No. S180179

In the Supreme Court of the State of California

MARVIN C. WEINSTAT, RICHARD NATHAN and PATRICIA MURRAY,
Plaintiffs and Appellants,

vs.

DENTSPLY INTERNATIONAL INC.,
Defendant and Respondent.

ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal,
First Appellate District, Division Four
Case No. A116248

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I. INTRODUCTION AND SUMMARY OF REASONS REVIEW SHOULD BE DENIED

Defendant and Respondent Dentsply International, Inc. ("Dentsply") petitions this Court for review of three issues that it contends satisfy the grounds set forth in Rule 8.500(b)(1) for Supreme Court review. Dentsply's issues, however, are based on mischaracterizations of the Court of Appeal's decision and related California cases. None of the three issues raised by Dentsply warrants review.

Dentsply's first issue—the "UCL issue" —challenges the Court of Appeal's application of this Court's recent decision, *In re Tobacco II Cases* (2009) 46 Cal.4th 298 ("*Tobacco II*"). While Dentsply acknowledges that under *Tobacco II,* only the named class representatives—not the absent class members—must satisfy the UCL (Business and Professions Code section 17200 et seq.) standing requirements, Dentsply argues the Court of Appeal impermissibly took this decision a step further and held that it also eliminated the traditional class certification requirements for absent class members. Based on this contention, Dentsply argues that a conflict exists among the lower appellate courts as to whether the traditional class certification requirements apply in UCL actions to the absent class members.

Dentsply misstates the Court of Appeal's decision to create a conflict where none exists. The Court of Appeal did not hold, as Dentsply contends, that *Tobacco II* eliminates the traditional class certification requirements. The Court of Appeal's holding was limited to the Proposition 64 standing requirements for UCL actions. To the extent the court addressed the "traditional class certification requirements" at all, it held that these requirements were met in this case, not that they were "irrelevant." Dentsply's first issue fails to raise a conflict or important issue of law warranting review.

Dentsply's second issue—the "decertification issue" —challenges the Court of Appeal's holding that the trial court committed a procedural error when it revisited its prior class certification rulings with respect to *both* the UCL materiality and express warranty claims without Dentsply having shown new or different facts, circumstances, or law. Dentsply argues the trial court had "inherent power" to reconsider and change a prior ruling without such showing. But Dentsply fails to acknowledge the distinction between reconsideration raised by a party's motion and reconsideration undertaken by the court sua sponte. California law is clear: when reconsideration is initiated by a party's motion, as here, it must be based on changed circumstances, or new evidence or law. Dentsply offers no contrary authority. If parties to an action were permitted to file repeated requests for decertification without a showing of changed circumstances, new evidence or changed law, trial courts would be inundated with serial motions repackaging failed arguments in an attempt to achieve a different result by attrition.

Dentsply's third issue—the "reliance" issue—challenges the Court of Appeal's reversal of the trial court's ruling that imposed a prior reliance element on the warranty class as to their breach of warranty claim. Dentsply argues that actual prior reliance is required to support breach of express warranty and that because the written warranty here came packaged in the box with the medical device, no reliance could be shown by the plaintiffs prior to acceptance of the goods. Dentsply's argument fails on both procedural and substantive grounds.

Substantively, the law is clear that under California Uniform Commercial Code section 2313, breach of express warranty is a doctrine of contract formation, not tort, and does not require proof of prior reliance. Dentsply blatantly misstates the holding in *Keith v. Buchanan* (1985) 173 Cal.App.3d 13 to create a conflict where none exists. Contrary to

Dentsply's contentions, the *Keith* decision does not hold that prior reliance is a required element of an express warranty claim, and instead states the opposite, entirely consistent with the Court of Appeal's decision. In addition, CACI 1240, to which Dentsply also points in an effort to create a conflict, has been recommended for *revocation* by the Judicial Council's "CACI Committee." Again, no conflict is shown between the Court of Appeal's decision and existing law.

The Court of Appeal's procedural holding was correct because Dentsply's decertification motion as to the warranty class again was not based on new or different facts, circumstances or law. Because California law requires such before a trial court's prior certification order can be revisited by motion, reversal of the decertification order was required on this alternative ground.

Dentsply's petition for review should be denied.

II. BACKGROUND

A. The "Cavitron" Device

This case arises from Dentsply's sale to dentists of a dental treatment device called the Cavitron Ultrasonic Scaler ("Cavitron"), which employs an ultrasonically-pulsating water stream to debride calculus (tartar) in oral surgical and other procedures. (Decision p.2.) The Cavitron is a "Class II Medical Device" under the purview of the Food and Drug Administration. (*Ibid.*) It is inherently unsafe for its *indicated* use when maintained according to Dentsply's Directions for Use ("DFU"), because the device's plastic inner water tubing forms "biofilm" that breeds potentially pathogenic bacteria and transmits them into the patient's mouth through the dental water stream. (*Id.* at 3-4.) As a result, the Cavitron's output water is neither potable, nor safe for dental procedures. (*Id.* at 4.) Dentsply

marketed and sold the Cavitron for aseptic dental applications knowing that it was unsafe.[1] (*Ibid.*)

B. Plaintiffs' Complaint

Doctors Marvin Weinstat, Richard Nathan, and Patricia Murray (collectively "Plaintiffs" or "Appellants") are Periodontists who purchased Cavitrons for surgical use on patients, expecting that the device would be fit for aseptic dental applications in compliance with the devices' DFUs. Doctors Weinstat and Nathan initiated this lawsuit in San Francisco Superior Court in June 2004. (*Id.* at 3.) The original complaint alleged, *inter alia*, causes of action for violation of the UCL (both as to fraudulent practices and illegal acts), common law fraud and negligent misrepresentation based upon the false representation of safe surgical use, and concealment of the biofilm infection risk. (*Id.* at 3-4.) It was amended to add a cause of action for breach of express warranty based upon the printed "Limited Warranty" against defects in materials and workmanship, as well as the specific written representations that the Cavitron was indicated for use in oral surgical procedures. (*Ibid.*)

Following discovery, Appellants further amended their complaint to clarify the liability allegations and divide the proposed class into two subclasses. The broad class consists of California dental professionals who, like Plaintiffs, purchased one or more Cavitrons from Dentsply (or its agents) for use in performing oral surgical procedures on patients, and who used the Cavitrons for that purpose. (*Id.* at 4-5.) The two subclasses include: (1) **Subclass A**, consisting of dentists who purchased Cavitrons during a time period when Dentsply expressly "indicated" use of the device

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[1] This case addresses financial losses and equitable remedies available to dentists who purchased Cavitrons for use in oral surgical procedures, not injuries to dental patients. It is not a suit for negligence or product liability, and there are no issues of comparative fault or consequential damages.

for "root planing [debridement] during oral surgery;" and (2) **Subclass B**, consisting of dentists who purchased Cavitrons after approximately 1997, when Dentsply changed its DFUs to indicate use in "periodontal debridement for all types of periodontal diseases," which necessarily encompassed surgical applications. (*Ibid.*) The Third Amended Complaint is the operative complaint in this action (hereinafter the "Complaint"). (*Ibid.*; see also 1-AA (Appellants Appendix) pp.1-20.)

C. Initial Class Certification

The trial court certified the class as to Plaintiffs' UCL and breach of express warranty claims in June 2006. (*Id.* at 5.) In its order granting the certification motion, the trial court made the following findings: (1) the proposed class was ascertainable; (2) the proposed class was sufficiently numerous; (3) the case presented a community of interest among the proposed class members as to common factual and legal issues; (4) the common factual and legal issues predominate over any individual issues; (5) the amount at issue for each proposed class member was such that it would be financially impracticable for each plaintiff to pursue his or her own action and that judicial economy would be served by having the class members' similar legal and factual issues tried in a single proceeding; and (6) there were no conflicts with or antagonism toward the similar claims of other proposed class members. (10-AA 2370-2377 [order granting motion to certify class, dated June 16, 2006].)

D. The Class Decertification Ruling

Shortly after class certification, the Second District issued its opinion in *Pfizer v. Superior Court* (2006) 45 Cal.Rptr.3d 840 ("*Pfizer*") (*originally published at* 141 Cal.App.4th 290), *review granted*, 51 Cal.Rptr.3d 707 and cause transferred with directions to vacate the decision and reconsider in light of *Tobacco II, supra,* 46 Cal.4th 298.) (Decision

p.5.) *Pfizer* addressed the impact of Proposition 64 on class action standing requirements. (*Ibid.*) The *Pfizer* court held that *all* class members must suffer injury in fact and lose money or property as a result of the unfair competition or false advertising. (*Ibid.*) Additionally, the *Pfizer* court held that the plaintiffs must show that in entering the transaction at issue they necessarily relied on the false or misleading representation or advertisement. (*Ibid.*) Relying principally on *Pfizer,* Dentsply moved to decertify the class in August 2006. (*Ibid.*; see also 10-AA 2378–2380).)

In response to Dentsply's motion, the trial court decertified the UCL class, finding that Plaintiffs could not meet *Pfizer*'s more rigorous proof standard for UCL fraud actions. (*Id.* at 5-6.) Despite the absence of new or different facts, circumstances or law on the point, the trial court further decertified the UCL class on the ground that individual questions would predominate in addressing the nature and extent of any material misrepresentations made to the Plaintiff class. (*Id.* at 6.)

As to Plaintiffs' breach of warranty claim, and again without new or different facts, circumstances or law, the trial court also granted Dentsply's motion to decertify. (*Ibid.*) Specifically, the court held that to establish a certifiable warranty class, Plaintiffs would have had to prove that all class members read and relied upon Dentsply's DFU representations and express warranties *before* making their purchasing decisions – an impossible standard, since purchasers do not even see instructions and printed warranties until they purchase a product and open the sealed box. (*Ibid.*) The court utterly disregarded the fact that no dental professional would buy a costly dental treatment device if he or she did not believe it was fit for the purpose for which it was marketed, sold, and intended. The trial court nonetheless ruled that (1) Appellants could not prove prior reliance on Dentsply's alleged misrepresentations on a class-wide basis, although reliance could be presumed under some circumstances, the presumption

was rebuttable and use of the class procedure would circumvent Dentsply's right to rebut; and (2) variations in the wording of the DFUs for the different Cavitron models created predominantly individual fact issues concerning reliance, so the court could not infer class-wide reliance. (*Ibid.*; 13-AA 3137-3143 [order granting motion to decertify class, dated September 22, 2006].)

Appellants moved for reconsideration of these actions, based in part on subsequent appellate authority contradicting *Pfizer*, and in part on new evidence demonstrating the falsity of the factual bases on which the trial court decertified Plaintiffs' warranty claims. (*Ibid.*) While the motion for reconsideration was under submission, the California Supreme Court granted review in *Pfizer* and *In re Tobacco II Cases* (2006) 142 Cal.App.4th 891, eliminating those decisions as the only citable authority that could support the trial court's decertification ruling. (*Ibid.*) Although the trial court's decertification ruling cited other cases in respect of the UCL claims, none actually supported the outcome. The trial court initially requested briefing on the propriety of staying the matter pending resolution of *Pfizer* and *Tobacco II*, but ultimately withdrew its request and denied the motion for reconsideration. Plaintiffs appealed.

E. The Court of Appeal's Decision

The Court of Appeal reversed, holding that the trial court's order decertifying the class was procedurally and substantively erroneous as to both the UCL causes of action and the express warranty cause of action.

1. The Trial Court's UCL Ruling Constituted Reversible Error Under *Tobacco II*.

The Court of Appeal held that the trial court's UCL decertification ruling was reversible error on both substantive and procedural grounds. On the substantive issues, the court held that "it is abundantly clear that the trial court incorrectly believed that each class member must establish

standing..." (Decision p.9.) The court held that based on the Supreme Court's opinion in *Tobacco II*, only the representative class members had to meet the UCL standing requirements. (*Ibid.*) As a result, it was not necessary for the court to "delve into the individual proof of material, reliance, and resulting damage." (*Ibid.*) Accordingly, the trial court's ruling to decertify the UCL claims was "indisputably erroneous." (*Ibid.*)

In footnote 8, the Court of Appeal addressed Dentsply's argument that the trial court's order was correct, regardless of *Tobacco II*, because Plaintiffs could not satisfy "traditional class certification requirements," specifically, that individual issues about the nature and extent of any material representation would predominate over common issues. (Decision p.8, fn.8.) The Court of Appeal dismissed this argument and held that "materiality" is determined objectively by whether "a reasonable dentist [would] attach importance to Dentsply's claim that the Cavitron was safe for use in surgery." (*Ibid.*) Based on that standard, the court held that the materiality of Dentsply's representation that the Cavitron was safe for oral surgery "was established objectively by appellants' actual use of the device for oral surgery, in accordance with those representations, regardless of whether appellants saw the Directions before or after purchasing the device." (*Ibid.*) Accordingly, there were "no individual issues concerning the nature and extent of material representations." (*Ibid.*)

Additionally, the Court of Appeal held that the decertification order was procedurally improper "because Dentsply offered no new law or newly discovered evidence regarding the nature and extent of any material misrepresentation." (Decision p.7-8, fn.8.)

2. The Trial Court's Express Warranty Ruling Constituted Reversible Error Under Existing Law.

With respect to the express warranty cause of action, the Court of Appeal held that the decertification order was substantively and

procedurally erroneous. (Decision p.12.) The court first addressed the trial court's "incorrect legal assumption that a breach of express warranty claim requires proof of prior reliance." (*Ibid.*) The Court of Appeal noted that plaintiffs' cause of action for breach of express warranty was governed by the California Uniform Commercial Code section 2313(1) (a) and (b) (hereinafter "Section 2313"). While acknowledging that pre-UCC law governing express warranty claims did include an element of reliance, the court explained that the UCC had "purposefully abandoned" the concept of prior reliance and "does not require such proof" to prevail on a claim for breach of express warranty. (Decision p.13, citing *Keith, supra,* 173 Cal.App.3d at 23.) The court noted that "[w]hile the tort of fraud turns on inducement...breach of express warranty arises in the context of contract formation in which *reliance plays no role.*" (Decision p.12; emphasis added.)

In response to Dentsply's argument that affirmations or descriptions concerning the goods only become "express warranties" if they were "dickered aspects of the bargain" and, therefore, reached the buyer before the purchase is consummated, the court stated that "while the basis of the bargain of course includes dickered terms to which the buyer specifically assents, section 2313 itself does not suggest that express warranty protection is confined to them such that affirmations by the seller that are not dickered are excluded." (Decision p.15.)[2] The court explained that "affirmations and descriptions in product literature received at the time of delivery but after payment of the purchase price are, without more, part of the basis of the bargain, period." (Decision p.21.)

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[2] It is undisputed that the alleged express warranties were sealed in the device packaging when delivered. (Decision p.14.)

The Court of Appeal also dismissed Dentsply's argument (adopted by the trial court) that because the directions were not identical for all the devices over time, the court could not infer class-wide reliance and the individual issues of reliance predominated over common ones. (Decision pp.18-20.)[3] The court rejected the argument both legally and factually. Legally, the court reiterated that "reliance" is not an element of the breach of express warranty claims and, therefore, it is not something that each plaintiff would have to establish. (*Id.* at 18.) Factually, the court held that "Dentsply did not, and has not, identified any variation in the wording of indications for use, contraindications, precautions or maintenance instructions ...that bear materially on the issues relevant to this lawsuit," noting that the DFUs "were silent on the issue of biofilm infection risk." (*Id.* at 19.)

Finally, the Court of Appeal addressed the trial court's reasoning that class certification was inappropriate because Dentsply had a right to rebut the "presumption of reliance." The court held that a seller's "right to rebut" goes only to rebuttal that would extract "the affirmations from the 'agreement' or 'bargain' of the parties in fact' not...to proof that they were not an inducement for the purchase." (*Id.* at 21-22.) Thus, the right to rebut is only as to the existence of the warranty itself and the "representations would not lose express warranty status simply because the buyer initially bought the device with another use in mind." (*Id.* at 22.) Furthermore, the court concluded, "the possibility that a defendant may be able to defeat the showing of an element of a cause of action 'as to a few individual class members[,] does not transform the common question into a

[3] The trial court found that since 1993, over 30 versions of the DFUs had been published with the Cavitron devices. (Decision p.17.)

multitude of individual ones....'" (*Id.* at 22-23, quoting *Mass. Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1291-1293.)

With respect to the procedural error, the court held that the trial court's decertification order was improper because Dentsply failed to show any new or different facts, circumstances or law that would warrant reconsideration of the prior class certification order. (Decision p.11-12.) Citing the rule stated by this court in *Green v. Obledo* (1981) 29 Cal.3d 126, the Court of Appeal held that the trial court had "in effect reassessed the matter under existing law, coupled with newly packaged, but not newly discovered, evidence." (Decision p.10.) The court held that, based on *Green*, the trial court's order granting Dentsply's motion to decertify was procedurally flawed and reversible error.

The Court of Appeal reversed the trial court's ruling with respect to both the UCL and express warranty causes of action and remanded the UCL issue back to the trial court "for the limited purpose of determining whether the named representatives can meet the UCL standing requirements announced in *Tobacco II* and if not, whether amendment should be permitted." (*Ibid.*)

III. REASONS WHY REVIEW SHOULD BE DENIED

A. Review Of Issue One Is Unwarranted Because The Court Of Appeal's Decision Does Not Conflict With The Supreme Court's Holding In *Tobacco II.*

1. The Court Of Appeal Did Not Hold That *Tobacco II* Eliminated Traditional Class Certification Requirements.

Dentsply's first issue misstates the Court of Appeal's decision to create a conflict of law where none exists. Dentsply premises its Issue One on the incorrect assertion that the Court of Appeal interpreted this Court's *Tobacco II* decision to eliminate the "traditional class certification

principles" in UCL actions and to relieve absent class members of the requirement to comply with such principles. (Petition p.1.) As Dentsply puts it, the Court of Appeal applied *Tobacco II* "to hold that traditional class certification requirements—such as the predominance of common issues of causation and injury among individual class members—are irrelevant in UCL actions." (Petition p.3.)

Dentsply misconstrues the Court of Appeal's decision with respect to UCL standing requirements and its discussion of traditional class certification requirements. The principal issue decided in this appeal, as well as in *Tobacco II,* was whether the UCL *standing* requirements following Proposition 64 applied to all class members or only the class representative. (Decision p.1.) The Court of Appeal correctly held, following *Tobacco II*, that "Proposition 64's standing requirements for UCL actions apply only to the class representatives." (Decision p.7.)

Applying this rule, the appellate court concluded that it was "abundantly clear that the trial court had incorrectly believed that each class member must establish *standing*, thereby requiring the court to delve into individual proof of material, reliance and resulting damage." (Decision p.9; emphasis added.) Accordingly, it was error for the trial court to decertify the class by imposing these requirements on a class-wide basis. (*Ibid.*) The court did not hold that traditional class certification requirements are now "irrelevant," as Dentsply contends. (Decision p.3.) Dentsply misstates the Court of Appeal's holding.

Contrary to Dentsply's spin, the Court of Appeal followed this Court's *Tobacco II* decision exactly, quoting it at length. The appellate court held that although the UCL standing requirements impose an "actual reliance" requirement on the class representatives, *Tobacco II* had limited that requirement by stating that the representative "need not show that the reliance was 'the sole or even the predominant or decisive factor

influencing their conduct....It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.'" (Decision p.7. quoting *Tobacco II*, 46 Cal.4th at 326-27.).)

Again quoting *Tobacco II*, the Court of Appeal further held that "'a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material.'" (Decision p.7, quoting *Tobacco II,* 46 Cal.4th at 326-327.) The court noted that a "misrepresentation is 'material' if a reasonable person would attach importance to its existence or nonexistence in deciding his or her course of action in the transaction in question [and] that a class representative need not demonstrate individual reliance on a specific misrepresentation." (Decision p.7, citing *Tobacco II,* 46 Cal.4th at 327.) This "materiality" holding followed a long line of consistent cases (including *Tobacco II*) holding that "materiality" of a misrepresentation in a UCL action is determined *objectively* rather than subjectively. (*Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1049; (See also *In re Memorex* (N.D. Cal. 1973) 61 F.R.D. 88, 100-101; *Aron v. U-Haul Co. of Calif.* (2006) 143 Cal.App.4th 796, 807.)

2. The Court Of Appeal Did Not Hold That Traditional Class Certification Requirements Are "Irrelevant."

The Court of Appeal separately addressed Dentsply's argument that the trial court's decertification order should be upheld because, regardless of UCL standing requirements, Plaintiffs could not meet the traditional class certification requirement because "individual issues about the nature and extent of any material misrepresentation would predominate over common issues." (Decision p.7-8, fn.8.) The appellate court dismissed this argument by explaining that the element of materiality is an *objective* inquiry rather than a *subjective* one. (*Ibid.*) The question of materiality

turns on whether a reasonable person would attach importance to the representation or nondisclosure in deciding how to proceed in the particular transaction. In this case, the materiality of Dentsply's representations concerning the Cavitron's safety for dental surgical uses was established objectively by Plaintiff's actual use of the device for oral surgery. (Decision p.8, fn.8.) As a result, the Court of Appeal held that there were no individual subjective issues to decide with respect to whether there is common materiality.

In sum, the Court of Appeal did not eliminate the traditional class certification requirements for absent class members or render them "irrelevant," as Dentsply contends. Rather, it held that the trial court's mistaken application of a subjective materiality standard – the legal premise of the trial court's third rationale for decertification – was incorrect and therefore did not support the decertification order. In other words, the Court of Appeal never said that the traditional class certification requirements did not apply; it just found that the trial court misapplied those requirements. Dentsply misrepresents the scope of the Court of Appeal's decision. In fact, this case has nothing to do with any purported "split of districts" on the scope of the *Tobacco II* standing ruling.[4]

[4] Other commentators agree. In a recent article, one group of authors stated "the [*Weinstat*] appellate court did not analyze whether the class definition would satisfy class requirements, such as commonality and typicality, but instead simply remanded the case for the limited purpose of determining whether the named representatives could meet the UCL standing requirements." (Neal Potischman, Mark Kokanovich and Julie Epley; Class Certification After In re Tobacco II, The Recorder (San Francisco), Feb. 1, 2010.) (emphasis added.)

B. Review of Issue Two Is Unwarranted Because The Court Of Appeal's Refusal To Permit The Trial Court To Grant A Motion To Reconsider Class Certification That Is Unsupported By New Or Different Facts, Circumstances Or Law Is Consistent With California Law.

In its opinion, the Court of Appeal held that the trial court's reconsideration of its original class certification order – in response to Dentsply's decertification motion –was procedurally improper with respect to both the UCL and warranty classes because Dentsply did not show any changed circumstances or new law or evidence.[5] This provided an alternative basis to reverse. Dentsply's Issue Two is premised on its contention that the Court of Appeal's procedural analysis conflicts with state and federal law holding that a defendant moving for class decertification need not first show new or different facts, circumstances or law. Contrary to Dentsply's contention, however, no California case permits reconsideration of a class certification ruling based *on a party's motion* that is not supported by a showing of changed circumstances, or new law or evidence. The Court of Appeal's decision is correct and no conflict is raised.

[5] While the Court of Appeal acknowledged that Dentsply's motion for decertification with respect to UCL standing *was* accompanied by changed circumstances, *i.e.*, the new *Pfizer* decision, the court went on to explain that this "changed circumstance" pertained only to the UCL standing claim and should not have influenced the court's ruling with respect to the UCL "commonality" issue or the warranty class. (Decision at pp.7- 8, fn.8 and p.12 ["Decertifying one theory should not sanction decertifying another absent some commonality with the changed circumstance or some other situation justifying reconsideration. [citation.] Here there was none."].)

1. A Defendant's Motion To Decertify A Class – As Opposed To Sua Sponte Reconsideration By The Court –Must Be Based On A Showing Of New Or Different Facts, Circumstances Or Law.

Following this Court's decisions in *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360 and *Green, supra* 29 Cal.3d at 148, the Court of Appeal held that where decertification of a class is ordered pursuant to a party's motion, the order must be based on a showing of changed circumstances or new evidence or law. (Decision p.11-12.) The appellate court's decision accords with both *Green* and *Occidental Land.*

In *Occidental Land,* the Supreme Court addressed whether a motion to decertify a class was properly considered by the trial court 18 months after the initial class certification ruling. (18 Cal.3d at 359-360.) This Court held the decertification motion there was proper *because* it was "based on evidence not before the trial court in the prior proceeding." (*Id.* at 360; see also *Danzig v. Jack Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 1136 ["Once the initial determination has been made, a motion to decertify the class action may be used whenever changed circumstances render class status no longer appropriate."].) Based on this "new evidence," this Court held that trial court in *Occidental Land* was correct to consider defendant's motion. (18 Cal.3d at 359-360.)

In *Green*, the Supreme Court considered the propriety of a class decertification order rendered after a decision on the merits. (29 Cal.3d at 145.) The court in *Green* began its analysis by observing "[b]efore judgment, a class *should be decertified* '*only* where it is clear there exists changed circumstances making continued class action treatment improper.'" (*Id.* at 148 [all emphasis added; quoting *Sley v. Jamaica Water & Util., Inc.* (E.D.Pa. 1977) 77 F.R.D. 391, 394 ("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.")].) Based on this rule, the *Green* court concluded that "[a] fortiori, a similar showing must be made to warrant decertification after a decision on the merits." (*Ibid.*) "This standard will prevent abuse on the part of the defendant while providing the trial court with enough flexibility to justly manage the class action." (*Id.* at 148 & fn. 17; cited with approval in *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1081-1082.) As the Court of Appeal here observed, "the standard in *Green* allows flexibility while curtailing defendant abuse." (Decision p.12.)

In the present case, the trial court's decertification order was in response to Dentsply's motion, and was *not* made by the court sua sponte. Dentsply failed to show any changed circumstances or new evidence in support of its motion warranting the trial court's revisiting its prior class certification ruling. (Decision p.12.) Instead, Dentsply merely recycled arguments and evidence it previously had advanced in opposition to Plaintiffs' certification motion. (*Compare* 4-AA 1005-1019 *with* 10-AA 2386-2405.)

With respect to the UCL "commonality" issue, Dentsply offered neither new law nor newly-discovered evidence regarding "the nature and extent of any material misrepresentation." The declaration of James Tillman referenced by the trial court as the only factual basis for this ruling was the same one submitted by Dentsply in opposition to the prior certification. At most, it proffered hearsay tables purporting to paraphrase the content of its own DFUs for Cavitron models (many of which were not even within the class *definition*).[6] (13-AA 3141 [order at 2:2-4]; 11-AA

[6] Tillman later acknowledged that his statements were not derived from the paralegal's table. (14-AA 3425-3427.)

2622-2628, 2565-2566, 2650-2654; 12-AA 3044-3053.) None of this "evidence" was new; Dentsply had possessed its own DFUs at all relevant times.

Dentsply similarly failed to show changed circumstances or new evidence in seeking decertification of the warranty class. Its motion was nothing more than a rehash of the arguments previously made and lost on the same evidence. (*Compare* 4-AA 992-1019 *with* 10-AA 2381-2405.) Again, the only thing "new" that Dentsply offered was the above-referenced hearsay table purporting to paraphrase aspects of various DFUs, which were neither new nor newly-discovered, nor even material to the issue. It claimed to merely summarize its own historical documents. Its "supplemental" table (filed *after* Plaintiffs' opposition) added other DFUs that were not germane to the Cavitron models within the class as defined. (11-AA 2565-2566, 2650-2654 and 12-AA 3044-3053.)

The Court of Appeal held that this "evidence" afforded no basis for reconsideration of the trial court's prior certification order, and that the only new related to the UCL standing issue. (Decision p.12.) Because the decertification was initiated by Dentsply, and not on the trial court's own motion, the trial court erred by considering the motion without the required showing of "changed circumstances or new evidence." (*Occidental Land, supra,* 18 Cal.3d at 359-360; see also *Green, supra*, 29 Cal.3d at 145.) For this reason alone, the trial court's ruling on decertification properly was reversed.

2. The Court of Appeal's Holding Is Not In Conflict With California Or Federal Authority.

Dentsply cites to a myriad of state and federal cases to support its argument for review of Issue Two. But none of the cases holds that a trial court can grant a party's motion for decertification without a showing of changed circumstances, or new evidence or law.

For example, Dentsply cites to this Court's decision in *Le Francois v. Goel* (2005) 35 Cal.4th 1094 for the proposition that trial courts have inherent authority to reconsider a prior ruling without a showing of new facts or changed circumstances. (Petition pp.26-28.) But the trial court's "inherent power" expressly was limited to circumstances where the trial court considers a prior ruling sua sponte. (*Id.* at 1104-05.) The *Le Francois* court held that while a court has inherent authority to reconsider a prior ruling at any time, *on its own motion*, the trial court cannot reconsider a prior ruling based on the motion of a party *unless it is based on new facts or law.* (*Id.* at 1097.) The court explained that if this were not the rule, trial courts would be inundated with motions requiring that they rehash issues upon which they have already ruled and squander judicial time and resources. (*Id.* at 1106.) Although *Le Francois* addressed the trial court's inherent power under Code of Civil Procedure section 1008, the same principles of judicial management underlie this Court's rulings in *Green* and *Occidental Land.*[7] *Le Francois* does not support Dentsply's petition.

[7] Code of Civil Procedure section 1008 precludes any party from moving for reconsideration of any court order absent "new or different facts, circumstances or law." While Section 1008 does not permit a non-moving party even to seek reconsideration more than ten days after an order is entered (Code of Civ. Proc. § 1008(b)), Code of Civil Procedure Section 382 uniquely permits a defendant to move to reconsider class certification at a later date. That does not mean, however, that the "new or different facts, circumstances or law" requirement would not still apply to such a motion seeking reconsideration of a certification order. To the contrary, the *Green* and *Occidental Land* decision impose the same standard on motions for decertification, as explained above.

Dentsply also cites *MacManus v. A.E. Realty Partners* (1987) 195 Cal.App.3d 1106, 1117 for the proposition that a trial court can decertify a class at any time, without a finding of changed circumstances or new facts. In its petition, Dentsply states that "at least one case after *Green* has acknowledged that 'certification of a class is not embedded in cement' and 'can de decertified at any time, even during trial, should it later appear individual issues dominate the case,' without stating any 'changed conditions or new facts.'" (Petition p.24.) But *MacManus* never addressed whether a court can decertify a class without a moving party showing changed circumstances or new facts. The court simply observed that a trial court can decertify a class at any time "should it later appear individual issues dominate the case." The requisite showing by the moving party was never discussed. *MacManus* does not support Dentsply's premise that a defendant may move for class decertification without any changed circumstances, or new evidence or law, and it is not in conflict with the Court of Appeal's holding in this case.

Dentsply argues that the courts should look to federal law for guidance concerning class action procedure. But California law on this point is settled without consideration of federal law, and federal law is consistent with California law in this respect. Specifically, under Federal Rule of Civil Procedure section 23(c)(1), a trial court may decertify a class action either on a party's motion or sua sponte, on its own motion. (Fed. R. Civ. Proc. §23(c)(1).) Dentsply points to no federal case granting defendants an unfettered right to bring class reconsideration motions without showing some change in circumstances, facts or law.[8] Trial courts

[8] See, e.g., *Slaven v. BP America, Inc.* (C.D. Cal. 2000) 190 F.R.D. 649, 651-52 (reconsideration motion prompted by change in law); *Valentino v. U.S. Postal Service* (D.C. Cir. 1982) 674 F.2d 56, 67, fn.12 (observing that reconsideration might be warranted where "nature of the proof" and

have more than sufficient flexibility to address changed factual or legal circumstances in a certified class action without creating a new right for a defendant to bring serial decertification motions where there has been no change of circumstances, or new evidence or law.[9]

As the court explained in *Cook v. Rockwell Int'l Corp.* (D.Colo.1998) 181 F.R.D. 473, class action litigants need some level of confidence that prior rulings can be relied on absent changed circumstances: "Once a class is certified, 'the parties can be expected to rely on it and conduct discovery, prepare for trial, and engage in settlement discussions on the assumption that in the normal course of events it will not be altered except for good cause. Sometimes, however, developments in litigation, such as discovery of new facts or changes in parties or in the substantive or procedural law, will necessitate reconsideration of the earlier order and the granting or denial of certification or redefinition of the class.'" (*Id.* at 477, quoting from Manual of Complex Litigation, Third (1995), § 30.18 at 223; see also *Sley, supra,* 77 F.R.D. at 394.)

Dentsply fails to cite any state or federal authority that demonstrates a conflict on this issue. *Green* and *Occidental Land* support the Court of Appeal's decision.

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circumstances of the class members have been revealed in discovery); *Boucher v. Syracuse Univ.* (2nd Cir. 1999) 164 F.3d 113, 118 (observing that reconsideration might be warranted as case moves from "assertion to facts").

[9] See Conte and Newberg, *Newberg on Class Actions*, §7:47, p.159 (4th ed. 2009) ("In the absence of materially changed or clarified circumstances, or the occurrence of a condition on which the initial class ruling was expressly contingent, courts should not condone a series of reargruments on the class issues by either the proponent or the opponent of class, in the guise of motions to reconsider the class ruling.")

C. Review of Issue Three Is Unwarranted Because Proof Of Prior Reliance Is Not Required For Breach of Express Warranty Under Cal. U. Com. Code § 2313.

As to Dentsply's Issue Three relating to express warranty, the purported "conflict" Dentsply posits actually is a one between pre-UCC law and the modern approach, not among post-UCC decisions. In effect, Dentsply seeks to roll back the clock to the time before the Uniform Commercial Code was adopted in California, arguing that prior reliance is still an element of breach of warranty. And because the written terms of the Cavitron warranty were sealed in plastic inside the box, Dentsply argues its warranty could not have been relied upon at the time the plaintiffs took possession of the product. (Decision p.14.)

The UCC put an end to such games and removed any requirement of proof of actual reliance from breach of warranty with the adoption of UCC section 2-313. (See Cal. U. Com. Code § 2313(1)(a) ["Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise."]; *Keith, supra,* 173 Cal.App.3d at 23 ["It is clear from the new language of this code section that the concept of reliance has been purposefully abandoned."]; see also *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 116 fn.12 ["No longer can [the seller] find solace in the fact that the injured consumer never saw his warranty."].)

Dentsply misframes the issue as whether recovery for breach of express warranty requires prior reliance "upon the alleged misrepresentation." (Petition at 4.) Although Dentsply never has acknowledged it, breach of warranty is *not*, and never has been, a *tort* doctrine whereby one recovers damages resulting from reliance upon a false representation (*e.g.*, fraud, negligent misrepresentation.) In

California, and virtually all other states adopting the UCC, breach of express warranty is *contractual*, providing recovery to the purchaser of goods for damages arising where the goods sold do not conform to the material terms of the sale contract. It has nothing to do with misrepresentation or reliance, but focuses instead on the quality of the goods sold and the terms of the contract under which they were sold, *i.e.* "the basis of the bargain." (Cal. U. Com. Code § 2313.) While this distinction has proven elusive for some courts in other jurisdictions, it is settled in California. (See 4 Witkin, *Summary of Cal. Law* (2005) Sales, §59 at 71, "Buyer Reliance Not Required.")

There is no reliance element for breach of warranty under California Uniform Commercial Code Section 2313(1)(a). (*Keith, supra*, 173 Cal.App.3d at 23.) The issue instead is whether the breached representation was a *material* to the parties' bargain. As explained in Comment 2 to Section 2313(1)(a), "[i]n former [California] Civil Code § 1732 reliance by the buyer was an essential requirement for the creation of an express warranty. [citation] Under Subdivision (1) of this section 'no particular reliance on [affirmations of fact] need be shown in order to weave them into the fabric of agreement.'[quoting Official Comment 3]." This Court explained the change in the law in *Hauter*: "The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller [citation], the Uniform Commercial Code requires no such proof." (*Hauter, supra*, 14 Cal.3d at 115.) As the Court of Appeal here explained, "[a]ny affirmation, once made, is part of the agreement unless there is 'clear affirmative proof' that the affirmation has been taken out of the agreement." (Decision p.15.)

To create a false conflict, however, Dentsply argues that the Court of Appeal's decision is somehow out of step with California law on the reliance issue, citing CACI 1240 and *Keith, supra,* 173 Cal.App.3d 12. (Petition pp.30-31.) As to CACI 1240, however, the Judicial Council's "CACI Committee" has recommended the instruction be *revoked* (likely the result of the *Weinstat* decision).[10] The instruction purports to set forth "Affirmative Defense to Express Warranty—Not Basis of Bargain," but it incorrectly defines the "basis of the bargain" concept from Section 2313 as meaning reliance. (Decision p.22 fn.12.) As the Court of Appeal observed, in criticizing CACI 1240, "if section 2313 has eliminated the concept of reliance from express warranty law all together, by what logic can reliance reappear, by its absence, as an affirmative defense?" (Decision p.22.).

Dentsply also misrepresents the holding in *Keith*, arguing that,

> *Keith* notes that some comments to section 2313 suggest that "the concept of reliance has been purposefully abandoned," but further notes that courts have nonetheless continued to hold that "consumer reliance still is a vital ingredient for recovery based on express warranty." (*Keith, supra*, 173 Cal.App.3d at pp.22-23.)

(Petition p.30 fn.7.)

It is difficult to fathom how Dentsply could reach this conclusion. *Keith* does not simply "*note*[] that some comments to section 2313 *suggest* that 'the concept of reliance has been purposefully abandoned;'" that is the *holding* of the decision: "It is clear from the new language of this code section that the concept of reliance has been purposefully abandoned." (*Keith*, *supra*, 173 Cal.App.3d at 23.) *Keith* also does not recognize the continued validity of other court holdings that "have nonetheless continued to hold that 'consumer reliance still is a vital ingredient for recovery based

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[10] See www.courtinfo.ca.gov/invitationstocomment/documents/CACI_10-01.pdf

on express warranty,'" as Dentsply misleadingly suggests. (Petition p.30, fn.7.) Instead, *Keith* stated the opposite, quoting this Court's *Hauter* decision and explaining that the decisions recognizing reliance as an element of breach of warranty were from out of state and decided before adoption of the UCC: "[D]ecisions of *other* states *prior to* [adoption of UCC 2-313] had 'ignored the significance of the new standard and have held that consumer reliance still is a vital ingredient for recovery based on express warranty.'" (*Keith*, *supra*, 173 Cal.App.3d at 22 [emphasis added; quoting *Hauter*, *supra*, 14 Cal.3d at 116, fn.13].) Dentsply's selective quotations from the *Keith* decision completely distort its holding.

In fact, *Keith* is directly contrary to Dentsply's position. *Keith* involved an individual's purchase of a sailboat in ostensible reliance on representations in promotional sales brochures. The court dispensed with any notion that breach of warranty requires showing that the purchase was induced by prior reliance on the warranty:

> A buyer need not show that he would not have entered into the agreement absent the warranty or even that it was a dominant factor inducing the agreement. A warranty statement is deemed to be part of the basis of the bargain and to have been relied upon as one of the inducements for the purchase of the product. In other words, the buyer's demonstration of reliance on an express warranty is "not a prerequisite for breach of warranty, as long as the express warranty involved became part of the bargain . . ."

(*Keith*, *supra*, 173 Cal.App.3d at 23; citations omitted.)

None of the other California cases Dentsply cites holds that reliance is still required for breach of warranty. Dentsply claims that *Hauter* "signaled that reliance *is* a required element of an express warranty claim." (Petition p.29 [original emphasis].) But this Court stated the opposite, as previously quoted. (*Hauter*, *supra*, 14 Cal.3d at 115.) *Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, also cited by Dentsply,

involved a transaction for medical services, not goods, and the court's comments regarding section 2313 were clearly *dicta*. (*Id.* at 760.) And the court's comments regarding reliance in *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, were made in regard to a national class that alleged fraud and misrepresentation in addition to breach of warranty. For these reasons, among others, the Court of Appeal here found *Osborne* "not convincing authority" as to breach of warranty under California's Section 2313. (Decision p.18.)

Instead, the Court of Appeal followed *Keith* and correctly held that Plaintiffs here have no burden to prove prior reliance upon Dentsply's written representations to recover for breach of warranty under Section 2313. (Decision p.14-15.) Dentsply's premise that a warranty statement had to be read and relied upon *before* delivery of purchased goods is simply wrong. (*Hauter, supra*, 14 Cal.3d at 116 fn.12.)

Although *Keith* posed a seller's right to rebut a buyer's presumed reliance on promotional representations as an affirmative defense (*id.* at 23-24), the Court of Appeal below correctly observed that the *dictum* was self-contradictory and contrary to Section 2313 and its elimination of the element of prior reliance from breach of express warranty. (Decision p.22.) If there is no element of prior reliance in a breach of warranty claim, a defendant cannot defeat that claim by showing the absence of reliance. (*Ibid.*) The issue in breach of express warranty, again, is not prior reliance on a false representation, but whether the representation was material to the transaction (part of the "basis of the bargain").

In this regard, the premise necessarily underlying the trial court's erroneous "rebuttal" analysis — that a dentist performing oral surgery might consider the risk of patient infection from the Cavitron immaterial — is preposterous. There was no evidence in this case that any class member was not concerned with surgical safety. In *Mass. Mutual,* in the context of a fraud class action, the Fourth District rejected a similar argument that decertification was necessary to protect a defendant's due process right to attack a presumption of class member reliance:

> "Causation [by reliance] as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class. The fact a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; *plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all.*" (*Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891, 907, fn. 22.)

(*Mass. Mutual*, *supra*, 97 Cal.App.4th at 1292 [emphasis added]; *accord*, *McFarland v. Memorex Corp.* (N.D.Cal. 1982) 96 F.R.D. 357, 361-362 (possibility of individual defenses does not create predominantly individual issues).)

A *hypothetical* right to rebut reliance of an objectively material fact affords no basis for decertification. (*Mass. Mutual*, *supra*, 97 Cal.App.4th at 1292-1293.) If such a completely hypothetical premise were to be applied in all warranty class actions, it would preclude certification of any warranty class in *any* circumstance. The Court of Appeal's decision is entirely consistent with both Section 2313 and California case law. Dentsply demonstrates no need for Supreme Court review.

IV. CONCLUSION

Dentsply's Petition should be denied.

Dated: March 2, 2010

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.24(c)(1), I certify that Appellants' Answer Brief contains 7,975 words, not including the Tables of Contents and Authorities, the caption page, signature blocks, or this certification page.

Dated: March 2, 2010

_____

Paul J. Killion

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is One Market, Spear Tower, Suite 2200, San Francisco, California 94105. I am a citizen of the United States and am employed in the City and County of San Francisco. On March 2, 2010, I caused to be served the following documents:

ANSWER TO PETITION FOR REVIEW

Upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

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Courtesy Copy

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 2, 2010, at San Francisco, California.

_____
Vikki Domantay