S183365
A125472

IN THE

SUPREME COURT OF CALIFORNIA

WALTER GREB, et al.,

Plaintiffs, Appellants, and Petitioners,

v.

DIAMOND INTERNATIONAL CORPORATION,

Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION ONE, NO. A125472;
ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO,
HONORABLE PETER J. BUSCH, JUDGE, NO. CGC-08-274989

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Answer filed by respondent Diamond International Corporation ("Diamond") fails to refute the Petition's showing that this Court should grant review to resolve a direct conflict in the appellate courts on an important question of California law.

Diamond devotes much of its Answer to trying to show that the Opinion below is correct—not to refuting that an appellate-court conflict exists or that the Petition presents an important question of California law for this Court to settle. Indeed, the Answer does not even address the "important question" ground. Diamond's attempt to show that the appellate courts are not in conflict fails. And Diamond's various other arguments in its Answer lack merit, as shown below.

DISCUSSION

A. The appellate courts are in conflict and the trial courts need guidance—and Diamond knows it.

Diamond first insists that the petition presents no conflict among the appellate courts for this Court to resolve.

The Opinion below expressly notes that the appellate courts are in conflict. The issue is whether Corporations Code section 2010, allowing dissolved corporations to be sued for pre-dissolution conduct without temporal limitation, applies to not just California corporations but also foreign corporations. *See* Petition at 1; Answer at 1. And the answer to this question is the subject of a "conflict in the Court of Appeal." Opinion at 8; *see* Petition at 7-12. Specifically:

(1) *North American Asbestos Corp. v. Superior Court (Young)* (1986) 180 Cal.App.3d 902, 909-910 ("*North American II*"), holds that section

2010 applies to foreign corporations and "conflicts with, and prevails over, foreign corporation laws that limit survival periods of dissolved corporations." Opinion at 8; *see North American II*, 180 Cal.App.3d at 909-910.

(2) The published Opinion below and *Riley v. Fitzgerald* (1986) 178 Cal.App.3d 871, 876-877 (*"Riley"*) hold that section 2010 "does not apply to foreign dissolved corporations." Opinion at 8, 12-15.

Nevertheless, Diamond insists that no "conflict" exists because *North American II* is supposedly now "disfavored" and "has not been followed"—so that *North American II* poses no "threat to securing uniformity of decision."[1] Answer at 1, 2, 9.

But Diamond knows that this is not true. Just as the Petition was filed, in another post-dissolution case against Diamond, Alameda County Judge Kenneth Burr overruled Diamond's demurrer, expressly rejecting the Opinion below and following *North American II*. *See* "Order – Demurrer to Complaint Overruled," *Hanlon v. Allis-Chalmers Corp.*, Alameda County Superior Court No. RG10494465 (June 7, 2010), attached as Exhibit A to the accompanying Request for Judicial Notice ("RJN").[2] Judge Burr expressly acknowledged the "split of authority" on whether "section 2010 is applicable to foreign corporations" and ruled that "the rule set out in *North American [II]*" is "correctly reasoned" and "preferable" to the Opinion below (*"Greb"*). RJN, Exh. A at A-1 to A-2.

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[1] At other times, Diamond effectively concedes that the authorities are split, claiming support from only the "weight of authority" (Answer at 1, 9, 17) and a "clear majority view" (*id.* at 7).

[2] We present this Court with Judge Burr's order in the accompanying RJN, pursuant to Evidence Code section 452, subdivision (d), as a "[r]ecord" of "any court of this state." Although we would not ordinarily burden a petition for review with judicially-noticeable materials, Diamond's knowingly inaccurate claim that *North American II* is not being "followed" requires correction.

In *Hanlon*, Diamond is represented by the same firm that represents Diamond here, Murchison & Cumming, who has now challenged the *Hanlon* order by a writ petition filed in the Court of Appeal on June 24, 2010. *See* RJN, Exh. A at A-4, B at B-1 to B-2 (*Diamond International Corporation v. Superior Court (Hanlon)*, 1st Dist., Div. 1, No. A128860).

In sum, Diamond and its counsel here know that *North American II* is being "followed" by some courts and thus does present an extant conflict in the Courts of Appeal.

B. *Peñasquitos* and *McCann* support adherence to *North American II*.

The Petition shows that this Court, in *Peñasquitos, Inc. v. Superior Court (Barbee)* (1991) 53 Cal.3d 1180, and *McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68, cited the holding of *North American II* (that section 2010 applies to foreign corporations) with tacit approval. Petition at 10.

In response, Diamond recites the Opinion's conclusion that this Court's citations to *North American II* are mere "dicta"—and insists that "neither" *Peñasquitos* nor *McCann*, in referring to *North American II*, "even references application of Corporations Code [section] 2010 to foreign corporations." Answer at 9.

This is nonsense. As the Petition notes, this Court in *Peñasquitos* specifically recited *North American II*'s holding that section 2010 "is not limited to dissolved California corporations, but also applies to dissolved foreign corporations." *Peñasquitos*, 53 Cal.3d at 1187-1188; *accord McCann*, 48 Cal.4th at 101 (citing *North American II*'s "holding" that California law (section 2010) applies to "a company incorporated in another state").

That this Court has twice tacitly approved of *North American II*'s holding further refutes Diamond's claim that *North American II* is "disfavored" and will not be "followed."

C. Petitioners acknowledge that the application of section 2010 is just the first step in a choice-of-law analysis.

Next, Diamond asserts that the Petition improperly conflates "multiple issues into one." Answer at 2-3. Diamond points out that, even if section 2010 applies to foreign corporations, it would merely create a "conflict" with Delaware law on suing dissolved corporations (barred after three years)—and "choice of law" analysis would then require a comparison of California and Delaware "interests" to determine which state's law should prevail. Answer at 3-4.

But the Petition acknowledges this, noting that the Opinion below did not reach the governmental-interest analysis because it held that section 2010 does not apply, so that no conflict exists between California and Delaware law. *See* Petition at 10 and n.5.

If this Court grants review and reverses the Opinion below by holding that section 2010 does apply to foreign corporations like Diamond, then this case can be remanded to the trial court to determine whose law (California or Delaware) should apply here. And petitioners are confident that the trial court, like the appellate court in *North American II* and Judge Burr in *Hanlon*, will rule correctly that California law applies because California's interest in protecting its citizens would be far more adversely affected if its law is not applied. *See North American II*, 180 Cal.App.3d at 905, 907; RJN Exh. A at A-2.

D. Petitioners cite California's "interest in protecting its citizens" to show that the Petition raises an important question of law for this Court to settle.

Next, Diamond chides the Petition for being "plagued with references to California's 'strong interest in protecting the rights of its citizens.'" Answer at 3. According to Diamond, these references to "policy interests" are improper because the "threshold issue" is whether section 2010 applies to foreign corporations—not the secondary issue of which state's law should apply (a determination requiring analysis of policy considerations).

But Diamond misapprehends the Petition. Petitioners cite California policy interests to show the existence of a Rule 8.500 ground for review: an "important question of law" for this Court to "settle." *See* Petition at 4, 12-13 (discussing "important question" review ground).

E. Diamond's sudden dissolution, two decades after ceasing operations, suggests that it dissolved to end its liability.

Next, Diamond attacks the Petition's "bald assertion that [Diamond] incorporated and dissolved under Delaware law in order to deceive California citizens and shield itself from liability." Answer at 2.

But the Petition asserts no such thing—nor does the Answer provide any citation to such an assertion. The Petition says nothing about why Diamond incorporated in Delaware, nor anything about Diamond trying to "deceive" Californians. Nor does the Petition assert as fact that Diamond dissolved in order to cut off its liability.

But the Petition does note that, under the circumstances, it sure does seem that way. As the Petition notes, Diamond stopped conducting business in 1987—a fact that Diamond does not here (and cannot) dispute. *See*

Petition at 2. The Petition also notes that Diamond, almost 20 years later, suddenly moved to "dissolve itself effective July 1, 2005." *Id.* And the Petition notes that, when Greb filed his suit shortly after Diamond had been dissolved for three years, Diamond promptly invoked Delaware law to avoid liability. *Id.* at 3. These circumstances certainly suggest that Diamond, out of business for almost 20 years, realized in about 2005 that it could try to cut off its growing liability by dissolving in Delaware—and them promptly invoked Delaware law when the three years expired.

But Diamond's specific motivation in dissolving is beside the point here. Whatever Diamond's motivation, the published Opinion below allows Diamond to escape liability for its past misconduct—and allows other foreign corporations to cut off their liability for past conduct by dissolving.

In light of that problem, this Petition presents an important question of law that this Court should settle.

CONCLUSION

Petitioners respectfully request that this Court grant review to resolve a conflict among the appellate courts on an important question of law that affects many Californians, thereby providing needed guidance to the trial courts.

Dated: July 9, 2010

CLAPPER, PATTI, SCHWEIZER & MASON

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CERTIFICATION OF WORD COUNT

I Ted W. Pelletier, hereby certify that this brief, exclusive of tables, consists of 1,431 words, in 14-point Times New Roman type, as counted by my word-processing program.

Ted W. Pelletier

PROOF OF SERVICE BY MAIL
(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action; my business address is 22 Skyline Road, San Anselmo, CA 94960.

On this date I served on the interested parties in this action the within document:

REPLY TO ANSWER TO PETITION FOR REVIEW

by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at San Anselmo, California, addressed as follows:

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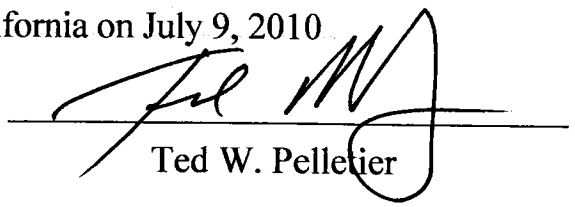
Executed at San Anselmo, California on July 9, 2010



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