S183365
Appeal No. A125472

In the
SUPREME COURT OF CALIFORNIA

WALTER GREB, et al.,

Plaintiffs, Appellants and Petitioners,

vs.

DIAMOND INTERNATIONAL CORPORATION,

Defendant and Respondent.

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

ANSWER TO PETITION FOR REVIEW

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I.

INTRODUCTION

Writ review is not appropriate in this case as the weight of authority is decidedly in Respondent's favor. Relying on well-settled legal precedent, the underlying Opinion concludes, as did two appellate courts before it, that California's corporate survival statute for dissolved corporations, Corporations Code § 2010, does not apply to foreign corporations such as Respondent.

In an attempt to manufacture proper grounds for review, Petitioners mischaracterize decisional law concerning the applicability of Corporations Code § 2010 to foreign corporations as "split." To the contrary, in analyzing this specific issue, as well as the general applicability of California Corporations Code to foreign corporations, California courts have consistently held that the provisions of California's Corporations Code apply only to domestic corporations, unless explicitly made applicable to foreign corporations. In the face of this consistent application of the law, Petitioners premise their contention that a split of authority exists on a now disfavored opinion: North American Asbestos Corporation v. Superior Court (Young), 180

Cal.App.3d 902 (1986) ("North American II"). North American II is unpersuasive, contradicted by well-settled precedent, and has not been followed, not even by the First District Court of Appeal (from which the decision came).

Although Respondent does not perceive North American II as a significant threat to securing uniformity of decision, should this Court grant review, the issue presented should be restated in compliance with the requirement that the petition begin with a "concise, nonargumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail." Cal. R. Ct 8.504(b)(1).

In a thinly-veiled attempt to cast Respondent in a negative light, Petitioners frame the issue as one involving a deceptive foreign corporation that attempts to escape liability for its defective products by incorporating and dissolving under favorable foreign laws. There is absolutely no factual basis for Petitioners' bald assertion that Respondent incorporated and dissolved under Delaware law in order to deceive California citizens and shield itself from liability. Moreover, whether arising out of a misapprehension of the law or an intentional attempt to obfuscate the issue, Petitioners improperly combine multiple

issues into one.

In asking this Court to decide whether California or Delaware law applies on the facts of this case, Petitioners invoke basic choice-of-law principles. The threshold inquiry in any such analysis is whether a "true" conflict of law exists. Thus, in the event that review is granted, the initial issue for this Court to decide is whether California Corporations Code § 2010 applies to dissolved foreign corporations.

If California Corporations Code § 2010 does not apply to foreign corporations, no true conflict between California and Delaware law exists, and there is no need to resort to a comparative interests analysis. Norwest Mortgage, Inc. v. Conley, 72 Cal.App.4th 214, 228 (1999) (if California law cannot be applied, there is no occasion for applying choice-of-law rules). Petitioners' issue presented clouds the threshold inquiry by repeatedly referencing one-sided policy interests and other considerations that purportedly favor applying California law. The entire Petition is plagued with references to California's "strong interest in protecting the rights of its citizens" without any analysis of, or deference to, the threshold issue of whether California Corporations Code § 2010 applies to foreign corporations in the first place. If, *and only if,* the threshold question is answered in the affirmative, is a

comparative interest analysis triggered to determine which state's interest would be more impaired if its policy were subordinated to that of the other state. Bernhard v. Harrah's Club, 16 Cal.3d 313, 320 (1976) (once a true conflict has been identified, the comparative impairment approach is utilized to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state). Since an evaluation of the competing state interests only comes into play *if* California Corporations Code § 2010 applies to foreign corporations, Petitioners' approach errs.

Assuming, *arguendo*, that this Court grants review, the threshold issue of whether California Corporations Code § 2010 applies to foreign corporations should be separately delineated in accord with well-settled choice-of-law principles.

II.

BACKGROUND

On December 22, 2008, Petitioners, Walter Greb and Karen Greb, initiated this action against multiple parties, including Respondent, Diamond International Corporation ("Diamond"), for personal injuries and damages resulting from alleged exposure to asbestos.

Generally, the complaint alleges that each of the corporate defendants, including Respondent, "were and are corporations organized and existing under and by virtue of the laws of the State of California, or the laws of some other state or foreign jurisdiction...." (JA 4-5, ¶ 3.) In fact, Respondent is a dissolved Delaware corporation. (JA 43-49.) Diamond was dissolved pursuant to and in accordance with the laws of Delaware on July 1, 2005. Id.

Under the laws of Delaware governing the dissolution of its corporations, a dissolved corporation shall continue to exist for a period of only three (3) years from the date of dissolution for the limited purpose of winding up its affairs, including prosecuting and defending lawsuits. 8 Delaware Code § 278. Thereafter, the dissolved corporation lacks the capacity to sue and be sued. Id. In the instant case, because

Petitioners filed their lawsuit more than three years after Respondent's dissolution, their claim is barred.

Invoking Delaware law, on or about February 13, 2009, Respondent demurred to Petitioners' complaint on the ground that Respondent lacked the capacity to be sued. (JA 31-42.) Relying, in part, on the decision in Riley v. Fitzgerald, 178 Cal.App.3d 871 (1986), the trial court sustained Respondent's demurrer without leave to amend.

Petitioners subsequently appealed the order and judgment of dismissal in favor of Respondent. Then, after the matter had been fully briefed, on November 17, 2009, Petitioners filed a Notice of Dismissal of their appeal. Given the significant impact a decision on the merits would have on pending and future lawsuits against Diamond, Respondent asked that the Court rule on the merits of the appeal despite Appellant's dismissal. The Court agreed and following oral argument, on April 26, 2010, the Opinion of the Appellate Court, affirming the Trial Court's order sustaining Respondent's demurrer and entering an order of dismissal in favor of Respondent, was certified for publication. On May 26, 2010, the Opinion became final.

Petitioners now seek review.

III.

LEGAL DISCUSSION

A. The Law is Settled and the Weight of Authority is Decidedly in Respondent's Favor.

Petitioners assert that the Opinion reinforces a split of authority in the appellate courts. To the contrary, the Opinion follows well-settled precedent and evinces the clear majority view. Sig nificantly, North American Asbestos Corp. v. Superior Court, 128 Cal.App.3d 138 (1982) (North American I), Riley v. Fitzgerald, 178 Cal.App.3d 871, 876 (1986), and the underlying Opinion uniformly conclude that California Corporations Code § 2010 does not apply to suits against foreign corporations such as Diamond. As first addressed in North American I, the court concluded that:

> "From a reading of the Corporations Code generally, we conclude that it does not apply to foreign corporations which have dissolved. Corporations Code section 102

> provides that with certain exceptions not applicable here the provisions of the Corporations Code apply only to domestic corporations and that application to other corporations is permitted only "to the extent expressly included in a particular provision of this division." Section 2010 is in chapter 20 of division 1, which is entitled "General Provisions Relating to Dissolution." Nowhere is there any mention that the provisions of that chapter or of section 2010 apply to foreign corporations. Foreign corporations are the subject of the entire next chapter, chapter 21." North American I, supra, 128 Cal.App.3d at 144.

Likewise, Riley and Greb hold that a plain reading of California's Corporations Code, including sections 102, 162 and 2115, makes it clear that section 2010 does not apply to foreign corporations.

North American II stands alone as the disfavored minority view in conflict with the foregoing authorities. Petitioners' attempt to find support for the North American II decision in Penasquitos, Inc. v. Superior Court, 53 Cal.3d 1180 (1991) and McCann v. Foster Wheeler LLC, 48 Cal.4th 68 (2010), is not only misleading but simply incorrect. Both cases make only a passing reference to North America II and neither one of them discusses or even references application of Corporations Code § 2010 to foreign corporations. As correctly concluded in the Opinion, the reference to North American II in both Penasquitos and McCann is **dicta only**. Opinion at 12. "As the facts of Peñasquitos did not involve a foreign corporation, the court's discussion of North American II is dicta only, which we are not bound to follow. [citations] This court also makes a similar observation of the reference to North American II in the recent case of McCann v. Foster Wheeler LLC, 48 Cal.4th 68, 101 (2010)." Id.

Accordingly, this Court should deny review for the simple reason that the Opinion is supported by well-settled precedent and represents the overwhelming weight of authority.

1. It is settled that the effect of dissolution is governed by the state of incorporation.

In sharp contrast to Petitioners' contention that California law governs the effect of Respondent's dissolution in Delaware, it is settled in both California and Delaware that the state of incorporation dictates the effect of corporate dissolution and/or extinguishment. Riley, supra, 178 Cal.App.3d at 876. In California, "[i]t appears to be settled law that the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile." Thatcher v. City Terrace Cultural Center, 181 Cal.App.2d 433, 440-441 (1960); Fidelity Metals Corp. v. Risley, 77 Cal.App.2d 377, 381 (1946). Likewise, in Delaware, "the existence or nonexistence of a Delaware corporation is governed by Delaware law." Akande v. Transamerica Airlines, Inc. (In re Transamerica Airlines, Inc.), 2007 Del.Ch. LEXIS 68 (Del. Ch. May 25, 2007).

Petitioners make no attempt to reconcile this well-settled principle with their conflicting and illogical contention that California law governs the dissolution of a Delaware corporation.

2. It is settled that the provisions of California Corporations Code apply only to domestic corporations unless foreign corporations are explicitly included.

The Opinion finds unanimous support in case precedent determining the applicability of certain other provisions of the California Corporations Code to foreign corporations.

As clearly articulated at California Corporations Code § 101, the general provisions and definitions govern the construction of California's General Corporation Law. Significantly, California Corporations Code § 102(a) provides that, with certain specified exceptions, the Corporations Code applies only to domestic corporations. Riley, supra, 178 Cal.App.3d 871. Likewise, California Corporations Code § 162 provides: "Corporation unless otherwise expressly provided, refers only to a corporation organized under this division or a corporation subject to this division under the provisions of subdivision (a) of Section 102."

Giving effect to these definitional provisions, it has been uniformly recognized that the provisions of California's General

Corporate Law only apply to foreign corporations when explicitly included in a particular provision. Ballantine & Sterling, Cal. Corporation Laws (4th ed. 2010) ch. 18, § 389.01 ("The General Corporation Law only applies to foreign corporations when its provisions expressly so provide"); see also, Pratt v. Robert S. Odell & Co., 49 Cal.App.2d 550, 560 (1942) ("Section 366 makes no reference to foreign corporations, [thus], the liability of a director or a corporation for a violation of official duty may be enforced in this state, but according to the laws of the state of incorporation"); Cooke v. Odell, 59 Cal.App.2d 820 (1943) (that a foreign corporation failed to comply with section 358 was of no value in determining fraud on its part because the obligations imposed by section 358 do not specifically refer to foreign corporations); Chapman v. Title Guarantee & Trust Co., 25 Cal.App.2d 567, 573 (1938) (Civil Code § 293 was held inapplicable to foreign corporations when construed in conjunction with Civil Code § 278 (the predecessor to California Corporations Code § 162) which specifically declares that the term "corporation" as it is used in that part of the code "unless otherwise expressly provided, refers only to a domestic corporation").

Likewise, Corporations Code § 2010, which omits any reference to "foreign" corporations, must be read as applying only to domestic

corporations and excluding from its reach foreign corporations which have dissolved. Hereto, Petitioners fail to reconcile their contention with this well-settled authority.

3. There is no ambiguity as to the scope of California Corporations Code § 2010.

Petitioners' further contend that California Corporations Code § 2010 is not clear on its face. In so stating, Petitioners turn a blind eye to other provisions in the Corporations Code which unambiguously establish the scope of section 2010. As noted above, the general provisions and definitions govern the construction of California's General Corporate Law, including California Corporations Code § 2010. Cal. Corp. Code § 101; Faulder v. Mendocino County Bd. of Supervisors, 144 Cal.App.4th 1362, 1370 (2006) (when attempting to resolve conflicting constructions of a statute, the analysis shall begin by "examining the statutes words, giving them a plain and commonsense meaning" and harmonizing these words with other provisions relating to the same subject matter).

Any question regarding the applicability of section 2010 to foreign corporations is eliminated by reference to sections 102 and 162. When read together, these provisions make it crystal clear that section 2010, which omits any reference to foreign corporations, applies only to domestic corporations. Accordingly, it should come as no surprise that Petitioners fail to analyze these interrelated provisions and offer a plausible explanation why their interpretation of section 2010 would not render sections 102 and 162 completely meaningless. This is the primary reason why North American II has become disfavored.

B. Petitioners' Reliance on North American II is Misplaced.

Ignoring the clear language of California's Corporation Code, Petitioners rely exclusively upon extrinsic evidence in an effort to interpret the intent of the Legislature in enacting California Corporations Code § 2010. In properly rejecting this analysis, the Opinion notes the well established rule that legislative intent should not be resorted to where a statute is clear on its face. Quoting Arnett v. Dal Cielo, 14 Cal. 4th 4, 24 (1996), it is stated that "[i]n determining legislative intent, courts look first to the words of the statute itself: if those words have a

well-established meaning, as we hold they do here, there is no need for construction and courts should not indulge it." Opinion at 10.

The repealed constitutional provision relied upon by Petitioners stated that "no corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State." Article XII, section 15 of the California Constitution (repealed in 1972).

Following North American II, Petitioners make the unsupported and purely speculative conclusion that because this constitutional provision was in effect when the original version of section 2010 was enacted, it clearly applied and mandated interpretation of that section as applying to all corporations. However, there is no authority offered for this presumed intent. Moreover, Civil Code § 278, the predecessor to section 162, which defined a corporation to mean only a "domestic" corporation, was enacted in 1931, only two years after the original version of section 2010 (see former section 278, added by Stats. 1931, ch. 862, § 2, p. 1764). Even more compelling, Civil Code § 278 was enacted decades before the repeal of Article XII, section 15. Presumably, by repealing Article XII, the electorate understood the

consequence of doing so.

The North American II court also ignores the fact that the current statutory framework underwent significant revision in 1975, which included the simultaneous enactment of sections 102, 162 and 2010. Ballantine & Sterling, Cal. Corporation Laws (4th ed. 2010) ch.1, § 6.02 (The General Corporation Law of this State was completely revised in 1975 to "modernize and streamline" the law). During the complete restructuring of the General Corporation Law in 1975, Article XII, section 15, had already been repealed (in 1972). If the Legislature wanted to incorporate this repealed provision into the revised statutory framework, it could have decided to do so. Instead, the Legislature enacted sections 102 and 162, *concurrently with section 2010.* Giving effect to each of these statutes, there can be no doubt that section 2010 does not have any application to foreign corporations. As correctly concluded in the underlying Opinion, accepting North American II's interpretation of section 2010 as applying to foreign corporations effectively renders sections 102 and 162 meaningless. Opinion at 15. It is a bedrock principle of statutory construction that such a result must be avoided.

IV.

CONCLUSION

Given the well settled precedent and weight of authority in Respondent's favor, review in the instant case is inappropriate. Any concerns that Petitioners may have regarding California Corporations Code § 2010 are more appropriately suited for the Legislature and not the judiciary.

DATED: June 28, 2010.

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By: _____

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CERTIFICATION OF COMPLIANCE

Counsel of record hereby certifies that pursuant to Rule 8.204(c) of the California Rules or Court, the enclosed Respondent's Brief is produced using 14-point Roman type with 13-point Romay type footnotes and contains approximately 2,806 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: June 28, 2010.

MURCHISON & CUMMING, LLP

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PROOF OF SERVICE VIA OVERNITE EXPRESS MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 South Grand Avenue, Ninth Floor, Los Angeles, California 90017-4613.

On June 28, 2010, I served a true copy of the following document described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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

Executed on June 28, 2010, at Los Angeles, California.

MARJORIE K. DE JOHNETTE