and other legal issues in the case.

The Court of Appeal opinion is also out of step with analogous federal authority. Fed. R. Civ. P. 23(c)(1)(C) expressly provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." The rule allows district courts broad discretion to alter or amend a class certification order. It does not require any showing of new law or

facts. This approach has served the federal courts well for half a century. There is no reason for California to chart a different course.

Interest Of Amici

Amicus American Financial Services Association ("AFSA") is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies.

For over 90 years, has represented financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices. AFSA is dedicated to protecting access to credit and consumer choice. It encourages ethical business practices and supports financial education for consumers of all ages. AFSA advocates before legislative, executive and judicial bodies on issues affecting its members' interests. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239.)

Founded in 1891, the California Bankers Association ("CBA") represents most of the FDIC-insured depository financial institutions doing business in California, including commercial banks, industrial loan companies and savings institutions. The CBA is one of the largest state trade associations in the country. The CBA advocates on behalf of its members before the state and federal legislatures, executive agencies, and in the courts..

AFSA and the CBA have often appeared in this Court and others as parties or amici in cases affecting their members' interests. Members of both associations are frequently targeted by class action lawsuits and so are vitally concerned with class action standards and procedures.

The Issue Is Important

Dentsply's second issue for review is important.

Each year, California's trial courts handle hundreds of putative class action lawsuits. The AOC's recent study showed that at least 3,711 putative class actions were filed in California trial courts between 2000 and 2005, with the annual filings steadily increasing except in the study's final year.[1] (Hehman, Findings of the Study of California Class Action Litigation, 2000-2006: First Interim Report (A.O.C. March 2009) p. 3.)

Class actions usurp more judicial resources than their numbers alone reflect. Cases in which a class is certified on motion take, on average, more than 990 days to reach final judg-

[1] During the 2000-2005 study period, general unlimited civil filings decreased by 17.8% while class action filings increased by 63.3%. (*Id.*, p. 4.)

ment. (*Id.*, pp. 21, C11.) This long time to disposition, the study explains, "is not surprising due to the case processing obligations and litigation strategies that a motion for certification introduces into a class action case. The filing of the motion for certification generally increases the number of hearings, party responses required, and judicial time per case, as well as inviting objections to the motion." (*Id.*, p. 21.)

Motions to decertify offer class opponents a much-needed avenue for post-certification review of possibly erroneous certification decisions, even if that remedy is invoked fairly infrequently and granted even less often. (See Class Certification in California: Second Interim Report from the Study of California Class Action Litigation (A.O.C. Feb. 2010) pp. 13-14),

Unlike the federal system, California does not permit interlocutory appeals of class certification orders. (*Id.*, at p. 13.) Review by extraordinary writ is only a theoretical possibility. Of the 3,711 class cases in the study, exactly one achieved review by that means. (*Ibid.*)

Appeal of class certification after entry of final judgment is equally impractical. Few defendants are willing to risk entry of judgment in a class action. Reversal of a class judgment for error in certifying the class is highly improbable given the difficult abuse-of-discretion standard of review. Also, the mere fact that trial was held, however unfairly, on a class basis will tend to show that common issues predominated and other class certification criteria were met.

A motion to decertify, therefore, is the only remedy that the class opponent may practically invoke to undo an erroneous class certification order. Unfettered access to this sole practical means of review enhances the appearance of justice in all class action cases, even if it is invoked relatively infrequently.

Unrestricted availability of decertification motions is also important to the courts, themselves, in resolving contested class certification motions. Courts, as well as class opponents, have a strong interest in being able to correct mistaken class certification decisions. No trial judge wishes to be forced to muddle through an unmanageable trial merely because months or even years earlier he or she may have mistakenly thought the case could efficiently proceed on a class basis.

The less subject to mid-course correction a class certification order becomes, the more reluctant courts will be to certify classes in the first instance, at least in doubtful cases when certification is hotly contested. By contrast, if error is easily corrected at the trial court level, both trial judges and appellate justices are more inclined to allow a case proceed as a class action. (See, e.g., *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 335 ("[I]f unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification."); *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360; *Vasquez v. Superior Court* (1970) 4 Cal.3d 800, 821.)

Thus, free availability of the self-correcting mechanism of a motion to decertify is of substantial importance to virtually all class actions in which a contested class certification motion is filed. Dentsply's second issue for review is, therefore, important in cases that are substantial in number and in the amount of judicial resources they require. The issue is worthy of this Court's review.

Moreover, this may be the only chance this Court will have to review the issue. As the only decision squarely on point, the Court of Appeal opinion will bind all California trial courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Trial courts will, therefore, routinely deny any decertification motion not based on new facts or law. Appellate review of those denials is extremely unlikely. Denial of a decertification motion is not an appealable order. No appellate court is likely to grant a mandate petition attacking denial of a decertification motion for failure to cite new facts or law.

The Court Of Appeal Decided The Issue Incorrectly

Perhaps the Court could afford to pass up what will likely be its only chance to review this important issue if the Court of Appeal had reached the correct result. Unfortunately, it plainly erred. So this Court's review is needed to restore balance in California class action procedure.

No previous California authority supports, let alone compels, the Court of Appeal's holding that decertification is improper without new facts or law. Code of Civil Procedure section 382 does not mention decertification. California Rules of Court, rule 3.764(a) states simply that any party may move to alter or amend a class certification order or decertify the class. The rule says nothing about requiring a showing of new facts or law to support such a motion. (See Cal. Rules of Court, rule 3.764(c)(3) (specifying documents required to support a motion).)

Nor does any previous California case sustain the Court of Appeal's errant holding. The Court of Appeal opinion cites only one sentence of dictum from *Green v. Obledo* (1981) 29 Cal.3d 126, 148. Dictum is not precedent. "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' " (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; citation omitted; see also *Central Virginia Community College v. Katz* (2006) 546 U.S. 356, 363 ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").)

Moreover, *Green's* dictum was ill-considered. The sole authority cited for the proposition that "changed circumstances" were required to decertify a class before a determination on the merits was a single federal district court opinion that not only was out of step with most other federal authority on the issue but also relied on a rule of law that does not apply in California

state court.[2] (See *Green v. Obledo, supra,* 29 Cal.3d at p. 148, citing *Sley v. Jamaica Water & Util., Inc.* (E.D. Pa. 1977) 77 F.R.D. 391, 394.)

When this Court has more carefully directed its attention to the issue, it has repeatedly stated that trial courts "should retain flexibility in the trial of a class action, for 'even after an initial determination of the propriety of such an action the trial court may discover subsequently that it is not appropriate.' " (*Occidental Land, Inc. v. Superior Court, supra,* 18 Cal.3d at p. 360; *Vasquez v. Superior Court, supra,* 4 Cal.3d at p. 821.) Thus, a class certification order may always " 'be altered or amended [or decertified] before a decision on the merits' " "if unanticipated or unmanageable individual issues ... arise ...." (*Ibid.*; *Sav-On Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at p. 335.)

Moreover, in California law a trial court's interlocutory orders are, generally, not final and may be modified by the trial court at any time. (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 13, pp. 556-557; see also *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104-1105.) Unlike the federal system, California state law does not apply the "law of the case" doctrine to any trial court decision, and most particularly not to interlocutory trial court rulings. (See 9 Witkin, *supra,* Appeal, § 460, p. 517; *Lawrence v. Ballou* (1869) 37 Cal. 518, 521; *Provience v. Valley Clerks Trust Fund* (1984) 163 Cal.App.3d 249, 256.)

Accordingly, a California trial court has inherent discretion to review, reconsider, revise or amend any of its rulings, even when Code of Civil Procedure section 1008 bans a party from filing a motion seeking reconsideration or renewing a previously denied order. (*Le Francois v. Goel, supra,* 35 Cal.4th at pp. 1104-1105.) Indeed, this Court strongly suggested in *Le Francois* that this inherent power is so basic to the judiciary's core functions that the constitutional separation of powers doctrine might well bar any legislation that infringed upon it. (*Ibid.*)

No public or judicial policy requires or even supports making an exception to these general rules for class certification orders. The Court of Appeal opinion certainly mentions none.

Quite to the contrary, it is particularly appropriate to allow trial courts wide discretion in decertifying classes. Class certification orders are often entered early in a case before discovery is completed, before the likely contours of the trial are known, and before rulings are made on often important evidentiary and other legal issues in the case. Like any other trial management tool, a class certification decision should evolve with the case in which it is made.

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[2] The entire sentence of the *Sley* opinion, from which *Green* excerpts the last phrase, states: "Applying a 'law of the case' rationale, a class once certified on the basis of the requirements of rule 23(a) and 23(b) should be decertified only where it is clear there exist changed circumstances making continued class action treatment improper." (*Sley v. Jamaica Water & Util., Inc., supra,* 77 F.R.D. at p. 394.) As the following text shows, California law does not apply the "law of the case" rationale to any trial court ruling.

Two recent federal decisions[3] illustrate the utility of decertification in response to developments in a case after the initial class certification order was entered. In *O'Connor v. Boeing North American, Inc.* (C.D. Cal. 2000) 197 F.R.D. 404, cited with approval in *Sav-On Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at p. 335, the district court decertified a class after its ruling on the defendant's summary judgment motion had revealed "the highly individualistic nature of the statute of limitations analysis" applicable to the class' claims. In light of its clearer understanding of plaintiffs' claims, the evidence needed to prove them, and the applicable law, the district court concluded that common issues, in fact, did not predominate, nor was class litigation a superior means of adjudicating the issues. (*Id.*, at pp. 413-415, 417-419.)

More recently, a different judge of the same court decertified a class in a wage-and-hour case against an employer. (*Marlo v. United Parcel Serv., Inc.* (C.D. Cal. 2008) 251 F.R.D. 476.) Again, the court's ruling on the parties' summary judgment motions (even though reversed on appeal) triggered the court's reassessment of the propriety of class certification. (*Id.*, 479-481.) Further inquiry by the court revealed that plaintiffs' vaunted common proof that the employer had misclassified most class members as exempt executive employees was an inadmissible, unscientifically prepared survey and that plaintiff otherwise lacked common evidence to prove its case. (*Id.*, at pp. 485-487.)

The Court of Appeal opinion in this case suggests that its requirement of new evidence or law "allows flexibility while curtailing defendant abuse." (Opn., at p. 12.) The opinion offers no support for either of these propositions, however. In fact, the previously mentioned study of class actions in California shows there is little danger of "defendant abuse." Out of 3,711 class actions surveyed, defendants moved for decertification in only 15 cases, and decertification was granted in only 2 instances. (Class Certification in California: Second Interim Report from the Study of California Class Action Litigation (A.O.C. Feb. 2010) pp. 13-14.) Certainly, Dentsply's motion was no evidence of "defendant abuse." It was supported by a change in law as to one cause of action. As to the other claim, the trial court found the motion had merit as well, though the Court of Appeal later reversed, disagreeing with the prior authority the trial court had followed.

Furthermore, there is no need to circumscribe trial courts' powers in order to avoid "defendant abuse" even were such abuse a real problem. Trial courts already possess ample tools for dealing with abusive litigation tactics. In addition to a variety of more subtle means of expressing its displeasure with an abusive motion, a trial court may summarily deny a decertification motion without reading further than is required to ascertain its abusive character. It may also issue an order to show cause why sanctions should not be imposed under Code of Civil Procedure section 128.7(c)(2).

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[3] But for the fact they are not published, California trial court rulings could doubtless be cited to illustrate the same proposition.

Nor is it at all clear that the Court of Appeal's new rule would allow trial courts the flexibility they require in dealing with class actions like those decertified in *O'Connor* and *Marlo*. In both of those cases, the plaintiff had resisted decertification arguing that nothing had changed in the case since the class was initially certified. (See *O'Connor v. Boeing North American, Inc., supra,* 197 F.R.D. at 411; *Marlo v. United Parcel Serv., Inc., supra,* 251 F.R.D. at p. 480.) While the district courts disagreed, it is far from clear that either case would have met the Court of Appeal's new test of "changed circumstances" or "new evidence or law."

In part, one cannot tell because the Court of Appeal did not explain what it meant by the just-quoted language. The Court of Appeal's terms have no fixed meaning under California law. The disarray of case law under Code of Civil Procedure section 1008 proves the point. Some cases interpret the requirement of "new or different facts, circumstances, or law" under that section as the equivalent of "newly discovered evidence" as a ground for a new trial motion, thus requiring a showing not only that the evidence is new but also that the moving party could not, with reasonable diligence, have discovered and produced it in connection with the original motion. (E.g., *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198-1200; *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013.) But other courts emphatically disagree, allowing a reconsideration or renewed motion on a showing of "any" new fact or law. (E.g., *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 888-889, rev. pet. pending, No. S179107.)

Needed flexibility might be retained if the Court of Appeal's new requirement of "changed circumstances" or "new facts or law" were interpreted as in *Standard Microsystems* to permit decertification upon a showing of *any* changed circumstance or *any* new fact or law. But in that event, the new rule would provide no bulwark against "defendant abuse" nor serve any other useful purpose. In every case, *some* fact will have changed between class certification and a later motion for decertification.

On the other hand, if *Baldwin's* and *Blue Mountain's* stricter reading of changed circumstances or new facts or law were engrafted onto the Court of Appeal's new rule for decertification motions, trial courts would have little, if any, flexibility in dealing with classes once certified. The new trial standard of newly discovered evidence is intentionally difficult to satisfy. It forces parties to prepare fully for trial the first time. Applied to class certifications, such a stiff burden would prevent decertification in almost any case—and certainly in circumstances similar to those of the *O'Connor* and *Marlo* cases cited above.

As those cases illustrate, the Court of Appeal's new rule is also inconsistent with most federal authority on this issue—to which this Court has admonished California courts to turn for guidance on similar questions of class action procedure which have not yet been elucidated under this state's law. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 469-470 n. 7; *Vasquez v. Superior Court, supra,* 4 Cal.3d at p. 821.) Fed. R. Civ. P. 23(c)(1)(C) expressly provides that "[a]n order that grants or denies class certification may be altered or amended before final judg-

ment." The rule allows district courts maximal discretion to alter or amend a class certification order. It does not require any showing of new law or facts. This approach has served the federal courts well for half a century. There is no reason for California to chart a different course.

Conclusion

In short, Dentsply's second issue for review is important. It was wrongly decided by the Court of Appeal. This may well be the Court's only opportunity to review the issue and correct the lower court's mistake. It should do so and not permit an errant Court of Appeal opinion to embed in California class action procedure a rule harmful to the courts, the parties and the public.

Respectfully yours,
SEVERSON & WERSON

By: _____
Jan T. Chilton

MORRISON & FOERSTER LLP

By: _____
William L Stern

cc: All Counsel of Record

CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

Amicus Letter Supporting Review of *Weinstat v. Dentsply Internat., Inc.*, No. S180179

on all interested parties in said case addressed as follows:

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☒ **(BY MAIL)** By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that 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 sealed envelopes with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. This declaration is executed in San Francisco, California, on February 24, 2010.

Marilyn C. Li