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IN THE SUPREME COURT OF CALIFORNIA

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

v.

DENTSPLY INTERNATIONAL INC.,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NO. A116248

REPLY TO ANSWER TO PETITION FOR REVIEW

HORVITZ & LEVY LLP
LISA PERROCHET (BAR NO. 132858)
JOHN A. TAYLOR, JR. (BAR NO. 129333)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
lperrochet@horvitzlevy.com
jtaylor@horvitzlevy.com

STOKES ROBERTS & WAGNER, ALC
MARIA C. ROBERTS (BAR NO. 137907)
600 WEST BROADWAY, SUITE 1150
SAN DIEGO, CALIFORNIA 92101-3354
(619) 232-4261 • FAX: (619) 232-4840
mroberts@stokesroberts.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
DENTSPLY INTERNATIONAL INC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

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INTRODUCTION

Ducking the fact that the Court of Appeal's opinion here creates undeniable conflicts and confusion on recurring legal questions of enormous statewide importance, plaintiffs' answer to Dentsply's petition attempts to defend the court's conclusions. That attempt, unpersuasive as it is, belongs in briefing on the merits, after review is granted. For now, the question is whether lower courts and litigants have the guidance they need on the questions presented in Dentsply's petition, and the answer is plainly no.

LEGAL ARGUMENT

I. THE ANSWER FAILS TO ADDRESS ANY OF THE POST-*TOBACCO II* DECISIONS THAT ARE INDISPUTABLY IN CONFLICT WITH THE COURT OF APPEAL'S DECISION.

Post-*Tobacco II* decisions are split on whether, in a class action based on the "fraud" prong of the UCL, individual inquiry into the effect of a challenged business practice on consumers may be needed to decide whether UCL claims can manageably be litigated on a class-wide basis. The Court of Appeal, assuming an *inherent* homogeneity among absent class members with respect to liability and remedies, held as a matter of law that it is unnecessary for courts "to delve into individual proof of material[ity], reliance and resulting damage" as to any of the absent class members. (Typed opn., 9.)

That conclusion is a controversial one. As recently noted by one prominent UCL commentator, there are now at least nine post-*Tobacco II* decisions (including the decision below) that "are difficult to reconcile," such that "the Supreme Court will need to select a case to take up and elaborate on *Tobacco II.*" (Kralowec, *Nine post-*Tobacco II *opinions* (Mar. 8, 2010) The UCL Practitioner <http://www.uclpractitioner.com/2010/03/nine-posttobacco-ii-opinions.html> [as of Mar. 10, 2010].)

Plaintiffs, however, fail to mention any of the conflicting post-*Tobacco II* decisions discussed in Dentsply's petition. For example,

plaintiffs never confront the conflict between the decision here and *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966 (*Cohen*), in which this court recently denied review. (See PFR 16-20.) *Cohen* held that "we do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice" (*Cohen, supra,* 178 Cal.App.4th at p. 980), and that "the trial court's concerns that the UCL . . . claims alleged by Cohen and the other class members would involve factual questions associated with their reliance on DIRECTV's alleged false representations was a proper criterion . . . when examining 'commonality' . . . even after *Tobacco II*" (*id.* at p. 981).

Here, plaintiffs *concede* that purchasers of the Cavitron "do not even see instructions and printed warranties until they purchase [the] product and open the sealed box." (APFR 6; see also typed opn., 14 ["Here it is undisputed that . . . the Directions are sealed in the Cavitron package when delivered"].) Thus, the plaintiff class indisputably includes dentists who, before purchasing a Cavitron, never read the Directions that are the basis for plaintiffs' UCL claims. Under *Cohen's* analysis, such class members are not entitled to a UCL remedy, and the individualized inquiry necessary to weed them out of the class supports the trial court's determination that the commonality necessary for a class-based recovery is missing.

Since the filing of Dentsply's petition, two more UCL decisions have been issued, *Pfizer v. Superior Court* (Feb. 25, 2010, B188106) __ Cal.App.4th __ [2010 WL 660359] (*Pfizer*) and *McAdams v.*

Monier, Inc. (Feb. 24, 2010, C051841) __ Cal.App.4th __ [2010 WL 630973] (*McAdams*), neither of which can be reconciled with the Court of Appeal's decision.

Pfizer held that a proposed class was "grossly overbroad" where it included members who "were never exposed to the alleged misrepresentations" regarding the Listerine mouthwash they purchased and therefore were not entitled to restitutionary disgorgement under the UCL. (*Pfizer, supra,* __ Cal.App.4th __ [2010 WL 660359, at p. *5, italics omitted].) The certified class improperly presumed a class-wide injury even though "large numbers of class members were *never exposed* to the [defendant's] 'as effective as floss' labels or television commercials" and "there is absolutely no likelihood they were deceived by the alleged false or misleading advertising or promotional campaign." (*Id.* at p. *7; see also *McAdams, supra,* __ Cal.App.4th __ [2010 WL 630973, at p. *11] [UCL class must be limited to members who, "prior to purchasing or obtaining [the] roof tile product [at issue], had to have been exposed to a statement along the lines that the roof tile would last 50 years, or would have a permanent color, or would be maintenance-free"]; *Princess Cruise Lines, Ltd. v. Superior Court* (2009) 179 Cal.App.4th 36, 43-44 [even if plaintiffs "were actually exposed to the alleged misrepresentations," they were still required to show "'individualized reliance on specific misrepresentations or false statements'" to obtain a UCL remedy].)

Here, by contrast, the Court of Appeal held that because the Directions "would be material to *any* dentist regardless of when the representation was made," it is irrelevant to class certification

"whether appellants saw the Directions *before or after* purchasing the device."[1] (Typed opn., 8, fn. 8, emphasis added.) But under the analysis in *Cohen, Pfizer* and *McAdams,* dentists who did not see the Directions until after purchase did not suffer any UCL injury, because their purchase decision did not result from any unfair business practice. The court's conclusion that a class including such purchasers must nonetheless be certified cannot be squared with those cases.

In sum, the Court of Appeal's decision falls on one side of a great divide in the post-*Tobacco II* cases. The decision adopts the view of some courts that the deterrence of unfair practices is a sufficient justification for permitting a restitution award to class members who have not actually been injured by any wrongful business practice. (See, e.g., *In re Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145; *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235.) On the other side of that divide are cases holding, in essence, that a class action in the UCL context, as in all others, is merely a procedural device that may be used only when class members show a commonality of interest as to required elements of their claims. (See, e.g., *Pfizer, supra,* __ Cal.App.4th __ [2010 WL 660359]; *Cohen, supra,* 178 Cal.App.4th 966; *Kaldenbach*

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[1] Dentsply's petition for rehearing explained why this premise is factually incorrect. (PFRH 4-10, 25-27.) The Directions would not be material to California dentists, who know (or are charged with knowing) that California's dental regulations require the use of sterile water for oral surgical procedures, and who could not have believed the Cavitron produces sterile water. (See also PFR 12-13.)

v. Mutual of Omaha Life Ins. Co. (2009) 178 Cal.App.4th 830.) This court should grant review to determine which view is correct.

II. THE COURT OF APPEAL'S PROHIBITION AGAINST RECONSIDERATION OF A CLASS CERTIFICATION RULING ABSENT CHANGED CIRCUMSTANCES OR NEW LAW WARRANTS REVIEW.

Rather than addressing any of the policy concerns flowing from the Court of Appeal's drastic constriction of trial courts' inherent discretion to revisit certification rulings they come to view as incorrect, plaintiffs' answer argues that "California law on this point is settled." (APFR 20.) But even the Court of Appeal acknowledged the lack of clear precedent underlying its holding requiring newly discovered evidence, new law or changed circumstances as a prerequisite for decertification. The Court of Appeal frankly admitted it was relying on "dicta" from a decades-old prior decision that merely "suggest[s]" the existence of such a requirement. (Typed opn., 12.) The Court of Appeal ignored more recent authority from this court affirming that interlocutory orders—such as the original certification ruling in this case—may be modified by the trial court at any time.

The Court of Appeal justified its limitation on trial courts' discretion as necessary for "curtailing defendant abuse." (Typed opn., 12.) But this court has identified the risk of abuse as one that arises from decertification motions made "*after a decision on the merits.*" (*Green v. Obledo* (1981) 29 Cal.3d 126, 148 (*Green*),

emphasis added.) A rule limiting the grounds on which decertification can be sought is necessary in that context to prevent a defendant from "sandbag[ging] a plaintiff [by] withholding its best case against certification and then seeking decertification if it suffered an unfavorable *merits* ruling." (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069,1081, emphasis added.) But *before* a merits ruling, trial courts have a variety of less extreme mechanisms to deal with abusive decertification motions—such as summary denial, or the imposition of sanctions under Code of Civil Procedure section 128.7, subdivision (c)(2). The Court of Appeal's draconian restriction on decertification motions prescribes a cure far worse than the disease.

Plaintiffs' answer addresses none of the countervailing policy concerns discussed in the petition, many of which were drawn directly from this court's decision in *Le Francois v. Goel* (2005) 35 Cal.4th 1094 (*Le Francois*). (See PFR 26-28.) Among these are the judicial inefficiency and injustice that will result when judges are rendered powerless to stop the class action machinery once it has been set in motion, even when they become convinced they have previously misunderstood or misapplied the law in ordering class certification. As explained in the February 24, 2010 letter in support of review submitted by the American Financial Services Association and California Bankers Association (AFSA-CBA letter), "[n]o trial judge wishes to be forced to muddle through an unmanageable trial merely because months or even years earlier he or she may have mistakenly thought the case could efficiently proceed on a class basis." (AFSA-CBA letter, 3.)

If, as plaintiffs urge, the Court of Appeal's newly discovered evidence standard is applied as it has been in the context of Code of Civil Procedure section 1008, decertification will become an illusory option. Here, for example, to support its decertification motion, Dentsply submitted evidence different from that previously submitted in opposing certification, but plaintiffs contend the evidence was not newly discovered. (APFR 18; see also typed opn., 10 [the trial court "reassessed the matter under existing law, coupled with newly packaged, *but not newly discovered,* evidence" (emphasis added)].) Restricting decertification to situations where the moving party is required not just to submit different evidence, but evidence it could not have discovered and produced in connection with its original motion would undermine rule 3.764 of the California Rules of Court, which expressly authorizes decertification motions without any "newly discovered evidence," "new law," or "changed circumstances" requirement.

Turning to plaintiffs' contention that the Court of Appeal's decision is "correct and no conflict is raised" by its holding, plaintiffs insist that "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." (APFR 15, emphasis omitted.) But plaintiffs have not cited any California case that has ever *foreclosed* reconsideration of class certification in the absence of changed circumstances, or new law or evidence, so the absence of contrary decisions establishes nothing.

Nor is the dictum plaintiffs cite from *Green* sufficient to establish that the Court of Appeal merely followed settled law, as

they contend. (APFR 16-17.) The only authority for *Green*'s dictum was a single federal district court opinion, *Sley v. Jamaica Water & Util., Inc.* (E.D.Pa. 1977) 77 F.R.D. 391, 394, which is not only out of step with most other federal authority on the issue, but relied on "a 'law of the case' rationale" that does not even apply in California to trial court rulings. (See AFSA-CBA letter, 4-5.)

Plaintiffs argue this court's *Le Francois* opinion forecloses a trial court from reconsidering a ruling in the absence of new facts or law if reconsideration is requested by a party. But *Le Francois* emphasized that "[i]f a court believes one of its prior interim orders was erroneous, it should be able to correct that error *no matter how it came to acquire that belief.*" (*Le Francois, supra*, 35 Cal.4th at p. 1108, emphasis added.) Moreover, reconsideration in *Le Francois* was subject to the restrictions imposed by Code of Civil Procedure sections 437c and 1008, but there is no similar rule or statute applicable to motions seeking class decertification.

Plaintiffs also argue that "federal law is consistent" with the Court of Appeal's decision and that Dentsply has cited "no federal case granting defendants an unfettered right to bring class reconsideration motions without showing some change in circumstances, facts or law." (APFR 20.) But Dentsply does not argue for any "unfettered" right. Trial courts should be free to summarily deny a motion where the defendant has offered nothing that changes the court's original decision, and courts may even sanction defendants who bring frivolous or abusive motions. But the Court of Appeal's new rule, holding that trial courts may *never* reconsider class certification absent newly discovered evidence or

new law, goes too far. As this court has explained, trial courts "should retain flexibility in the trial of a class action, for 'even after an initial determination of the propriety of such an action the trial court may discover subsequently that it is not appropriate.'" (*Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360.)

At any rate, it is simply wrong for plaintiffs to assert that the Court of Appeal's decision is consistent with federal law. For example, they ignore the detailed analysis in *Slaven v. BP America, Inc.* (C.D.Cal. 2000) 190 F.R.D. 649, 652, in which the federal district court held that a court's authority to "amend its decision to certify a class 'as may be desirable from time to time,'" cannot be restricted merely because a decertification motion "recounts old facts and law." The court emphasized that a decertification motion, even when not based on new facts or law, "serves an important role in the ongoing life of [a] class action" by offering the court "an opportunity to review the Rule 23 prerequisites with a view toward determining the continuing viability of the class action." (*Ibid.*)

Even *Cook v. Rockwell Intern. Corp.* (D.Colo. 1998) 181 F.R.D. 473, cited by plaintiffs, conflicts with the Court of Appeal's decision. In *Cook,* the district court decertified one of two classes based on new law, and then went on to consider whether to decertify the other class as well, even though there were no new facts or law to consider as to the other class. (See *id.* at p. 477-478 [while normally decertification occurs when circumstances change, it may also be warranted where "*clarified* circumstances have been shown that would make the continuation of the class action improper"; the court therefore engaged in an analysis of the factors supporting

certification rather than simply denying decertification on procedural grounds].) That is precisely the situation presented here, but the Court of Appeal held it was procedurally improper for the trial court to exercise the same inherent discretion that the district court exercised in *Cook*.

Unless review is granted now to consider whether the Court of Appeal's newly spun restriction on trial courts' authority to revisit class certification rulings is correct, that restriction will become irrevocably woven into the fabric of California class action law. As explained in the AFSA-CBA letter, the Court of Appeal's decision will bind all California trial courts, which will be required to deny any decertification motion not based on new facts or new law. Since denial of a decertification motion is not an appealable order, and appellate courts are unlikely to grant writ review of an order denying decertification based on a failure to cite new facts or law, this court may not have another good opportunity to consider the issue. (AFSA-CBA letter, 4.)

III. THE COURT OF APPEAL'S DECISION DOES NOT FOLLOW "SETTLED" EXPRESS WARRANTY LAW, BUT INSTEAD CONFLICTS WITH CALIFORNIA AUTHORITY AND THE MAJORITY VIEW IN OTHER JURISDICTIONS.

Plaintiffs argue that review on the third issue presented is unnecessary because the Court of Appeal's decision merely applies settled express warranty law. (APFR 22-27.) But far from applying

settled law, the Court of Appeal's decision conflicts with existing authority, as reflected in *Keith v. Buchanan* (1985) 173 Cal.App.3d 13 (*Keith*), CACI No. 1240, and every other California decision that has weighed in on the issue. Indeed, the Court of Appeal's decision is the first California case ever to foreclose a seller from defending against a warranty claim by showing that its representation was not "part of the basis of the bargain"—for example, because the buyer knew the true condition of the goods, or never heard or saw the representation before purchase. Review is necessary to determine whether California will continue to follow the majority view that a seller may show that the resulting bargain does not rest at all on the representation—as reflected in *Keith*—or the minority view set forth in the Court of Appeal's decision, under which "reliance plays no role." (Typed opn., 12.)

The Court of Appeal's decision cannot be reconciled with *Keith*, as plaintiffs contend. (APFR 24-25.) In holding that the boat seller in that case had "not overcome the presumption that the representations regarding seaworthiness were part of the basis of this bargain," the court in *Keith* considered whether the boat buyer's inspection would have "indicated whether or not the vessel was seaworthy." (*Keith*, *supra*, 173 Cal.App.3d at p. 24.) That holding follows from the court's earlier analysis that a "warranty statement made by a seller" is only "presumptively part of the basis of the bargain." (*Id.* at p. 23.) To rebut that presumption, the seller may "prove that the resulting bargain does not rest at all on the representation" because of the "buyer's actual knowledge of the true

condition of the goods," such that "the seller's statement was not relied upon as one of the inducements for the purchase." (*Ibid.*)

The Court of Appeal's decision in this case forecloses Dentsply from making precisely such a showing. The right to rebut any presumption of reliance is not merely "hypothetical" here, as plaintiffs contend (APFR 27), nor is it true that there "was no evidence . . . that any class member was not concerned with surgical safety" (APFR 27). Dentsply's petition for rehearing pointed out that some of the named plaintiffs admitted they continued to use Cavitron scalers daily in surgical and/or non-surgical procedures *even after filing this lawsuit*—in which they alleged the Cavitron could not produce even potable water. (PFRH 26, 35.) Plaintiffs had no reason to believe at the time of purchase that the output water from the Cavitron was sterile, yet they purchased it for use in oral surgery anyway. (PFRH 35-36.) Moreover, California dentists are charged with knowledge regarding California's sterile water regulations, and no dentist could reasonably believe that a device connected to his or her building's municipal water supply could produce sterile water. (PFRH 4-10.) Based on all of these points, Dentsply could easily rebut any presumption of reliance on indicated surgical uses that would be appropriate in other jurisdictions but not in California.

Plaintiffs also argue that "[t]he UCC . . . removed any requirement of proof of actual reliance from breach of warranty with the adoption of UCC section 2-313." (APFR 22.) But this court has expressly left open the question whether that is true. (See *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 116 (*Hauter*) ["We are not called upon

in this case to resolve the reliance issue"].) The snippets of language that plaintiffs quote from *Hauter* are all drawn from the opinion's summary of the *minority* view that reliance upon a seller's representation is no longer a required element of an express warranty claim. (See APFR 22-23, 25.) Plaintiffs ignore this court's seeming endorsement of the *majority* view—that "the comments to section 2313 seem to bear out [the] analysis" that "the basis of the bargain requirement merely shifts the burden of proving non-reliance to the seller," rather than eliminating the reliance requirement altogether. (*Hauter*, at p. 115.)

Plaintiffs also cite Witkin to support the contention that "it is *settled* in California" that a breach of express warranty claim "has nothing to do with misrepresentation or reliance." (APFR 23, emphasis added.) But Witkin states that the issue of whether "reliance is still a vital ingredient" of an express warranty claim "was left *unresolved*" by this court's decision in *Hauter*. (4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 59, p. 71, emphasis added.) Further, Witkin observes that in *Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 760, the court stated that "reliance is still a vital ingredient" of an express warranty claim, and cites another treatise's view that a "purchaser's disbelief in, or nonreliance upon, [a] seller's express warranties" is a basis for "precluding [an] action for breach." (4 Witkin, *supra*, Sales, § 59, p. 71.)

Plaintiffs also assert that the only conflict on the reliance issue is "between pre-UCC law and the modern approach, not

among post-UCC decisions."[2] (APFR 22.) But California Uniform Commercial Code section 2313 (section 2313) was enacted in California in 1963, and *all* of the conflicting authorities cited in Dentsply's petition are *post*-enactment cases. Further, as reflected by the legion of cases from other jurisdictions cited in Dentsply's petition for rehearing, the majority view among *post*-UCC decisions is that UCC section 2-313 still requires some form of reliance by the individual purchaser to create an express warranty. Consistent with CACI No. 1240—and contrary to the Court of Appeal's decision—those courts have held that UCC section 2-313, as enacted in their jurisdiction, at most creates a presumption of reliance by the purchaser, which the seller has a right to rebut. (See PFRH 13-19 [collecting cases].)

Oddly, plaintiffs emphasize that "the Judicial Council's 'CACI Committee' has recommended the instruction [CACI No. 1240] be *revoked* (likely the result of the *Weinstat* decision)." (APFR 24; see also APFR 3.) The only inference that can reasonably be drawn from the CACI Committee's proposed revocation of CACI No. 1240 is that the Court of Appeal's decision does *not* comport with the

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[2] Plaintiffs misleadingly insert language into a quote from the *Keith* decision to suggest that out-of-state decisions contrary to the Court of Appeal decision in this case predated adoption of the UCC. (APFR 25 [adding bracketed language to this quote: "'[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"'" (boldface added)].) In fact, *Keith* was addressing cases decided *after* the 1963 adoption of UCC 2-313 but before this court's 1975 decision in *Hauter*. Obviously, no decision can "ignore" a standard that has not yet even been adopted.

prior law on which CACI No. 1240 was based. Furthermore, if CACI 1240 is revoked, trial courts will have the option of following either *Keith* or *Weinstat*, which could lead to conflicting results in identical cases. (See Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 14:195, p. 14-78 ["When there are conflicting court of appeal decisions on point, the trial court can choose to follow *either* of them"].) Review by this court is necessary to provide guidance to trial courts and litigants regarding which decision correctly reflects California law.

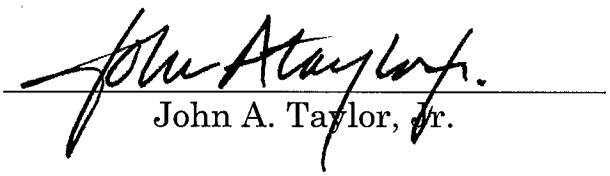
Finally, asserting that "[t]here is no reliance element for breach of warranty under [section 2313]," plaintiffs contend that the "issue instead is whether the breached representation was a [*sic*] *material* to the parties' bargain." (APFR 23.) But in the context of whether a representation was part of the "basis of the bargain" under section 2313, reliance and materiality are merely two sides of the same coin. Class treatment of plaintiffs' express warranty claims is inappropriate precisely because an individualized inquiry is necessary to determine whether the Cavitron's indications for use were material to dentists who already knew that (1) a Cavitron does not produce sterile water, and (2) sterile water is required by California regulations for oral surgical procedures. The Court of Appeal's decision forecloses any such inquiry, in conflict with *Keith*, CACI No. 1240, and the law in the majority of other jurisdictions. Review should be granted to determine whether such a dramatic change in California express warranty law is appropriate.

CONCLUSION

For all the reasons set forth above and in Dentsply's petition, this court should grant review to decide the three important issues that are presented in this case.

March 11, 2010

HORVITZ & LEVY LLP
LISA PERROCHET
JOHN A. TAYLOR, JR.
STOKES ROBERTS & WAGNER, ALC
MARIA C. ROBERTS

By: 
John A. Taylor, Jr.

Attorneys for Defendant and Respondent
DENTSPLY INTERNATIONAL INC.

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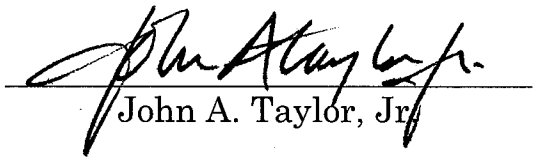
Dated: March 11, 2010



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 March 11, 2010, I served true copies of the following document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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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 March 11, 2010, at Encino, California.

Millie Gandola

Millie Gandola

SERVICE LIST
Weinstat et al. v. Dentsply International, Inc.
S180179

Maria C. Roberts, Esq. Ronald R. Giusso, Esq. STOKES ROBERTS & WAGNER 600 West Broadway, Suite 1150 San Diego, CA 92101	Co-Counsel for Defendant and Respondent Dentsply International, Inc.
Paul D. Nelson, Esq. Bullivant Houser Bailey LLC 601 California Street Suite 1800 San Francisco, CA 94108-2823	Counsel for Plaintiffs and Appellants Marvin C. Weinstat; Richard Nathan; Patricia Murray
Edwin Zinman, Esq. Edwin J. Zinman, A Professional Corporation 220 Bush Street, Suite 1600 San Francisco, CA 94104	Counsel for Plaintiffs and Appellants Marvin C. Weinstat, Richard Nathan; Patricia Murray
Hon. Arlene T. Borick Department 212 San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102	Trial Judge Case No. CGC-04-432370
Court of Appeal First Appellate District, Division 4 350 McAllister Street San Francisco, CA 94102-3600	Case No.: A116248
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).)
Jan T. Chilton Severson & Werson One Embarcadero Center Suite 2600 San Francisco, CA 94111	Attorneys for Amicus Curiae American Financial Services; California Bankers Association
Alan J. Lazarus Drinker Biddle & Reath LLP 50 Fremont Street San Francisco, CA 94105-2234	Attorneys for Amicus Curiae The Product Liability Advisory, Inc. ("PLAC")