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S150066

February 6, 2007

Chief Justice Ronald M. George
Associate Justices Baxter, Chin,
Kennard, Werdeger, Moreno & Corrigan
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: Request for Depublication
Sony Electronics, Inc. v. Superior Court
D048468, Fourth Appellate District, Division One

Dear Honorable Justices:

This letter is written under rule 8.1125(a), California Rules of Court, requesting depublication by the Supreme Court of *Sony Electronics, Inc. v. Superior Court* D048468, (2006) 145 Cal.App.4th 1086 (*Sony*). The publication order of *Sony* is dated December 18, 2006. This request is thus timely filed under rule 8.1125(a) within 30 days following the January 17, 2007 date of finality of the opinion pursuant to rule 8.264(b)(5). The time for filing a Petition for Review elapsed on January 27, 2007 pursuant to rule 8.500(e) without the parties having sought Review.

DESCRIPTION OF REQUESTING PARTY'S INTEREST AND REASON WHY OPINION SHOULD NOT BE PUBLISHED

I am the author of *Cohelan on California Class Actions* (The Expert Series) (Thomson-West 2006), and I represent consumer, employee, and corporate plaintiffs in California class actions. I have submitted one prior request for depublication of a Court of Appeal decision, *Gattuso v. Harte-Hanks Shoppers, Inc.*, B167037, (2005) 133 Cal.App.4th 985, currently under review by this Court.

I periodically review and compile the State's published body of class action law for my book, a yearly-updated procedural guide for practitioners published since 1997. This role necessitates this depublication request to prevent likely confusion among trial courts ruling on class certification motions state-wide following the *Sony* decision. Mistaking

"ascertainability" for "ascertainment," *Sony* pronounces a new rule affecting all class actions by prohibiting so-called "fail safe" class definitions (definitions that include the alleged violation in defining the class) on the basis that a merits determination is necessary to establish the ascertainability component for class certification. This ruling sets forth an incorrect legal standard contrary to established case law from this Court in *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695 [*Daar*] that differentiates between "ascertainability" necessary for class certification and "ascertainment" of the class in later proceedings following a determination of liability.

Relying on foreign authority and a mistaken interpretation of *Hicks v. Kaufman & Broad* (2001) 89 Cal.App.4th 908 [*Hicks*], a case in which my firm was class counsel, the Court of Appeal mistakes the necessity of a determination of merits at the ascertainment stage from simply describing an ultimately ascertainable class, the requirement necessary to meet the ascertainability requirement at the certification stage. Had the Court of Appeal followed *Daar,* apposite Ninth Circuit authority in *Vizcaino v. United States Dist. Court,* 173 F.3d 713, 721-722 (9th Cir. 1999) renouncing the "fail safe" class definition prohibition, and the multitude of California cases certifying classes with definitions including the violation alleged, it would not have rendered its erroneous opinion.

Sony's new ascertainability standard is contrary to well-accepted principles established in published cases from this Court and the California Courts of Appeal. If left as a published opinion, *Sony* threatens to contradict decades of solid case law on these issues and result in trial courts failing to certify classes that should be certified. It should, therefore, be depublished.

FACTS AND PROCEDURAL HISTORY

In *Sony,* the purchaser of a Sony notebook computer alleged that Sony had marketed and distributed GRX Series Notebook computers, knowing that the computers had defective memory chip sockets, but without disclosing such defects to consumers. The complaint asserted causes of action for violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), false advertising, violations of the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), breach of express warranty and violations of the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.). Plaintiff moved for certification of a proposed class of consumers consisting of "all persons or entities in the United States who purchased Sony Vaio GRX Series Notebook Computers." Plaintiff contended that the computers suffered from a soldering defect which prevented many, but not all, from properly "booting" (i.e., starting the operating system when turned on) or utilizing their memory.
(*Sony, supra,* 145 Cal.App.4th at pp. 1089-1090.)

Pertinent to ascertainability, Sony argued the proposed class was not ascertainable because it included persons who lacked viable claims (including persons whose computers do not have any defects, persons who had their computers repaired under warranty or persons who bought their computers used, "as is" or in a refurbished condition), in addition to those whose computers suffered from the alleged defect. (*Id* at p. 1091).

The trial court declined to certify the class as defined but *sua sponte* certified a class as follows:

> All persons or entities in the United States who are original purchasers of Sony Vaio GRX Notebook computers from Sony or from an authorized reseller, and in which the memory connector pins for either of the two memory slots were inadequately soldered[,] impeding the recognition of installed memory causing boot failures, and other problems. Excluded from this Class are the following: (1) [Sony] (including its affiliates, employees, officers and directors); (2) persons or entities which distribute or sell Sony Vaio GRX Notebook computers; (3) the Court; and (4) purchasers who had the solder points repaired by Sony at no cost under the express warranty and who no longer experience boot failures and other problems related to inadequate soldering of the memory connector pins.

(*Id.*)

Sony petitioned for mandate seeking reversal of the certification order. Sony argued the partial class certified was not ascertainable because the class definition was not based on objective criteria, but instead on the issue of ultimate liability, i.e., whether a particular person's notebook computer contained a soldering defect. (*Id.* at p. 1095.) The Court of Appeal granted the Petition, relying on *Intratex Gas Co. v. Beeson* (Tex. 2000) 22 S.W.3d 398 [43 Tex. Sup. Ct. J. 489] (*Intratex*) and *Hicks*. The court essentially interpreted these cases to find class definitions fundamentally flawed if not defined using objective criteria such that class membership would not be ascertainable until after a determination of liability.

The court found the class definition of purchasers of "inadequately soldered" notebooks flawed:

> the class definition requires a merits-based determination in order to establish whether a particular GRX Series Notebook owner is a member of the class. The members of such a class are thus not readily identifiable so as to permit appropriate notice to be given and the definition would not permit persons who

receive notice of this action to determine whether they are part of the class.

(*Id.* at p. 1096.)

Somewhat contradictorily, the Court of Appeal implies, if not suggests, that an ascertainable class could have been defined to include all purchasers of certain notebook computers manufactured in Spring and Summer 2002 and with motherboards manufactured in Japan, as well as purchasers who experienced memory or "no boot" problems (though these do not specifically describe allegations of statutory violations). (*Id.* at p. 1097.)

THE COURT'S CONFUSION REGARDING ASCERTAINABILITY CREATES AN ERRONEOUS, NEW LEGAL STANDARD THAT SUPPORTS DEPUBLICATION

"Ascertainability is required in order to give notice to putative class members as to whom the judgment in the action will be res judicata." (*Hicks, supra*, 89 Cal.App.4th at 914, citing *City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447, 454; *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704, 706 [*Daar*]; and Cohelan on California Class Actions (1997 ed.) section 2.02, pages 2-2 to 2-3.) Following this standard, "A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify him or herself as having a right to recover based on the description." (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828.) There is no prohibition against including factual circumstances involving liability violations in the description provided individuals can identify themselves after liability is established, and in fact it is common to do so.

Ascertainability issues concern (1) the class definition, (2) the size of the class, and (3) the means of identifying class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326 [*Sav-On*].)

In essence, *Sony* holds that if a merits determination must be made before a class member can be ascertained, a class definition that includes the violation alleged does not define an ascertainable class. However, *Sony* mistakes "ascertainability" with "ascertainment," which is not part of the class certification process.

Daar v. Yellow Cab Co. (1967) 67 Cal.2d 695, in which purchasers of script alleged they were charged excessive meter rates, establishes that a procedure for ascertaining class members at the certification stage is neither necessary nor appropriate.

> Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment. The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class. Presumably an accounting in the suit at bench will determine the total amount of the alleged overcharges; any judgment will be binding on all the users of taxicabs within the prior four years. However, no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof.

(*Daar*, 67 Cal.2d at 705.)

Thus, all that is required is that the class be *ascertainable,* that is, defined in such a way that members may be ascertained (individually identified) after a liability determination for purposes of being notified of the judgment and for res judicata. Class members whose notebooks were "inadequately soldered" resulting in booting problems would thus be able "come forward and identify himself." Thus the class as defined by the trial court in *Sony* would be ascertainable pursuant to *Daar*.

The Ninth Circuit also conclusively refutes *Sony's* analysis, rejecting the argument that a definition that includes the violation is impermissibly "circular." *Vizcaino v. United States Dist. Court*, 173 F.3d 713, 721-722 (9th Cir. 1999) states as follows:

> The district court's position that "unusual circumstances" permit redefinition of the class after decision on the merits lacks legal support and is erroneous. . . .The "unusual circumstances" rather seem to arise from the district court's perception that the class it previously certified is "circular," i.e., that it relies on a legal conclusion to define membership in the class. According to the court, "common law employees are plaintiffs, and plaintiffs are common law employees." But the court's reading reflects a misconception. It is implicit in the definition of the class that its members are persons who claim to have been (or to be) common law employees who were denied ESPP benefits. That under this definition ultimate success may turn on resolution of a disputed legal issue does not make it circular. In *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993), the court, dealing with an analogous situation, said:
>
> Penney asserts that this definition is hopelessly "circular," as the

> court must first determine whether an employee's pension benefits were improperly reduced before that person may be said to be a member of the class. This argument is meritless and, if accepted, would preclude certification of just about any class of persons alleging injury from a particular action. These persons are linked by this common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership.
> *Id.* at 1105.

Vizcaino concluded that the definition linking employees by their common claim to have been denied benefits "is no more circular than defining a class of employees by their common claim to have been injured by their employer's unlawful actions." (*Id.*, referencing *Vaszlavik v. Storage Tech. Corp.*, 183 F.R.D. 264, 267 (D. Colo. 1998) [certifying plaintiffs' class defined by description of plaintiffs' legal claim]; see, also *Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F.3d 767, 774 [certified class defined as "All current civilian citizens of the Republic of the Philippines, their heirs and beneficiaries, who between 1972 and 1986 were tortured, summarily executed or disappeared while in the custody of military or paramilitary groups"])

In other words, it is implicit in every class definition that its members be persons who suffered the harm alleged in the case. Including the description of the violation in class definition or otherwise defining the class in terms of liability is permissible and does not invoke a premature merits determination.

Many California and federal cases are in accord, certifying classes and consistently not finding it "fatal" for definitions to include the violation alleged. (See, e.g.,*Hicks*, *supra*, 89 Cal.App.4th at p. 915 ["A class is still ascertainable even if the definition pleads ultimate facts or conclusions of law"]; *Stephens*,193 Cal.App.3d 411, 416 [class certified of "women who, since 1978, were, are or will be qualified to hold a reserve department manager position ... but have been denied the opportunity to do so because of their sex"]. *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 960 [The definition--persons who owned policies issued by defendant "which were purchased as a result of deceptive or fraudulent sales practices described herein . . . and were thereby harmed"--described the class sufficiently enough to make it ascertainable]; *Stephens v. Montgomery Ward*(1987) 193 Cal.App.3d 411, 415 [class of women excluded from holding managerial positions]; *Dukes v. Wal-Mart, Inc.* (9th Cir. Feb. 6, 2007) ___F.3d 1333, 1340 [class defined as "All women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and

practices"]; *Slaven v. BP America, Inc.* (C.D.Cal. 2000) 190 F.R.D. 649 [class certified of persons with interest in real or personal property "who have suffered or will suffer economic damage as a result of the oil spill and/or the ensuing clean-up effort"].) Class actions are thus regularly certified with classes defined in terms of liability.

In *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, telephone subscribers sought recovery of overcharges for improper long distance charges. The proposed class was defined as "all persons nationwide subscribing to Sprint since January 1, 1981, who were charged for one or more unanswered long distance calls." The court specifically found this an ascertainable class, despite being framed to consist solely of those subscribers who had been improperly charged long distance fees:

> Plainly such class is ascertainable. Individual subscribers know whether they were charged for unanswered calls and must prove they were so charged. No individual may recover separate damages until he comes forward, identifies himself as a class member and proves the amount of his damages. The necessity for class members to prove their own damages does not mean the class is not ascertainable. In *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 706 [63 Cal.Rptr. 724, 433 P.2d 732], the California Supreme Court stated: "Defendant apparently fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. If the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment. The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the class. Presumably an accounting in the suit at bench will determine the total amount of the alleged overcharges; any judgment will be binding on all the users of taxicabs within the prior four years. However, no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof.

(*Id.* at p. 611.) *GTE* confirms the established California procedure pursuant to *Daar* permitting a class to proceed to a liability determination prior to identification of the class members, authorizing class members to come forward subsequently to establish their eligibility for class inclusion and the amount of individual damages. (See, also *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319 [*Sav-On*] [determination of which employees were misclassified as exempt from overtime pay and hence included in the class would not take place until after certification].)

Sony relies on the inapposite Texas *Intranex* case and a misreading of *Hicks*. The Texas Supreme Court in *Intranex* found that a class defined as "natural gas producers whose gas was purchased by Intratex between 1978 and 1988 in less than ratable proportions" was not ascertainable until after a determination of liability. While that may constitute grounds against certification in Texas, it is not the law in California. .

Sony states that the court in *Hicks* "was faced with this precise issue and rejected the plaintiffs' proposed liability-based class definition as lacking in the requisite ascertainability." (*Sony, supra,* 145 Cal.App.4th at p. 1096.) This understanding of *Hicks* is backwards. The court actually found that there was an ascertainable class of homeowners whose concrete slabs were potentially defective but ruled that the trial court's requirement that they demonstrate slab failure for class membership was not proper under warranty law. In *Hicks*, the trial court had made an erroneous ruling on demurrer limiting warranty claims to potential class members with homes in which a product had "failed" and caused "manifest damage." (*Hicks*, 89 Cal.App.4th at p. 916.) Plaintiff therefore included the trial court's limitation in the class definition. The Court of Appeal found as a matter of substantive warranty law that failure and manifest damage were *not* required; therefore, the class definition requiring them to be included in the class was improper. (*Id.* at 926.) The court did not make the ruling advanced by *Sony* that the reason the definition was improper was because it defined the class on the basis of the inclusion of ultimate facts to be proven. The reason the Court of Appeal found it improper was because the trial court had erred in finding those ultimate facts needed to be proven at all.

In fact, *Hicks* states specifically the opposite of the principle enunciated in *Sony*: "A class is still ascertainable even if the definition pleads ultimate facts or conclusions of law"

THE APPLICATION OF AN IMPROPER STANDARD FOR ASCERTAINABILITY WARRANTS DEPUBLICATION TO PRESERVE PUBLIC POLICY SUPPORTING CLASS RELIEF

Though the broad-based rule *Sony* implicates and its partial overruling of *Daar* cannot stand, it is noteworthy that plaintiffs in *Sony* submitted critical objective evidence of notebook computers suffering from failure rates ten times that accepted by the manufacturer, with 60 to 70 percent of models sent to Sony for repair suffering from "no boot" problems. (*Sony, supra,* 145 Cal.App.4th at 1090.) Such evidence is indicative of a need for remedial action through the class vehicle. Public policy concerns require that in the face of such evidence, companies not be allowed to avoid liability by hiding behind a rule cutting off class rights with an arbitrary and overly broad rule limiting language used in defining the class.

The situation is similar to one in which a group, but not all, of a company's employees suffer Labor Code violations, such as failure to pay minimum wages, failure to pay overtime to a subset of employees who do not spend more than half their time performing exempt tasks, or failure to reimburse all reasonable and necessary expenses. If plaintiffs submit evidence of widespread violations and define a class limited to those who failed to be reimbursed or failed to receive overtime due, such a definition might run afoul of *Sony*. The result would be a class ascertainable pursuant to *Daar* standards being denied certification following *Sony*, and a company improperly avoiding class liability.

The new standard set forth by *Sony* creates the unintended consequence of broad misapplication to deny certification by trial courts. This incorrect legal standard, if allowed to stand, carries the potential of adversely affecting ongoing and future class actions statewide.

A trial court ruling on class certification supported by substantial evidence will not be disturbed "unless (1) improper criteria were used; or (2) erroneous legal assumptions were made." (*Sav-on*, *supra*, 34 Cal.4th at pp. 326-327.) *Sony's* analysis of the "ascertainability" issue suffers from both these flaws and should thus be depublished.

Finally, as to the analysis of ascertainability, the opinion does not qualify for publication under the grounds set forth in rule 8.1105(b).

Based on the foregoing, we respectfully request depublication of the *Sony* opinion.

Thank you for your consideration of this request.

Very truly yours,
COHELAN & KHOURY

Timothy D. Cohelan

TDC/mds
enclosure
cc: Service on All Counsel

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan & Khoury, 605 "C" Street, Suite 200, San Diego, California 92101-5305.

On February 6, 2007, I served the foregoing documents described as **REQUEST FOR DEPUBLICATION** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I then served each document in the manner described below:

[XX] **BY MAIL:** I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

[ ] **BY FAX:** I transmitted the foregoing document(s) by facsimile to the party identified above by using the facsimile number indicated. Said transmission(s) were verified as complete and without error.

[ ] **BY UNITED PARCEL SERVICE:** I placed each envelope for deposit in the nearest United Parcel Service drop box for pick up this same day and for "next day air" delivery.

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

Executed February 6, 2007 at San Diego, California.

Amber Worden

Amber Worden

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