SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
555 WEST FIFTH STREET
LOS ANGELES, CA 90013
+1 213 896 6000
+1 213 896 6600 FAX

BEIJING
BOSTON
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
GENEVA
HONG KONG
HOUSTON
LONDON
LOS ANGELES
NEW YORK
PALO ALTO
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C.

FOUNDED 1866

September 21, 2015

By Overnight Mail

The Chief Justice and the Associate Justices
of the State of California
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: Request for Depublication (Cal. Rules of Court, Rule 8.1125)
Rutledge v. Hewlett-Packard Company (2015) 238 Cal.App.4th 1164 (Case No. H036790), petition for review pending, No. S22898

May it please the Court:

Hewlett-Packard Company ("HP") is the defendant, appellee, and petitioner in the above-referenced matter, *Rutledge v. Hewlett-Packard Co.* On August 31, 2015, HP timely filed with this Court a petition for review of the decision of the Sixth District Court of Appeal. For the reasons set forth in its Petition, HP believes that this Court should grant review to resolve the conflict over the scope of a manufacturer's duty under the UCL and CLRA to disclose potential non-safety-related product defects, and to address the criteria that a court must consider before it can certify a nationwide class of consumers under California law.

In the alternative, HP requests at a minimum that, pursuant to California Rules of Court, rule 8.1125(a)(1) and (2), this Court order that the opinion – which has been certified for publication – not be published.[1] The opinion does not meet the criteria for publication and, if let stand, will adversely affect the adjudication of consumer class actions in state and federal court.

[1] This request for depublication is timely filed within 30 days after the opinion became final on August 21, 2015. *See* Cal. R. Ct. 8.1125(a)(4).

Grounds for Depublication

The fundamental purpose of publishing an opinion is to elucidate the law with reasoning and analysis that is fit to guide the resolution of other similar disputes. Thus, a decision may warrant publication when, for example, it "[m]odifies, explains, or criticizes *with reasons given*, an existing rule of law," or when it "[m]akes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of constitution, statute, or other written law." Cal. R. Ct. 8.1105(c)(3), (7) (emphasis added). Decisions will also warrant publication – and review by this Court – when they create a conflict with existing law or address issues of continuing importance. Cal. R. Ct. 8.1105(c)(5), (6). The common ground underlying these and the other criteria for publication, *see id.* at Cal. R. Ct. 8.1105(c)(1), (2),(4), is that a published decision will advance the law and provide helpful guidance to lower state courts and the federal courts. Given the important role that publication plays in defining California law, this Court has discretion under Rule 8.1125 to order depublication, and historically it has done so when an opinion – even if it otherwise meets the standards for publication – is "wrong in some significant way, such that it would mislead the bench and bar if it remained a citable precedent." Justice Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. L. Rev. 514, 514 (1984).[2]

The stakes here are sufficiently great, and the need for clear guidance sufficiently compelling, to warrant plenary review. But at the very least, the Court should depublish the opinion because it neither faithfully applies nor reasonably distinguishes existing precedent, but conflicts with prior opinions addressing a manufacturer's disclosure obligations and the criteria for certifying nationwide classes of consumers. As the most recent published opinion in these two critical areas of law, the decision below would serve not to advance the law but to create substantial confusion and uncertainty for state and federal courts. The decision would stand as a precedent for a sweeping expansion of liability for essentially all manufacturers and sellers doing business in California, enforceable through nationwide class actions whenever a business is headquartered and operates in this state. Busy judges in the Superior Court and federal courts will be left to choose between conflicting California published precedents.

---

[2] The article is available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2090&context=californialawreview.

I. Depublication is Appropriate Because the Decision Attempts Dramatically to Expand Liability Under the CLRA and UCL for a Manufacturer's "Failure to Disclose" Potential Product Defects Without Carefully Addressing the Reasoning or Factual Context of Prior Decisions

Plaintiffs allege that HP violated the UCL and CLRA by failing to disclose an alleged defect in a component part that created an increased risk of failure "at some point before the end of the notebook's useful life." Pet.App.1; *see also* Pet.App.8 (noting theory that consumers are entitled to expect that notebook display screens "would function properly for the duration of the notebook's useful life"). That theory fails to state a claim under well-established state precedent and a long line of federal authority applying state law. *See Daugherty v. Am. Honda Motor Co.* (2006) 144 Cal.App.4th 824; *Bardin v. Daimlerchrysler Corp.* (2006) 136 Cal.App.4th 1255; *see also, e.g.*, *Wilson v. Hewlett-Packard Co.* (9th Cir. 2012) 668 F.3d 1136; *Vitt v. Apple Computer, Inc.* (9th Cir. 2012) 469 F.App'x 605, 608; *Long v. Hewlett–Packard Co.* (N.D. Cal. July 27, 2007) No. C06–02816, 2007 WL 2994812, at *8, affd. (9th Cir. 2009) 316 F.App'x 585; *Oestreicher v. Alienware Corp.* (N.D. Cal. 2008) 544 F.Supp.2d 964, 972, affd. (9th Cir. 2009) 322 F.App'x 489.

These decisions not only establish and consistently apply a clear rule of law, they also explain the reasons underlying the rule. It derives from this Court's seminal decision in *Seely v. White Motor Company* (1965) 63 Cal.2d 9, and the principle that manufacturers' obligations and consumers' economic expectations – and the duration during which each bears the "risk of repair" – are defined by contract through limited and extended warranties. *See Bardin*, 136 Cal.App.4th at 1262-70; *Daugherty*, 144 Cal.App.4th at 829-39. A contrary rule creating liability under the UCL or CLRA for a "failure to disclose" would eliminate the effect of limited warranties and "product defect litigation would become as widespread as manufacturing itself." *Daugherty*, 144 Cal.App.4th at 829; *see also*, *Wilson*, 668 F.3d at 1141-42; *Oestreicher*, 322 F.App'x at 493; *Vitt*, 469 F.App'x at 608 (citing *Seely* and stating, "We would be surprised if the California Supreme Court found such an extension in the consumer protection laws at issue").

In allowing Plaintiffs' claims to proceed, the decision below is in conflict with *Bardin* and *Daugherty* and their progeny. Although the court below recognized that the Ninth Circuit has rejected similar claims, it failed to provide any *reasons* for disagreeing with the Ninth Circuit, and instead merely noted that it was "not bound by a federal

circuit court opinion." Pet.App.8 & n.5. The court below also did not conduct a careful review of the principles underlying *Bardin* and *Daugherty*, or of their roots in this Court's *Seely* decision. As a result, the decision lacks the hallmarks of a published decision, *e.g.*, Cal. R. Ct. 8.1105(c)(3), (7), and it will create substantial confusion among lower courts – especially federal courts that now hear most class actions – as to what the state of California law is, and which precedent to follow.

To the extent the court below attempted to distinguish *Bardin* and *Daugherty*, the purported distinctions only confirm that the decision will create confusion. The lower court's decision relies on erroneous assumptions with potentially sweeping, unintended consequences.[3]

First, the decision below relies on the clearly erroneous distinction that HP knew of, and concealed, the alleged defect. Pet.App.8; *see also id.* at 12-15. In fact, both *Daugherty* and *Bardin* contained express allegations that the manufacturers knew of the defects – as shown by service complaints and remedial measures – but continued to sell cars without disclosing those material facts. *See Daugherty*, 144 Cal.App.4th at 828; *Bardin*, 136 Cal.App.4th at 1262. Read in isolation, the decision below is authority for the view that California law imposes a duty to disclose whenever a manufacturer – through service records or otherwise – becomes aware of any potential defect affecting even a tiny fraction of consumers. Such a sea change in California law is wholly unwarranted, but if it is to occur, it should not be caused by a published opinion that fails fairly to consider directly adverse precedent.

Second, the court below attempted to characterize the alleged defect in this case as existing from the inception of the product, purportedly in contrast to a defect in which a component "wears out and breaks over time because of use and wear and tear." Pet.App.10. In fact, both *Daugherty* and *Bardin* involved alleged defects in design or installation existing at the time of sale, and as *Daugherty* observed, "[v]irtually all" product failures "can be attributed to a 'latent defect' that existed at the time of sale or during the term of the warranty." 144 Cal.App.4th at 830 (internal quotation omitted).

---

[3] To the extent Plaintiffs – in Opposition to the Petition for Review – may attempt to characterize the decision below as based on the particular facts of this case and therefore unworthy of plenary review, that argument should fail. But if the decision below were viewed merely as a fact-specific application of existing law, as Plaintiffs may claim, then plainly the case would not warrant publication.

Allowing a plaintiff to pursue claims simply by characterizing the issue as a defect in design or installation at the time of sale would eviscerate the *Daugherty/Bardin* rule and the concept of limited warranties. Once again, the opinion conflicts with prior opinions without acknowledging or explaining why it is doing so.

Third, the decision below is clearly erroneous in concluding that a duty to disclose was triggered by a press release generally describing the notebooks as "within HP's tradition of 'reliable, manageable, stable, secure, and expandable' products." Pet.App.11. As a matter of law, such generic representations are puffery and therefore insufficient to trigger a duty to disclose. *See, e.g.*, *Consumer Advocates v. EchoStar Satellite* (2002), 113 Cal.App.4th 1351, 1361; *Vitt*, 469 F.App'x at 607. If a duty to disclose were triggered any time a seller generally promoted its products as reliable or of good quality, the duty to disclose effectively would become the rule for every product. Moreover, the decision below held that the question of whether such a generalized statement is puffery must be left to the trier of fact. That alone is a dangerous precedent, as it could significantly inhibit courts' ability to dispose of frivolous claims on demurrer or summary judgment.

For all the foregoing reasons, the decision as a whole – and in its individual parts – creates a substantial risk of confusing the bar and bench as to the proper application of California law, *see* Grodin, 72 Cal. L. Rev. at 514, and lacks the kind of rigorous analysis necessary to operate as effective, carefully defined precedent.

II. Depublication is Appropriate Because the Decision Compelled Certification of a Nationwide Class under California Law Without Any Rigorous Analysis of the Distinct Claims, and Differing State Laws, at Issue

Depublication is also warranted as to the portion of the decision certifying a nationwide class. Read narrowly, the decision could be viewed as holding merely that the trial court misstated the burden of proof and that HP failed to meet its burden below. Pet.App.28. Read in this way, the decision still would be erroneous, but it also clearly would not meet any basis for publication.

Petitioner submits, however, that as a published decision, the opinion below is more likely to be read as establishing a broad new presumptive rule that California law should apply to transactions and consumers nationwide whenever a defendant is headquartered in, and operates out of, California. The due process and federalism

implications of such precedent are profound. Yet the court below reached its path-breaking conclusion through a number of methodological shortcuts, and it failed to perform the kind of careful analysis one would expect for a decision with such dramatic implications.

First, the court clearly erred in not conducting a separate choice-of-law analysis for each individual claim. Such separate analysis is particularly important where, as here, facts relevant to the breach of express warranty claim (*e.g.*, the location of HP's repair facility) are irrelevant to the UCL claim.

Second, the decision below also assumed, without analysis, that California was the "state where the injury occurs," within the meaning of *McCann Foster Wheeler LLC* (2010) 48 Cal.4th 68. Pet.App.27. The court below did not consider case law holding that, in claims arising from a consumer transaction, the "place of injury" is ordinarily where the purchase occurs. *See McCann*, 48 Cal.4th at 94 n.12; *Zinn v. Ex-Cell-O Corp.* (1957) 148 Cal.App.2d 56, 80 n.6; *see also Mazza v. Am. Honda Motor Co., Inc.* (9th Cir. 2012) 666 F.3d 581, 593-94. This is true even for claims for breach of express warranty. *See Bracker v. Am. Nat'l Food, Inc.* (1955) 133 Cal.App.2d 338, 344.

Third, the court of appeal did not undertake any analysis of the actual conflict (amply demonstrated in the record, AA Vol. 4 963-1040) between California and other states' laws. Instead, it simply assumed that "'California's consumer protection laws are among the strongest in the country,'" and that California law thus should apply. Pet.App.27 (quoting *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 242). That is not the proper inquiry for the governmental interest test. *See McCann*, 48 Cal.4th at 97-98. This Court should not let stand as precedential authority the notion that a court does not need to undertake an actual analysis of various state laws, but instead can apply California law to consumers nationwide whenever judicial intuition suggests that doing so would be fairly protective of consumers.

In sum, depublication is warranted because the decision below mandated the certification of a nationwide class of consumers under California law without engaging in the requisite independent evaluation of each underlying claim and of the applicable principles of conflict of laws, due process, and federalism.

Respectfully submitted,
SIDLEY AUSTIN LLP

By: _____

Mark E. Haddad
David R. Carpenter
Attorneys for Hewlett-Packard Company

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN FRANCISCO)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 555 California Street, Suite 2000, San Francisco, CA 94104.

On September 21, 2015, I served the foregoing document(s) described as **LETTER RE: REQUEST FOR DEPUBLICATION** on all interested parties in this action as listed on the attached service list.

☑ (VIA U.S. MAIL) I served the foregoing document(s) by U.S. Mail, as follows: I placed true copies of the document(s) in a sealed envelope addressed to each interested party as shown above. I placed each such envelope with postage thereon fully prepaid, for collection and mailing at Sidley Austin LLP, Los Angeles, California. I am readily familiar with Sidley Austin LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business.

☑ (VIA E-MAIL) I caused such documents to be transmitted by e-mail to the following e-mail addresses as set forth below. [TO COUNSEL ONLY]

☑ (VIA OVERNIGHT DELIVERY) Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by for overnight delivery on this date.

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

Executed on September 21, 2015, at San Francisco, California.

Theresa Scuffil

Re: *Rutledge v. Hewlett-Packard Company*
Supreme Court Case No. S22898

SERVICE LIST

Robert S. Green
Green & Noblin, P.C.
2200 Larkspur Landing Circle, Suite 101
Larkspur, CA 94939
Telephone: (415) 477-6700
Email: rsg@classcounsel.com
Attorney for Plaintiff
[By E-Mail and U.S. Mail]

C. Brooks Cutter
Kershaw, Cutter & Ratinoff, LLP
401 Watt Avenue
Sacramento, CA 95864
Telephone: (916) 448-9800
Email: bcutter@kcrlegal.com
Attorney for Plaintiff
[By E-Mail and U.S. Mail]

Jenelle Welling
Bramson, Plutzik, Mahler & Birkhaeuser, LLP
2125 Oak Grove Road, Suite 120
Walnut Creek, CA 94598
Telephone: (925) 945-0200
Email: jwelling@bramsonplutzik.com
Attorney for Plaintiff
[By E-Mail and U.S. Mail]

Shaun P. Martin
University of San Diego School of Law
5998 Alcala Park, Warren Hall
San Diego, CA 92110
Telephone: (619) 260-2347
Email: smartin@sandiego.edu
Attorney for Plaintiff
[By E-Mail and U.S. Mail]

Daniel J. Bergeson
John W. Fowler
Bergeson LLP
303 Almaden Blvd., Suite 500
San Jose, CA 95110
Telephone: (408) 291-6200
Email:
dbergeson@be-law.com
jfowler@be-law.com
Attorney for Defendant
[By Email and U.S. Mail]

Sonia E. Valdez
Orrick, Herrington & Sutcliffe, LLP
1000 Marsh Road
Menlo Park, CA 94025
Telephone: (650) 614-7400
Email: svaldez@orrick.com
Attorney for BizcomElectronics, Inc.
[By Email and U.S. Mail]

Michael J. Stortz
Drinker Biddle & Reath LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105
Telephone: (415) 591-7500
Email: michael.stortz@dbr.com
Attorney for Defendant
[By Email and U.S. Mail]

Ronald A. Reiter
Supervising Deputy Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7005
[By Overnight Delivery]

Complex Legal Department
Santa Clara Superior Court
191 North First Street
San Jose, CA 95113-1090
[By Overnight Delivery]

California Court of Appeals
Sixth Appellate District
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113-1717
[By Overnight Delivery]

Office of the District Attorney
70 West Hedding Street, West Wing
San Jose, CA 95110
[By Overnight Delivery]