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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

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

v.

DENTSPLY INTERNATIONAL INC.,
Defendant and Respondent.

APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT
RONALD QUIDACHAY, JUDGE • CASE NO. CGC-04-432370

PETITION FOR REHEARING OR MODIFICATION

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PETITION FOR REHEARING OR MODIFICATION

INTRODUCTION

This court should grant rehearing because a key presumption essential to the court's analysis is factually and legally without foundation. Moreover, the court should grant rehearing and/or modify the opinion (a) to delete a portion of the discussion that is unnecessary to the disposition and that injects significant confusion into California jurisprudence on express warranty claims, and (b) to correct numerous factual statements that are unsupported by the record on appeal.

First, the court's opinion rests on a presumption that Dentsply's representations enclosed in product packaging concerning the Cavitron's indicated uses were *material* to class member dentists. Specifically, the court concluded that Dentsply might be found to have misled dentists into failing to appreciate the risk of "biofilm contamination," and thus might be found to have caused dentists to purchase the Cavitron for surgical use on the mistaken belief it could safely be used for "root planing during surgery" or "periodontal debridement" in California. But even if such an inference could be drawn, it would be *irrelevant as a matter of law,* because all California dentists knew or were on notice that, for *other* reasons, the Cavitron could *not* be used for oral surgery.

It is undisputed that Dentsply never represented that the Cavitron produces sterile water and that no dentist could reasonably believe the Cavitron can transform their municipal water supply into a sterile water source. And because California regulations require *sterile* water for oral surgery as a matter of licensure, Dentsply's alleged representations that the Cavitron could be used for certain procedures that some dentists may consider to be surgical—representations that were perfectly accurate in most jurisdictions—could not have been material to licensed California dentists, who all are charged with knowledge regarding California's sterile water regulations.

In other words, this court could not properly presume that any dentist was misled into purchasing a Cavitron for oral surgery due to nondisclosure of potential biofilm formation when all dentists were already charged with knowing the Cavitron could not be used

for oral surgery because its output water was not sterile. Without a presumption of materiality that applies to all class members, the trial court's decertification order was correct and should be sustained.

But even if the court is unwilling to reconsider its analysis on materiality, it should at least modify the decision to eliminate the sections in pages 12 through 23 analyzing the merits of plaintiffs' express warranty claims. Because the opinion sets forth a foundational procedural basis for reversing decertification of the express warranty class—the absence of new law or changed circumstances following the class certification—the remainder of the court's analysis is superfluous. More problematic, it creates a conflict in California law by (1) expressly disagreeing with two earlier appellate decisions, (2) implicitly disagreeing with a third decision, and (3) disapproving a CACI instruction promulgated by the Judicial Council. The court's discussion also conflicts with the majority view of other jurisdictions construing section 2-313 of the Uniform Commercial Code as adopted in those jurisdictions. The discussion also violates the rule against deciding the legal merits of a claim when determining the propriety of class treatment. Rather than creating an issue that will cause uncertainty for future litigants and that will require Supreme Court review to resolve a conflict in the law, the court should simply omit that portion of the decision.

Finally, in many respects the opinion disregards the pertinent substantial evidence standard of review, which requires that factual conflicts in the record be construed in the light most favorable to

sustaining the trial court's decertification order. The opinion should be modified to correct the various resulting factual errors and omissions, which are detailed below. Since many of these factual errors and omissions appear in the express warranty section of the opinion, modifying the opinion to omit that section would be the most straightforward method of correcting the court's opinion.

LEGAL DISCUSSION

I. THE OPINION'S FOCUS ON A PERCEIVED BIOFILM RISK IGNORES THAT NO DENTIST COULD PROPERLY HAVE INTENDED TO USE THE CAVITRON FOR ORAL SURGERY BECAUSE IT WAS NOT DESIGNED OR REPRESENTED TO DELIVER THE STERILE WATER LEGALLY REQUIRED FOR SUCH PROCEDURES.

The UCL and express warranty analyses in this court's opinion are based on a perceived distinction between water sterility and potential biofilm contamination. The opinion states that "the issue in this litigation is not water sterility per se, but rather the formation of bacteria-laden biofilm, caused by the design of the Cavitron's inner water tubing, and the contamination risks posed by that phenomenon." (Typed opn., 23.) But whether or not the Cavitron generates any unsafe level of biofilm when used as directed (a disputed question), the Cavitron simply cannot be used in California for oral surgical procedures *because, regardless of*

potential biofilm formation, it does not produce sterile water—which California regulations have required for oral surgery for the past 14 years.

The plaintiff class includes *every* California dentist who purchased the Cavitron for use in oral surgery—including the vast majority who use *nonsterile* input water. Dentsply certainly never represented that the Cavitron sterilizes water or is even capable of delivering sterile water. Thus, nothing Dentsply said about potential oral surgery applications for the Cavitron could have been material to California dentists, who all know they *must* use sterile water for oral surgical procedures.

Indeed, this court's opinion notes that "[s]ince 1996, California dental regulations have required practitioners to use '[s]terile coolants/irrigants' for 'surgical procedures involving soft tissue or bone'" and that "'[s]terile coolants/irrigants must be delivered using a sterile delivery system.'" (Typed opn., 3.) The opinion then states that the "crux of the complaint is that the Directions [for Use] indicate that Cavitrons can be used in oral surgery, but in fact they are unsafe for such use because the device is incapable of delivering a *safe* water stream during oral surgical procedures." (Typed opn., 3, emphasis added.) But in California, any dispute over the Cavitron's safety for oral surgery due to potential biofilm formation is irrelevant when, by law effective since 1994, no dentist is allowed to perform oral surgery using *any*

nonsterile water—such as municipal water fed through the Cavitron.[1]

The opinion overlooks this critical fact in determining that the trial court should not have decertified plaintiffs' UCL and express warranty claims.

For example, with regard to the UCL claims, the opinion holds that this "case involves alleged uniform fraudulent practices—misrepresentations regarding the Cavitron's safety for surgical use *and the concomitant nondisclosure of biofilm risk*—by Dentsply, directed to the entire class." (Typed opn., 8, fn. 8, emphasis added.) The opinion then finds that the materiality of these representations "was established objectively by appellants' actual use of the device for oral surgery, in accordance with those representations" and that "[t]here are no individual issues concerning the nature and extent of material misrepresentations." (Typed opn., 8, fn. 8.)

But the indications for use for procedures that could be deemed oral surgery and the alleged nondisclosure of biofilm risk would be material only to dentists who not only were unaware of biofilm formation, but who *also* were unaware that the Cavitron

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[1] Any distinction between water sterility and biofilm formation would be relevant only to those few dentists who purchased the Cavitron intending to connect it to a self-contained sterile water system, and who were unaware that the potential formation of biofilm—even using sterile input water—prevented the Cavitron from producing sterile water and therefore precluded its use in oral surgery. But the plaintiff class is not so limited, but rather includes *every* California dentist who purchased the Cavitron for use in oral surgery—even those who intended to use input water from a municipal source and knew the Cavitron would not convert that input water to sterile water.

does not produce sterile water, *and* that sterile water is required for oral surgery in California. The record contains no support for the notion that any dentist believed that Cavitrons are water sterilizers, and the law permits no presumption that any dentist would be ignorant that their licensure regulations require sterile solutions for use in oral surgery because all people, especially licensed professionals, are presumed to know the law applicable to them. (See, e.g., *Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1507 ["the legal effect of a statute cannot be avoided merely by pleading ignorance of the statute"]; *Delaney v. Baker* (1999) 20 Cal.4th 23, 31 ["'the standard for professionals is articulated in terms of exercising "the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing . . . ."'"]; *James v. Board of Dental Examiners* (1985) 172 Cal.App.3d 1096, 1109 [in the field of dentistry, "[i]ncompetence generally is defined as a lack of knowledge or ability in the discharging of professional obligations"]; see also 5 AA 1046 ["it is the responsibility of each dental professional, *as a matter of licensure*, to comply with state laws and regulations" (emphasis added)].)

The express warranty analysis is similarly flawed. The opinion agrees "that appellants do not claim Dentsply warranted that the Cavitron produced a *specific quality* of water or promised *sterility*," but says this does not help Dentsply because the "alleged inevitable formation of biofilm is both the inherent defect in the Cavitron, as well as the health risk that purportedly renders the device unsafe." (Typed opn., 20, emphasis added.) But this is not a

product defect case,[2] and plaintiffs' express warranty claims must be measured against affirmative representations concerning the Cavitron's propriety for use in oral surgery. As previously discussed, it was not the "alleged inevitable formation of biofilm" (*ibid.*) that precluded use of the Cavitron for oral surgery in California, but the fact that even new, just out of the box, ultrasonic scalers like the Cavitron are not intended to and cannot produce sterile water.[3]

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[2] A product defect claim would require proof that the product had caused personal injury or property damage—an insurmountable obstacle here because no injuries or infections have ever been reported from Cavitron output water.

[3] The opinion says plaintiffs assert that Dentsply "warranted the Cavitrons were free from defects in workmanship and materials *that would pose health risks to patients.*" (Typed opn., 20, emphasis added.) If that were plaintiffs' claim, it would be demonstrably unprovable, because nothing like the italicized language appears anywhere in the directions for use. A warranty that the Cavitron would be free from defects in workmanship and materials (here, for two years from the date of purchase (see 3 AA 580)) is not a guarantee of the propriety (or safety) of the device for any particular purpose. (See *McDonnell Douglas Corp. v. Thiokol Corporation* (9th Cir. 1997) 124 F.3d 1173, 1176-1179 [promise to deliver goods free from defects in labor, material, and manufacture could not be construed as a warranty of performance or suitability for a particular purpose].) Furthermore, the warranty language in question disclaims any other express or implied warranties. (See, e.g., 3 AA 581.) Plaintiffs do not, in fact, allege that the Cavitron's inability to produce sterile water is due to any defect in workmanship or the quality of the materials used—e.g., that screws were loose or the plastic tubing was weak or defective. No Cavitron scaler has ever been shown to be defective in either workmanship or manufacture. (4 AA 1029; 11 AA 2625.)

The express warranty section of the opinion acknowledges Dentsply's argument that it "could meet its burden of rebutting any presumption that statements in the Directions created an express warranty by showing that individual class members knew that the Directions supposedly 'were not accurate under applicable California regulations.'" (Typed opn., 23.) The opinion then dismisses that defense as turning on "the matter of water sterility" when "the issue in this litigation is not water sterility . . . but rather the formation of bacteria-laden biofilm . . . ." (*Ibid.*) But as noted, the pertinent question for establishing the defense based on non-materiality is not, as the opinion states, whether "appellants were aware of the biofilm risk posed by Cavitron usage, but purchased and used it anyway." (*Ibid.*) The defense requires only that Dentsply show appellants were aware of *other* barriers to using the Cavitron in oral surgery (such as its inability to deliver sterile water, a fact known by all of the named plaintiffs), but purchased and used it for oral surgery anyway.

As noted, dentists are charged with knowledge of the regulations governing their profession. Whether individual class members were ignorant that the various directions for use were inconsistent with applicable California regulations is the question at the heart of plaintiffs' express warranty claims, and is one that must be answered on a dentist-by-dentist basis. It is precisely why both the UCL and express warranty claims are inappropriate for class treatment, and the need for individual inquiry cannot be avoided by focusing exclusively on the issues of biofilm formation and ignoring the materiality of water sterility. Rehearing should be

granted to reconsider the validity of the trial court's decertification order without resorting to the legally and factually irrelevant distinction on which the opinion rests.

II. THOSE PORTIONS OF THE EXPRESS WARRANTY ANALYSIS THAT ARE UNNECESSARY TO RESOLVE THE APPEAL SHOULD BE OMITTED.

A. Portions of the opinion's express warranty analysis create an unnecessary conflict with existing law in California and the majority of other jurisdictions.

This court's opinion holds that the order decertifying plaintiffs' express warranty class must be reversed because there were no changed circumstances or new evidence pertaining to the breach of warranty class that allowed the trial court to revisit the certification issue. (Typed opn., 11-12.) Under that reasoning, the remainder of the opinion—addressing the trial court's substantive reasons for decertifying the express warranty class—is unnecessary to the resolution of the appeal. (See typed opn., 12-23.) This court should therefore omit that discussion, because it needlessly creates a conflict in California law that will require resolution by the Supreme Court.

This court's opinion on the merits of plaintiffs' express warranty claims holds that the "basis of the bargain" element in section 2313 of the California Uniform Commercial Code (section 2313) eliminates the requirement of reliance by the purchaser on a

seller's factual statement for an express warranty claim to be based on the statement. In that regard, the opinion is not only in direct conflict with *Keith v. Buchanan* (1985) 173 Cal.App.3d 13 (*Keith*), it also disapproves CACI No. 1240, based on *Keith*, which the opinion says "misguidedly states that the defendant is not liable for harm to the plaintiff if the defendant 'proves that plaintiff did not rely on' the defendant's statement in deciding to purchase the product." (Typed opn., 22, fn. 12.)[4] This court's opinion is also in conflict with *Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 760 (*Fogo*), which noted on the issue of whether "reliance is a necessary element" under section 2313 "there appears to be no reason to hold that reliance upon the warranty is not still a vital ingredient for

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[4] The opinion misreads *Keith* in stating that "the court in *Keith* concluded that 'the concept of reliance has been purposefully abandoned'" (typed opn., 13) and that "the opinion in *Keith* contradicts itself on this matter [whether section 2313 abandoned the concept of reliance]" (typed opn., 22). The quoted language from *Keith* is merely descriptive of the views expressed by the *commentators* to section 2313. (*Keith, supra*, 173 Cal.App.3d at p. 23.) But *Keith* explains that those views have not been followed by the courts, which instead "'have held that consumer reliance still is a vital ingredient for recovery based on express warranty.'" (*Id.* at pp. 22-23.) The *Keith* opinion goes on clearly to hold that reliance *is* an element of an express warranty claim: (1) if "'the resulting bargain does not rest at all on the representations of the seller, those representations cannot be considered as becoming any part of the "basis of the bargain"'"; (2) while a "warranty statement made by a seller is presumptively part of the basis of the bargain," a seller may "prove that the resulting bargain does not rest at all on the representation"; and (3) the "buyer's actual knowledge of the true condition of the goods prior to the making of the contract may make it plain that the seller's statement was not relied upon as one of the inducements for the purchase." (*Id.* at p. 23.)

recovery," and with *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 660 (*Osborne*), in which the court's analysis of express warranty claims in a class action context assumed that reliance was a required element of those claims.

Unless this court omits the opinion's alternative ground for reversing the trial court's order decertifying the express warranty class, Supreme Court review will be necessary to resolve the conflict the opinion creates with *Keith, Fogo,* and *Osborne.* (See Cal. Rules of Court, rule 8.500(b)(1) [providing for Supreme Court review of Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law"].) Both trial courts and the CACI Committee will now need guidance on which approach is correct.

While the Supreme Court has not yet itself resolved whether the basis of the bargain requirement in section 2313 has eliminated the element of reliance, the court signaled in *Hauter v. Zogarts* (1975) 14 Cal.3d 104 that reliance *is* a required element of an express warranty claim. First, the Supreme Court noted the view of commentators that "the basis of the bargain requirement merely shifts the burden of proving non-reliance to the seller," and stated that "the comments to section 2313 seem to bear out this analysis; they declare that 'all of the statements of the seller [become part of the basis of the bargain] *unless good reason is shown to the contrary.*" (*Id.* at pp. 115-116.) Second, the Supreme Court observed that the "scattered cases from other jurisdictions generally have ignored the significance of the new standard and have held

that consumer reliance still is a vital ingredient for recovery based on express warranty." (*Id.* at p. 116, fn. 13.)

Indeed, most other jurisdictions that have considered the issue—including the highest courts of several other states—have held that analogous versions of section 2313 do require actual reliance by the individual purchaser to create an express warranty. Consistent with CACI No. 1240, those courts have held that section 2313 at most creates a presumption of reliance by the purchaser, which the seller has a right to rebut. For example:

Arkansas: In *Ciba-Geigy Corp. v. Alter* (1992) 309 Ark. 426, 447 [834 S.W.2d 136, 147], the Arkansas Supreme Court held that under section 2313 as adopted in its state, an "affirmation of fact must be part of the basis of the parties[']bargain to be an express warranty" and "[w]hen a buyer is not influenced by the statement in making his or her purchase, the statement is not a basis of the bargain."

Colorado: In *Anderson v. Heron Engineering Co., Inc.* (1979) 198 Colo. 391, 394 [604 P.2d 674, 676], the Colorado Supreme Court held that under its state's version of section 2313, a representation in a brochure did not create an express warranty absent evidence "that the sales brochure which contained that warranty *was seen or otherwise relied on* by Keystone when it purchased the chair lift." (Emphasis added.)

Delaware: In *DiIenno v. Libbey Glass Div., Owens-Illinois, Inc.* (D.Del. 1987) 668 F.Supp. 373, 376, the district court held that "[i]t is clear that a successful action for breach of an expressed warranty may not be maintained in Delaware absent some reliance

by the buyer on the warranty," and that an express warranty claim based on a representation the buyer did not see before purchasing the product "must fail."

Florida: In *Royal Typewriter Co. v. Xerographic Supplies* (11th Cir. 1983) 719 F.2d 1092, 1101, the Eleventh Circuit held that under Florida's version of section 2313, "[t]he requirement that a statement be part of the basis of the bargain 'is essentially a reliance requirement'" and "[t]he buyer's knowledge [of the product's actual capabilities] or *absence of reliance* will negate the existence of an express warranty." (Emphasis added.)

Indiana: In *Royal Business Machines, Inc. v. Lorraine Corp.* (7th Cir. 1980) 633 F.2d 34, 44 and footnote 7, the Seventh Circuit held that under Indiana's enactment of section 2313 the "requirement that a statement be part of the basis of the bargain in order to constitute an express warranty 'is essentially a reliance requirement'" and that an "affirmation of fact which the buyer from his experience knows to be untrue cannot form a part of the basis of the bargain."

Illinois: In *Stamm v. Wilder Travel Trailers* (1976) 44 Ill.App.3d 530, 534 [358 N.E.2d 382, 385], the intermediate appellate court held that under Illinois' version of section 2313, the "language of the statute requires that the 'affirmation of fact or promise' or description of the goods be 'part of the basis of the bargain,'" and that "cases under the present day Commercial Code [citation omitted] require a reliance by the buyer upon the promise, affirmation or description" before an express warranty is created. (See also *Alan Wood Steel Co. v. Capital Equipment Enterprises,*

Inc. (1976) 39 Ill.App.3d 48, 57 [349 N.E.2d 627, 635] [a "buyer's lack of reliance on seller's affirmations or descriptions preclude[s] the creation of an express warranty"]; typed opn., 15 [citing *Alan Wood*].)

Kentucky: In *Overstreet v. Norden Laboratories, Inc.* (6th Cir. 1982) 669 F.2d 1286, the Sixth Circuit held that "[r]eliance is an element of a cause of action for express warranty" under Kentucky's version of section 2313 (*id.* at p. 1288), and that "a buyer may not rely blindly on a statement or affirmation that he knows is incorrect" and may "not disregard any special knowledge he possesses or his accumulated experience with a product in determining whether to enter the bargain" (*id.* at p. 1291). "Consequently, a statement known to be incorrect cannot be an inducement to enter a bargain." (*Ibid.*)

Maine: In *Cuthbertson v. Clark Equipment Co.* (Me. 1982) 448 A.2d 315, 321 (see also typed opn., 14 [citing *Cuthbertson*]), the Maine Supreme Court held that under its state's version of section 2313 there was no express warranty absent evidence that the purchaser "relied on the quoted language [from the product's manual] in making the purchase."

Minnesota: In *Midland Loan Finance Co. v. Madsen* (1944) 217 Minn. 267, 278 [14 N.W.2d 475, 481], the Minnesota Supreme Court held that "[t]o enable a party relying upon a breach of express or implied warranty to recover, it must be clear and definite that there was actual reliance upon the warranties involved." In *Hendricks v. Callahan* (8th Cir. 1992) 972 F.2d 190, 193-195, the Eight Circuit subsequently surveyed Minnesota law and concluded

that *Midland* reflects current law and that a plaintiff "must show some form of reliance on the warranty to succeed" on an express warranty claim.

Mississippi: In *Global Truck & Equipment Co. v. Palmer Mach. Works* (N.D.Miss. 1986) 628 F.Supp. 641, 652, the district court held that under Mississippi's version of section 2313, an express warranty was not created where "the plaintiff failed to prove by a preponderance of the evidence that the statements contained in the [defendant's] brochure were relied upon by [plaintiff] prior to or contemporaneously with the [purchase of the product]."

Nebraska: In *Wendt v. Beardmore Suburban Chevrolet, Inc.* (1985) 219 Neb. 775, 780 [366 N.W.2d 424, 428], the Nebraska Supreme Court held that under section 2313 (as enacted in Nebraska), "[s]ince an express warranty must have been 'made part of the basis of the bargain,' it is essential that the plaintiffs prove reliance upon the warranty."

New Hampshire: In *Kelleher v. Marvin Lumber & Cedar Co.* (2005) 152 N.H. 813, 844 [891 A.2d 477, 502], the New Hampshire Supreme Court held that under its state's version of 2313, "[t]he presumption that a seller's statement becomes a part of the basis of the bargain can be overcome," and "a seller's statement will not be presumed to be part of the basis of the bargain when the buyer knew the statement to be false or was not influenced by it, or when the statement was not made until after the sale of the product."

New Jersey: In *Viking Yacht Co. v. Composites One LLC* (D.N.J. 2007) 496 F.Supp.2d 462, 469, the district court held that

"[u]nder New Jersey law, a representation is presumed to be part of the basis of the bargain once the buyer has become aware of the affirmation of fact or promise and can be rebutted by clear affirmative proof . . . that the buyer knew that the affirmation of fact or promise was untrue." (Internal quotation marks omitted; see also *Cippollone v. Liggett Group, Inc.* (3d Cir. 1990) 893 F.2d 541, 567, revd. on other grounds (1992) 505 U.S. 504 [112 S.Ct. 2608, 120 L.Ed.2d 407] [applying New Jersey law and noting "[i]t strains the language to say that a statement is part of the 'basis' of the buyer's 'bargain,' when that buyer had no knowledge of the statement's existence"].)

Oklahoma: In *Speed Fastners, Inc. v. Newsom* (10th Cir. 1967) 382 F.2d 395, 397, the Tenth Circuit held that under Oklahoma's version of section 2313, a representation did not become a part of the basis of the bargain where "[n]othing shows that the employer when purchasing [the product] relied on any statement in the pamphlet, any promise, or any description of the product."

Pennsylvania: In *Sessa v. Riegle* (E.D.Pa. 1977) 427 F.Supp. 760, 766, the district court held that under Pennsylvania's enactment of section 2313, the "'part of the basis of the bargain', the second requisite of [section 2313] . . . is essentially a reliance requirement," although "all statements of the seller [become] part of the basis of the bargain unless clear affirmative proof is shown to the contrary." (See also *Solarz v. DaimlerChrysler Corp.* (Pa.Ct.Com.Pl., Oct. 23, 2003, No. 2033 April Term 2001, 111376) 2003 WL 23190038, at *4-*5 [nonpub. opn.] ["[b]asic contract law provides that to form an express warranty, the buyer must have

'relied' on the seller's representations" and "[g]iven that individuals must have 'relied' on the Defendant's alleged misrepresentations or omissions to form an express warranty, individual questions exist as to whether such representations formed the 'basis of the bargain'"].)

Rhode Island: In *Thomas v. Amway Corp.* (R.I. 1985) 488 A.2d 716, 720, the Rhode Island Supreme Court held that under its state's version of section 2313, the "plaintiff who claims breach of express warranty has the burden of proving that the statements or representations made by the seller induced her to purchase that product and that she relied upon such statements or representations."

South Dakota: In *Schmaltz v. Nissen* (S.D. 1988) 431 N.W.2d 657, 661, the Supreme Court of South Dakota held that language on a bag containing seed, the product at issue, did not "constitute[] an express warranty, since it is clear that such language did not in any way become the basis of the bargain" where the buyers "admit that they purchased the seed prior to seeing the bag containing the seed." Thus, "[w]ithout having read or even known of this language, it is impossible to say this language was part of the basis of the bargain." (*Ibid.*)

Texas: In *Compaq Computer Corp. v. Lapray* (Tex. 2004) 135 S.W.3d 657, 676-677, the Texas Supreme Court held that "[u]nder Texas law, we have said that '[r]eliance is . . . not only relevant to, but an element of proof of, plaintiffs' claims of breach of express warranty (to a certain extent) . . .' and that "'an express warranty claim . . . requires a form of reliance.'" (See also *Indust-Ri-Chem*

Laboratory, Inc. v. Par-Pak Co., Inc. (Tex.Civ.App. 1980) 602 S.W.2d 282, 293 ["Obviously, if the buyer knows that a representation of the seller is untrue, that representation cannot be a part of the basis of the bargain"].)

Wisconsin: In *Ewers v. Eisenzopf* (1979) 88 Wis.2d 482, 489 [276 N.W.2d 802, 805], the Wisconsin Supreme Court adopted a reliance-like test for determining whether an express warranty has been created under UCC section 2-213: "'The true test is . . .whether [the seller] made an affirmation of fact *the natural tendency of which was to induce the sale and which did in fact induce it.*'"

In adopting a contrary approach, this court's opinion relies on *Murphy v. Mallard Coach Co.* (N.Y.App.Div. 1992) 179 A.D.2d 187, 193, and three other cases for the proposition that a warranty card accompanying a consumer good becomes part of the basis of the bargain. (See typed opn., 16-17.) Even those decisions, however, do not categorically reject the requirement of reliance under section 2313 as this court's opinion does, but instead rest on "the practical realities of consumer transactions" in each case when determining what a consumer would reasonably rely upon. (*Murphy*, at p. 193.)

Here, the trial court's decertification of the express warranty class was supported by much more than the evidence that plaintiffs would not have seen the directions for use until after purchasing the Cavitron. The court's order was also supported by evidence that dentists are not ordinary consumers, and are either aware or are presumed to be aware of controlling California regulations requiring the use of sterile water in oral surgery. An individualized dentist-

by-dentist inquiry is therefore necessary to determine whether, despite that awareness, he or she relied on any representation in the directions for use when purchasing a Cavitron for oral surgery.

In sum, this court's conclusion that there is no longer any element of reliance that must be proven in connection with an express warranty claim under section 2313 is in conflict with currently settled California law (as expressed in *Keith* and in CACI No. 1240), as well as the majority of other jurisdictions that have addressed the question. Because this court found an independent basis for reversing the trial court decertification of the express warranty class, it is wholly unnecessary for the opinion to reach an issue that creates a split in California law. The court should therefore modify its opinion to delete that portion of its express warranty discussion (pages 12 to 23).

B. The opinion violates the rule against addressing the legal merits of a claim when determining the propriety of class treatment.

In *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438-443 (*Linder*), the Supreme Court endorsed the general rule followed by the federal courts that in making a procedural determination regarding the propriety of class treatment of a claim, a court should

avoid any inquiry into—much less determination of—the legal merits of the claim.[5]

Here, rather than merely determining whether the trial court properly decertified the express warranty class as a procedural matter, the opinion appears to address the merits of whether the representations in the Cavitron's directions for use were, in fact, part of the basis of the bargain between Dentsply and purchasers of the Cavitron. The opinion could therefore be misinterpreted as foreclosing the trier of fact from later determining whether those representations qualified as express warranties under section 2313. Determinations on the merits of plaintiffs' claims should be left to the finder of fact, and should not be made at the certification stage.

This court should therefore modify its opinion to delete the express warranty analysis at pages 12 through 23, since that analysis addresses and even suggests a determination on the merits of plaintiffs' express warranty claims, in violation of *Linder*.

III. THE OPINION SHOULD BE MODIFIED TO CORRECT VARIOUS FACTUAL ERRORS AND OMISSIONS.

It is well settled that the substantial evidence standard of review applies on appeal when determining the propriety of an order certifying or decertifying a class. (See, e.g., *Capitol People*

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[5] The exception to that general rule—"where the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class, the trial court may, after giving the parties notice and an opportunity to brief the merits question"—is not applicable here. (*Linder*, *supra*, 23 Cal.4th at p. 443.)

First v. State Dept. of Developmental Services (2007) 155 Cal.App.4th 676, 689 [First Dist., Div. Four].) Under that standard, this court should have viewed the record in the light most favorable to the prevailing party (here, Dentsply), resolving all evidentiary conflicts in its favor and indulging all reasonable inferences in support of the trial court's order. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633.)

In numerous respects, however, this court's opinion resolves factual conflicts in favor of *plaintiffs* rather than Dentsply, makes inferences contrary to the trial court's order, or simply misstates the record, all contrary to the governing substantial evidence standard of review. The opinion should be modified to conform to that standard of review and to correct the following factual errors and omissions, which are bound to cause confusion on remand:

Section I.A. The Device; Regulatory Framework

- The discussion of federal labeling requirements at pages 2 through 3 of the opinion omits any mention of a highly important exception to labeling requirements for hazards that are commonly known: "*Provided, however*, [t]hat *such information may be omitted* from the dispensing package if, but only if, the article is a device for which directions, hazards, warnings, and other information are *commonly known to practitioners* licensed by law to use the device. (21 C.F.R. § 801.109(c) (2009), second emphasis added; 3 AA 736 [same]; see also 2 AA 359 ["indications, contraindications, precautions and warnings assume a certain level of expertise and

knowledge on behalf of the learned intermediary, the dentist[,] who is, in fact, responsible for the health of his patient"].) This omission undermines any assumption that a warning must state all known hazards to be adequate under federal labeling requirements.

- The opinion states that "*[s]ince 1996*, California dental regulations have required practitioners to use '[s]terile coolants/irrigants' for 'surgical procedures involving soft tissue or bone.'" (Typed opn., 3, emphasis added.) The date "1996" should be replaced with "1994," since the record reflects that the regulations went into effect that year rather than in 1996 (see 5 AA 1043; 11 AA 2659)—a fact that is relevant to the materiality of the directions for use as to plaintiffs who purchased the Cavitron after 1994.

- The opinion states that "[a]round 1997, new Cavitron models were introduced in which the indications were stated in *broader* language to encompass '[a]ll general supra and subgingival scaling applications' and '[p]eriodontal debridement for all types of periodontal diseases.'" (Typed opn., 3, emphasis added.) The word "broader" should be replaced with "narrower." While the pre-1997 directions referred to "root planing during surgery" (e.g., 1 AA 239), the revised instructions did not use the word surgery at all, and there is evidence in the record that general "supra and subgingival scaling" and "periodontal debridement" are *not* per se oral surgical procedures (12 AA 2895; 14 AA 3618 [debridement of root after opening gum flap not oral surgery]; see 16 AA 4102, 4105-4106; see also 9 AA 2146 [referring to "ultrasonic debridement" as a "nonsurgical dental procedure"].

Section I.B. Litigation and Discovery

- The opinion states that the "crux of the complaint is that the Directions indicate that Cavitrons can be used in oral surgery, but in fact they are unsafe for such use because the device is incapable of delivering a *safe* water stream during oral surgical procedures." (Typed opn., 3, emphasis added.) The word "safe" should be replaced with "sterile," for the reasons discussed in section I, above. Moreover, the record reflects that plaintiffs' focus in discovery was on whether Dentsply disclosed nonsterility, rather than on whether the water stream was "safe." (See, e.g., 4 AA 934-936 [request for admissions].)

- The opinion notes that Denstply sent letters to over 20,000 dentists in June 2005 "emphasizing that 'conventional ultrasonic scalers do not deliver sterile fluids unless specifically equipped with a sterile water delivery system,'" and that "'if in your professional judgment, any dental procedure requires the delivery of sterile fluids, choose a sterile delivery system.'" (Typed opn, 4.) Even though the letter (which merely summarizes the information already disseminated by the 2003 CDC guidelines (see 3 AA 689)) is highly relevant to the materiality of indications in the directions for use as to any dentist who thereafter purchased a Cavitron, the opinion omits any discussion of the letter in either its UCL or express warranty discussion.

Section II.A. Decertification of UCL Cause of Action

- In summarizing the Supreme Court's decision in *In re Tobacco II Cases* (2009) 46 Cal.4th 298, the opinion states that the decision holds that a "class representative need not demonstrate

individualized reliance on a specific misrepresentation." (Typed opn., 7.) That sentence should be modified to add the following italicized language: "Finally, *in the context of a 'decades-long campaign of the tobacco industry to conceal the health risks of its product,'* the class representative need not demonstrate individualized reliance on a specific misrepresentation."

- Footnote eight of the opinion refers to "Dentsply's claim that the Cavitron *was safe for use in surgery*." (Typed opn., 8, fn. 8, emphasis added.) As previously noted, the post-1997 directions for use do not mention oral surgery, and the premise that periodontal debridement can reasonably be construed as oral surgery is contrary to the record under the governing standard of review and, at minimum, raises individual issues. Furthermore, the interpretation that post-1997 indications for use meant the device was safe and efficacious for oral surgery rests on an inference. (1 AA 56 [contending that the 1997 revision made use in surgery "implicit rather than explicit"]; 2 AA 267 [whether pre-1997 indications referred to surgery depends on how dentists would interpret "'root planing' during oral surgery" to include "an oral surgical context"].) Plaintiffs' motion for class certification concedes as much. (1 AA 53 ["this implied that the Cavitron, when flushed as directed, was safe"].) Under the substantial evidence standard of review that applies here, all inferences must be drawn in favor of Dentsply, rather than plaintiffs.

- With respect to the "materiality of Dentsply's representations concerning the Cavitron's safety for surgical uses," the opinion states that materiality "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." (Typed opn., 8, fn. 8.) This is inherently illogical as to dentists who knew the Cavitron could not produce sterile water and knew that California regulations required the use of sterile water during oral surgery, but who nonetheless either purchased the Cavitron for use in oral surgery or continued using it in surgery after learning those facts. Indeed, some of the named plaintiffs admit they have continued to use Cavitron scalers daily in surgical and/or non-surgical procedures *even after filing this lawsuit.* (5 AA 1050, 1217-1219, 1232-1233, 1242, 1245; 6 AA 1430; 11 AA 2632-2634, 2642-2643, 2647, 2666, 2687; see also 5 AA 1227, 1238; 11 AA 2638.) Dr. Nathan, for example, testified when deposed in 2005 that he had used the Cavitron "in oral surgical procedures" during the week before his deposition. (6 AA 1430.)[6] Contrary to the language in the opinion, the *immateriality* of the directions for use was objectively established by plaintiffs' use of the device knowing it did not

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[6] One of plaintiffs' original class representatives, Dr. Stultz, also testified that he continued using the Cavitron for surgery even after filing his complaint. (6 AA 1470.) Thus, while Dr. Stultz is no longer part of this action, it is significant that two of the original class representatives continued using the Cavitron *for surgery* after filing a lawsuit claiming that doing so was dangerous. Dentsply's directions for use could not have been material to them. Accordingly, the materiality of the indications in the directions for use cannot be presumed classwide, and necessarily presents a question for individual determination.

produce sterile water and its continued use in oral surgery after they filed this lawsuit.

- For the same reasons, the statement that "[t]here are no individual issues concerning the nature and extent of material misrepresentations" (typed opn., 8, fn. 8) contradicts the evidentiary record. There are a myriad of such individual issues—for example, whether the directions for use were material to (1) a purchaser of a Cavitron for oral surgery who was aware that the device could not produce sterile water and that California regulations require the use of sterile water during surgery; (2) a post-1997 purchaser who does not consider "periodontal debridement" or general "supra and subgingival scaling" to be oral surgical procedures; (3) a purchaser who intended to use the Cavitron for both surgical and non-surgical uses, but then switched to a sterile water system based on changes in California regulations requiring sterile water; or (4) a purchaser who did not change his or her use after subsequently learning that the water produced by the Cavitron was neither sterile nor compatible with state regulations for oral surgery.

Section II.B.1. Breach of Express Warranties—Introduction; Standard of Review

- In the first paragraph on page 10 of the opinion, the second, third, and fourth sentences should be modified by the introductory phrase "The third amended complaint alleged that . . . ." As written, the opinion appears to be quoting Dentsply's warranty language, rather than plaintiffs' characterization of that language. For example, the italicized language in this sentence does not appear in any written express warranty: "First, Dentsply

expressly warranted at the time of purchase that the Cavitron 'would be free from any defects in materials or workmanship *that could affect its intended professional use in a dental office*, for one year after its sale.'" (Typed opn., 10, emphasis added; see, e.g., 3 AA 580.) Nor does the italicized language in this sentence appear in the directions for use: "Second, Dentsply expressly warranted *that the device was 'safe, appropriate and "indicated" for use in performing* root planing during oral surgical procedures' . . . ." (Typed opn., 10, emphasis added; see, e.g., 1 AA 239.) Finally, since there is no quoted language at all in the fourth sentence, a reader could mistakenly understand that sentence to be the court's view rather than a summary of plaintiffs' allegations.

Section II.B.3. Breach of Express Warranties—Reliance

- For the reasons stated previously (see *ante*, p. 11, fn. 4), the following sentence on page 13, at the end of the first paragraph, should be modified to add the italicized language: "In light of the language of section 2313 and official comment 3, the court in *Keith* concluded that *the commentators to section 2313 believed* 'the concept of reliance has been purposefully abandoned.'"

- At page 14, the opinion states: "Here it is undisputed that *the alleged express warranties* are statements in the Directions, and the Directions are sealed in the Cavitron package when delivered." (Emphasis added.) As previously noted, much of the language that plaintiffs allege to be express warranties—e.g., that the Cavitron is "'safe, appropriate and "indicated" for use'" (typed opn., 10)—does not even appear in the directions for use, so the terms of any express warranty by Dentsply are far from undisputed.

- At page 16, the opinion states that "[u]nder Denstply's view of express warranty law, the company would not be obliged to stand by any statement it made in the Directions, including the printed 'limited warranty' guaranteeing against defects in manufacture and workmanship." That misstates Dentsply's argument. The respondent's brief acknowledges that where the words "warrant" or "guarantee" are used, an express warranty is created regardless whether that language is seen by the buyer prior to purchase. (RB 60, fn. 21.)

Section II.B.4. Variations in Directions

- With respect to the two subclasses alleged by plaintiffs, the opinion states that "there was no possibility for variation among the representations at issue because the two subclasses were defined by the appropriate wording that the Cavitron was medically indicated for surgical use." (Typed opn., 19.) But as to subclass B, the representation did not refer to "'oral surgery,'" but only to "'"periodontal debridement for all types of periodontal diseases."'" (*Ibid.*) As previously discussed (see *ante*, pp. 23, 25), there is substantial evidence in the record that this representation does not involve oral surgery at all. Furthermore, if the distinction between water sterility and biofilm formation were a legally significant one, then another material variation in the directions for use within subclass B occurred in 2005 to 2006, when Dentsply warned dentists not to use the Cavitron where sterile fluids are required, and further advised that the Cavitron's waterlines be flushed

weekly with bleach. (See typed opn., 4-5; see also 2 AA 264, 288, 290 [chemical flushing is effective in controlling biofilm].)[7]

- In the same paragraph, the opinion states that "Dentsply did not, and has not, identified any variation in the wording of indications for use, contraindications, precautions or maintenance instructions within the models contained in the two subclasses that bear materially on the issues relevant to the lawsuit." (Typed opn., 19.) As just noted, the 2005 to 2006 warnings created material variations in indications for use and maintenance among members of subclass B.

- The final sentence in the first paragraph of page 19 should be modified as indicated: "Significantly, throughout the class period, the Directions were silent on the issue of *potential biofilm formation* ~~biofilm infection risk~~." The record establishes that in millions of uses of the Cavitron over more than 40 years, there has never been any reported infection or illness attributed to the output water of the device. (4 AA 935, 1028; 5 AA 1042-1043; 11 AA 2624, 2658-2659; see also 4 AA 1034, 1036, 1038.) And the 2003

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[7] As early as 1997, the directions for use advised dentists:

> **4.3 Water Supply Recommendations**
> It is highly recommended that all dental water supply systems conform to applicable CDC (U.S. Centers for Disease Control and Prevention) and ADA (American Dental Association) standards, and that all recommendations be followed in terms of flushing, chemical flushing, and general infection control procedures. See sections 5.2 and 9.

(6 AA 1319.)

CDC guidelines state that "[r]esearchers have not demonstrated a measurable risk among adverse health effects among [dental practitioners] or patients from exposure to dental water." (3 AA 688; see also 4 AA 894.) Indeed, the microorganisms found in dental unit water lines are considered to be of "low pathogenicity," with "little evidence that any have directly caused a human infection." (2 AA 296; see also 6 AA 1383 ["there is no evidence that dental unit water is harmful to patients"].)

- The opinion states that "the infection control information card is a red herring" because "[o]ther than advising on brief flushing of waterlines at the beginning of the day and between patients, the bulk of the 'information' on the card pertained to cleaning the Cavitron's external surfaces and sterilizing removable patient-contact components." (Typed opn., 19.) The opinion fails to explain why the fact that the bulk of the information on the card is not at issue renders the highly relevant portion of the card immaterial.

- The following sentence at page 19 of the opinion should be modified as follows: "*While* [t]he card did not mention waterline biofilm risk or its treatment, ~~nor did it~~ *or specifically* discuss the indications for use, *it did state that the recommended daily procedures were directed to 'the destruction of . . . harmful microorganisms.'*" (See 6 AA 1271-1275.)

- At page 20, the opinion states: "Appellants proclaim that Dentsply warranted the Cavitrons were free from defects in workmanship and materials *that would pose health risks to patients*, and were safe and indicated for use in surgical applications when

maintained as specified in the Directions." (Emphasis added.) The italicized language is factually wrong because, as previously explained (see *ante*, p. 8, fn. 3, 27, 28), it does not appear anywhere in the directions for use. Also, it is disputed that any express warranty as to surgical applications was made because, as also previously explained (see *ante,* pp. 23, 25), there is substantial evidence that the indicated uses from 1997 onward are not surgical applications.

- The opinion next states that "[t]he alleged inevitable formation of biofilm is both the inherent defect in the Cavitron, as well as the health risk that purportedly renders the device unsafe." (Typed opn., 20.) This statement contradicts the record in multiple respects. As explained in section I, the potential formation of biofilm is not an "inherent defect" relevant to plaintiffs' express warranty claims, which rest on an alleged unfitness for use in oral surgery. But if the Cavitron is unfit for use in oral surgery in California, it is because it is not designed to and does not purport to produce sterile water, not because of biofilm per se. The potential formation of biofilm is merely incidental to its fitness for oral surgery, because even if the Cavitron did not potentially form biofilm it still could not be used for oral surgery under California's stringent regulations.

Furthermore, in this and all other uses, the Cavitron does not present any health risk that renders the device unsafe. For example, Dr. Nathan, one of the named plaintiffs testified that after 18 years of use, his Cavitron was tested at only 200 cfu/ml, well within the standard for water potability, and that he still uses it

daily and in most surgeries. (5 AA 1211; 6 AA 1461; see 5 AA 1212 [since Nathan's purchase of a Cavitron in 1987, it has not needed service or repair and "seems to be working fine"]; see also 4 AA 1034, 1036, 1038 [declarations of three other California dentists who have used Cavitrons without problems for 12, 20, and 9 years respectively].) Dr. Weinstat also testified about his satisfaction with the Cavitron and its superiority to hand scaling, acknowledging that he still uses it daily for cleaning "both [supra]gingivally and subgingivally"—even after filing his complaint. (6 AA 1455.) The actions of these two class representatives cannot be reconciled with the statement in the opinion that the Cavitron is inherently defective or unsafe.

Section II.B.5. Seller's Right to Rebut

- Page 22 of this court's opinion misreads the *Keith* decision when it states:

> Moreover, the opinion in *Keith* contradicts itself on this matter. On the one hand the opinion states unequivocally that "[i]t is clear" section 2313 "purposefully abandoned" the concept of reliance. (*Keith, supra*, 173 Cal.App.3d at p. 23.) On the other hand, we must ask 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?

As previously explained (see *ante*, p. 11, fn. 4), the *Keith* decision merely observed that it was clear that the *commentators* to section 2313 believed it had "purposefully abandoned" the concept of reliance. The decision further observed that most courts interpreting and applying section 2313 had disagreed with that

view—as did the *Keith* court itself, by holding that section 2313 merely creates a *presumption* of reliance that may be rebutted by the defendant.

- At the bottom of page 22 and top of the next page, the opinion states that "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 multitude of individual ones . . . .'" But here it is likely that more than a "few individuals" read the Journal of the American Dental Association, which ran a cover story on biofilm in 1996 (3 AA 717 [reference 339]), or the many other articles on biofilm that are detailed in the CDC's 2003 "Guidelines for Infection Control in Dental Health-Care Settings" which are directed to practitioners (see 3 AA 659, 708-720 [e.g., references 303, 305, 307, 309, 312, 314, 315, 316, 335, 338, 339, 343, 345]). Further, as previously explained, plaintiffs' express warranty claim raises questions regarding individual purchasers' presumed, if not actual knowledge of California regulations and the Cavitron's inability to produce sterile water—knowledge that would rebut any presumption of reliance on the directions for use. (See 5 AA 1049 ["it is the dental health care practitioner's responsibility to keep current with the relevant literature and state and national guidelines and regulations regarding dental unit waterline quality, as infection control and water quality is an evolving concept"].)

- With further respect to plaintiffs' express warranty claims, the opinion states that the "issue is whether patient safety in surgical applications went to the essence of what Dentsply agreed

to sell." (Typed opn., 23.) That would be true only if plaintiffs were asserting a claim for breach of implied warranties of fitness for a particular purpose or merchantability. On their express warranty claims, the issue is whether Dentsply *expressly* warranted "patient safety in surgical applications." (*Ibid.*) Dentsply will not "be hard pressed to show it did not" (*ibid.*), since those words do not appear anywhere in the directions for use, and as to the directions for use from 1997 onward, it is disputed whether there is any reference to surgical applications at all.

- Regarding whether Dentsply could present evidence rebutting plaintiffs' claims of reliance on the indicated uses in the directions for use, the opinion states: "Furthermore, there was no factual showing that the relevant affirmations were *taken out of* the agreement, i.e., there was no showing that any class members were not concerned about surgical safety or the safe functioning of Cavitrons according to their indicated uses, or waived affirmations going to such concerns." (Typed opn., 23.) As previously discussed, some of the named plaintiffs (who are deemed to have claims typical of the class) continued to use the Cavitron daily in surgical and/or non-surgical procedures even after filing this lawsuit, showing either a recognition of the absence of any expected harm or, if their allegations of "biofilm risk" are sincere, a lack of concern about the safe functioning of the Cavitron according to its indicated uses. Furthermore, there is evidence in the record from which a factfinder could conclude that some—if not all—plaintiffs knew at the time of purchase that the output water from the Cavitron was not sterile,

yet they purchased it for oral surgery anyway. (E.g., 13 AA 3112-3114 [Dr. Nathan], 3124-3125 [Dr. Weinstat].)

- At page 23, the opinion states that "the issue in this litigation is not water sterility per se, but rather the formation of bacteria-laden biofilm, caused by the design of the Cavitron's inner water tubing, and the contamination risks posed by that phenomenon." For the reasons already explained in section I, that statement is factually and legally incorrect.

- The final sentence in the opinion's express warranty analysis states: "There was no evidence that appellants were aware of the biofilm risk posed by Cavitron usage, but purchased and used it anyway." (Typed opn., 23.) To the contrary, Dr. Weinstat testified that he knew about the formation of biofilm in dental waterlines as early as 1963. (5 AA 1149; 6 AA 1456.) Likewise, Drs. Nathan and Stultz were still using the Cavitron for oral surgery even after retaining counsel and filing the complaint in this action. (6 AA 1430, 1461, 1470.)

CONCLUSION

For the foregoing reasons, rehearing should be granted so that this court's decision can be modified as the court deems appropriate with respect to the errors and omissions outlined herein.

January 21, 2010

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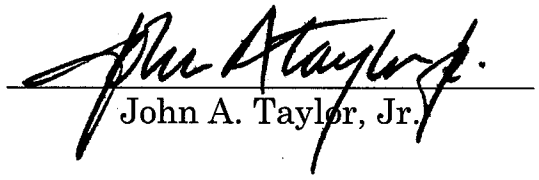
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 8,460 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: January 21, 2010



John A. Taylor, Jr.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On January 21, 2010, I served true copies of the following document(s) described as **PETITION FOR REHEARING OR MODIFICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on January 21, 2010, at Encino, California.

Raeann Diamond

SERVICE LIST
Weinstat v. Dentsply International, Inc.
Court of Appeal No. A116248

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California Supreme Court 350 McAllister Street San Francisco, CA 94102-3600	4 copies

Ronald A. Reiter Supervising Deputy Attorney General Office of the Attorney General Consumer Law Section 455 Golden Gate Avenue, Suite 11000 San Francisco, California 94102-7004	Unfair Competition Case: Service on Attorney General and District Attorney Required by Bus. & Prof. Code, § 17209. (See Cal. Rules of Court, Rule 8.29(c).)
Office of the District Attorney Hall of Justice 850 Bryant Street, Room 325 San Francisco, CA 94103	Unfair Competition Case: Service on Attorney General and District Attorney Required by Bus. & Prof. Code, § 17209. (See Cal. Rules of Court, Rule 8.29(c).)