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October 13, 2015

BY COURIER

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Rutledge v. Hewlett-Packard Co.*, S228989

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Chamber of Commerce of the United States of America ("U.S. Chamber") submits this letter as *amicus curiae* in support of Hewlett-Packard Company's petition for review and alternative request for depublication.

Interests of the *Amicus Curiae*

The U.S. Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of thousands of California businesses. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In fulfilling that role, the Chamber has appeared many times before this Court, both at the petition stage and on the merits.

The Chamber and its members have a strong interest in further review because the decision below misapplies the Unfair Competition Law (UCL) in a way that effectively imposes a warranty obligation of indefinite duration on all manufacturers subject to litigation in California, while extending the reach of California substantive law nationwide.

Reasons Why Review Should Be Granted

The Sixth District opinion in this case raises two issues of critical practical importance to all manufacturers who sell to Californians. First, by holding that the post-warranty failure of a component supports a UCL action for failure to disclose the purported defect, the

decision creates a square conflict with at least two other decisions of the Court of Appeal and nullifies the economic loss rule long recognized by this Court. Second, the decision compounds that error by extending this erroneous rule of law—which stands alone, or nearly so, among the laws of the 50 states—to all consumers nationwide. The net result is that a unique and erroneous rule of California law extends to transactions that occurred entirely out of state, based solely on the residence of the defendant. The Court should grant review to forestall that result and the confusion the decision will engender in the lower courts. In the alternative, should the Court find that some unique aspect of the factual setting here counsels against review, the opinion should be depublished so that its broad language does not lead to erroneous decisions in different factual contexts.

A. Review Is Warranted Because Of The Widespread Practical Effects Of Its Abrogation Of The Economic Loss Doctrine And Imposition Of A Warranty Obligation Of Indefinite (And Potentially Perpetual) Duration.

Until the decision below, California courts have refused to recognize under the UCL or any other theory a claim that a product was defective—or, what is the same thing, its manufacturer is liable for failure to disclose a purported defect—because some aspect of the product failed at some point after the expiration of all express and implied warranties. The only exception was for alleged defects that threatened the user's safety.

This Court explained the reason why tort or statutory law does not provide recovery for every disappointing product: While "a consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market," he may be "fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will," as through a warranty. (*Seely v. White Motor Company* (1965) 63 Cal.2d 9, 18). *Seely* precludes use of tort theories, including statutory torts like the UCL, to end-run the limits of contractual warranties except when a product failure results in physical harm. That position now represents the mainstream position, having been adopted by the U.S. Supreme Court and the high courts of many states. (*E.g.*, *East River Steamship Corp. v. Transamerica Delaval Inc.* (1986) 476 U.S. 858.) As the Restatement authors have observed, "A strong majority of courts have taken the position that the key to whether products liability law or commercial law principles should govern depends on the nature of the loss suffered by the plaintiff. If the plaintiff has suffered loss because the defective product simply malfunctioned or self-destructed, the loss is deemed economic loss within the purview of the Uniform Commercial Code (U.C.C.)." (Restatement (3d) Torts: Product Liability § 21, Reporter's Note, com. d (1998) (collecting cases).

The decision below evades the economic-loss principle, however, by the semantic expedient of transforming the post-warranty failure of a component into a latent defect at the time of sale. No limiting principle appears on the face of the opinion, and its unsound logic would foreclose any limits other than the whim of the factfinder.

On the contrary, relying on noncontractual sources of law to support recovery for a product's failure after the expiration of all warranties—as the Sixth District did here—would impose on manufacturers an obligation to guarantee their products for life. As the Second District recognized, "Failure of a product to last forever would become a 'defect,' a manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread as manufacturing itself." (*Daugherty v. American Honda Motor Co.* (2006) 144 Cal.App.4th 824, 829.) *Daugherty* followed the decision of the Fourth District, Division Three in *Bardin v. Daimlerchrysler Corp.* (2006) 136 Cal.App.4th 1255, which similarly rejected claims based on the alleged failure of warranted components after the expiration of the warranty. As the petition explains at length (at 11-21), *Daugherty* and *Bardin* would require dismissal of the UCL claims in this case. The contrary conclusion of the court below creates a square conflict that warrants this Court's review.

The sweeping effect of the decision below is especially pronounced because the decision ultimately rests potential liability on the vaguest puffery: statements about the use of the "latest technologies" and recalling HP's tradition of "'reliable, manageable, stable, secure and expandable products'" (Pet. App. 11), and the use of a picture of the display screen in a print ad. (Pet. App. 12.) That is, a picture of the product amounts to a representation—tantamount to a contractual commitment—that the product will function for the duration of an "indefinite useful life." (*Ibid.*). Indeed, plaintiffs' theory was that the failure of the component "at any time would be premature." (*Ibid.*; but see *id.* at 19 [recognizing that "a computer, like a car or tires, has limited useful life"].)

In short, the net effect of the Sixth Circuit's decision is that any representation extolling the general quality of a product, coupled with the post-warranty failure of a component in a small proportion of the units sold (apparently less than 4%, see Pet. 5-6), supports a UCL claim contending that the supposed propensity to failure should have been disclosed before sale. That position not only conflicts with well-reasoned decisions from two other Appellate Districts, but also departs from this Court's long adherence to the economic loss doctrine, undermining predictability in the administration of justice in California. The Court should review and reverse.

B. Review Is Warranted Because The Decision Below Improperly Certified A Nationwide Class Predicated On The Application Of The UCL To Out-Of-State Transactions, Plaintiffs, And Alleged Injuries.

Review is warranted for a second reason. The Court of Appeal ordered the certification of a nationwide class consisting primarily of persons whose injuries, if any, occurred where they were allegedly misled and where they purchased and used their computers. That certification rests on the premise that California's UCL applies no matter where plaintiffs purchased their computers and no matter where they may have been harmed by malfunctioning displays. If this ruling is left in place to confuse the lower courts, it will have substantial significance for California businesses that will be subjected to California law wherever they may operate, which may impose a significant competitive

disadvantage on California companies due to the application of rules like the Sixth District's UCL holding discussed above. The costs of overbroad nationwide class actions will be borne ultimately by California consumers, employees, and businesses.

As the petition explains (at 21-23), recognized federal constitutional restrictions on the extraterritorial projection of state law are sufficient to preclude the nationwide imposition of the UCL. Under our federal system, "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 422.) Communications or product sales in (for example) Missouri are governed by Missouri law. California cannot constitutionally set the rules of business conduct and consumer protection in other states.

But the Court need not address the constitutional limits on the extraterritorial application of California law, because the decision below is equally wrong as a matter of California choice-of-law principles, which address the comparative interests of different states in applying their law to a given dispute. As this Court has held, "a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders." (*McCann v. Foster Wheeler LLC,* (2010) 48 Cal.4th 68, 97-98 [internal quotation marks omitted].) Indeed, the Court of Appeal acknowledged that "[t]he state where the injury occurs has a 'predominant interest' in applying its law." (Pet. App. 27 [quoting *McCann*].)

Yet the Court of Appeal abandoned that principle immediately upon stating it. Instead, the Sixth District relied on the remarkable notion that—even for a UCL claim based on a failure to disclose an increased risk of component failure—the injury to a South Dakota consumer occurs in California because that is where HP allegedly failed to perform adequate warranty repairs. But warranty repairs had nothing to do with the UCL claim, and the vast majority of the UCL class did not present their laptops for warranty repairs.[1] Injury from a supposed flaw existing at purchase occurs where the product is purchased, or where the flaw manifests (if it ever does). And a misrepresentation—or failure to communicate—causes injury where the communication was (or should have been) received. (See *McCann*, 48 Cal.4th at 94 n.12 [failure to warn claim governed by law of state where communication should have been received].)

Yet the class was defined to encompass all purchasers of the computer models at issue, whether or not they sought warranty repairs. Except for the tiny class of persons who

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[1] In light of the small size of the warranty class, HP's petition does not challenge the Court of Appeal's conclusion that breach of warranty plaintiffs were injured in California to the extent that their claims rest on HP's alleged failure to adequately repair their computers. (See Pet. 10 n.2.) We doubt that a consumer who never travels to California is injured here merely because a product that failed elsewhere is shipped here but not properly repaired, so that it fails again when used in the consumer's home state. The Court of Appeal's dubious and inadequately explained conclusion on this point presents another reason to depublish the opinion if review is not granted.

actually presented computers for repair during the warranty period and who were dissatisfied with the result, the Court of Appeal's rationale for a nationwide class does not withstand scrutiny. That is especially so for the claims under the UCL, which are based on allegedly misleading representations and omissions combined with alleged deficiencies in the products' performance. For all out-of-state class members, the relevant misrepresentations were communicated outside California and any product failure—the only alleged injury—also occurred outside California.

Rather than follow *McCann*'s clear instructions about the state that has the predominant interest in such circumstances, the Court of Appeal followed earlier decisions of lower courts asserting that "'California's more favorable laws may properly apply to benefit nonresident plaintiffs when their home states have no identifiable interest in denying such persons full recovery.'" (Pet. App. 28 [quoting *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 243].) And the Court of Appeal quoted with approval a federal trial court's remarkable and unsupported assertion that "California's interest in having its consumer protection laws applied to claims involving [notebooks made by a California company] outweigh any other particular state's interest in have its laws applied." (*Ibid.* [quoting *Wolph v. Acer America Corp.* (2011) 272 F.R.D. 477, 486].)

The Court of Appeal simply glossed over the well-recognized, material differences in state consumer protection laws. (See, *e.g.*, *Mazza v. American Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 591-92.)[2] Instead, the court simply asserted that "'California's consumer protection laws are among the strongest in the country.'" (Pet.App.27 [quoting *Wershba*, 91 Cal.App.4th at 242].) But that is not enough, and indeed the court's observation suggests that the differences that lead to the supposed superiority of California law are indeed material.

More important, this Court in *McCann* explicitly rejected a similar analysis that disregarded material conflicts so long as California law was likely to produce a better result for the plaintiffs. It does not matter whether a judge views California law as applying "the better or worthier rule." (*McCann*, 48 Cal.4th at 97.) (And as the petition points out (Pet. 25), the material differences between the UCL and other states' laws do not necessarily benefit out-of-state plaintiffs who are forced to sue under California law.) A state's interest in applying a "'business friendly' statute or rule of law" to "the activities of out-of-state companies within the jurisdiction" is just as strong as its interest in applying local law to local transactions involving in-state companies. (*McCann*, 48 Cal.4th at 92.)

The Court of Appeal criticized the trial court because it "did not address whether HP met its burden of demonstrating that the interests of other state's laws were *greater* than California's, nor did it make such finding." (Pet. App. 28.) But this Court already

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[2] We note that HP asserts that it included an analysis of those differences in the record below. (See Pet. 4, 21 [citing 4AA963-1040].)

answered that question in *McCann* in holding that a state has the "predominant interest" in regulating conduct that takes place (and allegedly causes injury) within its borders. (*McCann*, 48 Cal.4th at 98.) As the Court recognized, a state "bears the primary responsibility for regulating the conduct of those who create a risk of injury to persons within its borders." (*Id.* at 101.) In contrast, just as a state has "has no legitimate interest in protecting nonresident shareholders" (*Edgar v. MITE Corp.* (1982) 457 U.S. 624, 644), it also has no legitimate interest in "protecting nonresident" consumers. Under *McCann*, the other states' interests in applying their laws to representations made and products sold to their consumers "were greater than California's." (Pet. App. 28.) The Court of Appeal's cursory analysis simply overlooked governing law.

C. In The Alternative, The Decision Below Should Be Depublished If Review Is Denied.

If the Court declines to review this case on the merits, it should depublish the opinion of the Court of Appeal so that the decision does not spawn error and confusion in important areas of the law. Depublishing the opinion would remove the unwarranted precedential conflict with *Daugherty* and *Bardin*. And depublication also would prevent any confusion in the trial courts about the proper choice-of-law analysis for false advertising claims with respect to statements communicated, products purchased, and injuries sustained outside California. The cursory analysis of choice of law in the decision below does not meet the standards for publication and should not remain precedential.

Conclusion

The decision of the Court of Appeal should be reviewed and reversed. In the alternative, the opinion of the Court of Appeal should be depublished.

Respectfully submitted,

Donald M. Falk /GMB

Donald M. Falk

CERTIFICATE OF SERVICE

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On October 13, 2014, I served the foregoing document(s) described as:

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

Executed on October 13, 2015, at Palo Alto, California.

Kristine Neale

Kristine Neale