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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

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

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ISSUES PRESENTED

1. In *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 315-316 (*Tobacco II*), this court held that in a UCL class action, unnamed class members need not satisfy Proposition 64's standing requirements. Did *Tobacco II* also relieve absent class members of other requirements for asserting UCL claims, so as to foreclose trial courts in UCL actions from finding that class treatment is inappropriate under traditional class certification principles, such as lack of commonality among class members on issues of causation and injury? That is how the Court of Appeal here interpreted *Tobacco II* when overruling a trial court order decertifying UCL

claims for class treatment, but other courts have not adopted that same interpretation.

2. Once a trial court has ruled on a class certification motion, is it foreclosed from revisiting the issue of certification absent new law, newly discovered evidence or changed circumstances, as the Court of Appeal held? Or do trial courts retain discretion to reevaluate the propriety and manageability of class treatment, consistent with (a) the approach followed by the federal courts under rule 23 of the Federal Rules of Civil Procedure, and (b) the inherent constitutional power of trial courts to reconsider and correct interim rulings, as this court recognized in *Le Francois v. Goel* (2005) 35 Cal.4th 1094 (*Le Francois*)?

3. Is some form of reliance on a seller's representation still a required element of an express warranty claim, as held in *Keith v. Buchanan* (1985) 173 Cal.App.3d 13 (*Keith*), other California cases, and by the vast majority of other jurisdictions? Or, as the Court of Appeal held here, does the California Uniform Commercial Code dispense with any reliance requirement?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

This is the unusual case in which multiple independent issues for review warrant this court's consideration. All three issues presented involve serious conflicts on important questions of law, requiring resolution by this court.

1. The UCL issue. Since this court decided *Tobacco II*, the lower appellate courts have evenly split on whether this court

decided only that the standing requirements of Proposition 64 do not apply to absent class members in a UCL class action, or whether the court intended more broadly to hold that traditional class certification requirements—such as the predominance of common issues of causation and injury among individual class members—are irrelevant in UCL actions. The Court of Appeal's decision here takes the latter view, rejecting the trial court's ruling that, even apart from issues of Proposition 64 standing, plaintiffs' UCL claims were inappropriate for class treatment because individual issues involving the materiality of any misrepresentation to class members would predominate over common issues.

The conflict between these two lines of lower appellate court decisions has been prominently noted in the legal press. One writer recently observed that a "bloodless war of sorts is being waged in California's judicial branch . . . in areas related to class action litigation," suggesting that some courts have "devised an analysis that permits circumvention of *Tobacco II*." (Leviant, *When Courts Disagree,* L.A. Daily J. (Nov. 10, 2009) p. 7.) Another article has noted that "[i]n the months since the court's ruling [in *Tobacco II*], the lower courts have chipped away at the ruling, leading some lawyers to question whether there's a mutiny brewing." (Ernde, *Lower Courts Chip at Tobacco Ruling*, L.A. Daily J. (Jan. 19, 2010) p. 1.) Under one view, "the lower courts [have] simply applied standard class action certification rules to consumer lawsuits," while under another, such "rulings flout the key holdings of *Tobacco II*." (*Ibid*.) Review should be granted to resolve these two irreconcilable views regarding the scope of *Tobacco II*.

2. The discretion-to-decertify issue. Review is also necessary to resolve a conflict between the Court of Appeal's decision on the one hand, and both federal class action jurisprudence and this court's decision in *Le Francois* on the other. The Court of Appeal held that the trial court could not decertify plaintiffs' claims unless prompted by new law, newly discovered evidence, or changed circumstances. That is a novel holding that will dramatically limit the broad discretion, and indeed duty, that California's trial judges have always had to continually reevaluate whether class treatment is the most efficient and fair method for litigation to proceed. Depriving courts of that authority represents a sharp break from federal procedure, to which the California courts look for guidance on class action procedures. It is also wholly inconsistent with the principles enunciated in *Le Francois*, in which this court (a) affirmed a trial court's inherent constitutional authority to reconsider a ruling it comes to believe is wrong, regardless of the reason why, and (b) noted the absurdity of prohibiting a trial court from revising a ruling, no matter how obvious the error, unless newly discovered facts or a change in law occurs.

3. The express warranty issue. Finally, the Court of Appeal's decision expressly disagrees with the earlier *Keith* decision on an important issue of commercial law that this court has never addressed—whether an express warranty claim is cognizable where the buyer did not rely on any alleged misrepresentation (e.g., because the buyer never saw or heard the representation, knew the true facts about the condition of the goods, or for other reasons). The Court of Appeal's decision approving express warranty claims

without any showing of reliance expressly calls into question a CACI instruction that is based on *Keith*. Moreover, the court's ruling conflicts with the views of the vast majority of other jurisdictions. Since the statute in question is part of the Uniform Commercial Code (UCC), the Court of Appeal's decision undermines the very uniformity the UCC was intended to create. Review by this court is essential to clarify which approach is correct—the approach reflected in the *Keith* decision, or the Court of Appeal's contrary view in this case.

STATEMENT OF THE CASE

A. The Cavitron device and regulatory framework.

Dentsply manufactures the "Cavitron" ultrasonic scaler, a medical device whose sale is restricted to dental professionals. (Typed opn., 2.) The Cavitron's handpiece has a metal tip that vibrates at ultrasonic speeds and expels a pulsating water stream, lifting plaque from teeth and reducing the need for scraping by the dental practitioner. (*Ibid.*)

The Cavitron, which typically is connected to the ordinary water supply in dental office buildings (see 4-AA 1030; typed opn., 4), is not designed to deliver sterile water (4-AA 879, 893, 898, 934), nor has Dentsply ever represented that its output water is sterile (see 2-AA 418; 4-AA 934, 1030; 5-AA 1048; 11-AA 2626, 2664; see 6-AA 1424-1425, 1430, 1440; 11-AA 2692-2693). Dental professionals have used the Cavitron for more than four decades, primarily for

the routine cleaning of teeth, without a single reported patient illness or infection attributed to its output water. (Typed opn., 2; 4-AA 935, 1028; 5-AA 1042-1043; 11-AA 2624, 2658-2659; see 4-AA 1034, 1036, 1038.)

Included in the Cavitron's sealed packaging are "Directions for Use" (Directions). (Typed opn., 3, 14.) Because the Cavitron is sold throughout the United States and abroad, the Directions are not specific to California. (See 4-AA 1029; 11-AA 2625.) The Directions are supplemented with an Infection Control Information card advising dentists that "'[i]n the event any regulatory agency disagrees with this information, the agency requirements take precedence.'" (Typed opn., 18, fn. 11.)

Beginning in 1993, the Directions referred to use for "'root planing during surgery.'" (Typed opn., 3.) In 1994, however, California enacted a dental regulation requiring "'[s]terile coolants/irrigants' for 'surgical procedures involving soft tissue or bone.'"[1] (*Ibid.*) Because the Cavitron was not designed to deliver sterile water, the 1993 Directions arguably referenced a use that California dentists were prohibited from exploiting under the 1994 regulation.

The Directions accompanying Cavitron models introduced around 1997 no longer referred to root planing during surgery, but instead indicated its use for "'[a]ll general supra and subgingival

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[1] The sterile water regulation took effect in 1994, rather than 1996 as stated in the Court of Appeal's decision. (See PFRH 23 [citing 5-AA 1043; 11-AA 2659].) The Centers for Disease Control and Prevention (CDC) did not issue guidelines recommending sterile solutions for oral surgical procedures until 2003. (Typed opn., 3.)

scaling applications'" and "'[p]eriodontal debridement for all types of periodontal diseases.'" (Typed opn., 3; see 12-AA 2895; 14-AA 3618 [debridement of root after opening gum flap not oral surgery]; 16-AA 4102; see also 9-AA 2146 [referring to "ultrasonic debridement" as a "nonsurgical dental procedure[ ]"].)

B. Plaintiffs' class action litigation.

Plaintiffs, several dentists seeking to represent a class of dentists who purchased Cavitrons for use during oral surgical procedures, commenced this action in 2004. (Typed opn., 3.) Plaintiffs assert a UCL claim and a claim for breach of express warranty. (*Ibid.*) They allege that the Directions indicate Cavitrons can be used in oral surgery but are not appropriate for that use because the device cannot deliver sterile water as required by California regulations for surgical procedures. (*Ibid.*; see PFRH 24.)

No dentist in California would have any reason to expect the Cavitron to produce sterile water—as the Court of Appeal indicated, California dentists customarily connect their Cavitrons to tap water from the municipal water supply. (See typed opn., 4.) Nonetheless, plaintiffs allege that Dentsply should have advised dentists that one reason Cavitrons do not produce sterile water is "that the inner tubing of the Cavitron 'was designed in a manner that was subject to the formation of a progressive biofilm coating of bacteria . . . which could harbor pathogens'" and "because the inner

tubing 'was incapable of being sterilized before or during its use.'"[2] (*Ibid.*)

The complaint divided the proposed class into two subclasses. (Typed opn., 5.) Subclass A consisted of California dentists who purchased a Cavitron before 1999 for use "'in the performance of oral surgical applications as to which Dentsply's accompanying [Directions] specified that it was indicated for use for root planing during oral surgery.'" (*Ibid.*; see 1-AA 3.) Subclass B consisted of California dentists who purchased a Cavitron in or after 1997 where the Directions stated that it was indicated for "'periodontal debridement for all types of periodontal diseases.'" (*Ibid.*)

C. The trial court's class certification rulings.

Initially, the trial court approved the proposed classes for plaintiffs' UCL and express warranty claims. (Typed opn., 5.) Dentsply moved to decertify the classes after the Second District Court of Appeal issued its opinion in *Pfizer, Inc. v. Superior Court* (2006) 141 Cal.App.4th 290, review granted November 1, 2006,

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[2] "Biofilm" refers to the natural formation of generally benign microscopic organisms in any aquatic environment, including drinking water systems. (2-AA 288-289; see 3-AA 688; 4-AA 886-887.) The 2003 CDC guidelines state that "[r]esearchers have not demonstrated a measurable risk of 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"].)

cause transferred August 19, 2009, S145775 (*Pfizer*), which held that all class members must meet Proposition 64's newly imposed standing requirements. (Typed opn., 5.)

The trial court granted the decertification motion, relying on *Pfizer's* rationale for two of its three grounds for decertifying the UCL class. (13-AA 3140-3141.) As to the third ground, however, the trial court relied on *pre*-Proposition 64 authorities, determining that even apart from issues of Proposition 64 standing, plaintiffs' UCL claims were inappropriate for class treatment because (a) "individual issues involving the nature and extent of any *material misrepresentation* would predominate over common issues" and (b) "'the community of interest requirement [is] not satisfied'" where "'class members would have to prove individually the existence of liability and damages.'" (13-AA 3141.)

The trial court also decertified the express warranty class, ruling, inter alia, that plaintiffs "could not prove reliance on Dentsply's alleged misrepresentations on a classwide basis" and that even if "reliance could be presumed under some circumstances, the presumption was rebuttable and use of the class procedure would circumvent Dentsply's right to rebut" any presumption of reliance. (Typed opn., 6.) Plaintiffs appealed.

D. The Court of Appeal's opinion.

While plaintiffs' appeal was pending, this court issued its *Tobacco II* decision, holding that Proposition 64's standing requirements apply only to the class representatives in a UCL

action. The Court of Appeal here therefore reversed the trial court's order insofar as it rested on the assumption "that each class member must establish standing." (Typed opn., 9.) The court directed the trial court on remand to determine "whether the named representatives can meet the UCL standing requirements announced in *Tobacco II* and if not, whether amendment should be permitted." (*Ibid.*)

As to the third ground of the trial court's UCL decertification order, which "was untainted by Proposition 64 standing concerns," the Court of Appeal held that the decertification ruling was procedurally improper "because Dentsply offered no new law or newly discovered evidence regarding the nature and extent of any material misrepresentation" when it sought decertification. (Typed opn., 7-8, fn. 8.)

Nonetheless reaching the merits of that ruling, the Court of Appeal further held that *Tobacco II* eliminated any reason for a court "to delve into individual proof of material [*sic*], reliance, and resulting damage" as to class members. (Typed opn., 9.) The court found that (1) plaintiffs had alleged uniform misrepresentations directed to the entire class that, in the court's view, "would be material to *any* dentist"; (2) the materiality of Dentsply's representations was, to the court's satisfaction, "established objectively by appellants' actual use of the device for oral surgery, in accordance with those representations"; and (3) notwithstanding individual dentists' differing reasons for purchasing the Cavitron and awareness of water quality

regulations, "[t]here are no individual issues concerning the nature and extent of material misrepresentations." (Typed opn., 7-8, fn. 8.)

The Court of Appeal likewise reversed the trial court's decertification of the express warranty class. In a subsection captioned "*No New Evidence or Law*," the court again disapproved decertifying the class in the absence of changed circumstances or newly discovered evidence. (Typed opn., 11.) The court reasoned that while Dentsply's motion for decertification of the *UCL class* was supported by new law—the Second District Court of Appeal's *Pfizer* decision—the motion as to the breach of warranty class was not supported by "changed circumstance or some other situation justifying reconsideration." (Typed opn., 12.)

On the merits of the order decertifying the express warranty class, the Court of Appeal disagreed with the trial court's conclusion that reliance is an element of an express warranty claim, and that resolving the claims would require an individual, dentist-by-dentist inquiry. (See typed opn., 12-23.) In rejecting the trial court's rationale, the Court of Appeal expressly disagreed with *Keith*, *supra*, 173 Cal.App.3d 13, *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 661 (*Osborne*), and with CACI No. 1240. (Typed opn., 18, 21-22 & fn. 12.) The Court of Appeal held that the "basis of the bargain" test in section 2313 of the California Uniform Commercial Code imposes no reliance requirement as a prerequisite for an express warranty claim. (See typed opn., 12-17.) Thus, if a seller's statement is "material" in the abstract, then any consumer can bring an express warranty action based on the statement, even if the consumer never heard the statement, didn't believe the

statement, or didn't have any personal reason to care about the statement when purchasing the product.

The Court of Appeal further held that Dentsply had no right to rebut any presumption that statements in the Directions create an express warranty—e.g., by showing that individual class members knew the Directions were not consistent with California regulations and therefore did not rely on them in purchasing a Cavitron. (Typed opn., 21-23.) The court reasoned that Dentsply's defense "goes to the matter of water sterility," but that plaintiffs' claims turn on "the formation of bacteria-laden biofilm," and that "[t]here was no evidence that appellants were aware of the biofilm risk posed by Cavitron usage, but purchased and used it anyway." (Typed opn., 23.)

E. Dentsply's petition for rehearing.

Dentsply sought rehearing or modification of the Court of Appeal's opinion. Dentsply explained that both the UCL and express warranty analyses in the court's opinion rested on the court's decision to draw a class-wide inference that Dentsply's representations concerning the Cavitron's indicated uses were "material" to class member dentists. (PFRH 2-9.) As to both claims, the Court of Appeal assumed that, but for an undisclosed risk of biofilm formation, California dentists could properly have purchased Cavitrons for "root planing during surgery" or "periodontal debridement." (See, e.g., typed opn., 8, fn. 8, 19, 23.) But because California regulations require *sterile* water for oral

surgery, any representations about surgical uses for the Cavitron—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 as a matter of licensure. (PFRH 2-3, 6-7; see 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)]).

In other words, as to both the UCL and express warranty claims, it was improper for the Court of Appeal to impose a class-wide presumption that the nondisclosure of potential biofilm formation would be material to any dentist who purchased the Cavitron for use in oral surgery, when all California dentists are presumed to know the Cavitron cannot be used for oral surgery (regardless of biofilm issues) because its output water is not sterile. (See PFRH 9.)

The rehearing petition also pointed out more than two dozen aspects of the Court of Appeal's opinion that misstated the record, omitted relevant facts, or made inferences contrary to the trial court's order or resolved factual conflicts in favor of plaintiffs rather than Dentsply, in violation of the governing standard of review. (See PFRH 21-36.)

The Court of Appeal denied Dentsply's rehearing petition, and corrected none of the factual errors in the opinion.

LEGAL ARGUMENT

I. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG UCL DECISIONS REGARDING WHETHER *TOBACCO II* ELIMINATES THE PRE-PROPOSITION 64 CLASS CERTIFICATION REQUIREMENT OF COMMONALITY AMONG CLASS MEMBERS AS TO CAUSATION AND RESULTING INJURY.

In *Tobacco II*, this court addressed "[w]ho in a UCL class action must comply with Proposition 64's standing requirements, the class representatives or all unnamed class members, in order for the class action to proceed?" (*Tobacco II*, *supra*, 46 Cal.4th at pp. 315-316.) The court concluded that Business and Professions Code section 17203, as amended by Proposition 64, does not support a requirement "that all unnamed class members in a UCL class action must demonstrate section 17204 standing." (*Id.* at p. 316.) Courts around the state have since struggled to understand the effect of this holding on trial courts' discretion to find that aspects of the UCL *other than standing* may require individualized inquiries, and thus render claims unsuitable for resolution on a class-wide basis.

Some courts have concluded *Tobacco II* implicitly overruled earlier cases holding that UCL class certification may be denied based on lack of commonality as to whether an asserted

misrepresentation was material to individual class members such that it resulted in injury.[3]

Taking this view, the court in *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 134, footnote 19, stated that "it is clear from Supreme Court authority that recovery in a UCL action is available in the absence of individual proof of deception, reliance, and injury" by absent class members. Further, the court assumed that *Akkerman*, *Caro*, and similar authorities have been superseded by *Tobacco II*. (See also *In re Steroid Hormone Product Cases* (Jan. 21, 2010, B211968) __ Cal.App.4th __ [2010 WL 196559, at p. *4] [after *Tobacco II*, "while a named plaintiff in a UCL class action now must show that he or she suffered injury in fact and lost money or property as a result of the unfair competition, once the named plaintiff meets that burden, no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members"]; *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1256 [the "fraudulent prong of the UCL" does not require "allegations of actual falsity and reasonable reliance," citing *Tobacco II*]; *Plascencia v. Lending 1st Mort.* (N.D.Cal. 2009) 259 F.R.D. 437, 448

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[3] Those earlier cases include *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1103 (*Akkerman*) (denial of class certification upheld where "each class member would have to prove his individual claim for restitution by establishing reliance and causation") and *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 668 (*Caro*) (denial of class certification upheld where "the [trial] court properly concluded the issue whether any asserted misrepresentation induced the purchase of Citrus Hill Fresh Choice orange juice would vary from consumer to consumer").

["The individual circumstances of each class member's loan need not be examined because the class members are not required to prove reliance and damage. Common issues will thus predominate on the UCL claim"].)[4]

Another line of decisions, however, has held that the analysis in *Tobacco II* was by its terms limited to whether absent class members are individually required to establish *standing* under Proposition 64's requirements, and that *Tobacco II* does *not* foreclose trial courts in UCL actions from finding, just as they sometimes did before Proposition 64, that class treatment is inappropriate due to lack of commonality among class members on other aspects of a UCL claim, such as issues of causation and injury.

In *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966 (*Cohen*), for example, the Court of Appeal affirmed the trial court's denial of class certification of UCL claims alleging that the defendant had disseminated false advertising regarding the quality of its "high definition" services. The court held that the trial court correctly found "common issues of fact do not predominate" because the proposed class "would include subscribers who never saw DIRECTV advertisements or representations of any kind before deciding to purchase the company's HD services," who "only saw and/or relied upon advertisements that contained no mention of technical terms regarding bandwidth or pixels," or "who purchased

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[4] Under this line of cases, the incongruous result of Proposition 64—a voter initiative intended to limit the scope and prevalence of UCL class actions—would actually be to encourage them.

DIRECTV HD primarily based on word of mouth" or for other reasons independent of DirecTV's representations. (*Id.* at p. 979.)

The court held further that *Tobacco II* does not require a different result, because "*Tobacco II* held that, *for purposes of standing* in context of the class certification issue in a 'false advertising' case involving the UCL, the class members need not be assessed for the element of reliance." (*Cohen*, *supra*, 178 Cal.App.4th at p. 981.) The court therefore found *"Tobacco II* to be irrelevant" to its analysis because "the issue of 'standing' simply is not the same thing as the issue of 'commonality.'" (*Ibid.*) In distinguishing between issues of standing and commonality in proving the elements necessary to obtain a UCL remedy, the court noted that standing "is a matter addressed to the trial court's jurisdiction," while commonality as to the substantive elements of a claim "is a matter addressed to the practicalities and utilities of litigating a class action in the trial court," and "[w]e see no language in *Tobacco II* which suggests . . . that the Supreme Court intended our state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification." (*Ibid.*; see also *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 847 (*Kaldenbach*) ["the [trial] court did not abuse its discretion in concluding individualized issues predominated and could not be proven on a classwide basis including . . . whether [individual class members] relied on representations made in the sales presentation" in which alleged misrepresentations were made].)

Here, the Court of Appeal was advised of, but did not address, *Cohen's* analysis. Instead, it followed the approach of the first line of cases discussed above, construing *Tobacco II* as broadly mandating certification of a UCL class if the named representatives have met standing requirements. The decision expressly rejected Dentsply's argument that the trial court's decertification order should be affirmed "because *one* of the trial court's UCL decertification rulings was untainted by Proposition 64 standing concerns, namely the ruling that the UCL claims were inappropriate for class treatment because individual issues about the nature and extent of any material misrepresentation would predominate over common issues." (Typed opn., 7-8, fn. 8.) The court held instead that plaintiffs were required only to show "that the representations or nondisclosures in question would likely be misleading to a reasonable consumer" (typed opn., 7-8, fn. 8), and that, as to absent class members, *Tobacco II* "dispatched" any reason for the trial court "to delve into individual proof of material [*sic*], reliance, and resulting damage" (typed opn., 9).

The analysis in *Cohen,* and not that of the Court of Appeal here, comports with pre-Proposition 64 law on the required elements for UCL actions—law that this court has said Proposition 64 did not change. (*Tobacco II*, *supra*, 46 Cal.4th at pp. 313-314.) The only monetary relief a court may order on a UCL claim is restitution. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.) Only "[a]ctual direct victims of unfair competition" may obtain restitution. (*Id*. at p. 1152; see also *Kraus v. Trinity, Inc.* (2000) 23 Cal.4th 116, 138 [only present and former

tenants who were overcharged were entitled to refunds].) Indeed, the actual language of Business and Professions Code section 17203 regarding the restitution remedy is "to *restore* to any person in interest any money or property, real or personal, which may have been acquired *by means of* such unfair competition." (Emphasis added; see *Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 338-339 ["Taken in the context of the statutory scheme, the definition [of 'restore'] suggests that section 17203 operates only to return to a person those *measurable amounts* which are *wrongfully taken* by means of an unfair business practice"].)

Thus, *Cohen* reasonably concluded 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; see also Samel, "*Socratic Solitaire"—Implications of* In re Tobacco II *for Proof of Injury in Antitrust and Unfair Competition Class Actions* (2009) 18 Competition: The J. of the Antitrust and Unfair Competition Law Sec. of the St. B. of Cal. 1 [while *Tobacco II* held absent class members need not meet Proposition 64's standing requirements, it did not affect traditional class certification requirements such as commonality, which may preclude certification of a UCL claim for restitution when the alleged unfair

practice is not shown to have caused actual harm or loss on a class-wide basis]).

The conflict between these two irreconcilable lines of cases has been featured prominently in California's legal press. One article observes that *Tobacco II* left open the question "whether a court could essentially presume that the class relied on . . . allegedly misleading representations as long as the class representative could show actual reliance," and that subsequent decisions "suggest that such reliance *cannot* necessarily be presumed." (Cypers & Stokes, *Attacking Class Certification Motions,* L.A. Daily J. (Dec. 15, 2009) p. 6, emphasis added.) Under the latter view, a "plaintiff must satisfy the elements of class certification *in addition to* establishing that the class representative has met the standing requirements under *Tobacco II*," so that after Proposition 64, as before, "obtaining class certification requires the named plaintiff to show that a class action is the best way to adjudicate claims related to that allegedly unfair business practice." (*Ibid.*)

The conflicting lines of cases, represented on the one hand by the Court of Appeal's decision below, and on the other by decisions such as *Cohen* and *Kaldenbach*, cannot be reconciled. Further guidance from this court is necessary to determine whether *Tobacco II* was limited to issues of Proposition 64 standing, or whether in UCL actions the court intended to eliminate the traditional requirement of commonality as to UCL elements of causation and injury among class members as a requirement for certification.

II. REVIEW SHOULD BE GRANTED TO RESOLVE WHETHER A TRIAL COURT IS PRECLUDED FROM RECONSIDERING A CLASS CERTIFICATION RULING ABSENT CHANGED CIRCUMSTANCES OR NEW EVIDENCE.

Citing what it conceded was "dicta" in a prior decision by this court, the Court of Appeal decided an issue of first impression in California—holding that once a trial court rules on a certification motion, it may not entertain a decertification motion absent newly discovered evidence, new law, or changed circumstances. (Typed opn., 10-12; see also typed opn., 7-8, fn. 8.) Such a limitation on trial courts' discretion is a poor policy choice, given that the trial courts are exhorted to make class certification rulings as early as practicable—often before the case has matured to the point that the court can fully appreciate whether and how classwide resolution of the dispute can be managed efficiently and fairly. The published opinion now binds all trial courts in California to follow without exception their initial impression concerning certifiability in each case, which inevitably will lead to courts either delaying certification decisions until well into the proceedings, or being forced to conduct litigation in a manner the court has come to understand is simply not the best way for claims to be resolved. Whether California should endorse such an approach is "an important question of law" warranting review. (Cal. Rules of Court, rule 8.500(b)(1).)

In *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360, this court "recognized that the 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.'" (See also *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1084 (*Fireside Bank*) [trial court has discretion to decertify a class "to avoid inequitable outcomes in a given case" and "in recognition of the broad discretion trial courts rightfully possess to order class action proceedings"].)

Bypassing the sound principles outlined in these cases, the Court of Appeal here relied on language in *Green v. Obledo* (1981) 29 Cal.3d 126 (*Green*) to limit trial court discretion. But *Green* addressed whether a trial court may decertify a class *after a decision on the merits has been rendered*. This court held that "after a decision on the merits," a class may be decertified only upon a showing of "'changed circumstances.'" (*Id.* at p. 148.) This court later explained the rationale for that limitation is that "a defendant should not be allowed to sandbag a plaintiff, withholding its best case against certification and then seeking decertification if it suffered an unfavorable *merits* ruling." (*Fireside Bank*, *supra*, 40 Cal.4th at p. 1081, emphasis added.) That "one-way intervention" concern does not exist when, as here, decertification occurs *before* a judgment or other merits decision has been rendered. The logic behind imposing a "changed circumstances" requirement is thus absent here.

Green quotes one 1977 Pennsylvania federal district court decision in stating that "[b]efore judgment, a class should be decertified 'only where it is clear there exist changed circumstances making continued class action treatment improper.'" (*Green*, *supra*, 29 Cal.3d at p. 148, citing *Sley v. Jamaica Water & Utilities, Inc.* (E.D.Pa. 1977) 77 F.R.D. 391, 394.)[5] But "'[i]t is axiomatic . . . that a decision does not stand for a proposition not considered by the court.'" (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 332.) *Green* did not actually decide what standards apply to decertification motions brought *before* judgments or other merits decisions, so the Court of Appeal mistakenly relied on that quote for its conclusion that new evidence or changed circumstances are *always* required before a trial court may reconsider the propriety of class certification. (Typed opn., 11.)

California cases after *Green*—apart from the Court of Appeal's decision here—have discussed the "changed circumstances or new law" requirement in the context of a decertification motion made after a decision on the merits. (See *Fireside Bank*, *supra*, 40 Cal.4th at pp. 1083-1084; *Ortiz v. Lyon Management Group, Inc.* (2007) 157 Cal.App.4th 604, 620-623; *Grogan-Beall v. Ferdinand Roten Galleries* (1982) 133 Cal.App.3d 969, 977-978; cf. *Danzig v. Jack Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 1136 [even if decertification is sought based on changed circumstances, the motion must be made *before* any dispositive ruling].) Logically, if there were an *unqualified* requirement of new facts or changed

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[5] *Sley*, in turn, did not cite any authority to support the proposition for which it was cited in *Green*.

circumstances for decertification rulings, as the Court of Appeal held, any distinction between pre- and post-merits decertification rulings would be entirely irrelevant. In other words, courts would simply hold that a decertification ruling cannot be made absent new facts or changed circumstances, without discussing what rules govern *post-merits* decertification rulings. Thus, at least one case after *Green* has acknowledged that "certification of the class is not embedded in cement" and "can be decertified at any time, even during trial, should it later appear individual issues dominate the case," without stating any "changed conditions or new facts" requirement. (*MacManus v. A. E. Realty Partners* (1987) 195 Cal.App.3d 1106, 1117.)

Moreover, in focusing on dicta in *Green*, the Court of Appeal lost sight of a larger point in *Green's* analysis—that "our trial courts are urged to follow the procedures prescribed in rule 23 of the Federal Rules of Civil Procedure for conducting class actions." (*Green*, *supra*, 29 Cal.3d at pp. 145-146.) As this court noted in *Green*, the "California class action statute (Code Civ. Proc., § 382) is silent on the question of when a court may order a class to be certified or decertified," so courts look to rule 23 for guidance. (*Green*, at p. 146; see *Tobacco II*, *supra*, 46 Cal.4th at p. 318 [looking to federal law for guidance concerning class action procedure].) The pertinent part of rule 23, as currently drafted, provides:

> *Altering or Amending the Order*. An order that grants or denies class certification *may be altered or amended* before final judgment.

(Fed. Rules Civ. Proc., rule 23(c)(1)(C), second emphasis added.)

Federal decisions construing rule 23 have repeatedly explained that trial judges have broad, continuing discretion to decertify a class at any time before final judgment as their understanding of often-complex cases improves or the structure of the proposed trial emerges. While judges are frequently prompted to revisit class certification issues because of new facts or law, rule 23 does not limit their discretion to only those scenarios.

In *Slaven v. BP America, Inc.* (C.D.Cal. 2000) 190 F.R.D. 649, 650-651 (*Slaven*), for example, the plaintiffs argued that the defendants' motion to decertify was improper because it violated the narrow standards for reconsideration under the Central District's Local Rules, which barred motions for reconsideration in the absence of new facts or law. Rejecting that argument, the court held that "even if Defendants *had* committed a facial violation of the Local Rule, their motion should be considered because of the special procedural role played by a district court in supervising the maintenance of a class action." (*Id.* at p. 652.) After extensive review of federal authorities regarding a court's authority to "amend its decision to certify a class 'as may be desirable from time to time,'" the court held that "[b]ecause Defendants' [decertification] motion assists the Court in performing its role as gatekeeper, or manager, of the class action, the motion should not be denied on the ground that it impermissibly recounts old facts and law under Local Rule 7.16." (*Ibid.*)

The analysis in *Slaven* is echoed in the decisions of federal appellate courts.[6] Those cases all recognize that the ability of a trial court to reconsider an initial class certification ruling is a vital ingredient in the flexibility and inherent discretion trial courts have to realize the benefits that flow from use of the class action mechanism.

In addition to creating a conflict between federal and state class action procedures, the Court of Appeal's decision is contrary to this court's decision in *Le Francois*, *supra*, 35 Cal.4th 1094. In *Le Francois*, this court addressed whether "a trial court [may] consider interim orders it has already made in the absence of new facts or

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[6] E.g., *Valentino v. United States Postal Service* (D.C. Cir. 1982) 674 F.2d 56, 67, fn 12 (maj. opn. of Ginsburg, J.) ("class certification ordered at the initial stage of litigation may be withdrawn, altered or amended when the merits of the case unfold"); *Lamphere v. Brown University* (1st Cir. 1977) 553 F.2d 714, 719 (trial court judge who denies certification "may well change his mind later on"); *Boucher v. Syracuse University* (2d Cir. 1999) 164 F.3d 113, 118 ("under Rule 23(c)(1), courts are 'required to reassess their class rulings as the case develops'"); *McNamara v. Felderhof* (5th Cir. 2005) 410 F.3d 277, 280 ("a district court is free to reconsider its class certification ruling as often as necessary before judgment"); *Armstrong v. Davis* (9th Cir. 2001) 275 F.3d 849, 871, fn. 28 (trial courts have "broad discretion . . . to revisit [class] certification throughout the legal proceedings before the court"); *In re Integra Realty Resources, Inc.* (10th Cir. 2004) 354 F.3d 1246, 1261 ("a trial court overseeing a class action retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment"); *Shin v. Cobb County Bd. of Educ.* (11th Cir. 2001) 248 F.3d 1061, 1065 ("[t]he district judge may review his certification order at any time and may consider redefined or more narrowly tailored classes or subclasses").

new law." (*Id.* at p. 1101.) A trial court has an "'inherent constitutional power sua sponte to reconsider, correct and change its own interim rulings." (*Id.* at p. 1107.) Thus, even express statutory provisions that set forth a "changed circumstances" standard in some contexts (see Code Civ. Proc., §§ 437c, 1008) cannot be interpreted to limit a court's authority to reconsider its own rulings, as that could "'emasculate the judiciary's core power to decide controversies between parties.'" (*Le Francois*, at p. 1104.) A """[m]iscarriage of justice""" would result where a "'court realizes it has misunderstood or misapplied the law,'" but is "'prohibited from revisiting its ruling . . . no matter how obvious its error or how draconian the effects of its misstep.'" (*Id.* at p. 1105.) """A court could not operate successfully under the requirement of infallibility in its interim rulings.""" (*Ibid.*)

If "'[j]udicial inefficiencies may . . . result from the need for an appeal that would not have been required if correction [of rulings belatedly shown to be erroneous] could have been made by a trial court willing to do so'" (*Le Francois*, *supra*, 35 Cal.4th at p. 1100), such inefficiencies will be magnified a hundredfold in the class action context, where trial courts will be powerless to stop the class action machinery once it is put into motion, even if they later conclude certification is inappropriate. Plaintiffs seeking class certification will be harmed as trial judges become reluctant to grant certification, knowing they will be locked into such decisions absent newly discovered facts or other changed circumstances. Defendants will be harmed by having to bear the tremendous administrative burden of class notification and the threat of liability

to an entire class, or be forced into an unreasonable settlement, when even the trial judge no longer believes class certification is appropriate but is powerless to revisit his or her initial certification decision.

No rule or statute restricts a party's right to seek class decertification absent new law or newly discovered facts. To the contrary, rule 3.764 of the California Rules of Court, captioned "Motion to certify or decertify a class or amend or modify an order certifying a class," contains no "newly discovered evidence," "new law," or "changed circumstances" requirement. The Court of Appeal here has nonetheless, as a matter of first impression, imposed a judge-made rule to that effect, contrary to all of the reasoning in *Le Francois,* and contrary to the approach followed by federal courts across the country. Before that rule becomes woven into the fabric of California class action jurisprudence, this court should grant review to determine whether courts and litigants are best served by a rule that so narrowly circumscribes trial judges' discretion.

III. REVIEW SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN CALIFORNIA LAW ON WHETHER A BUYER'S RELIANCE IS A REQUIRED ELEMENT OF AN EXPRESS WARRANTY CLAIM.

On the merits of plaintiffs' express warranty claim, the Court of Appeal's opinion holds that the "basis of the bargain" element in section 2313 of the California Uniform Commercial Code (section

2313) imposes no requirement of reliance by the purchaser on a seller's representation as a prerequisite for asserting an express warranty claim based on the representation. Review should be granted because the Court of Appeal's opinion creates a conflict with existing California law and with the majority of other jurisdictions regarding a statute that should have uniform application.

In *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 (*Hauter*) this court stated that express warranty claims are governed by section 2313, and that the "key under this section is that the seller's statements—whether fact or opinion—must become 'part of the basis of the bargain.'" Noting a disagreement as to whether section 2313 entirely eliminated the traditional requirement of reliance by the purchaser on the seller's statement, this court signaled that reliance *is* a required element of an express warranty claim. (*Id.* at pp. 115-116.) First, the 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*." (*Ibid.*) Second, the 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.)

Two years after *Hauter*, in *Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 760 (*Fogo*), another division of the First District Court of Appeal likewise noted the "general disagreement"

regarding "whether or not reliance is a necessary element" under section 2313, but stated that "there appears to be no reason to hold that reliance upon the warranty is not still a vital ingredient for recovery."

The Second District Court of Appeal reached and decided the reliance issue in *Keith*, *supra*, 173 Cal.App.3d at page 23, holding that reliance *is* an element of an express warranty claim under section 2313: (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."[7]

Three years later, in *Osborne*, *supra*, 198 Cal.App.3d at pages 660-661, the Third District Court of Appeal's analysis of an express warranty claim in a class action context assumed that reliance was a required element of those claims. In affirming the trial court's determination that "reliance was an issue that would have to be litigated as to each individual plaintiff," the Court of Appeal held

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

that "plaintiffs here failed to show that representations were made to each class member" and that "[t]here was no basis to draw an inference of classwide reliance without a showing that representations were made uniformly to all members of the class." (*Ibid.*)

In 2003, the Judicial Council of California approved a model jury instruction, CACI No. 1240, entitled "Affirmative Defense to Express Warranty—Not 'Basis of Bargain'":

> [Name of defendant] is not responsible for any harm to [name of plaintiff] if [name of defendant] proves that [name of plaintiff] *did not rely* on [his/her/its] [statement/description/sample/model] in deciding to [purchase/use] the [product].

(Italics and boldface omitted, emphasis added.) CACI No. 1240's "Sources and Authority" section includes citations to *Keith* and two secondary sources for the proposition that absence of reliance on the seller's statement is an affirmative defense to an express warranty claim.

The Court of Appeal's decision here creates a conflict with all these authorities, holding that "breach of express warranty arises in the context of contractual formation *in which reliance plays no role*." (Typed opn., 12, emphasis added; see also typed opn., 13 [while "[p]re-Uniform Commercial Code law governing express warranties required the purchaser to prove reliance on specific promises made by the seller . . . [t]he Uniform Commercial Code . . . *does not require such proof*" (citations omitted; emphasis added)], 18 ["the trial court incorrectly assumed that reasonable reliance was an element of the

breach of express warranty claim that each member would have to establish"].)

The Court of Appeal's decision also expressly disagrees with the holding in *Keith* that a seller has a right to *rebut* any presumption of reliance on the seller's statement with proof regarding the buyer's actual knowledge of the true condition of the goods or that the bargain did not rest at all on the alleged representation. Rather, according to the Court of Appeal, "the seller's right to rebut goes [only] to proof that extracts the affirmations from the 'agreement' or 'bargain of the parties in fact,' *not, as* Keith *would suggest, to proof that they were not an inducement to purchase.*" (Typed opn., pp. 21-22, emphasis added.) On this same point, the Court of Appeal's decision also expressly 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.)

The Court of Appeal's decision not only conflicts with existing California law, but is also contrary to the majority of other jurisdictions that have examined whether a modified reliance requirement remains relevant to an express warranty claim under section 2313. 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 some form of reliance by the individual purchaser to create an express warranty. Consistent with CACI No. 1240, those courts have held

that section 2313, 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].)

In sum, the Court of Appeal'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 of the California Uniform Commercial Code is in conflict with currently settled California law, as well as the majority of other jurisdictions that have addressed the question. Review by this court is necessary to resolve the conflict between the Court of Appeal's opinion and *Keith, Fogo,* and *Osborne*, and with CACI No. 1240, as well as to harmonize California law with the rest of the nation on a provision of the UCC that should have uniform application among the various states. Both trial courts and the CACI Committee need guidance on which approach is correct.

CONCLUSION

For all the foregoing reasons, review should be granted to decide all three of the significant issues presented here.

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