

**A116248**

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).)

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION FOUR**

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

vs.

**DENTSPLY INTERNATIONAL INC.,**  
*Defendant and Respondent.*

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APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO  
RONALD QUIDACHAY, JUDGE • CGC-04-432370

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**RESPONDENT'S BRIEF**

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**RESPONDENT'S BRIEF**

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**INTRODUCTION**

This appeal arises out of an action in which plaintiffs, on behalf of certain California dentists, seek class treatment of UCL (Bus. & Prof. Code, § 17200, et seq.) and breach of warranty claims against Dentsply International, Inc. Dentsply is the manufacturer of the Cavitron ultrasonic scaler, a medical device that has been used by dental

professionals for more than four decades, primarily for the routine cleaning of teeth. On appeal, plaintiffs challenge the trial court's order decertifying their claims.

Plaintiffs seek various forms of injunctive relief, including the disgorgement of all profits earned by Dentsply from Cavitron sales in California since 1993. Their claims rest on allegations that the Cavitron scaler should not be used in oral surgical procedures, that the directions for use (DFUs) supplied with Cavitron scalers indicate that the device could be used in oral surgery, that a small minority of California dentists who purchased Cavitrons (fewer than 1,000 out of more than 23,000) used them in oral surgery, and that some of those dentists purportedly did so in reliance on the DFUs.

The trial court initially certified a plaintiff class based on plaintiffs' disavowal of any obligation to prove that any individual dentist class member bought the Cavitron in reliance on Dentsply's alleged representations concerning oral surgery. Proposition 64, however, requires a UCL plaintiff to show a loss of money or property "as a result of" an alleged UCL violation. Shortly after the trial court's initial certification order, the California Supreme Court held that Proposition 64 applies to cases such as this one that were pending when the initiative was passed by the electorate in November 2004. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227 (*Mervyn's*)). Concurrently, another appellate court decision, *Pfizer v. Superior Court* (2006) 141 Cal.App.4th 290, review granted November 1, 2006, S145775 (*Pfizer*), held that in a class action such as this one,

Proposition 64's standing requirements apply to *all* putative class members, requiring individual proof from each class member that he or she lost money or property as a result of the alleged UCL violation.

Following issuance of the *Mervyn's* and *Pfizer* decisions, Dentsply moved to decertify the plaintiff class because the trial court's certification order conflicted with those decisions. Dentsply's motion explained why no causal link between the DFUs and plaintiffs' purchase of the Cavitron could be established by predominantly common proof on a class-wide basis. Although Dentsply challenges plaintiffs' interpretations of the DFUs, whatever the DFUs said, dentists are required to exercise their professional judgment in understanding and following the evolving regulations and standards applicable to the dental profession, and each dentist therefore must decide individually whether a medical device is appropriate for a particular procedure. Moreover, most or all purchasers of Cavitron scalers would not even have seen the DFUs until after the purchase decision had been made and the device had been delivered, so no class-wide presumption of a purchase in reliance on the DFUs could appropriately be applied. The trial court agreed, and decertified plaintiffs' UCL and express warranty claims on the ground that individual issues of reliance and causation would predominate over common issues, rendering them inappropriate for class treatment.

The question presented here is whether the trial court abused its discretion in decertifying the plaintiff class. The answer must be no.

As explained below, the trial court correctly decided that Proposition 64's new standing requirements apply to private party UCL class actions such as this one. Each class member must have standing to assert a UCL claim, and therefore each must show he or she has suffered injury in fact and lost money or property "as a result" of the defendant's alleged UCL violation. In the factual context presented here, that requires each class member to show that his or her purchase of a Cavitron scaler and alleged loss was caused by, or resulted from, reliance on the DFU representations that plaintiffs contend were in violation of the UCL. It is hard to imagine how dentists purchasing Cavitron scalers could commonly rely on DFUs that they did not even see until after they had already ordered the device. Moreover, because a dentist's individual training, experience, and knowledge necessarily affects his or her understanding of the DFUs, and because dentists have widely differing practices in using the Cavitron, reliance cannot be proven on a class-wide basis. The trial court therefore correctly concluded that plaintiffs' UCL claims are not appropriate for class treatment.

The trial court properly decertified plaintiffs' express warranty claims for similar reasons. A product manufacturer's factual statement—such as the asserted representation in the DFUs that the Cavitron is indicated for oral surgical procedures—provides the basis for an express warranty claim only if it is part of the basis of the bargain for the purchase. Except where a factual statement is specifically labeled as a "warranty"—which the indicated uses in the

DFUs were not—the statement must have been heard or read by the purchaser *before* the sale in order to be deemed part of the basis of the bargain. In addition, even if a presumption of reliance could arise as to any dentist who somehow read the DFUs before purchase, Dentsply is entitled to rebut that presumption of reliance on an individual basis.

Consequently, because each member of the class must prove the improbable—that he or she saw the DFUs prior to making the purchase—and because Dentsply is entitled to rebut any presumption of reliance on the DFUs, the trial court did not abuse its discretion in concluding that plaintiffs' express warranty claims are not appropriate for class treatment.

In sum, this case involves a rather straightforward application of both Proposition 64's new standing requirements and traditional express warranty principles in a class action context. The trial court applied the governing legal principles correctly, and did not abuse its discretion in concluding that individual issues of reliance and causation preclude class treatment of plaintiffs' UCL and express warranty claims.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY<sup>1/</sup>

### A. The parties.

Dentsply is a Delaware corporation that manufactures the “Cavitron” ultrasonic scaler, a medical device that has been marketed and sold exclusively to dental professionals for more than four decades. (1 AA 2; 2 AA 352, 363-364, 445; 5 AA 1042.)

Plaintiffs are four dentists residing in Northern California who have purchased Cavitron scalers since 1993, allegedly for use in oral surgical procedures. (1 AA 1-2, 10.)

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<sup>1/</sup> A class decertification order is reviewed under an abuse of discretion standard. (See I.A., *post.*) Plaintiffs’ opening brief violates the governing standard of review by stating the facts in the light most favorable to *their* position rather than in deference to the trial court’s findings. (See *Quacchia v. DaimlerChrysler Corp.* (2004) 122 Cal.App.4th 1442, 1448 [substantial evidence standard of review applies to “a class certification ruling . . . whether a grant or a denial”].) Plaintiffs’ brief also cites evidence not even before the court when it entered the decertification order. (See AOB 10 [citing appellant’s appendix volume 13]; see also *Quacchia*, at p. 1448 [improper for plaintiff to “pick and choose among the facts to present to the court . . . an incomplete picture of the litigable issues, in order to ensure a certification”].) We summarize here the evidence available to the trial court in accordance with the applicable standard of review.

**B. Dental schools and professionals have used a variety of Cavitron scalers for decades.**

Cavitron scalers are used primarily by dental hygienists during the routine cleaning of teeth. (2 AA 422; 4 AA 1028, 1034, 1036, 1038; 5 AA 1050; 11 AA 2624, 2647, 2658, 2666, 2790.) The Cavitron works by expelling a pulsating (or “cavitating”) water stream from the tiny hollow tip of a handpiece attached to the Cavitron by a flexible tube. (See, e.g., 1 AA 149, 153.) The ultrasonic motion of the tip of the Cavitron scaler, in conjunction with the bubbling action of the water, helps to lift plaque from teeth and flush debris from the treatment area, reducing the amount of scraping, or “scaling,” required by the dental hygienist. (4 AA 793, 809, 1028; 5 AA 1042; 11 AA 2658.)

Studies have demonstrated the benefit of such ultrasonic scaling in the treatment of periodontal disease. (See, e.g., 11 AA 2787-2802, 2815-2820.) The use of an ultrasonic scaler eliminates the need for time-consuming and tiring scaling with hand instruments during dental procedures, reducing by up to half the time needed for these procedures. (11 AA 2787, 2799.)

Another use for the Cavitron, practiced only by a small minority of dentists (fewer than 1,000 in California), is “root planing” of the dental anatomy where soft tissue has been excised. (4 AA 1028; 5 AA 1042, 1225, 1229; 6 AA 1424; 11 AA 2624, 2647, 2658, 2790; see also 11 AA 2590 [plaintiff’s expert: 5 to 10 percent of non-periodontist California dentists use some sort of ultrasonic device during oral

surgery].) This procedure is either not considered to be oral surgery (14 AA 3618), or is considered to be the least invasive form of oral surgery (see 13 AA 3114-3115).

Despite many millions of uses of Cavitron scalers by hundreds of thousands of dental professionals over the past 40 years, there has never been a single reported patient illness or infection attributed to the use of a Cavitron scaler in accordance with manufacturer recommendations. (4 AA 935, 1028, 1034, 1036, 1038; 5 AA 1042-1043; 11 AA 2624, 2658-2659.) No Cavitron scaler has ever been shown to be defective either in design or manufacture, or has ever been recalled by a government or regulatory agency. (4 AA 1029; 11 AA 2625.) Nor has any lawsuit or claim been asserted against Dentsply charging that the water delivered by a Cavitron scaler caused any personal injury. (*Ibid.*)

As a testament to the utility and safety of the Cavitron, dentists are commonly trained in its use while in dental school. (See, e.g., 5 AA 1217, 1223, 1238; 6 AA 1298, 1415, 1425.) Moreover, some of the named plaintiffs admit they have continued to use Cavitron scalers daily in surgical and/or non-surgical procedures even after filing this lawsuit. (5 AA 1050, 1217-1219, 1227, 1232-1233, 1238, 1242, 1245; 6 AA 1430; 11 AA 2632-2634, 2638, 2642-2643, 2647, 2666, 2687.)

**C. Many dental procedures involve the use of water and all dental units with water lines, including the Cavitron, are subject to the formation of biofilm, control of which varies with individual dentists' practices.**

Dentists typically use tap water as the input source for dental unit water and the Cavitron. (4 AA 1030.) Consequently, the Cavitron is not designed to deliver sterile water. (4 AA 879, 893, 898, 934.) The quality of the water delivered by the Cavitron depends on the age and quality of the pipes carrying the input water, and on whether the dentist has installed and properly maintained water filters on the input water supply. (4 AA 1030; see also 6 AA 1393 [“[n]o dental unit can provide water that is cleaner than the water that enters it”].)

All dental units with water lines, including ultrasonic scalers like the Cavitron, are subject to the formation of biofilm, which occurs naturally in any aquatic environment, including community drinking water systems. (2 AA 288-289; 3 AA 688; 4 AA 886-887, 891-892.) Biofilm is caused by microorganisms in potable water supplies, which grow on the interior surfaces of water lines. (3 AA 688.) No dental unit with non-disposable water lines can deliver sterile (microorganism-free) water—even when equipped with an independent water reservoir—because non-disposable water lines cannot be reliably sterilized. (6 AA 1386.)

No measurable risk of adverse health effects to dental patients from biofilm has been demonstrated. (3 AA 688; 4 AA 894.) Indeed,

the mouth is not a sterile environment, but rather is already colonized with numerous microorganisms. (3 AA 692.) Furthermore, 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”].)

Flushing water lines in dental units for two minutes each morning and for 20 to 30 seconds between patients removes most microorganisms from biofilm in dental units.<sup>2/</sup> (2 AA 290.) One study (co-authored by one of plaintiffs’ experts) found that a “2-minute flush in the morning can reduce bacterial counts by 99%.” (*Ibid.*) Additionally, chemical flushing of dental water lines can control biofilms. (2 AA 299; see also 6 AA 1384, 1391-1392.) One of the plaintiffs, Dr. Nathan, testified that when he tested two Cavitron units in his office, he found that both were delivering water with approximately 200 cfu/ml (“colony forming units per milliliter”) (5 AA 1211)—a figure well within the EPA potable water standard of less than or equal to 500 cfu/ml (5 AA 1045; 6 AA 1376, 1381).

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<sup>2/</sup> The maintenance procedures supplied with Cavitron scalers recommend that the unit be flushed for at least two minutes upon startup and for at least 30 seconds between patients. (2 AA 410; see also 6 AA 1313, 1327, 1340.)

**D. Evolving dental industry guidelines and regulations have created non-uniform standards for water quality in dental devices and procedures depending on jurisdiction and date of use.**

- 1. Dental practitioners are individually responsible for properly using devices like the Cavitron under applicable state regulations and professional guidelines.**

Each dental professional is required to know and comply with the rules and regulations governing the practice of dentistry in his or her state, and make his or her own professional judgment as to whether a particular instrument or procedure is appropriate and safe. (2 AA 424; 5 AA 1044, 1046-1047; 11 AA 2660, 2662-2663; see also 2 AA 416.) Furthermore, it is the responsibility of the dental practitioner to understand when sterile water is required during a dental procedure and to use the Cavitron appropriately. (2 AA 418.)

Consistent with the fact that dentists engage in different types of practices in different geographic areas, and are subject to standards and regulations that differ over time, Dentsply has never warranted that Cavitron scalers would meet every prospective standard or regulation in every jurisdiction. (4 AA 1029; 11 AA 2625.) As a reminder to dentists of their independent responsibility to use the Cavitron only in conformance with governing regulations, Dentsply began warning all

Cavitron users in 1990 that “[i]n the event any regulatory agency disagrees with this information, the agency requirements take precedence.” (*Ibid.*, emphasis added.) Dentsply also advised in the preamble of an Infection Control Information card accompanying each Cavitron that:

The objective of this information is to *supplement* published general guidelines for reducing cross-contamination of infectious diseases when using a [Cavitron] during routine dental care.

(5 AA 1048; 11 AA 2664, bolding omitted and emphasis added.)<sup>3/</sup>

Similarly, beginning in 1997, all Cavitrons have included a recommendation that dentists should ensure that “all dental water supply systems conform to applicable CDC (Center for Disease Control and Prevention) and ADA (American Dental Association) standards, and that all recommendations be followed in terms of flushing, chemical flushing and general infection control procedures.” (6 AA 1277, 1307, 1319; see also 2 AA 393-394, 401-403, 429-430; 4 AA 1030; 5 AA 1049; 11 AA 2626, 2665.)

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<sup>3/</sup> This preamble language was later revised to state even more clearly that “[t]he objective of these instructions is to supplement CDC/ADA guidelines . . . .” (5 AA 1048; 11 AA 2664, bolding omitted and emphasis added.)

## 2. CDC and ADA guidelines.

Dental industry guidelines and recommendations have changed dramatically over the past 40 years in the areas of infection control, dental unit water quality, dental equipment usages, and cleaning and maintenance of equipment.

Before 1993, there were no federal or professional guidelines pertaining to water quality in dental unit water lines and oral surgery. (11 AA 2668; see also 5 AA 1042; 11 AA 2658.) In 1993, the CDC released guidelines directed to the dental profession entitled "Recommended Infection-Control Practices for Dentistry." (3 AA 738-757; 5 AA 1043; 11 AA 2659.) These guidelines recommended to dentists that, when performing oral surgical procedures involving the cutting of bone, dentists use sterile water/saline as a coolant or irrigant.<sup>4/</sup> (3 AA 750; 5 AA 1043; 11 AA 2659.) The guidelines had no application to the Cavitron, since the Cavitron has never been indicated for procedures involving the cutting of bone. (5 AA 1043; 11 AA 2659.)

In 2003, the CDC updated its 1993 guidelines, and recommended for the first time that sterile solutions be used as a coolant/irrigant in *all* oral surgical procedures, including the "incision, excision, or reflection of tissue." (5 AA 1045; 11 AA 2661; see also 3 AA 689, 706.) The 2003 CDC guidelines also recommended that dental water for non-surgical

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<sup>4/</sup> In 1996, the ADA similarly issued a statement recommending the use of sterile water as a coolant/irrigant in surgical procedures involving the cutting of bone. (5 AA 1044.)

procedures meet the EPA potable water standard of less than or equal to 500 cfu/ml (“colony forming units per milliliter”).<sup>5/</sup> (3 AA 689, 705; 5 AA 1045; 6 AA 1376, 1381.)

### 3. State regulations.

For California dentists, the California Dental Practices Act (the Act) provides the standards regulating the dental profession.<sup>6/</sup> (5 AA 1043-1044; 11 AA 2659-2660.) Enacted in 1994, the Act states that only “sterile” dental water is “safe” in the context of oral surgery involving the cutting of bone *and* tissue:

Sterile coolants/irrigants shall be used for surgical procedures involving soft tissue or bone. Sterile coolant/irrigants must be delivered using a sterile delivery system.

(Cal. Code Regs., tit. 16, § 1005, subd. (c)(15); see also 5 AA 1043; 11 AA 2659.)

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<sup>5/</sup> Plaintiffs’ opening brief asserts that the “American Dental Association (‘ADA’) recommended a more stringent 200 cfu/ml standard.” (AOB 7.) But the ADA’s 1995 request to industry and researchers to attempt to develop technology that would meet that level (see 6 AA 1376) was subsequently disregarded by the CDC, which instead adopted the EPA’s 500 cfu/ml standard for potable water.

<sup>6/</sup> Neither the Act nor the ADA and CDC guidelines have any legal effect on manufacturers of dental products or equipment. (5 AA 1045, 1047; 11 AA 2661, 2663.)

**E. Dentsply has never warranted or represented that the Cavitron can deliver a specific quality of water, much less “sterile” water.**

Dentsply has never represented that the Cavitron is a “sterile water delivery system” or that it is capable of delivering or intended to deliver sterile water. (2 AA 418; 4 AA 934, 1030; 5 AA 1048; 11 AA 2625, 2664; see 6 AA 1424-1425, 1430, 1440; 11 AA 2692-2693.) To the contrary, in 2005 Dentsply sent a letter to California dentists reminding them that “conventional ultrasonic scalers do not deliver sterile fluids” and that “if in your professional judgment, any dental procedure requires the delivery of sterile fluids, choose a sterile delivery system.” (4 AA 876, 883.)

Dentsply has also never represented that Cavitron scalers could deliver a specific *quality* of water, such as “safe” or “potable” water. (4 AA 1030; 11 AA 2626.) Although the Cavitron is capable of delivering water meeting potable water standards (see, e.g., 5 AA 1211), the quality of water delivered by *any* device in a dentist’s office (including scalers, drills, and dental units) depends on the quality of the water source in the office, as well as the cleaning and maintenance practices of the individual user and a multitude of other factors (4 AA 1030-1031; 11 AA 2626-2627). Whether the dentist has installed and properly maintained water filters on the input water supply, as well as the age and quality of the pipes supplying input water, will affect the quality of water delivered by a Cavitron. (*Ibid.*) These and a variety of other

factors affecting the quality of water delivered by the Cavitron are outside Dentsply's control. (4 AA 1031; 5 AA 1047; 11 AA 2627, 2663.)

**F. Dental practitioners have received many different "Directions for Use" with the various Cavitron models as infection control standards have evolved.**

Over the years, more than 30 different models of Cavitron scalers have been sold in the United States and abroad. (4 AA 1029; 11 AA 2625.) Different Cavitron models have different features, accessories, and DFUs. (Compare, e.g., 2 AA 498-521 with 3 AA 524-553, 556-581, 584-594, 630-645, and 647-657; see also 4 AA 1029; 10 AA 2568-2569.) Since 1993, 20 different DFUs have been published and included with the various models of the Cavitron scaler (some of the same models have contained different DFUs, depending on the year of sale). (10 AA 2568-2569; 11 AA 2650-2654; 12 AA 3045-3053.) The various DFUs contain different information regarding product use, product maintenance, and warnings regarding biofilm/infection control. (4 AA 1029; 11 AA 2625, 2668-2672; 12 AA 3045-3053.) The DFUs have evolved at the same time as industry recommendations to improve infection control. (2 AA 405, 415-416.)

FDA regulations require manufacturers of medical devices to specify their indicated uses. (12 AA 2890-2891.) An "indicated use" is one for which the product is designed to be used safely. (12 AA 2891.) While most of the Cavitron DFUs do not indicate its use in oral surgery,

some of the earlier DFUs do indicate use in root planing during periodontal surgery—a procedure that does not involve cutting into bone—consistent with then existing ADA and/or CDC guidelines. (4 AA 1031; 5 AA 1046, 1048; 11 AA 2627, 2650-2654, 2662, 2668-2671; 12 AA 3045-3053.) However, the DFUs supplied with dental equipment like the Cavitron do not replace or supersede either (a) requirements imposed by state law or (b) the judgment and experience of the dental practitioner. (11 AA 2663.) Consequently, because the Cavitron is sold throughout the United States and the world, and is subject to varying standards depending on where it is used, since the early 1990s, its DFUs have been accompanied 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.” (4 AA 1031; 5 AA 1044, 1046; 6 AA 1272, 1274; 11 AA 2625, 2660, 2662, 2668-2672.)

Beginning in 1997, the DFUs had no reference to oral surgery and stated only that the Cavitron is indicated for “periodontal debridement for all types of periodontal diseases.”<sup>7/</sup> (See, e.g., 2 AA 407; 12 AA 3071, 3075.) Whether that can be interpreted to include oral surgery is questionable, because the two types of periodontal disease are periodontitis and gingivitis, and neither one of those necessarily requires oral surgery for treatment. (12 AA 2895; see also 14 AA 3618 [debridement of root after opening gum flap not oral surgery]; but see

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<sup>7/</sup> Periodontal debridement is the removal of plaque and tartar from the teeth below the gumline.

12 AA 2895, 2900 [Dr. Murray: “periodontal debridement . . . can include oral surgery”]; 13 AA 3129 [Dr. Weinstat: when told the Cavitron could be used “for all kinds of periodontal debridement,” he “just assumed . . . that it could be used in a surgical application”].)

**G. Dental practitioners do not ordinarily purchase Cavitron scalers based on the “Directions for Use” supplied *after* purchase, but for a variety of individual reasons.**

A dentist who decides to purchase a Cavitron scaler does not receive the DFUs until the Cavitron is actually delivered to the dental office. (4 AA 1031; 11 AA 2627, 2676-2677.) In other words, the information in the DFUs is not typically available to a dentist until after he or she has already made the decision to purchase a Cavitron scaler, placed the order for the scaler, and the scaler has been shipped to and received by the dentist’s office. (*Ibid.*) Consequently, dental practitioners who purchase a Cavitron ordinarily cannot read the DFUs accompanying their device until after their Cavitron has been shipped to them days or weeks after the initial purchase decision. (*Ibid.*; see also 12 AA 2899-2900 [plaintiff Weinstat did not recall reviewing the Cavitron’s DFUs until they were delivered with the unit]; 13 AA 3106-3107 [purchase decision of plaintiff Murray, who did not see DFUs prior to purchase and installation, was not based on DFUs].) And, indeed, no plaintiff or putative class member has ever testified that

they read and/or relied on any DFUs in making the Cavitron purchase decision.

Cavitron scalers are purchased from independent third party distributors, not from Dentsply. (10 AA 2568; see also 11 AA 2713-2717.) A variety of information about the Cavitron and its appropriate uses was therefore conveyed to dental practitioners through these third-party sales agents, as well as other sources—e.g., in national training sessions, brochures, and national magazine advertising. (See 1 AA 14; see also 11 AA 2761 [plaintiff Murray purchased her Cavitron following representations by a third-party representative that it was “very reliable, good to get”].)

Furthermore, based on the many clinical uses for the Cavitron—and the many uses to which the Cavitron was put by the plaintiffs in this action—there are individual reasons why a dental care professional would purchase a Cavitron other than reliance on any DFU content.<sup>8/</sup> (5 AA 1050; 11 AA 2666.) The experience of the four named plaintiffs here is illustrative.

Plaintiff Nathan, for example, testified that when he was purchasing equipment for his dental office he “had to have a Cavitron,” by which he meant that he “used a Cavitron in dental school” and at “perio school at UCSF,” that “it’s part of my bag of instruments . . . that

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<sup>8/</sup> Indeed, the vast majority of dental practitioners buy Cavitron scalers for non-surgical cleaning and scaling procedures performed by dental hygienists and (to a lesser extent) by dentists. These are uses not affected by the Act and outside the CDC and ADA guidelines. (5 AA 1050; 11 AA 2666.)

I felt comfortable with,” that “[i]t did the job that I needed it for,” and that “it worked well during surgery and so I used it all the time.” (11 AA 2682-2683.) Dr. Nathan acknowledged that he knew the Cavitrons he purchased were not sterilizable, and that they did not come with any instructions indicating that they were. (11 AA 2684-2687, 2701; 13 AA 3112-3114.) When Dr. Nathan purchased his Cavitron in 1989, there were no scalers on the market that could deliver sterile water. (13 AA 3117-3118.)

Testimony from other plaintiffs also strongly suggested that prior professional and academic experience with Cavitron scalers, rather than any reliance on references to oral surgery in the DFUs, motivated their purchase decisions. Dr. Weinstat, for example, testified that he first used a Cavitron in oral surgery during his second year in dental school in 1962, where “our instructors had us use the Cavitron for final scaling even while the flaps were laid open.” (13 AA 3122-3133.) Dr. Weinstat continued using Cavitrons while in the Army during the 1960s, and again continuously during 34 years of private dental practice, without any kind of problem (11 AA 2638, 2726, 2728-2729)—all the while aware that the Cavitron is not capable of delivering sterile water (13 AA 3124-3125, 3126-3128). Dr. Murray similarly testified that she had used a Cavitron scaler while teaching at the University of the Pacific, and that her experience there was one of the factors in her decision to purchase Cavitron scalers for her private practice. (11 AA 2760-2761.)

Another relevant factor in the individualized inquiry necessary to determine whether any statement or omission in the Cavitron DFUs affected any dentist's purchase decision involves the independent judgment exercised by each dental practitioner to deliver to patients the quality of water required by state regulations and other guidelines for particular procedures. (5 AA 1049; 11 AA 2665.) For example, as late as 2003 or 2004, it was standard practice at the UCSF faculty dental clinic to use a Cavitron during oral surgery—even as its faculty members were preparing a study published in the *Journal of Periodontology* on the purported risks of biofilm in dental units. (8 AA 1929-1930, 1941-1946; see also 8 AA 1987-2001 [Nov. 2003 study re "Formation and Decontamination of Biofilms in Dental Unit Waterlines"].) Furthermore, all of the named plaintiffs in this action who used their Cavitrons for oral surgery were apparently in violation of the California Dental Practices Act (requiring sterile coolants/irrigants in oral surgical procedures) for at least 10 years, and they ignored the recommendations/warnings in their Cavitrons' Infection Control Information cards, which advised that regulatory requirements such as the Act take precedence over any information in the DFUs. (5 AA 1050; 11 AA 2666.)

The apparent failure of plaintiffs to heed this written information supplied with the Cavitron demonstrates that they and other dental practitioners would have purchased the device for use in oral surgery even if the DFUs had not indicated such a use. (5 AA 1050; 11 AA 2666.)

## H. Plaintiffs file this putative class action against Dentsply.

In this action, plaintiffs seek to represent a class of California dentists who purchased one or more Cavitron scalers and who have used the device during oral surgical procedures on their patients.<sup>9/</sup> (1 AA 3.) Plaintiffs' operative third amended complaint asserts, inter alia, class claims against Dentsply for (1) violation of the UCL (1 AA 10-13); and (2) breach of express warranties (1 AA 17-19).

The gravamen of these claims is that the DFUs supplied with their Cavitron scalers indicate that the device may be used in oral surgery, and that dentists purchased their Cavitrons in reliance on such indications. (See generally 1 AA 1-20.) Plaintiffs contend that, contrary to the variously phrased indications in the DFUs, the Cavitron cannot safely be used in oral surgery because it cannot supply sterile water. (*Ibid.*) Plaintiffs seek various forms of injunctive relief, including recall of all Cavitrons sold in California; restitution of the purchase price of each recalled Cavitron; replacement of each recalled Cavitron with a "like machine" capable of delivering a sterile water stream for use in oral surgery; and/or disgorgement of profits earned by Dentsply from

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<sup>9/</sup> "Subclass A" is defined as class members who, before 1999, purchased a Cavitron scaler for use in oral surgery where the DFUs stated that it was indicated for use in "root planing during oral surgery." (1 AA 3.) "Subclass B" is defined as class members who, in or after 1997, purchased a Cavitron scaler for use in oral surgery where the DFUs stated that it was indicated for "periodontal debridement for all types of periodontal diseases." (*Ibid.*)

Cavitron sales in California. (1 AA 18-19.) Plaintiffs also seek punitive damages and attorney fees. (1 AA 19.)

**I. The trial court certifies plaintiffs' UCL and express warranty claims for class treatment.**

Plaintiffs moved to certify the class. (1 AA 41-70; see also 4 AA 992-1019 [Dentsply's opposition]; 8 AA 2058-2076 [plaintiff's reply].) With respect to their UCL claims, plaintiffs relied on pre-Proposition 64 authorities to disavow any obligation to prove individual reliance by class members on Dentsply's alleged representations. Instead, they asserted they were required to "only show that, as a result of defendant's conduct, 'members of the public are likely to be deceived,'" and that no individual class member would be "required to prove that he actually was deceived by the defendant's conduct, relied on that conduct, or suffered damage as a result of the conduct." (1 AA 64; see also 8 AA 2068 ["There also is no reliance issue at all under § 17200"]; see also 6/7/06 RT 39 [plaintiffs' counsel: "you don't have to prove actual reliance. All you have to prove is that there's a substantial likelihood that it would mislead the person getting the representation"].)

The court granted plaintiffs' motion as to their UCL and express warranty causes of action. (10 AA 2373-2376.) During the hearing on the class certification motion, the court said that it was basing its ruling

on the understanding that “there’s no proof regarding reliance required.” (6/7/06 RT 16.)

**J. Dentsply seeks class decertification based on two appellate decisions issued shortly after the trial court’s certification order.**

Shortly after the trial court entered its certification order, the Court of Appeal issued its decision in *Pfizer, supra*, 141 Cal.App.4th 290. Contrary to the position in plaintiffs’ class certification motion, the court in *Pfizer* held that “inherent in Proposition 64’s requirement that a plaintiff suffered ‘injury in fact . . . as a result of’ the fraudulent business practice or false advertising ([Bus & Prof. Code,] §§ 17204, 17353, italics added) is that a plaintiff actually *relied* on the false or misleading misrepresentation or advertisement in entering into the transaction in issue.”<sup>10/</sup> (*Pfizer*, at p. 296, original emphases; see also *id.* at pp. 305-307.) The court also rejected the argument that “only the class representative must meet the new standing requirements of Proposition 64,” holding instead that “[t]he class members being represented by the named plaintiff likewise must have suffered injury

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<sup>10/</sup> We summarize the primary holdings in *Pfizer* not for any precedential value (see Cal. Rules of Court, rule 8.1115(a)), but only to explain the procedural context for Dentsply’s subsequent class decertification motion.

in fact and lost money or property *as a result of* the unfair competition or false advertising.” (*Id.* at pp. 302-303, emphasis added.)

Soon afterward, the Supreme Court issued its decision in *Mervyn's, supra*, 39 Cal.4th at page 227, holding that Proposition 64 applies to cases like this one that were already pending when the initiative was passed by the electorate.

Based on *Pfizer* and *Mervyn's*, Dentsply filed a motion to decertify the class. (10 AA 2378-2405; see also 12 AA 2824-2849 [plaintiff's opposition], 3080-3090 [Dentsply's reply].) Dentsply argued that the trial court's certification order could not be squared with those cases, under which plaintiffs' UCL claims required individualized proof of reliance and causation. (10 AA 2386-2396; 12 AA 3082-3085.) Dentsply sought decertification of plaintiffs' breach of warranty claim because similar individual issues of reliance predominated on that claim as well. (10 AA 2396-2399; 12 AA 3086-3088.)

**K. The trial court decertifies the class, finding plaintiffs' UCL and express warranty claims are not suitable for class treatment based on individual issues of reliance and causation.**

The trial court granted Dentsply's motion for decertification on multiple grounds, finding that plaintiffs' UCL claims are inappropriate for class treatment because:

- Each class member has standing only if he or she has “suffered injury in fact’ and ‘lost money or property as a result of’ the defendant’s alleged UCL violations” in order to have standing to assert a UCL claim. (13 AA 3140.)
- Each class member must prove actual injury caused by the alleged unfair business practice—i.e., “that they purchased a Cavitron *as a result of* a particular misrepresentation by Dentsply” – which would require an “*individual* inquiry of each class member” to determine whether they “saw, read and relied upon the alleged representation in making their decision to purchase a Cavitron scaler” and that it “was the cause of [their] decision to purchase.” (13 AA 3140-3141, original emphasis.)
- Individual issues predominate over common issues regarding “the nature and extent of any *material misrepresentation*” where dentists who purchased the Cavitron typically did not see the DFUs until after their decision to purchase, such that “the DFUs could not have influenced the purchasing decision.” (13 AA 3141, original emphasis.)

Similarly, the court found that plaintiffs’ express warranty claims are inappropriate for class treatment because:

- Using class procedures would circumvent Dentsply’s right to rebut any presumption of reliance by individual plaintiffs on any express warranty by Dentsply, e.g., by showing a class member originally purchased a Cavitron for non-surgical uses or did not

rely on any representation allegedly giving rise to a warranty until after the purchase of the product. (13 AA 3142.)

- The DFUs are not uniform in language, and therefore must be individually examined to determine the scope of the representation made to individual class members and whether there was reasonable reliance on that representation. (*Ibid.*)

**L. The trial court denies plaintiffs' reconsideration motion.  
Plaintiffs appeal.**

The trial court denied plaintiffs' motion for reconsideration of the decertification order. (16 AA 4205-4206.) Plaintiffs appealed both the decertification order and the denial of its motion for reconsideration.<sup>11/</sup>

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<sup>11/</sup> In their opening brief, plaintiffs do not separately challenge the propriety of the trial court's order denying reconsideration, and have thereby abandoned their appeal from that order. (See *Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633 ["an appellant must affirmatively demonstrate error through reasoned argument and discussion of legal authority" or the argument is waived].)

## LEGAL ARGUMENT

### I.

**THE TRIAL COURT HAD BROAD DISCRETION TO ORDER CLASS DECERTIFICATION, UNFETTERED BY ANY NEW LAW OR EVIDENCE REQUIREMENT IN THE ABSENCE OF A PRIOR MERITS RULING.**

- A. A trial court’s decertification order based on an insufficient “community of interest” finding is reviewed under an abuse of discretion standard.**

Because a class action “has the potential to create injustice, trial courts are required to “carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.”” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) A class action can be maintained only if the class proponent demonstrates “there is an ascertainable, manageable class of plaintiffs and a well-defined *community of interest* among class members, such that litigating the controversy as a class action would be a superior method of resolving the dispute and of substantial benefit to the litigants and the court.” (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450.) To establish the community of interest requirement, the class proponent must show, among other things, that common issues of law

or fact predominate over issues unique to individual class members. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

A trial court has great discretion in determining whether class certification is appropriate, and “[u]nless the trial court applied improper criteria or erroneous legal assumptions, and in the absence of ‘other error,’ a class certification ruling supported by substantial evidence—whether a grant or a denial—will not be disturbed on appeal.” (*Quacchia v. DaimlerChrysler Corp., supra*, 122 Cal.App.4th at pp. 1448-1449; see also *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 914; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 655-656.) The task of the reviewing court “‘is not to determine in the first instance whether the requested class is appropriate but rather whether the trial court has abused its discretion in denying certification.’ [Citation.] [¶] . . . ‘[S]o long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld.’ [Citations.] [Citations.]” (*Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1233; see also *Walsh v. IKON Office Solutions, Inc., supra*, 148 Cal.App.4th at p. 1451 [“We review a trial court’s ruling on class certification for abuse of discretion”]; *Caro*, at p. 655, fn. 6 [“The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason”].) Thus, a decertification order will be upheld if the reviewing court “cannot say it would be irrational for a court to conclude that, tried on appellants’ theory, questions of law or fact common to the class do not predominate over the questions affecting individual class members.” (*Walsh*, at p. 1458;

see also *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 329.)

When examining the trial court's grounds for denying class certification, "[a]ny valid pertinent reason stated will be sufficient to uphold the order." (*Caro v. Procter & Gamble Co., supra*, 18 Cal.App.4th at p. 656; see also *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at pp. 326-327; *Walsh v. IKON Office Solutions, Inc., supra*, 148 Cal.App.4th at p. 1453, fn. 7.) Thus, plaintiffs here must show that *each and every one* of the trial court's grounds for decertification are based on improper criteria or erroneous legal assumptions. If any reason is valid, the decertification order should be affirmed. (See, e.g., *Walsh*, at p. 1451, fn. 6 [where substantial evidence supported decertification on one ground, court "need not consider" whether other grounds supported decertification as well].)

**B. The trial court's authority to order class decertification was not circumscribed by any "new law" or "newly discovered evidence" requirement, which was met here in any event.**

Plaintiffs assert that the trial court's decertification order was procedurally flawed because Dentsply offered "neither new law nor newly-discovered evidence" to support some aspects of the decertification order. (AOB 29.) Plaintiffs contend that a "motion to decertify—like a motion for reconsideration under Code of Civil

Procedure section 1008—must be premised on new law or newly discovered evidence.” (AOB 29; see also AOB 18, 34, 39 [asserting trial court could not revisit prior class certification ruling absent changed circumstances or newly discovered evidence].) Plaintiffs misstate the law.

Rule 3.764 of the California Rules of Court (former rule 1854), which governs class decertification motions, contains no “newly discovered evidence” or “new law” requirement, which would unduly circumscribe a trial court’s inherent discretion to reassess class certification at any time before a ruling on the merits. (See *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1084 [affirming trial court’s 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”]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360 (*Occidental Land*) [“Our decisions clearly contemplate the possibility of successive motions concerning certification . . . for ‘even after an initial determination of the propriety of such an action the trial court may discover subsequently that it is not appropriate’”]; *Shelley v. City of Los Angeles* (1995) 36 Cal.App.4th 692, 696 [“An order certifying a class is subject to modification at any time”].)<sup>12/</sup> Any other approach would force courts

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<sup>12/</sup> California courts look to rule 23 of the Federal Rules of Civil Procedure in analyzing class action procedure. (See *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 453.) And, as the Supreme Court has noted, under rule 23 “a certification order . . . ‘may be altered or  
(continued...)”

and litigants to proceed to trial with unwieldy and expensive class proceedings that the trial court later concludes it should not have certified.

The cases cited by plaintiffs for the proposition that a trial court cannot decertify a class absent “new law or newly discovered evidence” affect a trial court’s discretion to decertify a class only *after* a decision on the merits has been rendered. (See *Green v. Obledo* (1981) 29 Cal.3d 126, 148 [a showing of “‘changed circumstances’ . . . must be made to warrant decertification *after a decision on the merits*” (emphasis added)]; *Fireside Bank v. Superior Court, supra*, 40 Cal.4th at pp. 1083-1084 [construing *Green* as “declin[ing] to strip trial courts of all authority to certify or decertify a class *after a decision on the merits*” (emphasis added), but requiring “a clear showing of changed circumstances” in that procedural posture].) The rationale for that qualification of a trial court’s otherwise broad discretion to decertify a class is that “a defendant should not be allowed to sandbag a plaintiff, withholding its best case against certification and then seeking

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12/ (...continued)

amended before a decision on the merits.” (*Occidental Land, supra*, 18 Cal.3d at p. 360; see also *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”].)

decertification if it suffered an unfavorable *merits* ruling.”<sup>13/</sup> (*Fireside Bank* at p. 1081, emphasis added.)

In this case, the trial court’s authority to decertify the class was not “confined” by any requirement of a showing of “changed circumstances” (*Fireside Bank v. Superior Court, supra*, 40 Cal.4th at p. 1084) because the trial court had not yet made any decision on the merits of plaintiffs’ claims (or Dentsply’s defenses). Accordingly, the trial court retained full authority to decertify the class without any showing of “newly discovered evidence” or “new law,” contrary to plaintiffs’ contention.

But even if a showing of changed circumstances were required as a prerequisite to class decertification, Dentsply made such a showing based on the *Pfizer* and *Mervyn’s* decisions, both of which called into question the trial court’s earlier certification order. Plaintiffs do not dispute that those decisions qualified as changed circumstances, but instead argue the trial court could reconsider only those aspects of its prior certification order that were directly affected by the decisions. But even where a showing of changed circumstances is required—because there has already been a merits ruling, unlike the situation presented here—no authority supports the proposition that

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<sup>13/</sup> The same rationale applies to certification motions filed after a merits ruling, since that would subject a defendant “to ‘one-way intervention,’ which would allow potential class members to elect whether to join in the action depending upon the outcome of the decision on the merits.” (*Fireside Bank v. Superior Court, supra*, 40 Cal.4th at p. 1081.)

there must be changed circumstances as to *every* basis for the original certification order before a trial court can exercise its discretion to order class decertification. That would be a recipe for wasting judicial resources. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104-1105 [the “restriction of a court’s ability to sua sponte reconsider its own rulings . . . would directly and materially impair and defeat the court’s most basic functions, exercising its discretion to rule upon controversies between the parties and ensuring the orderly administration of justice. . . . “A court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors . . .”].)

In sum, the trial court had authority to revisit the question of class certification under the procedural circumstances presented here, and as we next explain, properly exercised its discretion to decertify the class.

## II.

THE COURT DID NOT ABUSE ITS DISCRETION IN DECERTIFYING PLAINTIFFS' UCL CLAIMS BASED ON ITS DETERMINATION THAT INDIVIDUAL ISSUES OF STANDING, RELIANCE, CAUSATION, AND MATERIALITY PRECLUDED CLASS TREATMENT.

- A. **The trial court correctly ruled that each class member must have standing to assert a UCL claim.**

As its first ground for decertification of plaintiffs' UCL claims, the trial court determined that under Proposition 64, each class member has standing only if he or she has "'suffered injury in fact' and 'lost money or property as a result of' the defendant's alleged UCL violation" in order to have standing to assert a UCL claim. (13 AA 3140.) Plaintiffs challenge this ruling, asserting that Proposition 64's standing requirements apply to the named plaintiff *only*, and not to individual class members. (AOB 19-23.) The trial court correctly interpreted Proposition 64 to require that its standing requirements be met by both named plaintiffs and absent class members.

One recent case confirms that absent class members as well as the named plaintiffs must satisfy Proposition 64's statutory standing requirements. In *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1103, the Court of Appeal affirmed the denial of class certification

because “each class member would have to prove his individual [UCL] claim for restitution by establishing reliance and causation.” (See also *Oshana v. Coca-Cola Co.* (7th Cir. 2006) 472 F.3d 506, 514 [affirming denial of class certification because “[c]ountless members of Oshana’s putative class” could not satisfy the standing-to-sue requirement of the Illinois Consumer Fraud and Deceptive Practices Act because they “could not show any damage, let alone damage approximately caused by Coke’s alleged deception”].)

The *Akkerman* decision correctly interprets Proposition 64’s language limiting private actions to those plaintiffs who have “suffered injury in fact and . . . lost money or property as a result of” the alleged unfair competition. (Bus. & Prof. Code, § 17204.) Proposition 64 also expressly limits the ability of a private party to “pursue representative claims or relief on behalf of others” to situations where “the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure.”<sup>14/</sup> (*Id.* § 17203.) Thus, under the plain language of the UCL amendments wrought by Proposition 64, a private claimant (whether acting as a named plaintiff

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<sup>14/</sup> Code of Civil Procedure section 382 provides that “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue for the benefit of all.” The court in *Arias v. Superior Court* (2007) 153 Cal.App.4th 777, 785-786, recently explained that “the plain meaning of Business and Professions Code section 17203 requiring a claimant to comply with section 382 is clear: a representative UCL action by an individual must meet the requirements of a class action.”

or unnamed class member) can pursue a UCL action only if he or she meets *both* the new standing requirements of Proposition 64 *and* “complies with Section 382 of the Code of Civil Procedure.” (*Ibid.*)

This construction of Proposition 64 comports with the general rule that a class action is merely a procedural device that “aggregates individual claims” but that “does not alter the parties’ underlying substantive rights.” (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1018.) A class action cannot be used to enlarge individual substantive rights and remedies, but only to consolidate individual claims. (*Id.* at p. 1014.) Thus, a class representative is not permitted to assert “claims” the absent class members do not have. (*Ibid.* [“If a specific form of relief is foreclosed to [class action] claimants as individuals, it remains unavailable to them even if they congregate into a class”]; *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716; see also *City of San Jose v. Superior Court, supra*, 12 Cal.3d at p. 462 & fn. 9.) In other words, a named class representative may assert on behalf of absent class members only those claims that the absent class members could *themselves* assert were they to do so in individual actions. (See *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 714-715 [the propriety of class treatment of claims is assessed in light of the individual actions that might otherwise be brought to assert those claims].)

Because standing is essential to an individual’s cause of action, “[e]ach class member must have standing to bring the suit in his [or her] own right,” and “[t]he definition of a class cannot be so broad as

to include individuals who are without standing to maintain the action on their own behalf.” (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73.) It is therefore well settled that, in a properly certified class, all of the class members must satisfy whatever standing requirements would apply in an individual action. (See, e.g., *Adashunas v. Negley* (7th Cir. 1980) 626 F.2d 600, 604 [class certification properly denied where it was not clear “that the proposed class members have all suffered a constitutional or statutory violation warranting some relief”]; *Zelman v. JDS Uniphase Corp.* (N.D.Cal. 2005) 376 F.Supp.2d 956, 966 [class must be limited “to those ascertainable individuals who have standing to bring the action”]; *In re Copper Antitrust Litigation* (W.D.Wis. 2000) 196 F.R.D. 348, 353 [“Implicit in Federal Rule of Civil Procedure 23 is the requirement that the plaintiffs and the class they seek to represent have standing”]; *Ex parte Central Bank of the South* (Ala. 1996) 675 So.2d 403, 406-407 [“Each class member must have standing to bring the suit *in his own right*”]; *Zine v. Chrysler Corp.* (1999) 236 Mich.App. 261, 289 [600 N.W.2d 384, 400] [class members “must have suffered actual injury” so as to “have standing to sue”]; see also 7 AA Wright et al., *Federal Practice and Procedure* (3d ed. 2005) § 1785.1, p. 387 [“An appropriate application of standing in class suits necessitates an inquiry into whether *the class members* have been injured by the defendant’s conduct” (emphasis added)].)

If Proposition 64 were interpreted to require only that the *named* plaintiff meet its standing requirements as a prerequisite to asserting a UCL claim on behalf of uninjured class members, the initiative would

have implemented no more than a cosmetic change to the UCL. Under plaintiffs' proposed approach, a representative action could proceed so long as a single injured person could be rustled up to act as the named plaintiff.<sup>15/</sup> A person who otherwise could not bring a UCL claim on his or her own behalf—e.g., because the person never heard or read the challenged statements of the defendant and was not in any way influenced by them in making purchasing decisions—would have a valid UCL claim through the artifice of being an absent class member.

Such an interpretation would import back into the UCL the very sort of private attorney general action that Proposition 64 unambiguously eliminated. (See Prop. 64, § 1, subd. (f).) As the Supreme Court explained in *Mervyn's*, one of the expressly stated purposes of the initiative was to ensure “that *only* the California Attorney General and local public officials [would] be authorized to file and prosecute actions on behalf of the general public.” (*Mervyn's, supra*, 39 Cal.4th at p. 228.) Plaintiffs' reading of Proposition 64 would allow a private party to represent a broad class of persons without regard to whether those persons suffered any injury, effectively adding

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<sup>15/</sup> In the ballot pamphlet for Proposition 64, its opponents warned the electorate that the “initiative goes unbelievably far” and that “[i]f voters approve the measure, the current law would be drastically curtailed.” (Official Voter Information Guide, California General Election (Nov. 2004) <[http://www.sos.ca.gov/elections/bp\\_nov04/prop\\_64\\_entire.pdf](http://www.sos.ca.gov/elections/bp_nov04/prop_64_entire.pdf)>, at pp. 40-41 [as of Sept. 19, 2007].) Plaintiffs now urge this court to adopt an extraordinarily narrow reading of the initiative, one that imposes only the ministerial requirement that a representative UCL action have a single injured plaintiff in order to proceed as a class action.

“injured named plaintiffs” to the list of persons who can sue on behalf of the (uninjured) general public.

Attempting to counter the principle that Proposition 64’s actual damage requirement for standing extends to class members, plaintiffs contend that “the Supreme Court reached the opposite conclusion” in its *Mervyn’s* decision.<sup>16/</sup> (AOB 20.) But *Mervyn’s* did *not* reach any such conclusion, which is why the Supreme Court subsequently granted review in another case to decide that very question. (*In re Tobacco II Cases*, review granted Nov. 1, 2006, S147345.) Nor did the Supreme Court remotely suggest in *Mervyn’s* that Proposition 64’s standing requirements do *not* extend to all class members. The Court held that Proposition 64 properly “withdraws the standing of persons who have not been harmed to represent those who have” without affecting any

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<sup>16/</sup> Plaintiffs contend that two lower court decisions likewise “hold the exact opposite.” (AOB 23.) But neither case even involved a class certification order, much less addressed whether Proposition 64’s standing requirements apply to absent class members. In *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, which arose from a judgment on the pleadings, the court merely held that the *named plaintiff* had UCL standing because he had pleaded “actual economic injury as a result of an unfair and illegal business practice.” (*Id.* at pp. 802-803.) In *Foundation for Taxpayer & Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal.App.4th 131, which also arose from a judgment on the pleadings, the court held that it was an abuse of discretion for the trial court to deny leave to amend to substitute a *named plaintiff* who “meets the modified standing requirements under the UCL.” (*Id.* at p. 137.) Neither case involved the issue of whether absent class members must meet Proposition 64’s standing requirements.

substantive right. (*Mervyn's, supra*, 39 Cal.4th at p. 232.) It logically follows that by similarly withdrawing the standing of those who have not been harmed to participate as absent class members, Proposition 64 does not affect any substantive right.

Finally, plaintiffs argue that it was improper for the trial court to decertify their claim because the “UCL provides remedies for illegal acts regardless of whether class members relied on a defendant’s compliance with the law or class members suffer monetary damage.” (AOB 28.) But the cases cited by plaintiffs, *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499 and *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, both predate Proposition 64, which entirely changed the UCL landscape. Now, even under the “illegal conduct” prong of the UCL, only the Attorney General and certain other public officials remain free to prosecute a UCL claim on behalf of the general public without having to prove any actual loss of money or property as a result of the alleged illegal conduct. (Bus. & Prof. Code, § 17204.) As previously explained, in a private party UCL action, both the plaintiff and the putative class members must meet Proposition 64’s new standing requirements by showing they lost money or property as a result of the challenged conduct. (*Ibid.*) Plaintiffs cite no exception to the amended standing requirements for claims asserted under the “illegal conduct” prong of the UCL, and there is none.

**B. The trial court correctly ruled that standing exists only as to those persons who suffered an injury “as a result of” a Dentsply representation that violated the UCL.**

**1. Under Proposition 64, a UCL claimant must prove actual causation.**

Because Proposition 64’s standing requirements apply to all class members, the trial court determined that each class member must prove actual injury caused by the alleged unfair business practice—i.e., “that they purchased a Cavitron *as a result of* a particular misrepresentation by Dentsply.” (13 AA 3140.) Consequently, an “*individual* inquiry of each class member” would be required to determine whether they “saw, read and relied upon the alleged representation in making their decision to purchase a Cavitron scaler” and that it “was the cause of [their] decision to purchase”—so that class treatment of plaintiffs’ UCL claims would be inappropriate. (13 AA 3140-3141.)

Citing pre-Proposition 64 law, plaintiffs attack these rulings on the ground that before Proposition 64 *no* plaintiff needed “to prove reliance upon a false representation to recover under the UCL,” and that Proposition 64 did nothing to change that. (AOB 25-26.) But as recently explained in *Daro v. Superior Court* (2007)151 Cal.App.4th 1079 (*Daro*), cases that “predate the voters’ approval of Proposition

64 . . . obviously do not address the amended standing requirements added by the initiative measure.” (*Id.* at p. 1100.)

“After Proposition 64, a private person has standing to sue under the UCL *only* if that person has suffered injury and lost money or property ‘*as a result* of such unfair competition.’” (*Daro, supra*, 151 Cal.App.4th at p. 1098, first emphasis added.) Therefore, no private person has standing under the UCL “unless that person can establish that the injury suffered and the loss of property or money resulted from conduct that fits within one of the categories of ‘unfair competition’ in section 17200.” (*Ibid.*) After Proposition 64, it is not sufficient in a private party action to show merely that a defendant’s conduct was “‘likely to deceive,’” as plaintiffs argue here. (AOB 25.) Rather, individual reliance on the alleged unlawful business practice must be proven to establish standing:

When a UCL action is based on an unlawful business practice . . . a party may not premise its standing to sue upon injury caused by a defendant’s lawful activity simply because the lawful activity has some connection to an unlawful practice that does not otherwise affect the party. In short, there must be a *causal connection* between the harm suffered and the unlawful business activity.

(*Daro, supra*, 151 Cal.App.4th at p. 1099, emphasis added and fn. omitted.)<sup>17/</sup>

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<sup>17/</sup> Where an act or initiative such as Proposition 64 uses terms with a settled legal meaning, it is presumed that the voters intended those terms to have the same meaning. (*People v. Weidert* (1985) 39 Cal.3d (continued...))

The causal connection between an alleged unfair business practice and resulting harm “is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law.” (*Daro, supra*, 151 Cal.App.4th at p. 1099.) Consequently, the trial court here correctly concluded that, to establish UCL standing, each class member would be required to make an individual showing that his or her purchase of a Cavitron resulted from reliance on an alleged misrepresentation by Dentsply.

*Akkerman v. Mecta Corp., Inc., supra*, 152 Cal.App.4th 1094, is directly on point. In that case, the plaintiff sought class certification of UCL claims against Mecta, the manufacturer of an electroconvulsive (ECT) machine, based on “allegations about patients who received ECT after relying on Mecta’s misrepresentations about ECT risks” that were disseminated in a booklet “which falsely minimizes the risks of

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17/ (...continued)

836, 845-846.) The very same “as a result of” language appears in the standing provision of California’s other consumer-protection statute, the CLRA (Civ. Code, § 1780, subd. (a)), and courts have consistently construed that act as imposing a proximate causation requirement. (See, e.g., *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754; *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292.) That the standing requirement of the UCL now mirrors the standing requirement of the most closely analogous California statute confirms that the same showing of causation is required under both. (See, e.g., *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 766 [“legislation framed in the language of an earlier enactment on the same or an analogous subject that has been judicially construed is presumptively subject to a similar construction”].)

memory loss.” (*Id.* at pp. 1097, 1100.) The Court of Appeal affirmed the denial of class certification because “*each* class member would have to prove his individual claim for restitution by establishing *reliance and causation.*” (*Id.* at p. 1103, emphasis added.) Specifically, each class member would have to prove: “1) whether he relied on Mecta’s brochure, 2) documents from other sources, or 3) whether he relied on a combination of information, 4) whether he was in fact deceived, or 5) whether he would have requested ECT, notwithstanding knowledge of all the risks.” (*Ibid.*) Consequently, the court concluded, “individual issues will predominate over common questions.” (*Ibid.*)

Plaintiffs nonetheless argue that because in *Mervyn’s* “our Supreme Court held that Proposition 64 did not change substantive UCL law,” the initiative could not have imposed any individual reliance requirement in private class actions. (AOB 25-26.) In essence, plaintiffs assert that when the Supreme Court said that Proposition 64 “left entirely unchanged the substantive rules governing business and competitive conduct” (*Mervyn’s, supra*, 39 Cal.4th at pp. 230, 232), that meant Proposition 64 could not have imposed a causation requirement for private party standing because such a requirement would change the UCL’s “substantive rules.” Plaintiffs’ contention is meritless.

Proposition 64 does not in any way change the scope of conduct covered by the UCL, but only who has standing to sue based on that conduct—by mandating that a private plaintiff has standing only if he or she “has suffered injury in fact and has lost money or property *as a result of*” a defendant’s unfair business practices. (Bus. & Prof. Code,

§ 17204, emphasis added.) Construing that amendment to mean what it says—i.e., to add a causation requirement for standing—“does not change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct.” (*Mervyn's, supra*, 39 Cal.4th at p. 230.)

Put another way, the question of *what* conduct is prohibited by the UCL is entirely distinct from the question of *which* private parties may sue for such conduct. Proposition 64 changed only who could bring a UCL action to obtain a civil remedy by narrowing the range of private plaintiffs who may assert a UCL claim to those actually injured as a result of the alleged UCL violation. Public prosecutors such as the Attorney General retain full standing to sue for all UCL violations, including business practices that are likely to mislead the public, without any showing of a loss of money or property “as a result of” a defendant’s conduct. Thus, all previously actionable business practices under the UCL remain subject to suit after Proposition 64. Moreover, in an Attorney General action, the full scope of the UCL’s remedial authority remains completely unchanged.

In light of the continuing standing for affected private plaintiffs and public official plaintiffs, the inability of some private claimants to sue for conduct *that they cannot show caused them to suffer a loss* effects no change in “the substantive rules governing business and competitive conduct.” (*Mervyn's, supra*, 39 Cal.4th at p. 232.) The test for evaluating whether “substantive rules” have changed within the meaning of the “retroactivity” analysis at issue in *Mervyn's* is whether anything “a

business might lawfully do before Proposition 64 is unlawful now,” or whether anything “earlier forbidden is now permitted.” (*Ibid.*) Because Proposition 64 did not change or expand what constitutes a UCL violation, but merely changed who has standing to sue based on such violations, an interpretation of Proposition 64 that gives full force to its “as a result of” causation requirement for private party standing is entirely consistent with the holding in *Mervyn’s* that Proposition 64 applies to pending cases because it “left entirely unchanged the substantive rules governing business and competitive conduct.”

**2. The trial court properly rejected any class-wide inference of causation.**

Plaintiffs argue that even if proof of individual reliance is required under Proposition 64, reliance and causation can be presumed on a class-wide basis. (AOB 26-28.) The trial court did not abuse its discretion in declining to apply class-wide presumptions on these issues, and its determination not to do so has ample record support under the deferential standard of review that applies. The question of what motivated the purchase decision of each Cavitron owner is inherently fact-intensive, and precludes any inference or presumption of reliance and causation.

The determination of whether the issues in a specific case are suitable for class-wide treatment is committed to the sound discretion of the trial court, which is “ideally situated to evaluate the efficiencies

and practicalities of permitted group action.” (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 3 Cal.4th at p. 326.) The cases addressing the use of class-wide presumptions—many of them cited by plaintiffs here—recognize that the propriety of any such presumption can only be assessed in light of the facts and issues in each particular case. (See, e.g., *Massachusetts Mutual Life Ins. Co. v. Superior Court, supra*, 97 Cal.App.4th at p. 1294 & fn. 5 [recognizing the “flexibility” that trial courts have on this issues]; *Occidental Land, supra*, 18 Cal.3d at pp. 361-362 [question is whether trial court abused its discretion]; see also *Walsh v. IKON Office Solutions, Inc., supra*, 148 Cal.App.4th at pp. 1457-1458 [the affirmance of a class certification ruling in one case does not establish that refusal to certify a similar claim in another case is an abuse of discretion].) Plaintiffs’ suggestion that there is some “rule” in favor of class-wide presumptions cannot be squared with the Supreme Court’s instruction that “[w]here a certification order turns on inferences to be drawn from the facts, “the reviewing court has no authority to substitute its decision for that of the trial court.”” (*Sav-On*, at p. 328, quoting *Massachusetts Mutual*, at p. 1287.)

Plaintiffs nonetheless argue that the trial court was *required* to infer reliance sufficient to prove causation under Proposition 64 because, they say, their conduct in purchasing Cavitron scalers is “consistent with” certain representations in the DFUs that accompanied the product when delivered. (See, e.g., AOB 31.) Plaintiffs rely heavily on *Occidental Land, supra*, 18 Cal.3d 355, in which each class member was required to sign a developer’s report containing alleged

misrepresentations about home purchasers' maintenance expenses for common areas, and there was no evidence that the class members had any access to supplemental or clarifying information from other sources. Under the circumstances, the Court held that the trial court did not abuse its discretion in determining that each class member had received the same misrepresentation, and "in inferring that justifiable reliance may be established on a common basis." (*Id.* at pp. 362-363.) But holding the trial court *could* infer reliance on a report from home purchases that were consistent with such reliance is a far cry from any holding that the trial court was *required* to apply such an inference, especially under the very different facts here.<sup>18/</sup>

Moreover, the *Occidental Land* decision cannot be read in isolation where, 17 years later, the Supreme Court clarified that while "actual reliance *can* be proved on a class-wide basis *when each class*

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<sup>18/</sup> *Massachusetts Mutual Life Ins. Co. v. Superior Court, supra*, 97 Cal.App.4th 1282, also cited by plaintiffs, does not support the proposition that any mandatory class-wide inference of reliance is required whenever a purchase decision is "consistent with" a prior representation (or non-disclosure) by the defendant. As in *Occidental Land*, the Court of Appeal did not reverse a trial court for failing to apply a class-wide inference, but merely affirmed the trial court's discretion to do so where "the record *permits* an inference of common reliance" based on an allegedly common non-disclosure to purchasers of insurance policies. (*Id.* at pp. 1293-1295, emphasis added.) The appellate court did not hold such an inference was mandatory, and even noted the trial court's flexibility to decertify the class if evidence developed showing that class members were provided with such a variety of information "that a single determination as to materiality is not possible." (*Id.* at p. 1294, fn. 5.)

*member has read or heard the same misrepresentations, nothing in either [Vasquez v. Superior Court (1971) 4 Cal.3d 800 or Occidental Land] so much as hints that a plaintiff may plead a cause of action for deceit without alleging actual reliance,” and reliance cannot be inferred unless plaintiffs can affirmatively demonstrate that they “read or heard the alleged misrepresentations.” (Mirkin v. Wasserman (1993) 5 Cal.4th 1082, 1094-1095, emphasis added.)*

Because purchasing behavior is driven by complex motivations and disparate circumstances, it is only in the simplest, most uniform case of obvious direct cause-and-effect that a class-wide inference of causation may properly arise. Thus, for example, in *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 661, the court affirmed denial of class certification where plaintiffs’ claims were based on an allegedly misleading automobile advertising campaign. Observing, among other things, that there was no showing that representations were made uniformly to all members of the class, the court found “no basis to draw an inference of classwide reliance.” (*Ibid.*)

Likewise, in *Caro v. Procter & Gamble Co., supra*, 18 Cal.App.4th 644, the plaintiff asserted UCL and CLRA claims based on labeling and advertising representations that certain beverage products were fresh orange juice when, in fact, they were reconstituted from frozen concentrate. (*Id.* at pp. 651-652.) The Court of Appeal rejected the plaintiff’s argument that no “individualized proof” regarding the materiality of these representations—i.e., whether, ““without the misrepresentation, the plaintiff would not have acted as he

did"" — was required to prove his claims on a class-wide basis. (*Id.* at pp. 667-668.) The Court of Appeal held that the lower 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” and therefore that the “community of interest requirement was not satisfied. (*Id.* at pp. 668-669.)<sup>19/</sup>

Here, the trial court did not abuse its discretion in concluding, on the facts of this case, that a class-wide presumption of reliance and/or causation was not appropriate and the individualized issues of causation predominated. A salient point among the ample evidence supporting the trial court’s order was the fact that plaintiffs’ UCL claims are based on certain representations in the DFUs, and a dentist who decides to purchase a Cavitron scaler does not receive the DFUs until the Cavitron is actually delivered to the dental office. (4 AA 1031; 11 AA 2627, 2676-2677; see also 12 AA 2899 [plaintiff Weinstat did not recall reviewing the Cavitron’s DFUs until they were delivered with the unit]; 12 AA 2900; 13 AA 3106-3107 [purchase decision of plaintiff

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<sup>19/</sup> See, e.g., *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 990 (where plaintiffs sought class certification in a fraud case alleging that a medical center misrepresented its level of coronary care to its patients, court distinguished *Vasquez*, refusing to presume reliance on a class-wide basis because the decision to obtain surgery involves complex personal decision-making, and one could not presume that all patients made decisions based on the same factors); *Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 289 (in class action against housing developer for alleged misrepresentations, inference of reliance was not justified where some purchasers did not see representations, and others had access to information that contradicted representations).

Murray, who did not see DFUs prior to purchase and installation, was not based on DFUs].)

At the hearing on the decertification motion, the trial court observed: “As I understand it . . . what you refer to as DFUs often weren’t even available or provided until after the purchase had occurred.” (9/6/06 RT 7.) In its subsequent decertification order, the trial court properly determined that no class-wide inference of causation based on any representation in the DFUs could arise where many or most prospective class members did not even see the DFUs until *after* they had already made the decision to purchase a Cavitron scaler.

The trial court’s rejection of any class-wide inference of reliance and/or causation is further supported by evidence that Dentsply does not sell Cavitron scalers directly to dentists, but only through third-party distributors, who convey information about the Cavitron and its appropriate uses through their sales agents and in a variety of sources such as national training sessions, brochures, and national magazine advertising. (1 AA 14; 10 AA 2568; 11 AA 2713-2717.) There was evidence that this is the information motivating the purchase decision, and not the DFUs delivered with Cavitron scalers after orders have already been placed. (See 11 AA 2761 [plaintiff Murray’s purchase decision followed representations by a third party that the Cavitron was “very reliable, good to get”], 2774 [plaintiff Weinstat disavowed any “direct misleading” on the part of Dentsply, contending instead

that “there was . . . a lack of communication from the Dentsply distributor who [s]old it to me”.)

Finally, an inference of reliance and causation based on the DFUs would not be reasonable even among the named plaintiffs, whose testimony regarding their individual prior experiences with Cavitron scalers in dental school and other professional situations suggests that experience was the primary factor in their decision to purchase a Cavitron for use in private practice. (See 11 AA 2638, 2682-2683 [Dr. Nathan], 2726, 2728-2729, 2760-2761 [Dr. Murray]; 13 AA 3122-3133 [Dr. Weinstat].) Moreover, at least some of the named plaintiffs continued to use their Cavitron scalers for oral surgery despite personal knowledge that the Cavitron could not deliver sterile water, and in violation of warnings supplied by Dentsply that regulatory requirements take precedence over information in the DFUs. (5 AA 1217-1219, 1223-1224, 1227, 1232-1233, 1238, 1242, 1245; 6 AA 1430; 11 AA 2632-2634, 2638, 2642-2643, 2647, 2687 [plaintiffs’ use of Cavitron scalers after filing this lawsuit]; 5 AA 1050; 11 AA 2666 [plaintiffs’ violation of applicable regulations despite warnings in Infection Control Cards supplied with Cavitron]). The failure of some named plaintiffs to heed such warnings rebuts any across-the-board inference that they and other similarly situated dental practitioners purchased Cavitron scalers for use in oral surgery based on any aspect of the DFUs.

In sum, it would be impossible to say on this record that the trial court abused its discretion in rejecting a class-wide inference of reliance

and causation based on the DFUs supplied by Dentsply with Cavitron scalers. (See, e.g., *Massachusetts Mutual Life Ins. Co. v. Superior Court*, *supra*, 97 Cal.App.4th at p. 1294, fn. 5 [trial court may decline to apply presumption or inference when “class members were provided such a variety of information”]; *Osborne v. Subaru of America, Inc.*, *supra*, 198 Cal.App.3d at p. 661 [“[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”].)

**C. The trial court correctly ruled that individual issues predominate as to the “materiality” of any representation by Dentsply.**

The trial court found that individual issues predominate over common issues regarding “the nature and extent of any *material misrepresentation*” where dentists who purchased the Cavitron typically did not see the DFUs until after their decision to purchase, such that “the DFUs could not have influenced the purchasing decision.” (13 AA 3141.) Plaintiffs attack this ruling separately from the trial court’s conclusion that causation and reliance issues are not conducive to class treatment. (AOB 30-34.)

But as plaintiffs themselves argue, a “‘material’ fact is one that *influences* a purchasing decision.” (AOB 30, original emphasis; see also *Caro v. Procter & Gamble Co.*, *supra*, 18 Cal.App.4th at p. 668 [“‘[s]tated in terms of reliance, materiality means that without the

misrepresentation, the plaintiff would not have acted as he did”]).) Thus, in the context presented here, there is little or no distinction between issues of materiality, reliance and causation. Consequently, the authorities cited in the preceding section addressing the requirement that individual class members prove reliance and causation are responsive to plaintiffs’ argument that “conduct consistent with reliance” establishes materiality. (AOB 31.) Just as the trial court was not required to apply any class-wide presumption of reliance and causation (and did not abuse its discretion in not doing so), it was not required to apply any class-wide presumption of materiality either. (See, e.g., *Caro*, at pp. 666-669 [rejecting argument that “a misrepresentation’s materiality involves an objective inquiry susceptible to common proof”].)

Furthermore, the trial court logically (and properly) concluded that “[b]ecause dentists who purchased the Cavitron typically did not see the DFUs until *after* their decision to purchase, the DFUs could not have influenced the purchasing decision.” (13 AA 3141.) It is difficult to understand plaintiffs’ argument to the contrary. Representations in the DFUs that reached Cavitron owners only *after* the purchase decision could not have been material because they could not have “*influence[d]* a purchasing decision.” (AOB 30, original emphasis.) Even assuming certain representations in the DFUs would have been material to some Cavitron purchasers had they seen them before the purchase decision, individual questions predominate as to the timing of the alleged

representations to putative class members, and the nature of other information available to the class members.

Finally, apart from individual questions regarding the timing of access to the DFUs, there were separate issues of materiality arising out of evidence that some or many putative class members would have purchased the Cavitron scaler for surgical applications regardless whether the DFUs had said anything about oral surgery as an indicated use. (See *Caro v. Procter & Gamble Co.*, *supra*, 18 Cal.App.4th at p. 668 [sustaining denial of class certification where trial “court properly concluded the issue whether any asserted misrepresentation induced the purchase . . . would vary from consumer to consumer”].) Where dentists used — and some continue to use — the Cavitron in oral surgical applications despite explicit warnings by Dentsply that regulatory requirements take precedence over information in the DFUs, it is logical to infer that none of the written information supplied with the Cavitron was material to such users.

### III.

**THE COURT DID NOT ABUSE ITS DISCRETION IN DECERTIFYING PLAINTIFFS' EXPRESS WARRANTY CLAIMS BASED ON ITS DETERMINATION THAT INDIVIDUAL ISSUES OF PROOF PRECLUDED CLASS TREATMENT.**

- A. To prevail on an express warranty claim based on the DFUs, each plaintiff must prove that he or she actually read the DFUs before purchasing a Cavitron scaler.**

Plaintiffs' express warranty claims are based on the DFUs supplied with Cavitron scalers which, according to plaintiffs, state the device is "indicated" for certain uses during oral surgical procedures. (1 AA 17-18.) But as explained below, whether an express warranty claim can be based on the DFUs depends on whether they were read by a putative class member before the Cavitron purchase was concluded. Because that necessarily entails individual issues of proof, the trial court properly decertified plaintiffs' express warranty claims.

"The simplest and oldest form of express warranty is the promissory warranty, by which the seller expressly 'warrants' or 'guarantees' that certain things are true, or that the seller will be answerable for certain matters relating to the goods." (4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 56, p. 66.) But the indicated uses in the DFUs relied on by plaintiffs were not expressly

labeled as a warranty or included in the warranty section of the manuals supplied with Cavitron scalers. (See, e.g., 3 AA 528, 552 [indicated uses and warranty terms in separate sections of manual].)

Consequently, to support their allegation that the indicated uses in the DFUs provided a form of “warranty,” plaintiffs rely on Uniform Commercial Code section 2313, which governs warranties created by “affirmation, promise, or description,” rather than by use of the words “warrant” or “guarantee.” Section 2313 provides that an express warranty by a seller is created by “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods *and becomes part of the basis of the bargain*” or “[a]ny description of the goods *which is made part of the basis of the bargain . . .*” (Cal. U. Com. Code, § 2313, subd. (1)(a), (b), emphases added; see *Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20 [if the seller’s language is “susceptible to creation of a warranty, it must then be determined whether the statement was ‘part of the basis of the bargain’”].)

Comments 1 and 3 to this section clarify that these provisions apply only to “‘dickered’ aspects of the individual bargain” and “affirmations of fact made by the seller about the goods *during a bargain . . .*” (Official Comments on Cal. U. Com. Code, coms. 1, 3, West’s Ann. Cal. U. Com. Code, foll. § 2313, emphasis added.) As Witkin explains, “[e]xpress warranties are ‘dickered’ aspects of the negotiations *that led to the sale.*” (4 Witkin, Summary of Cal. Law, *supra*, Sales, § 51, p. 62, emphasis added; see also *Keith v. Buchanan, supra*, 173 Cal.App.3d at p. 21 [presumption of express warranty applies to

“[s]tatements made by a seller *during the course of negotiation*” (emphasis added)]; *id.* at p. 23 [where “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””].)

Thus, in their treatise on the Uniform Commercial Code, Professors White and Summers explain, in the context of advertising, that only representations *actually reaching the buyer* before the purchase is consummated are part of the “basis of the bargain” within the meaning of section 2313:

In the usual case one would not regard an advertisement as being made “during a bargain,” and therefore no statement in an advertisement would normally qualify for the presumption that may be authorized in Comment 3. At minimum a plaintiff in such a case should have to testify that he or she knew of . . . the advertisement in making the purchase.

(1 White & Summers, Uniform Commercial Code (5th ed. 2006) § 9-5, p. 623, footnotes omitted.)<sup>20/</sup>

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<sup>20/</sup> See, e.g., *Ciba-Geigy Corp. v. Alter* (1992) 309 Ar. 426, 447 [834 S.W.2d 136, 146-147] (statements in advertising materials “not a basis of the bargain” where purchaser “did not recall reading any of the advertising materials”); *Braughn v. Honda Motor Co.* (1986) 107 Wash.2d 127, 151-152 [727 P.2d 655, 669] (to assert express warranty claim based on advertising representations, plaintiff “must at least be aware of such representations”); *Global Truck & Equip. Co., Inc. v. Palmer Machine Works, Inc.* (N.D.Miss. 1986) 628 F.Supp. 641, 651 (affirmation in brochure not seen until after purchase was “not ‘part of the basis of the bargain’” and therefore “not an express warranty under the UCC”);

(continued...)

The White & Summers treatise goes on to cite the court's reasoning in *Interco, Inc. v. Randustrial Corp.* (Mo.Ct.App. 1976) 533 S.W.2d 257 with approval. In that case, after stating that a catalogue, brochure or advertisement may constitute an express warranty, the court cautioned that for such a warranty to arise, ". . . the catalogue, advertisement or brochure must at least have been read . . . as the U.C.C. requires the proposed express warranty be part of the basis of the bargain." (*Id.* at p. 262, citation omitted.) The White & Summers treatise concludes: "We approve of the court's logic and concur in the judgment." (1 White & Summers, Uniform Commercial Code, *supra*, § 9-5, pp. 623-624.)<sup>21/</sup>

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20/ (...continued)

*Anderson v. Heron Engineering Co., Inc.* (1979) 198 Colo. 391, 394 [604 P.2d 674, 676] (representation in brochure not an express warranty unless seen before purchase); *Adolphson v. Gardner-Denver Co.* (1990) 196 Ill.App.3d 396, 402 [553 N.E.2d 793, 798] (brochure did not create express warranty where purchaser "could not recall whether he first saw it before or after the sale"); *DiLenno v. Libbey Glass Div., Owens-Illinois, Inc.* (D.Del. 1987) 668 F.Supp. 373, 376 (catalog could not create warranty when never seen by buyer); *Cipollone v. Liggett Group, Inc.* (3d Cir. 1990) 893 F.2d 541, 567, *revd.* on other grounds (1992) 505 U.S. 504 ("a plaintiff effectuates the 'basis of the bargain' requirement . . . by proving that [before the purchase] she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise").

21/ By contrast, if the words "warrant" or "guarantee" are used, "then an express warranty is created" regardless whether they were seen by the buyer prior to purchase. (Civ. Code, § 1791.2, subd. (b); see also 1 White & Summers, Uniform Commercial Code, *supra*, § 9-5, p. (continued...)

The same analysis applies to representations in user manuals and on product labels that are not considered by the purchaser prior to the sale. (See, e.g., *Cuthbertson v. Clark Equipment Co.* (Me. 1982) 448 A.2d 315, 321 [statement in front-end loader operator’s manual not an express warranty where purchaser did not see the manual or “dicker[ ] over” its language before the purchase]; *Schmaltz v. Nissen* (S.D. 1988) 431 N.W.2d 657, 661 [language on packaging not “part of the basis of the bargain” and not a warranty where not read “until after the sale was completed”].)

Here, the statements on which plaintiffs’ express warranty claims are based—statements in the DFUs about indicated uses—were not generally available to plaintiffs until the purchase decision had already been made and the Cavitron scaler was delivered. Accordingly, for any plaintiff to prevail on an express warranty theory, there must be a showing that the plaintiff saw the indicated uses in the DFUs before the purchase was made. That question necessarily requires an individual inquiry and cannot be proven on a class-wide basis. Accordingly, the trial court did not abuse its discretion in concluding that individual issues predominated with respect to plaintiffs’ express warranty claims, and that they were not appropriate for class treatment.

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21/ (...continued)

627 (“we would recognize warranties that are delivered with the goods even if the delivery came well after the deal had been made”).

**B. Dentsply's right to rebut any presumption of individual reliance on the DFUs precludes class treatment of plaintiffs' express warranty claims.**

The trial court's decertification order provided a separate and independent reason for decertifying plaintiffs' express warranty claims—that using class procedures would circumvent Dentsply's right to rebut any presumption of reliance by individual plaintiffs on any express warranty by Dentsply. (13 AA 3142.) The presumption of reliance could be rebutted, for example, by showing that a class member originally purchased a Cavitron for non-surgical uses or did not rely on any representation allegedly giving rise to a warranty until after the purchase of the product. (*Ibid.*)

Plaintiffs assert that “[t]here is no reliance element in the Uniform Commercial Code.” (AOB 36.) Plaintiffs misunderstand the operation of Uniform Commercial Code section 2313, which creates a *rebuttable presumption* that a representation made *during the bargaining process* was part of the “basis of the bargain.” (Cal. U. Com. Code, § 2313, subd. (1)(a), (b).) For example, Comment 3 to that section provides that “no particular reliance on such statements need be shown” and that “any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof.” (Official Comments on Cal. U. Com. Code, com. 3, West’s Ann. Cal. U. Com. Code, foll. § 2313.) By negative implication, the presumption that a representation was a “basis of the bargain” *can* be rebutted upon “clear

affirmative proof.” (*Ibid.*; see also *Keith v. Buchanan, supra*, 173 Cal.App.3d at pp. 23-24 [presumption of reliance by the buyer may be “overcome” or rebutted by “[t]he buyer’s actual knowledge of the true condition of the goods prior to the making of the contract”].)

The Judicial Council of California Civil Jury Instructions (CACI) confirm that the presumption of reliance on an express warranty is rebuttable. CACI No. 1240, entitled “Affirmative Defense to Express Warranty—Not ‘Basis of Bargain,’” provides:

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

The presumption of reliance on a representation made during the bargaining process is thus rebuttable upon a showing “that [plaintiff] did not rely” on any statement or description made by the defendant. (*Ibid.*)

Here, the rebuttal of any presumption must be evaluated individually as to each class member’s express warranty claim. Dentsply could meet its rebuttal burden by showing that a class member did not read the DFUs during the bargaining process, read them but did not base the purchase decision on what the DFUs said, or purchased the Cavitron for non-surgical uses and only later decided to use it during surgery. Dentsply could also meet its burden by showing that an individual class member knew the DFUs, which were drafted for a national audience, were not accurate under applicable California

regulations. (See, e.g., *Keith v. Buchanan*, *supra*, 173 Cal.App.3d at pp. 23-24 [showing of “buyer’s actual knowledge of the true condition of the goods prior to the making of the contract” may rebut presumption of reliance]; *McDonnell Douglas Corp. v. Thiokol Corp.* (9th Cir. 1997) 124 F.3d 1173, 1178 [affirmation of fact “which the buyer from [its] experience knows to be untrue cannot form a part of the basis of the bargain”].)

Because Dentsply was entitled to rebut, on an individual basis, the presumption that the purchaser relied on any representation in the DFUs when purchasing a Cavitron scaler, the trial court correctly concluded that class certification of plaintiffs’ express warranty claims would be improper. (See *Walsh v. IKON Office Solutions, Inc.*, *supra*, 148 Cal.App.4th at p. 1450 [“[t]he affirmative defenses of the defendant must . . . be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues” ].)<sup>22/</sup>

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<sup>22/</sup> See also *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913 (in claims regarding mineral rights, “the defendants would undoubtedly raise the defense of abandonment of the mineral interests as to each alleged member of the class, which . . . creates a factual issue as to the individual owner’s intent”); *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 544 (as to right of publicity of class of baseball players, “affirmative defenses of consent, waiver, or estoppel” would not be common for all members. “The fact that the trial court would be obligated to evaluate each of these defenses for each member of the class[ ] weighed heavily against certification” (emphasis added));  
(continued...)

Any other ruling would have deprived Dentsply of its due process right to rebut the presumption of reliance. Such an approach would run afoul of the Supreme Court's admonition that "it is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen." (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749; see also *City of San Jose v. Superior Court, supra*, 12 Cal.3d at p. 462; *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 461

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22/ (...continued)

*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 811 (as to class of users of latex gloves, "[d]efenses will require individual litigation of claims. Health care workers may have been using latex gloves for a period of time exceeding the statute of limitations, thus requiring an examination of the viability of each plaintiff's claim. Questions will arise concerning assumption of the risk and comparative negligence" (emphasis added)); *National Solar Equipment Owners' Assn. v. Grumman Corp.* (1991) 235 Cal.App.3d 1273, 1284 (reliance *may* be inferred in appropriate cases, but defendant is entitled to reasonable discovery to rebut claim that alleged misconduct "amounted to a 'canned sales pitch' which is sufficiently common to warrant class treatment, as well as to explore the reliance issue and the effect of any alleged omissions" of information conveyed to class members); *Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 695 ("Even if the common question of law were decided in appellants' favor, the independent factual issues which would have to be separately litigated in this case would be so numerous that the maintenance of the alleged class action could not possibly serve the judicial process or the parties involved. Following are some examples. . . . [W]hat *affirmative defenses* does the state have against each individual claimant?" (emphasis added)).

[class action is merely a “procedural device for collectively litigating substantive claims”].)

Stated differently, courts must not create rules that enhance a plaintiff’s ability to prove his case at the expense of a defendant’s ability to defend against it. As the United States Supreme Court has explained, due process requires a civil defendant to be given “an opportunity to present every available defense.” (*Lindsey v. Normet* (1972) 405 U.S. 56, 66 [92 S.Ct. 862, 31 L.Ed.2d 36].)<sup>23/</sup> The trial court’s decertification of plaintiffs’ express warranty claims merely recognizes and upholds those rights, and therefore was not an abuse of discretion.

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<sup>23/</sup> See also *duPont v. Southern Nat. Bank of Houston, Tex.* (5th Cir. 1985) 771 F.2d 874, 880 (recognizing that civil litigants have a “due process right to fully and fairly litigate each issue in their case”); *Sandwich Chef of Texas v. Reliance Nat. Indemnity* (5th Cir. 2003) 319 F.3d 205, 220-221 (class certification based on plaintiffs’ potential use of circumstantial evidence to prove their case inferentially using expert testimony about customary business practices and proof that allegedly fraudulent invoices contained material misrepresentations was reversed: trial court “did not adequately account for individual issues of reliance that will be components of *defendants’ defense*,” including evidence that some class members had knowledge of the alleged misrepresentation (emphasis added)); *In re Masonite Corp. Hardboard Siding Products Liability Litigation* (E.D.La. 1997) 170 F.R.D. 417, 425 (“Masonite cannot receive a fair trial without a process which permits a thorough and discrete presentation of these defenses”); cf. *Arch v. American Tobacco Co., Inc.* (E.D.Pa. 1997) 175 F.R.D. 469, 489, fn. 21 (“[plaintiffs’] use of [evidence] to establish the elements of causation and injury—without cross-examination or rebuttal evidence—would violate defendants’ due process rights”).

**C. Plaintiffs' express warranty claims involve individual issues of proof due to variations in the DFUs.**

As a final independent basis for decertification of plaintiffs' express warranty claims, the trial court ruled that because the DFUs supplied with Cavitron scalers during the relevant time frame are not uniform in language, plaintiffs' express warranty claims must be examined on an individual basis to determine the scope of the representation made to each class member and whether there was reasonable reliance on that representation. (13 AA 3142.)

The trial court's ruling was supported by evidence that 15 different Cavitron models have been marketed and sold in the United States and abroad since 1993, and approximately 20 different variations of DFUs have been included with those various models. (10 AA 2568-2569; see also 4 AA 1029; 11 AA 2625, 2650-2654; 12 AA 3045-3053.) Depending on the year of sale, even some of the same models have different DFUs. (10 AA 2569.) Moreover, the various versions of the DFUs have referenced different versions of other recommendations, guidelines, warnings, and admonitions (such as the Infection Control Information Card, advising that regulatory requirements take

precedence over the DFUs).<sup>24/</sup> (4 AA 1029; 11 AA 2626, 2668-2672; 12 AA 3045-3053.)

In light of this evidence, it was not an abuse of discretion for the trial court to determine that the statements in the DFUs relied upon by plaintiffs cannot be divorced from the shifting factual context in which they appeared. Accordingly, there could be no class-wide determination regarding the precise nature of the warranty that arose from the DFUs, especially because the variations in the total package of information given to plaintiffs raised individual issues regarding the proof necessary to rebut any presumption of reliance on the DFUs by plaintiffs who saw them prior to sale.

Plaintiffs nonetheless assert that the trial court considered evidence that was “irrelevant and inadmissible hearsay” in concluding that variations in the DFUs precluded class treatment of plaintiffs’ breach of warranty claims. (See AOB 44-46.) Plaintiffs, however, never sought or obtained a ruling on objections to that evidence. They

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<sup>24/</sup> Plaintiffs argue there “*were no ‘agency regulations’* as to biofilm formation or waterline treatment or maintenance during the class period that could have contradicted the DFUs.” (AOB 42.) That is misleading. Plaintiffs contend the DFUs “warranted” that Cavitron scalers could be used for surgical procedures, but California regulations have provided since 1994 that sterile water must be used during surgical procedures. (Cal. Code Regs., tit. 16, § 1005, subd. (c)(15).) Since plaintiffs do not argue any Cavitron purchaser has ever understood that the Cavitron is capable of producing sterile water, those dentists who received the Infection Control Information Card could not reasonably rely on any indication in the DFUs about its propriety for use in surgical procedures.

concede that “a litigant’s failure to procure rulings on objections waives the objections and the evidence is deemed admitted.” (AOB 44-45; see *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 578.) They refer to an exception “where counsel has requested a ruling on objections and the trial court has refused” (AOB 45), but the only such request their counsel made was at an entirely *different* hearing—the hearing on plaintiffs’ original motion for class certification—with regard to different objections directed to different evidence. (See 6/7/06 RT 2, 42-43.) On the decertification motion at issue in this appeal, plaintiffs’ counsel waived their objections to the trial court’s consideration of the evidence submitted by Dentsply.

Furthermore, even in the context of the earlier hearing the request for a ruling by plaintiffs’ counsel was insufficient to preserve their evidentiary objections for appellate review. Cases applying an exception to the waiver rule have held that counsel must make *repeated* requests for evidentiary rulings before further requests will be deemed futile.<sup>25/</sup> (See, e.g., *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 641 [counsel “repeatedly pointed out the trial court’s failure to rule on the objections and requested a ruling”]; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785 [“defense counsel twice orally requested that the trial court rule on the

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<sup>25/</sup> In *Demps v. San Francisco Housing Authority*, *supra*, 149 Cal.App.4th at page 579, the court declined to decide the continuing vitality of the exception to the general rule of waiver that may apply “where counsel has expressly requested a ruling on the objections and the trial court has failed to rule.”

written evidentiary objections”].) Here, by contrast, after the court announced that it would not specifically rule on plaintiffs’ evidentiary objections, their counsel responded “Okay” and “[t]hat’s fine,” rather than even once pressing the trial court for a ruling, much less repeatedly asking for a ruling on the objections. (6/7/06 RT 43.) That was not sufficient to invoke the rule that “where the court neglects to rule on objections *despite repeated requests by counsel*, there is no waiver and the objections are preserved on appeal.” (*Demps v. San Francisco Housing Authority, supra*, 149 Cal.App.4th at p. 576, emphasis added.)

In sum, plaintiffs may not now use a belated evidentiary argument to defeat the trial court’s decertification order, which is supported by the differences both in the DFU representations and in other information given to different class members.

## CONCLUSION

For all the foregoing reasons, the trial court did not abuse its discretion in ordering class decertification, and its order should be affirmed.

Dated: September 17, 2009

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

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