August 20, 2010

Honorable Ronald M. George, Chief Justice,
and the Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: Baker v. American Horticulture Supply, Inc., Case No. S185034,
Petition for Review Filed August 3, 2010,
Court of Appeal, Case No. 2nd Civ. B 212975

To Chief Justice George and the Honorable Associate Justices of the Supreme Court:

The California Manufacturers and Technology Association ("CMTA") and the National Association of Manufacturers ("NAM") jointly support American Horticulture Supply, Inc.'s Petition for Review ("Petition") in the case of *Baker v. American Horticulture Supply, Inc.*, Case Number S185034. CMTA and the NAM submit this letter as *amici curiae* pursuant to California Rules of Court, Rule 8.500, subdivision (g).

SUMMARY OF REASONS FOR REVIEW

The Opinion that is the subject of the Petition is the first published decision in California to interpret Section 1738.15 of the Independent Wholesale Sales Representatives Act (Civ. Code, §§ 1738.10, *et seq.*) ("the Act"). Section 1738.15 creates a civil cause of action for a manufacturer's, jobber's or distributor's willful failure to enter into a written contract required by the Act or willful failure to pay commissions pursuant to the contract. The Court of Appeal, by its own admission, rewrote Section 1738.15 by creating a claim for actual damages even where a party does not act willfully. The Court of Appeal then departed from established precedent defining the element of willfulness in analogous contexts, holding that, even if a willful violation were required for compensatory damages, simply acting or not acting is enough if it were intentional. Under the Court of Appeal's definition of willfulness, any inadvertent violation of the Act subjects manufacturers to civil actions for treble damages and attorney fees.

If left to stand, the Opinion threatens to open the floodgates of litigation against manufacturers doing business in California who inadvertently run afoul of the Act. Because the Act provides for attorney fees, the Opinion creates an opportunity for enterprising plaintiffs and their counsel to take advantage of such inadvertent errors and omissions, no matter how innocuous the violation. Moreover, by lowering the threshold for the recovery of treble damages, the Opinion creates a trap for unwary manufacturers who do not know about technical requirements of the Act. This result is bad for manufacturers doing business in California and is not what the California Legislature wanted when it created the Act.

THE INTEREST OF *AMICI*

CMTA is a mutual, non-profit corporation established in 1918 to promote the interests of manufacturers and technology-based companies before state legislators, regulators, and courts with regard to matters that affect their ability to produce or sell products in California. CMTA is a 501(c)(6) trade association representing the interests of over 700 manufacturers in California. Manufacturers in the state employ 1.4 million workers, provide high wages and are the source of significant research and development investment. Litigation costs have a major impact on the costs of products and manufacturers' competitiveness in global markets.

The NAM is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million workers, contributes more than $1.6 trillion to the U.S. economy annually, it is the largest driver of economic growth in the nation, and it accounts for the lion's share of private sector research and development. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

WHY THE COURT SHOULD GRANT REVIEW OF THIS OPINION

This case is important for two reasons. First, it raises a fundamental question about the role of the courts in creating statutory causes of action when parties claim that the legislature has not clearly expressed the law. Specifically, this court must decide whether Section 1738.15 of the Act creates a cause of action against manufacturers for non-willful violations, when the statute speaks only about willful violations.

Second, the case raises a fundamental question about the power of the courts to lower the threshold of liability for imposing punitive sanctions like treble damages by broadly construing the definition of "willful." It is very important that manufacturers and other business people be held to reasonable standards of care, and not be subjected to substantial excess liability without clear evidence of willfulness. This is particularly important as businesses face a dramatically increasing number of civil and criminal statutes and regulations in which willfulness is required, yet courts are being asked, sometimes successfully, to accept minimal thresholds for intent.

Creating a New Remedy

When the intent of the parties is not clear on the face of a contract, it is up to a court to try to determine what the parties intended when a dispute arises over its meaning. Where a contract provides a specific commission for sales of goods with high margins, the omission of a similar commission for low-margin goods does not mean the parties intended to provide the same commission, or any commission. It is wrong for a court to impose its view about what the contract should contain. Rather, a court should determine what the parties actually agreed upon and leave it to the parties to exercise their business judgment whether to accept the contract's terms.

Similarly, when the intent of the legislature is not clear on the face of a law, it is up to a court to try to determine what the legislature meant without imposing its view about what the law

should contain. A court should determine what the legislature actually agreed upon and not create new causes of action that are not expressly adopted by the legislature.

In this case, the legislature adopted an amendment that would provide a punitive sanction (treble damages) for either willfully failing to enter into a contract with a sales representative or willfully failing to pay commissions according to the contract. It omitted a similar provision for non-willful acts. It is easy enough for the legislature to correct this oversight, if it were one, for future contracts. But the legislature would be reasonable to conclude that no change is necessary, since normal contract remedies are still available under black-letter law. As long as there is proof that the parties agreed to the commission at issue, the plaintiff has a remedy for breach of contract.

In 1990, the California Legislature enacted the Act. Section 1738.13 (a) of the Act provides that "[w]henever a manufacturer, jobber, or distributor is engaged in business within this state and uses the services of a wholesale sales representative, who is not an employee of the manufacturer, jobber, or distributor, to solicit wholesale orders at least partially within this state, and the contemplated method of payment involves commissions, the manufacturer, jobber, or distributor shall enter into a written contract with the sales representative." Section 1738.13(b), sets forth the required contents of such contracts.

Section 1738.15 of the Act provides that "[a] manufacturer, jobber, or distributor who willfully fails to enter into a written contract as required by this chapter or willfully fails to pay commissions as provided in the written contract shall be liable to the sales representative in a civil action for treble the damages proved at trial." Section 1738.16 provides for attorney fees and costs to the prevailing party.

The Opinion is the first published decision in California to interpret Section 1738.15's element of willfulness in civil actions. The Court of Appeal acknowledged that "a literal reading of the statutory scheme . . . does not expressly provide for simple compensatory damages in the nonwillful setting." However, it effectively rewrote the statute to eliminate the willfulness requirement for "regular compensatory" damages under the statute. It called this "an extreme case." We believe the decision was extreme, but the correct result does not need to be.

CMTA and the NAM support review of the Court of Appeal's error. This Court has repeatedly and consistently held that, in construing a statute, "the court's office is simply to ascertain and declare what the statute contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does. The court may not rewrite the statute to conform to an assumed intention that does not appear in its language." (*Vasquez v. State of California* (2008) 45 Cal. 4th 243, 253; *see also Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545).

Moreover, a less draconian solution exists. The Court of Appeal felt it necessary to provide a remedy to the sales representative to avoid the statute's attorney-fee provision. According to the court, "if a sales representative sued his manufacturer but was able to prove only a nonwillful violation, he would be required to pay the violator's reasonable attorney fees and costs since the violator would be the prevailing party pursuant to section 1738.16. . . . The Legislature did not intend such an absurd result . . . ." (Op., p. 13).

The court failed to recognize that a standard action for breach of contract need not be brought under the Independent Wholesale Sales Representatives Contractual Relations Act; it may be brought under regular California contract law. Such an action, not brought under the Act, would not subject the sales representative to the loser-pays provision of the Act, since Section 1738.16 provides attorneys fees in "a civil action brought . . . pursuant to this chapter." Thus, such a suit would enjoy the same legal status as any other contract suit, and could be resolved in the normal course.

Redefining Willfulness

One of the more troubling developments in the regulation of business today is the increasing demand for detailed and pervasive recordkeeping and reporting to government officials, regulatory agencies and the public. Requirements abound regarding the environment, occupational safety and health, lobbying, transportation, trade, taxes, securities and other aspects of commercial enterprises. California's law imposes such recordkeeping requirements and mandatory contract provisions on contracts between manufacturers and their sales representatives.

A key problem for business is that an error in a record may be viewed as either willful or not, with different penalties depending on the outcome. Some view a simple mathematical error as willful, because there was intent to file the document on which it appears, regardless of whether there was intent to make the error. It is therefore quite important that the standard for holding an entity liable for errors or omissions be quite clear, particularly in a case such as this, where the outcome could generate a damage award that is three times larger than the actual damages, plus attorney's fees.

The Court of Appeal's definition of "willfulness" under Section 1738.15 has created inconsistency and uncertainty in California regarding the proper definition of "willfulness" in statutes which, like Section 1738.15, impose civil liability and penalties upon defendants for willful conduct. The Court of Appeal rejected Petitioner's argument that willfulness requires a plaintiff to establish a manufacturer knew of its obligations under the Act but intentionally failed to comply with them. That holding is inconsistent with *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, as well as with cases that have defined "willfulness" for purposes of the Song-Beverly Act. *Ibrahim* and several cases after it have consistently held that conduct violating the Song-Beverly Act is willful *only* if the defendant "knew of its obligations but intentionally declines to fulfill them." (*Ibrahim, supra*, 214 Cal.App.3d at p. 894.) (See also *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1; *Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242; *Bishop v. Hyundai Motor America* (1996) 44 Cal. App. 4th 750.)

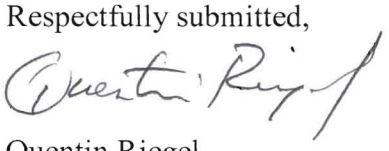
In addition to departing from this precedent, the Court of Appeal created confusion and uncertainty by holding that willfulness "may be negated by a reasonable, good faith belief in a legal defense to a commissions claim." (Mod. Op., p. 2, fn. 7). The Petitioner's defense to the commission claim was that the contract did not provide for commissions on low-margin sales. The Court of Appeal, however, did not clarify whether such a defense is available or whether it would serve to bar a claim that the Petitioner had willfully violated the Act.

Thus, as it stands right now, manufacturers must fear civil actions, treble damages, and attorney fees for inadvertent mistakes under the Act, while at the same time being in the dark about potential defenses to such actions. That is not a stable legal climate for businesses in California.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant review in this case. It is very important to manufacturers doing business in California.

Respectfully submitted,



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PROOF OF SERVICE

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Edwin Baker v. American Horticulture Supply, Inc.

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the District of Columbia and my business address is 1331 Pennsylvania Avenue, NW, Suite 600, Washington, DC 20004.

On August 20, 2010, I served the attached document described as:

Edwin Baker v. American Horticulture Supply, Inc. amicus brief letter

on the interested parties in this action by enclosing true copies of the document in sealed envelopes and addressed as follows:

See Attached Service List

☒ **BY MAIL:** I am "readily familiar" with the association's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Washington, District of Columbia in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on August 20, 2010, at Washington, District of Columbia.

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