S183365

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

PETITIONERS' REPLY BRIEF ON THE MERITS

TED W. PELLETIER (SBN 172938)
Law Office of Ted W. Pelletier
22 Skyline Road
San Anselmo, CA 94960
Tel: (415) 454-8783
tedpelletierlaw@comcast.net

JACK K. CLAPPER (SBN 83207)
STEVEN J. PATTI (SBN 163773)
CHRISTINE A. RENKEN (SBN 232797)
Clapper, Patti, Schweizer & Mason
2330 Marinship Way, Suite 140
Sausalito, CA 94965
Tel: (415) 332-4262
steve@clapperlaw.com
christine@clapperlaw.com

Attorneys for Plaintiffs, Appellants, and Petitioners

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INTRODUCTION

The answer brief ("AB") of respondent Diamond International Corporation ("Diamond") fails to refute the showing of petitioners Walter Greb et al. ("Greb") that this Court should reverse the Opinion below by holding that Corporations Code section 2010 applies to now-dissolved foreign corporations that incurred liability when "transacting intrastate business" in California.

Greb's opening brief on the merits ("OB") showed that this Court should rule that section 2010 applies to such foreign corporations for three reasons: (1) the Corporations Code, properly construed, applies section 2010 to foreign corporations like Diamond; (2) in the alternative, the California Constitution mandates applying section 2010 to Diamond; and (3) applying section 2010 to Diamond will promote California's sound public policy of protecting innocent citizens injured by a manufacturer's defective product.

Diamond's answer brief fails to refute these showings.

The Statute: Diamond fails to refute that the provisions of the Corporations Code apply section 2010 to foreign corporations like Diamond that choose to transact intrastate business in California. Although Diamond offers various arguments, Diamond fails to acknowledge the effect of two key statutory provisions:

1. Section 102: As Greb shows, section 102 expressly applies the provisions of Division 1 to both (a) "corporations organized under" Division 1, "and to" (b) several types of "domestic" corporations. Corps. Code § 102, subd. (a). This use of the word "domestic" to limit the second group of corporations indicates that the first group, corporations "organized under" Division 1, is not limited to domestic corporations. And the Legislature's use of "domestic" as a limiting term was not accidental—as Diamond points

out, the section initially applied to "business corporations," but the Legislature then amended it to apply to specified "domestic corporations." AB at 33 (*citing* Stats. 1975 c. 682 § 7, section 102(a); Stats. 1976, c. 641, § 1.3) (emphasis added). This use of "domestic" to limit the second group indicates that the first group is not so limited—and thus that both domestic and foreign corporations can be "organized under" Division 1. *See* Argument Part I.a.1 below.

2. Section 167: Diamond argues that a foreign corporation cannot be "organized under" California law because "organized" merely means "incorporated" or "formed"—so that only domestic corporations can be "organized under" California law. AB at 15-17. But Diamond fails to address or even acknowledge section 167, which (as Greb shows) defines a domestic corporation as one "formed under the laws of this state"—not as "organized under" California law. *See* OB at 18 (emphasis added). As Greb notes (OB at18), this word choice cannot be construed as accidental. Being "organized" in a state is not the same as being "formed" in that state. *See* Argument Part I.a.1 below.

The Constitution: Diamond fails to refute Greb's showing that, even if foreign corporations transacting business here are not "organized under" Division 1, this Court should follow the analysis in *North American Asbestos Corp. v. Superior Court (Young)* (1986) 180 Cal.App.3d 902 ("*North American II*") to hold that section 2010 still applies to such corporations under the California Constitution. OB at 5-6, 25-29. Contrary to Diamond's assertion, Greb's argument here is not "inconsistent" (AB at 50-51)—Greb argues in the alternative that if this Court does not agree with Greb that Diamond was "organized under" Division 1, then this Court should apply the *North American II* constitutional analysis regarding

corporations "organized" in other states. OB at 25-26. And Diamond's other arguments about the *North American II* analysis lack merit. *See* Argument Part I.B below.

Policy: Diamond fails to refute Greb's showing that holding that section 2010 applies to foreign corporations like Diamond would promote California's policy of protecting California citizens from injuries caused by those corporations' defective products. *See* AOB at 29-32. Diamond primarily does not respond on the merits, instead arguing that "the statute" constitutes public policy and "does not apply [section] 2010 to foreign corporations such as Diamond." AB at 58-59. But Diamond misses the point—public policy is instructive because the statute is not clear on whether section 2010 applies to foreign corporations like Diamond. And to promote that policy, this Court should construe the Corporations Code as applying section 2010 to Diamond. *See* Argument Part I.C below.

ARGUMENT

I.

Diamond fails to refute that this Court should hold that Corporations Code section 2010 applies to foreign corporations that "transact intrastate business" in California.

A. Diamond fails to refute that section 2010 applies because Diamond was "organized under" Division 1.

Greb's OB shows that Corporations Code section 2010, as part of that Code's Division 1, applies here because Diamond was a corporation "organized under" Division 1. OB at 12-25. Without dispute, the provisions of Division 1 (including section 2010) apply to all corporations "organized under" Division 1 (per Corps. Code §§ 102, 162). And Greb shows that (1) corporations "organized under" Division 1 necessarily can be either domestic or foreign corporations, and (2) among those foreign corporations "organized under" Division 1 are corporations that (like Diamond) follow the organizational mandates of Division 1's Chapter 21 to become authorized to "transact intrastate business" here. OB at 12-25.

Diamond fails to refute these showings, as discussed below.

1. Both domestic and foreign corporations can be "organized under" Division 1.

First, Diamond fails to refute that both domestic and foreign corporations can be "organized under" Division 1.

As Greb shows, that result is mandated by section 102, which expressly distinguishes corporations "organized under" Division 1 from "domestic" corporations:

> [T]his division applies to corporations organized under this division **and to** domestic corporations which are not subject to [several other parts of the Code not relevant here], and which are not organized or existing under any statute of this state other than this code; this division applies to any other corporation only to the extent expressly included in a particular provision of this division.

Corps. Code, § 102, subd. (a) (emphasis added).

Thus, the Legislature declared that Division 1 of the Code applies to two groups of corporations: (1) all corporations "organized under" Division 1; and (2) specified "domestic" corporations. But the Legislature limited only one of these groups to "domestic" corporations—the latter group.

In fact, as Diamond's OB points out, the Legislature intentionally included this "domestic" limitation by amending section 102 soon after its original enactment. AB at 33-34. In the original Section 102 (1975), the second specified group of corporations was "business corporations organized under any predecessor general corporation law . . . ." AB at 33; Stats. 1975 c. 682 § 7, section 102(a) (emphasis added). Then, in 1976, the Legislature amended section 102 to change this group from "business corporations" to its current language covering specified "domestic corporations." Corps. Code § 102, subd. (a); Stats. 1976, c. 641, § 1.3; *see* AB at 33-34.

Hence, the Legislature plainly limited just one of the two covered groups to "domestic" corporations. The only reasonable construction of this deliberate usage is that the former group (corporations "organized under this division") is not limited to "domestic" corporations.

Diamond responds that the Legislature included the latter group of specified "domestic" corporations to cover California corporations that pre-dated the 1977 enactment of Division 1. AB at 30. But all such California

corporations are necessarily "domestic" corporations—the Legislature did not need to specify "domestic" to cover these pre-1977 California corporations. Instead, the Legislature plainly limited the latter group to "domestic" corporations, showing that the other group is not so limited.

Similarly, Diamond asserts that section 102 applies Division 1 to "corporations organized under Division 1" and to "domestic corporations not organized under specified other [California] laws." AB at 9-10. Again, the Legislature's use of "domestic" is instructive—by so limiting the group, the Legislature acknowledged that non-domestic corporations can also be organized under the "other" California laws.

Next, Diamond contends that the term "organized under" in section 102 really just means "incorporated" or "formed"—so that a corporation is "organized under" California law only if it is incorporated here, *i.e.*, is a domestic corporation. AB at 15-17. But Diamond ignores section 167 (discussed in OB at 18), which defines "domestic corporations" not as corporations "organized under" California law but rather as "formed under the laws of this state." Corps. Code § 167 (emphasis added). This clear distinction in word choice must be given meaning—"organized" does not mean "formed."

Indeed, Diamond's AB at least twice acknowledges that both domestic and foreign corporations can be "organized under" Division 1:

1. Diamond states that, under *Riley*, section 102 applies Division 1 generally to "domestic corporations only" but with "certain exceptions"—and among these "exceptions" are "clearly" the group of "corporations organized under this division." AB at 35 (emphasis added) (*quoting Riley v. Fitzgerald* (1986) 178 Cal.App.3d 871, 877.

2. Diamond states that section 162 "defines a corporation to include only 'domestic' corporations and corporations organized under Division 1." AB at 53 (emphasis added) (*citing* Corps. Code § 162); *accord* AB at 2 (Division 1 applies to "(i) certain domestic corporations, [and] (ii) corporations organized under Division 1.").

But Diamond rests its brief on the theory that no foreign corporations can possibly be "organized under" Division 1—*i.e.*, that all such corporations are necessarily domestic corporations. If that were true, though, then corporations "organized under" Division 1 would not be an "exception" to domestic corporations, and section 162 (applying to both) would be redundant.

In sum, sections 102 and 162 apply the provisions of Division 1 to all corporations "organized under" Division 1—a group that can include both domestic and foreign corporations.

2. Among the foreign corporations "organized under" Division 1 are those that follow Division 1's organizational mandates for transacting intrastate business, including Diamond.

Next, Diamond fails to refute Greb's showing that the group of corporations organized under Division 1 includes those foreign corporations that choose to "transact intrastate business" here—and that accordingly follow the organizational mandates of Division 1's Chapter 21, covering "Foreign Corporations." *See* OB at 16-22.

a. To transact business here, foreign corporations do not just "file papers"—they take steps that Diamond concedes are organizational.

Diamond first argues that foreign corporations that follow Chapter 21's requirements to transact business here do not "organize" themselves under Division 1. According to Diamond, Chapter 21's requirements are not "organizational mandates," instead merely requiring foreign corporations to "file papers" in California. AB at 13, 17.

But this argument misstates Greb's showing and Chapter 21's requirements. As Greb shows, foreign corporations that wish to "transact intrastate business" here must comply with numerous requirements. OB at 15-16; *see* Corps. Code § 2100 (Chapter 21's requirements apply to all foreign corporations "transacting intrastate business"); *id.* § 191 ("transacting intrastate business" defined as "entering into repeated and successive transactions of its business in this state"). Any such corporations that wish to do repeated and successive business here must not only obtain a Certificate of Qualification to do so, *i.e.*, "file papers" here (*id.* § 2105(a)) but also set up and consent to a California agent for service of process, pay state fees, select a permissible corporate name for use in California, and continually update and amend their filings here. *Id.*, §§ 2105-2107; *see* OB at 15-16.

And these are precisely the types of corporate actions that Diamond concedes are "organiz[ing]" actions. According to Diamond, the term "organize" in the Corporations Code refers only to "incorporation and related formation activities." AB at 15. But Diamond then lists various corporate "activities" that it concedes are organizational—a list quite similar

to Chapter 21's requirements for foreign corporations transacting business here:

1. The "preparation and filing of the articles of incorporation" (AB at 15)—*i.e.*, "filing papers" to do corporate business here, much like applying for a Certificate of Qualification (§ 2105(a)).

2. "[A]ctions to be taken by the incorporators" (AB at 15)—much like the requirement that a foreign corporation must submit to California service of process and update its California filings (§§ 2105(a)(5), 2107).

3. The "selection of a permissible name for the corporation" (AB at 15-16)—precisely the same requirement that is imposed on foreign corporations transacting business here (§ 2106(b)).

4. The "naming of the initial directors and the adoption of bylaws by the corporation" (AB at 16)—much like the "naming" of a California agent for service of process (§ 2105(a)(4)).

Diamond's detailed listing of what it concedes to be corporate "organizational" requirements shows that Chapter 21's requirements are likewise "organizational mandates."[1]

[1] In this sense, the term "organizational" mandates draws a proper distinction from operational mandates, which require the corporation, once organized, to undertake certain actions in its continuing corporate life. *E.g.*, Corps. Code § 2115 (imposing operational mandates governing, *e.g.*, election and removal of directors, shareholder and director liability, voting requirements, and limitations on mergers and asset sales).

b. Diamond provides no reason why a foreign corporation cannot be "organized under" the laws of more than one state.

Next, Diamond argues that foreign corporations cannot be organized under Chapter 21 of Division 1—or under any California law for that matter—because a corporation supposedly can only be organized in one state. *E.g.*, AB at 18-19 (A "foreign corporation is 'organized' under the law of its home state.").

But Diamond fails to show that a corporation cannot simultaneously be "organized" to some degree in two or more states, let alone provide any reason why it cannot. Indeed, the various statutes cited by Diamond to support its proposition contemplate that a corporation can be incorporated in one state but organized in another, referring to a corporation's "state or place of incorporation or organization." AB at 18-19 (emphasis added) (*quoting* Corps. Code §§ 2105, 2112, 2116). Thus, contrary to Diamond's contention that corporate "organization" means merely "incorporation" or formation" (AB at 15-17), the Legislature clearly contemplated that a corporation can be incorporated in one state yet organized in another.

And we can see no reason why a corporation that is "organized" to comply with the laws of its state of incorporation may not also be considered to be "organized" to some degree under Division 1—*i.e.*, to have taken the additional corporate organizational steps required by Chapter 21. Indeed, if a corporation chooses to avail itself of the benefits of transacting repeated and successive business in California, it seems appropriate to consider it organized under Division 1 and thus subject to California's general corporate law.

c. Diamond organized itself under Division 1—and its eventual surrender of its qualification to transact business here is of no import.

Diamond does not dispute that it was qualified to transact business in California.[2]

But Diamond does suggest that, even if it was organized under Division 1 because it followed Chapter 21's organization mandates to qualify to transact business in California, it "terminated that qualification" by surrendering its right to transact business here in the 1980s, when it ceased doing business anywhere. AB at 14 n.4 (last ¶). According to Diamond, since it was not "qualified in California at the time of its dissolution" in 2005, it was no longer "organized under" Division 1, so that section 2010's rules governing dissolved corporations do not apply. *Id.* (emphasis added).

But this makes no sense—and would eviscerate the effect of section 2010. Under Diamond's approach, any foreign corporation that wished to avoid section 2010 would merely have to surrender its California qualification just before dissolving, thus assuring that "at the time of" dissolution, it was not then "qualified" to do business here.

That cannot be right. Instead, we must look to the status of the corporation when it allegedly engaged in the misconduct giving rise to its

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[2] Diamond does suggest that it was not the "same" Diamond International Corporation that had been qualified in California since the 1930s, noting that in September 1983 "that" Diamond International Corporation was "merged into" another Diamond entity, Diamond (USA) Inc., which at that precise moment "changed its name to Diamond International Corporation." AB at 13-14 n.4 (emphasis added). But "this" new Diamond International Corporation certainly took on the liabilities of the predecessor merged into it. *E.g., Petrini v. Mohasco Corp.* (1998) 61 Cal.App.4th 1091. In any case, Diamond merely notes the corporate name shuffle but does not assert that, as a result, the Diamond entity before this Court was not qualified to transact business in California.

liability. If a corporation incurs liability when transacting business in California (and thus when organized under Division 1), that corporation cannot avoid liability for resulting injuries by later dissolving itself—or by later surrendering its right to transact business here.

3. Diamond's various other arguments fail to refute petitioner's showing.

Diamond's various other responses to Greb's showing that Diamond was organized under Division 1 lack merit, as shown below.

a. Sections 102 and 162 do not apply Division 1 to "foreign corporations wholesale."

First, Diamond contends that Division 1 cannot apply to foreign corporations like Diamond because the "Legislature did not intend to govern foreign corporations wholesale." AB at 13.

But Greb does not contend that the Legislature applied Division 1 to "foreign corporations wholesale." Instead, the provisions of Division 1 apply only to those foreign corporations who choose to avail themselves of the benefits of transacting repeated business in California and therefore organize themselves under Division 1's Chapter 21.

Moreover, even for those corporations who choose to transact business here, Division 1 does not apply "wholesale"—it applies only subject to choice-of-law provisions, as discussed in the following section.

b. Recognizing that Division 1 applies to foreign corporations choosing to transact business here does not create chaos—choice of law principles still govern.

Next, Diamond asserts that the Legislature cannot have intended to apply Division 1 to foreign corporations who choose to transact business here because it "create[s] a bizarre regime" requiring those corporations to "follow all of California's general corporate laws" governing subjects from "organization and bylaws" to "directors and management" to "shareholder meetings," etc. AB at 24-25. According to Diamond, this would require such corporations to "follow a litany of requirements regarding various corporate activities that their home state already regulates, creating innumerable, treacherous conflicts of law that the corporation would find impossible to navigate." AB at 26.

But Diamond's cataclysmic prophecy is not grounded in reality. Foreign corporations that choose to subject themselves to Division 1 by transacting business here are protected by conflict-of-law principles. As Diamond concedes, even if a California law conflicts with the law of a corporation's "home" state, California law applies only if California has an interest in having its law applied that outweighs the other state's interest in having its law applied. *See* AB at 61 (*quoting Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 107-108).

And California has little or no interest in applying most of its general corporate law to foreign corporations transacting business here. Indeed, most of Division 1's corporate laws are generic requirements regarding corporate form and operation—*e.g.*, laws governing shareholder meetings, dividends, and amendment of articles of incorporation (AB at 25). As long as the corporation's home state has laws regulating these corporate

operations, to the extent they conflict, California has no interest in applying its own law. For example, Diamond cites Corporations Code section 500 and Delaware Code section 170, which "set forth different financial tests that must be satisfied for a corporation to be able to pay a dividend." AB at 26 n.8. But California has no interest in applying its own dividend test over Delaware's test—that does not generally affect California or its citizens.

It is only as to laws whose effect is materially different in the two states—so that the choice of law affects California and its citizens—that California has an interest in applying its law. This case is a perfect example. Because section 2010 protects Greb's right to recover for his injuries caused by Diamond, and Delaware law does not, California has a great interest in applying its law to protect its citizens. And Delaware's interest is minimal—as Greb shows, allowing recovery would not affect the dissolved "Diamond" at all, instead merely allowing Greb to collect compensation from Diamond's insurance.[3]

Contrary to Diamond's contention, recognizing that Diamond was organized under Division 1 when it transacted business here will not have any deleterious effect on foreign corporations.

c. Diamond ignores the distinction between transacting repeated business here (choice of law) and a majority of business here ("exclusion of" foreign law).

Next, Diamond argues that recognizing that Division 1 applies (via sections 102 and 162) to all foreign corporations that transact business here would "render [section] 2115 largely superfluous." AB at 22.

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[3] Diamond does not address, let alone dispute, Greb's showing that Diamond has at least $10 million in insurance coverage for asbestos claims like Greb's claim here. *See* OB at 8.

But Diamond ignores Greb's detailed showing to the contrary. OB at 22-24. As Greb shows, section 2115 expressly applies several sections of Division 1 to only those foreign corporations that conduct more than half of their business in California. OB at 22; Corps. Code § 2115, subd. (a). For such foreign corporations that elect to so immerse themselves in California business, section 2115 imposes stringent operational requirements governing election and removal of directors, shareholder and director liability, voting requirements, mergers, and asset sales. OB at 22; Corps. Code § 2115, subd. (b).

Diamond argues that if Division 1 already applies to all foreign corporations transacting business here because they are "organized under" Division 1, then section 2115 is "meaningless" because the Division 1 provisions listed in section 2115 "would already apply" to those corporations. AB at 23.

But Diamond ignores the key provision of section 2115 (discussed at length by Greb): section 2115 applies the specified provisions "to the exclusion of the law of the jurisdiction in which [the corporation] is incorporated." Corps. Code § 2115, subd. (b) (emphasis added); *see* OB at 23, 24. Thus, by declaration of the Legislature, no choice of law analysis applies—a foreign corporation that wants the benefit of conducting more than half of its business here must forego its home-state law and submit to California law in the specified areas. *See* OB at 23-24 (detailing the three classes of foreign corporations under California law based on amount of business in California: occasional business; repeated and successive business; majority of business).

Accordingly, applying Division 1 to foreign corporations that merely transact intrastate business here (subject to choice-of-law provisions) does

not impact section 2115, which subjects a small subset of those corporations (majority of business in California) to stringent operational provisions to the exclusion of any other state's law.

d. Diamond's cited cases mostly pre-date Division 1 and do not apply here.

Finally, Diamond cites several cases for the general propositions that California law "presumptively" does not apply to foreign corporations and "traditionally holds" that the effect of a corporation's dissolution is governed by the "law of its domicile." AB at 38-43.

But virtually all of these cases pre-date Division 1 (and thus section 2010), which was enacted in 1975 to be effective in 1977. *See id.* at 38 (*citing Pratt v. Robert S. Odell & Co.* (1942) 49 Cal.App.2d 550; *Cooke v. Odell* (1943) 59 Cal.App.2d 820), 43 (*citing Thatcher v. City Terr. Cult. Cen.* (1960) 181 Cal.App.2d 433; *MacMillan Petrol. Corp. v. Griffin* (1950) 99 Cal.App.2d 523; *Fidelity Metals Corp. v. Risley* (1946) 77 Cal.App.2d 377). But now we are analyzing the language of Division 1 to determine whether that 1975 statute applies its provisions to foreign corporations like Diamond. Any language in the cited 50-plus-year old opinions about the state of California corporate law then has no bearing on what Division 1 provides now.

The only post-1975 case cited by Diamond in this area is *Capital Gold Group, Inc. v. Nortier* (2009) 176 Cal.App.4th 1119. *See* AB at 38-39. But *Capital Gold* is inapposite—it does not even consider, let alone address, whether a foreign corporation that transacts business here is therefore subject to the provisions of Division 1. Moreover, the context of the statute at issue in *Capital Gold* (section 1175) shows without question that the term

"corporation" in that statute applies only to domestic corporations. Section 1175 governs the conversion of a "foreign corporation" (or other foreign "business entity" into a California corporation. *See* Corps. Code § 1175; *Capital Gold*, 176 Cal.App.4th at 1131. Therefore, the statute's use of the phrase "may be converted into a corporation" (§ 1175, subd. (a)) "makes sense [only] if the foreign corporation is converting to a domestic corporation," but not if it is converting into "another foreign corporation." *Capital Gold*, 176 Cal.App.4th at 1131-1132. Thus, the "statutory scheme" of section 1157 "makes it clear that [the section] applies solely to conversions to domestic corporations"—*i.e.*, it is clear in section 1157 that the type of "corporation" to be converted into can mean only a "domestic" corporation. *Id.* at 1131.

Here, by contrast, nothing in section 2010 makes it "clear" that its provisions do not, or cannot logically, apply to foreign corporations that transact intrastate business here.

In sum, Diamond's various arguments fail to refute Greb's showing that Diamond, as a foreign corporation choosing to transact business here, thereby "organized" itself under Division 1 (Chapter 21), so that (pursuant to sections 102 and 162) section 2010 applies to Diamond (subject to choice-of-law analysis).

B. Even if Diamond was not organized under California law, section 2010 applies to Diamond under the *North American II* constitutional analysis.

Diamond also fails to refute Greb's showing that, even if this Court rules that Diamond was not "organized under" Division 1, this Court should hold that section 2010 still applies to Diamond under the constitutional analysis of *North American II*, 180 Cal.App.3d at 902. *See* OB at 25-29.

Diamond's various argument in response lack merit, as shown below.

1. Greb's arguments are not inconsistent—they are alternatives.

Diamond first argues that Greb raises "inconsistent" arguments: that (1) section 2010 applies because Diamond was "organized under" California's Division 1; and (2) section 2010 applies pursuant to the constitutional guarantees of former Article XII, section 15 of the California Constitution, which bars favorable treatment of corporations "organized outside the limits of this State." AB at 50-51.

But Greb presents these as alternative arguments.

First, Greb contends that, for purposes of applying Division 1, Diamond was "organized under" California law because it organized itself to qualify to transact business here. OB at 12-24.

Second, Greb contends in the alternative that, "if this Court does not accept petitioners' argument that foreign corporations that transact intrastate business are 'organized under' Division 1," this Court "should still hold that section 2010 applies to such corporations under [*North American II*'s] California constitutional analysis," which applies to corporations "organized outside" California. OB at 25.

This is not a "blatant contradiction" (AB at 50). Greb simply presents two different reasons that this Court should reverse the Opinion below.

2. The "statute" is not clear.

Next, Diamond contends that *North American II* improperly analyzed the "historical evidence" of California's constitutional provisions because the Corporations Code, "specifically" sections "102, 162, 2010, and 2115,"

when "read together," supposedly "unambiguously provide that California's dissolution statutes [*i.e.* section 2010] have no application to dissolved foreign corporations." AB at 51-53.

But Diamond ignores Greb's discussion of this argument in analyzing the Opinion below. Greb notes that the Opinion "fails to analyze, let alone refute, *North American II*'s constitutional analysis," instead "merely discard[ing] *North American II*'s analysis as irrelevant because section 2010 is supposedly 'clear on its face,' obviating the need to analyze any 'legislative intent.'" OB at 27-28. But, as Greb shows, the statute is not "clear on its face"—although the "only reasonable construction of Division 1 is that it applies to both domestic corporations and foreign corporations transacting business here" (for the reasons discussed above), "at most, the statute is ambiguous—warranting review of 'legislative intent' and supporting the *North American II* analysis." OB at 28.

Moreover, *North American II* does not rest on mere "legislative intent" or "historical evidence"—it rests on constitutional analysis. Thus, as Greb shows, even if section 2010 can somehow be said to apply "clearly" to domestic corporations only, "the section would to that extent be constitutionally invalid because it would provide preferential treatment to foreign corporations that 'transact business within this state,' in violation of former Article XII, section 15, which was repealed only as 'obsolete and unnecessary' by a ballot provision expressly effecting 'no change in law or policy.'" *See* OB at 28 n.12; *North American II*, 180 Cal.App.3d at 909.

3. The "electorate" did not "understand" the repeal of former Article XII, section 15 to be changing the law.

As noted above, the *North American II* analysis rests on former Article XII, section 15 of the California Constitution, which assured that no foreign corporation transacting business here (like Diamond) would be treated "more favorabl[y]" than any domestic corporation. *See* OB at 26; *North American II*, 180 Cal.App.3d at 907-908. This constitutional provision was in effect when the original version of section 2010 was enacted, and it was repealed in 1972 only as "obsolete and unnecessary" in light of other provisions. *See* OB at 26-27; *North American II*, 180 Cal.App.3d at 908-909.

Diamond argues (or, rather, "presumes") that this repeal actually had substantive significance: "Presumably, by repealing Article XII, the electorate understood [that a repeal would have] the consequence of removing the only remaining bar to treating foreign corporations more favorabl[y] than domestic corporations."[4] AB at 54.

But Diamond fails to support this "presumption," which in fact is defeated by the evidence of the 1972 repeal. As *North American II* notes, the electorate knew nothing about this (supposed) dramatic shift in California corporate law—it was told that the proposed repeal was a "housekeeping measure" that effected "no change in law or policy":

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[4] Diamond likewise asks this Court to "presume" that former Article XII, section 15 "applied only to the ongoing business activities of a corporation" but not to the effect of dissolution. AB at 56. As with Diamond's proffered presumption about the electorate's repeal, this presumption lacks any support, cited or otherwise. Diamond allegedly injured Greb by selling a defective product when it was "transacting business" in California. If Diamond is allowed to avoid liability for these injuries by simply dissolving decades after ceasing business operations, then Diamond will have succeeded in transacting business on more favorable terms than a domestic corporation that cannot similarly erase its own liability after the fact.

> The ballot argument supporting repeal stated only that the proposition approved was "basically a housekeeping measure to eliminate obsolete and unnecessary words from the Constitution. No new material is added to the Constitution, and there is no change in law or policy."

North American II, 180 Cal.App.3d at 909 (emphasis added); *see* OB at 27.

In sum, Diamond fails to refute that, if this Court holds that Diamond was not "organized under" Division 1, this Court should still reverse under the constitutional analysis of *North American II*.

C. Diamond fails to refute that sound public policy concerns warrant application of section 2010 to Diamond.

Finally, Diamond fails to refute Greb's showing that construing section 2010 as applying to dissolved foreign corporations that transacted business here—whether by statutory or constitutional analysis—would support California's sound public policy of protecting innocent citizens from defectively manufactured products. *See* OB at 29-32.

Diamond does not address Greb's policy showing on the merits. Instead, Diamond insists that the Legislature "makes public policy" and that the Division 1 statutory scheme "clearly" does "not apply" section 2010's dissolution provisions to "foreign corporations such as Diamond." AB at 58, 59.

But, as discussed above, the statutory scheme is not clear. Thus, in construing the scheme, this Court should appropriately consider all factors, including legislative intent and the effect of the statute's interpretation on public policy.

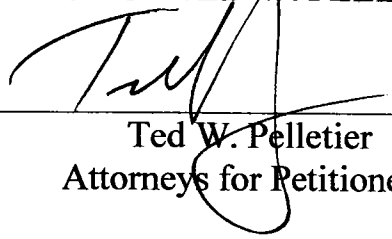
CONCLUSION

For all of the reasons discussed above and in petitioners' opening brief, this Court should reverse the Opinion below and hold that section 2010 applies to Diamond here, ending Diamond's bid to escape liability by an otherwise meaningless Delaware dissolution.

Dated: December 16, 2010

CLAPPER, PATTI, SCHWEIZER & MASON

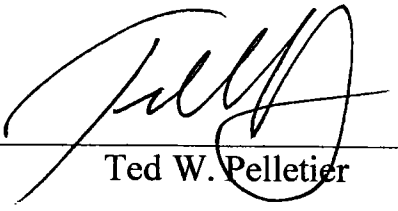
LAW OFFICE OF TED W. PELLETIER



Ted W. Pelletier
Attorneys for Petitioners

CERTIFICATION OF WORD COUNT

I Ted W. Pelletier, hereby certify that this brief, exclusive of tables, consists of 5,026 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:

PETITIONERS' REPLY BRIEF ON THE MERITS

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:

Maria A. Starn
Scott L. Hengesbach
MURCHISON & CUMMING, LLP
801 South Grand Avenue, 9th Floor
Los Angeles, CA 90017
For Respondent Diamond International Corporation

Clerk, Court of Appeal
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102-3600

Clerk, San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

Executed at San Anselmo, California on December 16, 2010

Ted W. Pelletier