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IN THE SUPREME COURT OF CALIFORNIA

GARY LEWIS, as Personal Representative, etc.,
Plaintiff and Appellant,

vs.

ROBINSON FORD SALES, INC.,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D049315

PETITION FOR REVIEW OR, IN THE ALTERNATIVE, REQUEST FOR A GRANT-AND-HOLD ORDER

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ISSUES PRESENTED

1. In a private party class action alleging violations of California's Unfair Competition Law (UCL), as amended by Proposition 64, must each class member satisfy the standing requirement that the plaintiff have suffered an "injury in fact" in the form of loss of money or property "as a result of" the alleged UCL violation?
2. In a class action in which the plaintiffs seek punitive damages, does due process require such individualized inquiries that claims for punitive damages are inherently unsuitable for class treatment?

WHY REVIEW SHOULD BE GRANTED

The petition of defendant and respondent Robinson Ford Sales, Inc. (Robinson Ford) should be granted because the Court of Appeal's published decision presents the same issue this Court agreed to review in *In re Tobacco II Cases*, review granted Nov. 1, 2006, S147345 (*Tobacco II*), *Pfizer, Inc. v. Superior Court*, review granted Nov. 1, 2006, S145775 (*Pfizer*), and *McAdams v. Monier, Inc.*, review granted Sept. 19, 2007, S154088 (*McAdams*). This Court accepted review of *Pfizer* and *McAdams* on a "grant and hold" basis pending the outcome of *Tobacco II*, and should do the same here.

Like *Tobacco II*, *Pfizer* and *McAdams*, this case presents the question whether, after the passage of Proposition 64, the class representative and all class members in a UCL class action must satisfy the statute's requirement that the plaintiff have suffered an "injury in fact" in the form of loss of money or property "as a result of" the alleged UCL violation. (See *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1103 [affirming denial of class certification because "each class member would have to prove his individual [UCL] claim for restitution by establishing reliance and causation"].)

Heedless of the statute's standing requirements, in a published decision the Court of Appeal reversed an order denying class certification of plaintiffs' claims that Robinson Ford did not disclose certain information in connection with some car buyers' trade-in transactions, and that the alleged nondisclosure violated the

Automobile Sales Finance Act, Civil Code section 2981 et seq. (ASFA). The court focused on the "strict liability" nature of the alleged ASFA violation in concluding that, as a matter of law, the litigation was subject to resolution by predominantly common issues of law and fact. (Typed opn., pp. 14-15.) But the court's narrow concentration on "commonality" as to just one aspect of the action reflects a flawed approach that is not isolated to this case—the court failed to address whether the trial court's order denying certification should be upheld because a threshold requirement for recovery (standing to assert the alleged UCL violation) cannot readily be resolved on a class-wide basis.

The propriety of the Court of Appeal's order requiring the trial court to certify a UCL class will in all likelihood be governed by this Court's decision in *Tobacco II*, in which the plaintiff is arguing that the UCL standing requirements either do not apply to unnamed class members or that, if they do apply, they do not defeat the finding of commonality necessary for certification of a UCL class. Therefore, this Court should grant review and hold this case pending its decision in *Tobacco II*. (Cal. Rules of Court, rule 8.512(d)(2).) Continued litigation in the period before this Court decides *Tobacco II* would only prejudice the parties and the trial court by requiring them to expend time and resources unnecessarily without this Court's guidance. (See *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 763 [recognizing importance of appellate review of class certification order before expensive and time-consuming proceedings take place on the

merits]; *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 387, fn. 4 [same].)

In addition, review is needed to determine whether individualized factual inquiries pertaining to the asserted claim for punitive damages render class certification improper. The United States Supreme Court has held that any punitive damage award must be tied to the harm suffered by the individual plaintiff before the court. (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 422-424 [123 S.Ct. 1513, 155 L.Ed.2d 585] (*State Farm*); see also *Philip Morris USA v. Williams* (2007) ___ U.S. ___ [127 S.Ct. 1057, 1065, 166 L.Ed.2d 940] (*Williams*) [defendant may be punished only for harm to the plaintiff before the court].)

Several federal courts have held that the need to assess the propriety and amount of punitive damages on an individualized basis renders such claims unsuitable for class treatment. (See, e.g., *In re Baycol Products Litigation* (D.Minn. 2003) 218 F.R.D. 197, 215 [holding class-wide punitive damages claim posed due process concerns "because the conduct upon which Plaintiffs would base their punitive damages claim is not specific to a particular plaintiff[']s[] claims"].) Nonetheless, relying on statements by this Court that predate *State Farm* and *Williams,* the Court of Appeal here held the trial court abused its discretion by considering the individualized issues presented by plaintiff's punitive damages claim when deciding to deny class certification. (Typed opn., pp. 15-16.) This Court should grant review

to provide needed guidance and clarification of California law in this important area.

STATEMENT OF THE CASE

The Court of Appeal's opinion correctly states the essential facts of the case. We therefore omit a lengthy statement of the case and offer only the following summary as pertinent to this petition.

Plaintiff's claims here arise out of Robinson Ford's sales of cars to buyers who wish to trade in their old cars, but who have "negative equity" on their existing loans. (Typed opn. pp. 1-2.) Negative equity exists where a prospective vehicle purchaser owes more on his or her trade-in vehicle than the vehicle is worth. (Typed opn., p. 5.) Plaintiff alleges that these negative equity amounts are sometimes folded into the total purchase price for the new vehicle to enable the buyer to effectively finance the payment due on the trade-in, but that this benefit to the buyer is offset by somewhat higher fees and taxes resulting from the higher purchase price. (See typed opn., pp. 2, 6.) Plaintiffs argue that, even if the pros and cons are fully explained to the consumer, any failure to list the "negative equity" portion of the purchase price in a particular spot on the car purchase contract constitutes a violation of ASFA, the Consumer Legal Remedies Act, Civil Code section 1750 et seq. (CLRA) and the UCL. (Typed opn., pp. 1-2.) Plaintiff sought to certify a class of all persons who purchased a vehicle from Robinson

Ford after December 28, 2000 whose vehicle sales contracts failed to properly disclose negative equity.

The trial court denied class certification in part because it found individualized factual issues pertaining to the claims of the absent class members defeat any finding of factual commonality among the claims of the class. (Joint Appendix (JA) 268 ["It would appear that the other members of the class, then, . . . would require each sale to be litigated as to causation, and damages, and the negotiations so that you wouldn't have the kind of efficiency you achieve in a typical class action where all parties are so similarly situated that if you resolve it for one, you resolve it for all"].) The trial court also concluded that the class-wide claim for punitive damages raised numerous issues for individualized determination and thus warranted the denial of class certification. (JA 277-278 ["I do think that each case would have to be litigated separately with regard to areas of fraud and punitive damages"].)

On appeal, as one ground for affirming the trial court's denial of UCL class certification, Robinson Ford asserted that the trial court was correct in finding a lack of commonality because "Business & Professions Code §17204 limits a person's standing to sue to those who have sustained 'injury in fact and loss of money or property' as a result of the alleged unfair competition." (RB 11-12.) Therefore, Robinson Ford argued, the trial court properly denied class certification because the claims of "the various potential members of the class would differ with regard to both causation and damages." (RB 13.)

The Court of Appeal issued its decision reversing the trial court and ordering class certification on September 28, 2007. The Court of Appeal found it was "premature for the trial court to consider [punitive damages under the CLRA] with respect to class certification, because the merits of the statutory claims had not yet been resolved." (Typed opn., p. 15.) However, the court did not address Robinson Ford's argument that the requirements of UCL standing after the passage of Proposition 64 preclude certification of a UCL class. Instead, the court simply noted that the plaintiff's principal contention is that Robinson Ford's treatment of negative equity on trade-in vehicles in transactions with class members violated ASFA. Therefore, wrote the court, "any related UCL allegations are not dependent on a finding of separate instances of fraud, because the business transactions here could still qualify as unlawful or likely to deceive the public, through any proven violations of the ASFA." (*Ibid.*)

On October 24, 2007, the Court of Appeal ordered its opinion published. On November 8, 2007, Robinson Ford petitioned the Court of Appeal for rehearing, pointing out that its opinion failed to address whether class-wide treatment is appropriate here in light of Proposition 64 and the UCL's standing requirements. Robinson Ford also noted that the opinion directs, without qualification, that a class be certified, rather than directing the trial court to reconsider its certification order in light of the Court of Appeal's analysis. Robinson Ford thus argued the disposition deprives the trial court of the discretion to find that, for reasons other than those reviewed by the Court of Appeal, certification

is inappropriate. The Court of Appeal denied rehearing on November 14, 2007.

LEGAL DISCUSSION

I.

THIS COURT SHOULD GRANT REVIEW AND HOLD THIS CASE PENDING THE DECISION IN *TOBACCO II*.

A. This petition presents for review the same issues presented in *Tobacco II*, *Pfizer* and *McAdams*.

The legal issues presented here are substantially the same as those presented in *Tobacco II*. (*In re Tobacco II Cases* (2006) 47 Cal.Rptr.3d 917, review granted Nov. 1, 2006, S147345 (*Tobacco II*).) Therefore, because its decision in *Tobacco II* will govern the result here, this Court should grant review and defer briefing pending its decision in that matter.

In *Tobacco II*, the plaintiffs instituted a putative class action on behalf of themselves and a class of smokers, alleging the defendant tobacco companies violated the UCL because their advertising misrepresented the health risks and addictive nature of smoking over a long period. (*Tobacco II*, *supra*, 47 Cal.Rptr.3d at p. 922.) Not all class members saw or even had an opportunity to see the same advertisements. (*Id.* at p. 923.) The Court of Appeal thus held class

certification was inappropriate because, to establish standing under the UCL after Proposition 64, each class member had to have suffered loss of money or property *as a result of* the practice alleged to be a UCL violation. (*Id.* at p. 926.) The court determined that such causation could not be presumed on a class-wide basis because class members had been exposed to varying advertising messages and would have had varying reactions to the advertising. (*Id.* at p. 923.)

Pfizer and *McAdams* present the same issue for resolution, which is why this Court has granted review and held both cases. In *Pfizer*, the issue is whether buyers of mouthwash relied on alleged misrepresentations in the product's marketing and labeling so that they lost money or property as a result of the practice alleged to be a UCL violation. (*Pfizer, Inc. v. Superior Court* (2006) 45 Cal.Rptr.3d 840, review granted Nov. 1, 2006, S145775 (*Pfizer*).) The Court of Appeal issued a writ of mandate overturning the trial court's order certifying a class of all persons who bought the mouthwash within a defined period, holding that class members would have standing to sue for a UCL violation only where they could prove the allegedly deceptive statements caused them to purchase the mouthwash. (*Id.* at pp. 844, 852.)

Likewise, in *McAdams*, the plaintiff filed a putative UCL class action against a manufacturer and marketer of roof tiles, alleging the defendant had failed to disclose that the color composition of the tiles would not last as long as the predicted life of the product. (*McAdams v. Monier, Inc.* (2007) 60 Cal.Rptr.3d 111, review granted Sept. 19, 2007,

S154088 (*McAdams*).) The Court of Appeal reversed a trial court order denying certification, holding the UCL claims were suitable for class treatment because "an 'inference of common reliance' may . . . be applied to a UCL class that alleges a material misrepresentation consisting of a failure to disclose a particular fact." (*Id.* at p. 113.) As in *Pfizer*, this Court granted review and held *McAdams* pending its decision in *Tobacco II*.

This case, too, presents for review whether, after Proposition 64, each member of a putative UCL class, to have standing to participate in the action, must establish that he or she lost money or property *as a result of* the practice alleged to be a UCL violation. Here, the plaintiff has alleged that Robinson Ford violated ASFA by failing to itemize on automotive sales contracts the negative equity on trade-in vehicles. Based only on its perception as to how the alleged ASFA violation might be proved, the Court of Appeal concluded a UCL class could be certified because a practice in violation of ASFA was potentially "unlawful" or "likely to deceive the public" within the meaning of the UCL. (Typed opn., p. 15.)

The court's approach reveals some confusion about the interplay between class certification rules and the UCL's heightened standing requirements after Proposition 64. (See *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1098 ["[a]fter 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'" (first emphasis added)].) Even if a predicate law (like

ASFA) establishes that the defendant's conduct was unlawful *without regard to individual reliance* on the defendant's conduct, a plaintiff's *standing* to "borrow" that predicate law to assert a private claim under the UCL is not satisfied until the plaintiff proves standing through evidence of a *causal link* between the allegedly unlawful conduct (such as failure to disclose certain information under ASFA) and a loss of money or property that would not have occurred but for the conduct:

> 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*, at p. 1099, emphases added and fn. omitted.)[1/]

Here, even assuming the failure to itemize negative equity on a sales contract would be a technical violation of ASFA, a particular class

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1/ Courts have consistently construed the CLRA, Civil Code, section 1780, subdivision (a), as similarly 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"].)

member still will not have suffered the requisite loss of money or property *as a result of* such a practice if, for example: (1) the class member was told verbally about the failure to itemize negative equity and agreed to it, e.g., in order to secure financing; (2) the class member chose not to review the sales contract before signing; or (3) Robinson Ford reduced its profit on the particular transaction to accommodate the inclusion of negative equity in the purchase price.

Each of these scenarios is plausible, and even likely, with regard to the claims of each individual class member. Therefore, as Robinson Ford contended below and the trial court necessarily found, the need to establish UCL standing precludes any finding of factual commonality among the claims of the class. Because this case presents the same question currently under review in *Tobacco II*, *Pfizer* and *McAdams*, the Court should grant and hold pending its decision in *Tobacco II*.

B. Denial of review would prejudice the parties and waste judicial resources.

In *Blue Chip Stamps v. Superior Court, supra,* 18 Cal.3d 381, this Court explained that the defendant in an improperly certified class action suffers severe prejudice if denied appellate review until after final judgment:

> Delaying review until final judgment — while the trial court attempts to manage the unmanageable — would

> mean that the parties could not obtain appellate review until after they had paid the great costs which render the damage action inappropriate.

(*Id.* at p. 387, fn. 4.)

Here, if review is denied, Robinson Ford will have no adequate remedy until after this Court issues its decision in *Tobacco II*. Litigating this matter as a class action without appellate guidance will prejudice the parties and the trial court because pretrial proceedings and trial will proceed despite significant doubts about the standing of the class representative and absent class members to assert causes of action under the UCL. If this Court's decision in *Tobacco II* demonstrates that the Court of Appeal here erred in ordering that a UCL class be certified, any judgment in this matter may have to be reversed and further trial proceedings ordered.

Accordingly, absent immediate review, the trial court and the parties may expend limited resources unnecessarily adjudicating this purported class action. In addition, the parties will be required to distribute a notice of a pending UCL class action to hundreds of putative class members, many of whom it may be determined have no standing to assert a UCL cause of action. To avoid these foreseeable problems, this Court should grant review.

II.

THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER CLAIMS FOR PUNITIVE DAMAGES CAN BE DECIDED ON A CLASS-WIDE BASIS.

This Court should grant review for the additional reason that the Court of Appeal's published decision interprets early class action decisions of this Court as holding the assertion of claims for punitive damages on a class-wide basis is irrelevant to the class certification analysis. The Court of Appeal's holding misconstrues this Court's precedent and is inconsistent with recent U.S. Supreme Court authority. Therefore, this Court should grant review to determine whether claims for punitive damages require inherently particularized factual inquiries that are inconsistent with class-wide adjudication.

Code of Civil Procedure section 382 authorizes class actions "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 . . . ." The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104 (*Lockheed*), citing *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913.) The "community of interest requirement . . . embodies three factors: (1) predominant common questions of law or fact; (2) class

representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Lockheed*, at p. 1104.)

Whether common issues predominate "'means "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants."'" (*Lockheed*, *supra*, 29 Cal.4th at p. 1104.) "'[T]he community of interest requirement is lacking and separate and distinct claims present, in those situations "where each member of the class must establish his right to recover on the basis of facts peculiar to his own case."'" (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 707-708 (*Daar*).)

The U.S. Supreme Court has held that any punitive damage award must be tied to the harm suffered by the individual plaintiff before the court. (*State Farm*, *supra*, 538 U.S. at p. 426 [an award of punitive damages must be "proportionate to the amount of harm to the plaintiff and to the general damages recovered"]; *id.* at p. 423 ["A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business"]; *Williams*, *supra*, 127 S.Ct. at p. 1065 [a punitive award in favor of a particular plaintiff must be tied to the harm suffered by that plaintiff].)

Consistent with the Supreme Court's holdings in this area, several federal decisions have held the constitutional necessity of assessing an award of punitive damages in light of the defendant's conduct toward a *particular* plaintiff, and in light of the compensatory damages awarded to that plaintiff, requires individualized factual inquiries incompatible with class-wide adjudication. (*Allison v. CITGO Petroleum Corp.* (5th Cir. 1998) 151 F.3d 402, 418 [finding no abuse of discretion in denying class certification in Title VII action in part because punitive damages would require "proof of how discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards"]; *In re Baycol Products Litigation, supra,* 218 F.R.D. at p. 215 ["a determination of punitive damages is based on individual issues"; holding "Plaintiffs' proposed class trial on punitive damages poses" due process concerns "because the conduct upon which Plaintiffs would base their punitive damages claim is not specific to a particular plaintiff[']s[] claims"]; *Reap v. Continental Cas. Co.* (D.N.J. 2001) 199 F.R.D. 536, 549 [finding "individual issues would predominate over common ones during the damages phase" of a putative Title VII and ADEA class action because "calculating compensatory and punitive damages . . . for thousands of class members would prove to be quite an individualized task"]; *Lang v. Kansas City Power & Light Co.* (W.D.Mo. 2001) 199 F.R.D. 640, 649 ["Assessment of punitive damages is not automatic; it depends upon the facts of each particular plaintiff. Thus, the facts surrounding each

Plaintiff's circumstances must be separately considered by the jury, so the class will ultimately be tried in the same manner as would separate trials"]; *In re Copley Pharmaceutical, Inc.* (D.Wyo. 1995) 161 F.R.D. 456, 467-468 [in a putative products liability class action, holding punitive damages "inappropriate for class certification because they depend on an individual's injury and compensable damages" and "should be determined on an individual basis"].)

In line with this federal authority, the trial court here concluded that the claim for punitive damages raised numerous issues for individualized determination and thus warranted the denial of class certification. (JA 277-278 ["I do think that each case would have to be litigated separately with regard to areas of fraud and punitive damages"].) The Court of Appeal reversed, however, finding it "premature for the trial court to consider [punitive damages under the CLRA] with respect to class certification, because the merits of the statutory claims had not yet been resolved." (Typed opn., p. 15.)

In so ruling, the Court of Appeal relied upon a statement taken out of context from *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 477 (*Richmond*), to support its view that "the fact that punitive damages are pled will not alone bar class certification." (Typed opn., p. 15.) *Richmond* does not support the Court of Appeal's decision to order that a class be certified here despite the assertion of claims for punitive damages, especially not after the U.S. Supreme Court's decisions in *State Farm* and *Williams*.

In *Richmond*, this Court reversed an order denying certification of homeowners' claims against a developer. In so ruling, the Court addressed the trial court's ruling that a claim for punitive damages and rescission created a *conflict of interest* between the named class representative and the absent class members. (*Richmond*, *supra*, 29 Cal.3d at p. 475, 479 ["The defendants contend that . . . the relief prayed for creates a conflict between the named plaintiffs and the absent class members by threatening the subdivision's financial stability"]; *id.* at p. 475 ["The trial court in this case refused to certify this ascertainable class of property owners at Tahoe Donner because it believed that the plaintiff's motion had to be denied if the defendant showed *any* antagonism between the members of the class and the named plaintiffs. This was an error of law"].) In ruling no significant intra-class conflict existed, the Court wrote: "Since the seeking of common relief is no longer a prerequisite to a class suit [citation], a prayer for relief that includes rescission and a request for punitive damages should not bar certification for a class suit." (*Id.* at p. 477.) Thus, *Richmond* in no way addresses the constitutional imperative of assessing the propriety of punitive damages on the basis of the defendant's conduct toward each class member, and in light of the compensatory damages, if any, awarded to each class member.

This Court's statement in *Richmond* that a claim for punitive damages "should not bar" class certification, on which the Court of Appeal here relied, was derived from its earlier decision in *Daar*. (*Richmond*, *supra*, 29 Cal.3d at p. 477.) But *Daar*, too, does not hold that

the due process requirement of assessing punitive damages on an individualized basis is irrelevant to whether a class can be properly certified. Indeed, there was no claim for punitive damages at issue in *Daar*. Rather, *Daar* addresses only whether any difference in the amount of *compensatory* damages sought will warrant denial of class certification. *Daar* overruled an order sustaining a demurrer as to class claims, holding that, on the record of that case, the right of each class member to a particular share of the common fund of damages could be litigated and determined after all common liability issues are adjudicated. (See *Daar*, *supra*, 67 Cal.2d at p. 709.)

Daar distinguished the situation in which questions critical to each class member's recovery vary with each class member's circumstances and counseled that, in such situations, class certification is inappropriate. (*Daar*, *supra*, 67 Cal.2d at p. 710 [where each class member's recovery "'would rest on a *distinct premise correlative with varying proof as to the facts of his particular case* . . . there is not the necessary "common or general interest" in the subject-matter of the litigation appropriate to the maintenance of a representative action as that type of proceeding has been analyzed in the adjudicated cases'" (emphasis added)].)

Here, because the propriety of imposing punitive damages turns on *all* of the facts pertaining to the defendant's conduct toward a particular class member, the degree of reprehensibility of that conduct, and the ratio of punitive damages to each plaintiff's compensatory damages, a claim for punitive damages necessarily calls for

individualized litigation of *liability* issues. As such, the claims for punitive damages are unsuitable for class-wide treatment. (See, e.g., *State Farm*, *supra*, 538 U.S. at p. 423 ["Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis"].)

The alleged reprehensibility of Robinson Ford's conduct could vary dramatically from one putative class member to the next. For example, regardless of whether there is a technical ASFA violation due to failure to disclose information *in writing*, the degree of reprehensibility of Robinson Ford's conduct would be quite low where a class member was orally advised of all relevant facts and, to secure financing that otherwise would be unavailable to the class member, knowingly consented to a misstatement of negative equity on the sales contract. Thus, even if a statutory interpretation issue as to ASFA were common to all class members' claims, that simple legal determination would not *predominate* in any trial, where no judgment could be reached without an exhaustive analysis of each car purchaser's particular circumstances. It is not enough for commonality to exist as to a legal issue—even the central legal issue—if other issues necessary to resolving the litigation will so consume the litigants' and court's efforts as to dominate the trial proceedings. (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 653-654 [class certification "'will not be permitted . . . where there are diverse factual issues to be

resolved, even though there may be many common questions of law'"].)

As the opinion in this case demonstrates, *Richmond* and *Daar* are susceptible to misinterpretation and invite error in light of the later pronouncements of the U.S. Supreme Court with regard to the constitutionality of punitive damages awards. Indeed, this is the only reason why the Court of Appeal here could have issued a published decision concluding, without analysis, that it is an abuse of discretion to consider the plaintiffs' claims for punitive damages when deciding whether to certify a class. To bring California law in line with *State Farm* and *Williams*, and to preserve the due process rights of class action defendants, this Court should grant review and address the impact of a class-wide claim for punitive damages on the class certification analysis.

CONCLUSION

For all of the reasons stated, this Court should grant review and defer briefing pending its decision in *Tobacco II*. In addition, this Court should grant review outright to determine whether claims for punitive damages ever can be adjudicated on a class-wide basis.

DATED: November 30, 2007

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

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