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By Facsimile  
Court of Appeal of the State of California  
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**Re: Request for Publication (Cal. R. Ct. 8.1120(a))**  
***Safaie v. Jacuzzi Whirlpool Bath, Inc.***  
**Court of Appeal Case No. D051511**

To the Honorable Justices of the Court of Appeal of the State of California:

## **I. THE ORGANIZATION'S INTEREST**

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association, representing small and large manufacturers in every industrial sector in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legal and regulatory environment conducive to U.S. economic growth, and its members have a vital interest in ensuring the predictability and fairness of laws and decisions regulating the sale and promotion of their products.

Accordingly, the NAM respectfully requests publication of the above-referenced opinion, which would provide substantial guidance for courts and litigants on critical issues for consumer class actions, particularly given the evolving nature of state law.

## **II. THE NEED FOR PUBLICATION**

The Court's decision addresses the ability to certify a class based on an inference of classwide reliance, causation, and injury. While this issue is frequently litigated, the detailed opinion is significant in highlighting the importance of the *materiality* inquiry and evaluating issues of classwide proof under several different theories for relief, including the Consumer Legal Remedies Act ("CLRA"), the Song-Beverly Act, express warranty, and the Unfair Competition Law ("UCL"). The opinion thus makes a substantial contribution to the legal literature in areas where there is little case law or the law is in flux, and it would provide substantial guidance for the many legal and factual contexts in which such issues arise.

**A. Publication Is Warranted Based On The Court’s Discussion Of Materiality As To The CLRA, Song-Beverly, And Express Warranty Claims**

In Part II.B, the Court addressed class certification as to the CLRA, Song-Beverly, and express warranty claims. *See Op.* at 13. While the Court confirmed that reliance is an element for both CLRA and Song-Beverly implied warranty claims, it observed that the nature of a reliance requirement is an open issue for express warranty claims. *Id.* at 13. The Court explained, however: “Regardless of the extent to which the reliance element has been statutorily altered or removed from express warranty claims, the plaintiff must show injury from the breach ... to obtain any recovery beyond nominal damages.” *Id.* at 13-14.

The Court then analyzed the inference of classwide reliance and injury under these theories. It observed that, even if Jacuzzi misrepresented the horsepower of its whirlpool jets to the class, the trial court could find that “the misrepresentation was not ... *material* to many purchasers,” *id.* at 19, because “the horsepower rating was merely listed as one technical feature among many features and that there are a wide variety of other features that can motivate a purchasing decision,” *id.* at 20. Notably, the Court found that the issue of materiality precluded class treatment *even assuming that reliance is not an element of an express warranty claim*: because “many purchasers might be satisfied” with their purchase notwithstanding the horsepower of the jets, individualized issues could predominate on the element of injury. *Id.*

While the inference of classwide reliance is frequently litigated as to whether a representation was uniform or communicated to all class members, there are fewer cases addressing the materiality requirement. Moreover, the decision draws the important connection – which has generally not been discussed in the case law – between materiality and *injury* for express warranty claims. In its discussion of both the law and the particular facts, the decision would provide substantial guidance to courts and litigants addressing such issues.

**B. The Decision Warrants Publication For Its Discussion As To The UCL Claim**

In Part II.C, the Court addressed the UCL claim separately, noting the evolution in the law since the passage of Proposition 64. As with the claims above, the Court assumed that an inference of classwide injury could be available for UCL class actions, but it reiterated: because “the horsepower rating ... was merely one of many features presented to consumers,” the trial court could find that it was not a material factor to all class members. *Id.* at 24.

Notably, the Court also analyzed class certification assuming a more lenient “likely to deceive the public” standard. The Court explained that even under that standard, and even if individualized proof of deception were not *required*, trial courts still have the *discretion* to deny class certification for other reasons, such as in this case, where the horsepower rating “was not shown to be of any particular significance to many tub purchasers.” *Id.* at 26.

As with the ruling on the express warranty claim, the decision is significant in addressing the UCL issues under alternative legal theories and for emphasizing the importance of materiality under each. Indeed, as the Court observed, the purpose of Proposition 64 was to prevent attorney-driven lawsuits where no consumers sustained actual injury. The Court’s discussion of the materiality issue and facts before it fulfills that purpose and would provide

substantial guidance to trial courts, whichever way the California Supreme Court rules in the Proposition 64 cases currently pending before it.

### **CONCLUSION**

Given the current evolution of state class action law, and the opinion's detailed treatment of important issues across a number of claims and legal theories, the publication of this opinion would provide important guidance to trial courts and litigants attempting to address similar issues in related factual and legal contexts.

Sincerely,

A handwritten signature in black ink, appearing to read "Quentin King". The signature is fluid and cursive, with a long, sweeping flourish extending from the end.