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March 4, 2010

The Honorable Ronald M. George,
Chief Justice, and Associate Justices
THE SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, California 94102

Re: Petition for Review of Dentsply International Inc. in *Weinstat v. Dentsply International Inc.*, No. S180179

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

Pursuant to California Rule of Court 8.500(g), The Product Liability Advisory Council, Inc. ("PLAC") asks this Court to grant the Petition for Review of Dentsply International Inc., to

- Eliminate the confusion in the lower courts on whether *In re Tobacco II Cases* (2009) 46 Cal.4th 298 (*Tobacco II*) altered the requirement that a well-defined community of interest exist before a class can be certified. The decision below joined a line of authority which reads *Tobacco II* to *foreclose* consideration of the difficulties individual questions of reliance and causation may pose for class-wide adjudication of UCL claims. Other cases have held just the opposite. The Court should accept Review and confirm that the application of statutory class action requirements remains unaffected by *Tobacco II*, and that the effect of any individual issues related to causation requirements still need to be accounted for in evaluating the requisite community of interest.

- Remove an impediment to the effective management of class action litigation, by allowing trial courts to revisit an initial decision on class certification where appropriate in an ongoing litigation. Though this Court recognizes that trial courts have inherent authority to reconsider their own rulings on any and all issues, the Court of Appeal decision here effectively eliminates that discretion as to decisions concerning class certification, a context where that flexibility is critical in managing complex litigation. This Court should accept Review and restore that flexibility.

- Resolve a split of authority and decide an important question of law, whether a plaintiff must prove reliance in claims of breach of express warranty. Every California appellate court decision prior to this one recognized that reliance

remains an issue. This Court should accept Review and confirm that line of authority.

IDENTITY AND INTEREST OF AMICUS

PLAC is a non-profit corporation with 100 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products. A list of PLAC's current corporate membership is attached as Appendix A. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (*i.e.*, non-voting) members of PLAC.

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus curiae* briefs in both state and federal courts, including this Court.

PLAC's interest in this Petition stems from the profound impact that unfair competition and consumer fraud class action litigation has on product manufacturers who do business in this State. The decision below, by expanding class actions in a manner inconsistent with their purpose, impeding the ability of trial courts to manage such cases, and eliminating a central element of the cause of action for breach of warranty suits, threatens those manufacturers with unlimited liability, in uncontrolled litigation, brought by uninjured plaintiffs. PLAC is interested in preventing these adverse effects. PLAC is interested as well in obtaining clear guidance for its members concerning interpretation and application of Proposition 64, the procedural safeguards available to prevent misuse of the class action device, and the rights and obligations of product sellers and purchasers in litigation over warranties.

BACKGROUND AND NATURE OF THE CASE

In this class action brought under the UCL and UCC, the Court of Appeal for the First District, Division 4, held that under *Tobacco II*, absent class members need not adduce individual proof of materiality, reliance and causation ("resulting damage") in UCL litigation. The court remanded 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." (Typed Opn. at 9)

Thus, the Court of Appeal interpreted *Tobacco II* to do much more than decide whether Proposition 64 required that class members as well as class representatives demonstrate standing at the certification stage. Effectively, the court read *Tobacco II* to

eliminate any substantive requirement that class members suffer a compensable injury under the UCL in order to obtain restitution, or indeed, that they show any exposure at all to the alleged misconduct at issue. And because no injury or other link to the alleged conduct need be shown, no inquiry was necessary, or permissible, into how reliance and causation issues applicable to the class members affected the manageability and superiority of the class action device. Some courts have adopted a similarly broad reading of *Tobacco II*. *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 134 n. 19; *In re Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 2010 WL 196559, *4; *Plascencia v. Lending 1st Mortg.* (N.D. Cal. 2009) 259 F.R.D. 437, 448.

Other courts have read *Tobacco II* more narrowly and sensibly. In *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, the court concluded that nothing in *Tobacco II* changes the substantive elements needed to recover on a UCL claim. The court held that it remains incumbent upon a trial court evaluating a certification motion to examine whether proof of the elements of the class members' claims calls for resolution of individual issues, eliminating the requisite community of interest and making the class device inappropriate. The court found further that the "standing" issue addressed by this Court was different from the substantive elements of the class members' claims, and that this Court did not jettison the class certification inquiry required under Code of Civil Procedure section 382 and well-established case law. 178 Cal.App.4th at 981.[1] A similar reading of *Tobacco II* was issued in *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 848-849 (holding that *Tobacco II* did not alter the proof needed for determining whether business practices were unfair, and that the predominance of individual issues concerning the nature of the business practices to which class members were exposed precluded class certification). *See also Pfizer, Inc. v. Superior Court* (2nd App. Dist., Div. 3 Feb. 25, 2010), No. B188106, ___ Cal.App.4th ____, Typed Opn. at 11 ("*Tobacco II* does not stand for the proposition that a consumer who was never exposed

[1] It was clear before Proposition 64, and it remains clear thereafter, that UCL claims incorporate *some* causation requirement. *See, e.g.,* Bus. & Prof. C. § 17203 (allowing restitution of money that "may have been acquired by means of" the unfair practice); *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 978-981 (requiring a causal link between the challenged practice and the alleged harm); *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 394 (requiring a causal nexus between defendant's conduct and plaintiff's loss of business); *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 887-888 (no UCL violation without deception of consumers); *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 841 (requiring injury due to defendant's conduct). *See also In re Firearm cases*, 126 Cal.App.4th at 978 ("Without evidence of a causative link between the unfair act and the injuries or damages, unfairness by itself merely exists as a will-'o-the-wisp legal principle."); *id* at 981 ("The UCL provisions are not so elastic as to stretch the imposition of liability to conduct that's not connected to the harm by causative evidence.").

to an alleged false or misleading advertising or promotional campaign is entitled to restitution.").

Under the circumstances, to describe the law in this area as "unsettled" and the lower courts as "split" on the issue is an understatement.

The court of appeal also reversed as to the claims brought under Cal. Comm. Code §2313, on both procedural and substantive grounds.

Procedurally, the court held that the trial court could not revisit its certification decision because there was no change in law or fact. The court relied on dicta in *Green v. Obledo* (1981) 29 Cal.3d 126. *Green,* however, involved decertification of a class following a decision on the merits. While there may be good reason to impose a changed circumstances prerequisite to decertification after the court has already ruled on the merits, the balance between the necessary level of discretion and flexibility, on the one hand, and finality, on the other, is drastically different after a court has adjudicated the merits than it is before. It simply makes no sense to lock a trial court into its decisions, preventing it from correcting errors, while a case is still proceeding. Such a rule would multiply the burdens of this Court and other appellate courts by embedding the trial court's initial certification decision as unalterable dogma, even where the trial court recognizes that its decision was wrong.

Finally, the court ruled, alternatively, that the decertification decision as to breach of express warranty claims was wrong on the merits as well, because the trial court erroneously assumed that individual issues of reliance had to be adjudicated. The court held that section 2313 does not require a plaintiff to prove reliance on the affirmation of fact, and even bars the seller from proving the purchaser did not rely. The court's novel interpretation of section 2313 disagreed with two longstanding court of appeal decisions on the subject, *Osborne v. Subaru of Am., Inc.* (1988) 198 Cal.App.3d 646 and *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, as well as the approved jury instruction based on this authority, CACI No. 1240. As this very case demonstrates, eliminating a reliance requirement (and its proxy, the basis of the bargain requirement) under California warranty law – allowing uninjured plaintiffs to sue – can further fuel the ever-expanding class action firestorm.

REASONS WHY REVIEW SHOULD BE GRANTED

This Court should accept the Petition, settle these important questions of law, and eliminate these significant threats to manufacturers doing business in this State.

The *raison d'être* of this Court is to guide the development of California law in areas of importance to the bench and bar. California Rule of Court 8.500(b) (1) recognizes this core function by directing that Review may be ordered "when necessary to secure uniformity of decision or to settle an important question of law."

Review is necessary to address the divergence among the courts as to what this Court meant in *Tobacco II*. Is it, as logic would seem to compel, a decision holding that Proposition 64 standing requirements apply only to the named plaintiffs? Or did the Court also intend to hold that class members can recover restitution under the UCL without suffering any injury-in-fact from – or, for that matter, any linkage to – the challenged practice? The courts are starkly divided on this issue, calling upon this Court to secure uniformity of decision. It is vitally important that stability be restored in this context. Given the prevalence of consumer class action practice, the enormous stakes involved in class certification decisions in these cases, and the impact of the operation of these laws on the California business climate, the questions to be settled are of significant importance.

On the merits, the broad view of *Tobacco II* adopted by the Court of Appeal is unsupported by the holding of this Court's decision, by the UCL, and by fundamental class action requirements. *Tobacco II* answered only the question of standing – it did not alter class action requirements, eliminate causation as an element of a UCL claim for restitution, or deem issues of reliance and causation irrelevant to UCL claims or the class certification inquiry. It would be inappropriate and unwise to allow precedents to stand which hold or suggest that people who suffered no loss can obtain restitution under the UCL, Restitution by its very nature is restorative, This Court in *Tobacco II* did not authorize the remedy when there is nothing to restore, nor did it dispense with proof connecting actual injuries to the alleged improper business practice under the UCL.

Review is also necessary to settle the important question of whether a trial court can correct its own mistake if it comes to believe, with further experience in the case, that a prior decision on certification was wrong or unwise. In no other area, and in no other case, have trial courts been irrevocably wedded to their decisions absent an intervening material change in fact or law. In all other respects, the law recognizes that trial judges are human, can make mistakes, and need the procedural discretion to correct their own errors when they recognize them, in order to perform one of "the court's most basic functions" – "ensuring the orderly administration of justice." *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104 (finding that California trial courts have inherent constitutional power to reconsider and correct interim rulings, even when there has been no change in facts or law). The Court of Appeal's decision

violates this common-sense rule, imports unnecessary rigidity into litigation, and conflicts with this Court's prior authority.

The Court of Appeals' departure from precedent, moreover, comes in a context where the trial courts' rulings are of elevated importance – class actions and, in particular, the critical issue of class certification. It is mystifying why the authority to correct should be withheld when it is needed the most. A trial court's certification decision, often issued early in the case in anticipation of how the issues are likely to develop, should not be permanently sheltered from a later determination that the decision was unwise, unfair or uworkable. For this very reason, the federal rules specifically recognize the trial court's authority to alter or amend an order granting or denying class certification before final judgment. Fed. R. Civ. Proc. 23(c)(1)(C). California Rule of Court 3.764(a)(4), also tacitly recognizes that authority by allowing, without limitation, a motion to decertify a class. This Court therefore should accept review to preserve the flexibility of trial courts to manage their own dockets in the most complex cases that come before them.

Finally, in essentially eliminating the elements of reliance and causation in causes of action for breach of express warranty, the court below rejected all prior case law, as well as the approved jury instruction on the issue. This Court should accept review to resolve the conflict in authority the court created, to secure uniformity, and to settle this important question of law. Delaying review, failing to restore the requirement that any non-conformity with a warranty must actually produce a loss to support recovery of damages, could unleash a torrent of breach of express warranty litigation, further burdening both the California courts and the manufacturers doing business in this State..

CONCLUSION

In sum, the court of appeal's decision unsettles the law of consumer class actions on three different points, all of them quite significant individually, and even more so taken together. Under this decision, UCL classes can be certified and restitution awarded without any proof that anyone other than the class representatives sustained any loss related to the challenged business practice. Express warranty classes can be certified and damages awarded without any evidence that the claimed misrepresentation caused any loss. And an erroneous ruling by the trial court launching the complex and expensive class action procedures is irrevocable, immune from correction or modification by the trial court absent the fortuity of external changes in law or fact.

For the foregoing reasons, PLAC urges this Court to grant the Petition of Dentsply and settle the law on each of these issues.

Respectfully submitted,

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Of Counsel

Attachment

Corporate Members of the Product Liability Advisory Council

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PROOF OF SERVICE

I, Connie B. Gutierrez, declare:

I am a citizen of the United States and employed in San Francisco, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 50 Fremont Street, 20th Floor, San Francisco, California 94105-2235. On March 4, 2010, I served a copy of the within document(s):

Amicus Curiae Letter In Support of Petition For Review

☐ 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 thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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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.

Executed on March 4, 2010, at San Francisco, California.

Connie B. Gutierrez