MAYER·BROWN

Mayer Brown LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, California 94306-2112

Main Tel (650) 331-2000
Main Fax (650) 331-2060
www.mayerbrown.com

Donald M. Falk
Direct Tel (650) 331-2030
Direct Fax (650) 331-4530
dfalk@mayerbrown.com

March 12, 2010

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Weinstat v. Dentsply International, Inc.*,
No. S180179.

Dear Chief Justice George and Associate Justices:

American Honda Motor Co, Inc. ("Honda"), through its attorneys, submits this letter as *amicus curiae* in support of the petition for review filed on February 11, 2010, by Dentsply International, Inc. Because Honda is headquartered in Torrance, California, it litigates with some frequency in the California courts. That litigation includes putative class actions under the Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200 *et seq.*, and claims alleging breach of express warranties. As a consequence, Honda has a keen interest in the orderly development of California law on those topics.

The petition should be granted because each of the questions presented implicates a disagreement among the lower courts on an issue of broad importance to the administration of justice in California.

1. The first question warranting review relates to the status of class certification under the UCL in the wake of Proposition 64. On that question, the decision below conflicts with other decisions of the Court of Appeal, including one on which this Court denied review. *See Cohen v. DIRECTV* (2009) 178 Cal.App.4th 966, review denied, No. S177734 (Feb. 10, 2010). *See also Pfizer v. Superior Court* (Feb. 25, 2010) __ Cal.App.4th ___, 2010 WL 660359; *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830. These decisions recognized that a class could not be certified to include a great mass of persons who did not see or rely upon communications challenged as deceptive, and that individualized questions as to these issues would preclude certification. *See Cohen*, 178 Cal.App.4th at 979, 980-981; *Pfizer*, 2010 WL 660359, at *6 (noting limited dissemination of challenged labels and commercials and noting that "perhaps the majority of class members who purchased Listerine during the pertinent six-month period did so not because of any exposure to Pfizer's allegedly

deceptive conduct, but rather, because they were brand-loyal customers or for other reasons"); *Kaldenbach*, 178 Cal.App.4th at 847-850.

On the other hand, the decision below is not the only one to suggest that a single injured person claiming injury by conduct that allegedly violates the UCL may certify a class virtually *ipso facto*. *See, e.g. Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235. In those courts' view—that is, in the view of the decision below—it does not matter for purposes of certification whether the putative class members also were exposed to (much less injured by) the same conduct, or whether the determination of exposure, causation and injury would require individualized inquiries that would swamp any common issues.

And the division in the Court of Appeal is fragmenting further. At least one court that agrees in part with the approach of the court below nonetheless recognized that certification under the UCL nonetheless may be denied based on individualized issues as to causation and damages. Compare *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 134 n.19 with *id.* at 135-136. And another held that exposure, at least, must be shown to be common even while recognizing other shortcuts to certification. *See McAdams v. Monier* (Feb. 24, 2010) ___ Cal.App.4th ___, 2010 WL 630973, at *11.

The upshot of the decision below is that Proposition 64 somehow made it *easier* to bring a class action based on isolated and individualized effects. That certainly was not the intention of the voters who passed the Proposition to limit rather than expand UCL litigation. This Court should grant review to dispel the uncertainty in the lower courts and to clarify its holding in the *Tobacco II Cases* (2009) 46 Cal.4th 298.

2. The second question presented by the petition is equally important. The decision below would preclude trial courts from decertifying classes that have proved to implicate predominantly individualized issues or to be unmanageable for other reasons. By imposing a new requirement barring decertification in the absence of newly discovered evidence or a change in the law, the decision below would lock courts and litigants into wasteful and inappropriate class litigation.

Until now the California courts have not straitjacketed the trial courts in this way. Indeed, from the earliest days of modern class action practice, this Court has "recognized that courts should retain flexibility" in class actions because after class certification "the trial court may discover subsequently" that class treatment "is not appropriate." *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360. And the Court observed only three years ago that "the broad discretion trial courts rightfully possess to order class action proceedings" affords considerable flexibility in ordering proceedings,

with the chief restrictions limiting only the power to alter class status after a decision on the merits. *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1084.

The decision below not only departs from this Court's holdings and settled California practice, but runs directly contrary to federal law and practice. The Federal Rules of Civil Procedure provide that "[a]n order that grants or denies class certification may be altered or amended before final judgment," Fed. R. Civ. P. 23(c)(1)(C), as they have since the inception of modern class practice in 1966. See Fed. R Civ. P. 23, Advisory Committee Notes, 1966 Amendments, subdiv. (c)(1) (change in certification order appropriate "if, upon fuller development of the facts, the original determination appears unsound"). Moreover, this Court has recognized a trial court's inherent power to correct its own mistakes. *See LeFrancois v. Goel* (2005) 35 Cal.4th 1094. Review should be granted to ensure that a trial court's costliest procedural mistake is not the only one that is practically immune to correction until an appeal from final judgment.

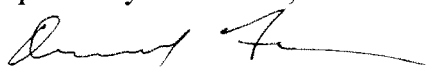
3. The third question in the petition is equally worthy of review because the decision below extended the scope of express warranty claims beyond the breaking point, and further eliminates the role of causation and injury as prerequisites to relief. Express warranties are restricted to statements that become "part of the basis of the bargain." Com. Code § 2313. According to the decision below, an express warranty claim may lie even if the seller shows that the buyer (or the plaintiff class) did not rely—indeed, could not have relied—on the challenged statement. Indeed, the court held that an express warranty claim may rest on representations about the product that were not communicated until after the purchase was completed—representations that, in light of their pre-existing knowledge about regulatory requirements, many buyers could not have construed in the way plaintiffs assert as the basis for the claims of breach. As the petition points out (at 30), at least prior decision of the Court of Appeal explicitly recognized that, if "the resulting bargain does not rest at all on the representations of the seller, those representations cannot be considered ... any part of the 'basis of the bargain.'" *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 23.

Contrary to the contention in the opinion below (slip op. 16), excluding some post-sale descriptive statements about the product from the scope of an express warranty would not exclude a "limited warranty" that explicitly sets out a separate contractual obligation. It is one thing to say that an explicit warranty agreement "becomes" or "is made" "part of the basis of the bargain" by virtue of the seller's explicit promise that the warranty is, in fact, part of the bargain. Com. Code § 2313(a), (b). It is quite another to say that any post-sale description or characterization of the goods obtains the same status even if the buyer did not and could not rely upon it. Under the decision below, any inaccuracy in a user manual or in followup communications such as a welcome letter

could support an express warranty claim. The Court should grant review to restore reasonable limits to express warranties as well.

The petition should be granted and the decision of the Court of Appeal reversed on all three questions.

Respectfully submitted,



Donald M. Falk

CERTIFICATE OF SERVICE
S180179

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On March 12, 2010, I served the foregoing document(s) described as:

AMICUS CURIAE LETTER

☐ By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail at Palo Alto, California addressed as set forth below.

☐ By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope, addressed as set forth below, to be delivered to an overnight service agent for delivery.

Paul D. Nelson, Esq.
Bullivant Houser Baily LLC
601 California Street, Suite 1800
San Francisco, CA 94108-2823

Attorney for Plaintiffs & Appellants

Edwin Zinman, Esq.
Edwin J. Zinman,
A Professional Corporation
220 Bush Street, Suite 1600
San Francisco, CA 94104

Attorney for Plaintiffs & Appellants

Lisa Perrochet, Esq.
Horvitz & Levy
15760 Ventura Boulevard, 18th Floor
Encino, CA 91436-3000

Attorney for Defendant & Respondent

Maria C. Roberts
Stokes Roberts & Wagner
600 West Broadway, Suite 1150
San Diego, CA 92101

Attorney for Defendant & Respondent

Jan T. Chilton
Severson & Werson
One Embarcadero Center, Suite 2600
San Francisco, CA 94111

Attorney for Amicus Curiae American Financial Services & California Bankers Association

Alan J. Lazarus
Drinker Biddle & Reath LLP
50 Fremont Street
San Francisco, CA 94105-2234

Attorney for Amicus Curiae The Product Liability Advisory, Inc. (PLAC)

Hon Arlene T. Borick
Department 212
San Francisco County Superior Court
400 McAllister Street
San Francisco, CA 94102

Court of Appeal
First Appellate District, Division 4
350 McAllister Street
San Francisco, CA 94102-3600

Office of the District Attorney
Hall of Justice
850 Bryant Street, Room 325
San Francisco, CA 94103

Office of the Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

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

Executed on March 12, 2010, at Palo Alto, California.

Kristine Neale