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May 28, 2013

The Honorable Tani Cantil-Sakauye,
Chief Justice, and Associate Justices
THE SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, CA 94102

Re: Petition for Review of Howmedica Osteonics Corp. and Stryker Corp. in *Garrett v. Howmedica Osteonics Corp.*, No. S210018

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

Pursuant to California Rule of Court 8.500(g), The Product Liability Advisory Council, Inc. ("PLAC") asks this Court to grant the Petition for Review to resolve the conflict between this opinion and *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755 and settle the important question of defining the appropriate standards for evaluating the admissibility of expert opinion testimony offered in connection with summary judgment motions. Specifically, the Court should accept Review and:

- Hold that the same standards which govern admissibility of expert opinion at trial govern the admissibility of opinion on a motion for summary judgment, and that the gatekeeping responsibilities mandated by this Court in *Sargon Enters., Inc. v. USC* (2012) 55 Cal.4th 747 are not limited to the evaluation of expert testimony after an evidentiary hearing.

- Hold that the judge-made rule that evidence offered in opposition to a motion for summary judgment is liberally construed for its sufficiency to raise a triable issue of fact applies only to admissible evidence, and the assessment of admissibility does not vary depending on whether the expert's testimony is offered to support or defeat the motion.

IDENTITY AND INTEREST OF AMICUS

PLAC is a non-profit corporation with 104 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products in a wide range of industries, from automobiles to electronics to pharmaceutical products to consumer goods. A list of PLAC's current corporate membership is attached as Appendix A. In addition, several hundred of the leading product liability defense attorneys in and outside of the country are sustaining (*i.e.*, non-voting) members of PLAC.

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development and administration of product liability law that have potential impact on PLAC's members. PLAC has submitted over 1000 *amicus curiae* briefs in state and federal courts, including many in this Court.

PLAC's interest in this Petition stems from the profound impact that the standards for admissibility of expert testimony have in litigation involving product manufacturers who do business in this State. Also critical to manufacturers is the viability of the summary judgment procedure for fairly and meaningfully adjudicating whether there is truly enough reliable, substantial liability evidence to warrant the increasingly expensive process of defending a case at trial. The decision below, by lowering the standards of admissibility for expert opinions opposing a motion for summary judgment, limits the ability to terminate or narrow litigation where the opponent's case rests on junk science or other forms of inadmissible expert testimony. And ironically, it comes on the heels of a decision of this Court which attempted to clarify that trial courts have an important gatekeeping function, to prevent the introduction of unreliable or unsupported expert opinion testimony.

Accordingly, this case triggers PLAC's interest in obtaining clear guidance for its members concerning the interpretation and application of the rules of evidence and the operation of the summary judgment statute, and in securing the fair operation of the laws which govern the obligations of product manufacturers and sellers.

BACKGROUND AND NATURE OF THE CASE

In this product liability case, the specific question is whether plaintiff presented a triable issue of fact through the declaration of his expert in opposition to defendants' motion for summary judgment. But the question of importance to PLAC revolves around the lens the Court of Appeal applied to the expert's declaration.[1]

On rehearing after this Court issued its *Sargon* decision, The Court of Appeal, ruled that a declaration opposing summary judgment is evaluated for admissibility under relaxed standards. The Court essentially extended the rule of liberal construction of opposing evidence for its *sufficiency to raise a triable issue* to the threshold analysis of whether the evidence is even *admissible*. The Court of Appeal cited two prior appellate

[1] The same basic questions are also presented by the recent unpublished decision of Division Five of the Second District Court of Appeal, *Liu v. Superior Court,* No. B246461 (April 19, 2013). Counsel for PLAC is appellate counsel for two of the defendants in that matter, and a Petition for Review has not yet been filed in that case.

decisions to support the proposition that "[t]he rule that a trial court must liberally construe the evidence submitted in opposition to a summary judgment motion applies in ruling on both the admissibility of expert testimony and its sufficiency to create a triable issue of fact", *Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1332-1333 and *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125-126, 128-30, Slip Op. at 20, but neither does so. And conspicuously *uncited* is the 2010 decision in *Bozzi*, which is squarely contrary.

> The declarations in support of a motion for summary judgment should be strictly construed, while the opposing declarations should be liberally construed. (*Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107 [252 Cal. Rptr. 122, 762 P.2d 46*].) **This does not mean that courts may relax the rules of evidence in determining the admissibility of an opposing declaration. Only *admissible evidence* is liberally construed in deciding whether there is a triable issue.** [*Bozzi*, 186 Cal.App.4th at 761 (italics in original; boldface added).]

The Court of Appeal here went on to hold that "the trial court failed to liberally construe the declaration as required, and that the sustaining of the objections to the Kashar declaration based on Evidence Code sections 801, subdivision (b) and 802 was an abuse of discretion." Slip Op. at 20.

A further, broader relaxation of admissibility standards arose from the Court's determination that *Sargon* did not alter the admissibility standards, finding *Sargon*'s gatekeeping responsibilities essentially irrelevant in the summary judgment context. The Court focused entirely on the differences between the procedural posture behind the trial court's exclusion in *Sargon* and the instant summary judgment context – an eight day evidentiary hearing in the former, where the expert's opinion and its bases were thoroughly explored, versus the terse presentation of the expert's opinions and bases by written declaration in the summary judgment hearing.

> Unlike *Sargon*, *supra*, 55 Cal.4th 747, this case involves the exclusion of expert testimony presented in opposition to a summary judgment motion. The trial court here did not conduct an evidentiary hearing, and there was no examination of an expert witness pursuant to Evidence Code section 802. Absent more specific information on the testing methods used and the results obtained, the trial court here could not scrutinize the reasons for Kashar's opinion to the same extent as did the trial court in *Sargon*. We do not believe, however, that the

> absence of such detailed information justified the exclusion of Kashar's testimony. [Slip Op. at 19-20]

Accordingly, the Court of Appeal mandated application of significantly more lenient gatekeeping at summary judgment than the scrutiny due to be applied later, to the expert's testimony at trial.

The Court ignored the case law which unequivocally holds that pretrial evidentiary determinations, including those made on summary judgment, are evaluated by the same standards applied at trial. For example, *Bozzi*, which said:

> B. Evidence in support of and in opposition to a summary judgment motion must be admissible, just like at trial.
>
> The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment. Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion. (*Code Civ. Proc., § 437c, subd. (d); DiCola v. White Brothers Performance Products, Inc. (2008) 158 Cal.App.4th 666 [69 Cal. Rptr. 3d 888] (DiCola)* [affirming summary judgment where trial court properly sustained hearsay objections].) [*Bozzi,*, 186 Cal.App.4th at 761.]

See also, e.g., Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1119 ("matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or impermissible opinions, must be disregarded in supporting affidavits"); *Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1400; *Hayman v. Block* (1986) 176 Cal.App.3d 629, 639.

The Court of Appeal identified no other reasons for applying a disparate screening standard on summary judgment, and cited no language in the *Sargon* opinion which suggested any intent by this Court to preclude similar gatekeeping in the summary judgment context. It therefore falls to this Court to answer this question, whether *Sargon* and the gatekeeping responsibility it requires does or does not apply to evidence offered in connection with a motion for summary judgment, or other motion contexts where the expert's testimony is presented by declaration, deposition or report rather than through live examination at an evidentiary hearing or trial.

REASONS WHY REVIEW SHOULD BE GRANTED

This Court should accept the Petition and settle the important questions of law presented. *Sargon's* gatekeeping responsibility derives from the need to prevent admission of unreliable, unsupported or speculative expert testimony without unduly compromising the right to trial by jury. That balance is at least equally important at the summary judgment stage, given the importance of the summary judgment remedy in modern high stakes, costly litigation. The Court of Appeal decision would emasculate the summary judgment remedy by allowing cases to avoid termination and proceed to trial based on evidence which would be inadmissible when it gets there.

California Rule of Court 8.500(b)(1) directs that Review may be ordered "when necessary to secure uniformity of decision or to settle an important question of law." The *raison d'etre* of this Court is to guide the development of California law in areas of importance to the bench and bar. This necessarily includes ensuring the development of rules which will keep our legal system operating in a sensible fashion.

THE STANDARDS GOVERNING ADMISSIBILITY OF EXPERT DECLARATIONS ON SUMMARY JUDGMENT ARE IMPORTANT, AND APPARENTLY UNSETTLED

Sargon recognizes the importance of defining and applying proper standards to assure the reliability of expert testimony in California courtrooms. That importance is not diminished in the summary judgment context.

Indeed, the importance is heightened. Comparatively few cases go to trial; many more cases are presented for disposition through the summary judgment procedure. While it is critically important to assure the reliability of expert testimony presented at trial, in practical terms it is even more important to assure that those cases which should never get there do not. Defense at trial, particularly in complex product liability cases, has never been more expensive, and given the trend in jury awards, the stakes of a misguided adverse verdict have never been higher. These factors put a premium on a summary judgment procedure which can effectively weed out those cases which lack merit prior to trial. And in expert-intensive litigation such as products liability cases, that in turn requires application of effective standards to limit the admissibility of junk science or other unreliable forms of expert testimony – for example, the gatekeeping responsibility described in *Sargon*. By diluting the gatekeeping rigor mandated by *Sargon* in the ubiquitous summary judgment context, *Garrett* seriously weakens the summary judgment remedy, compromising its ability to effectively perform its intended and necessary function. If allowed to stand, it undermines this Court's recent holding in

Sargon, and in effect places a thumb on the scales of justice favoring denial of motions for summary judgment.

APPLYING MORE RELAXED ADMISSIBILITY STANDARDS FOR EXPERT OPINIONS ON SUMMARY JUDGMENT IS UNWISE AND UNSUPPORTED

Garrett is an unwarranted departure from the usual rule that the same admissibility standards applied at trial also govern motion proceedings. *See Bozzi*, 186 Cal.App.4th at 761. The summary judgment statute requires that the evidence offered in support and opposition to the motion be "admissible." Code of Civil Procedure §437c(d). There is no language suggesting that anything other than the normal operation of the rules of evidence is to be consulted in deciding what is admissible.

Moreover, the operation of the summary judgment procedure is based on a trial outcome measuring stick. The moving party shifts the burden of raising a triable issue of fact, and the opposing party discharges it, by production of *substantial evidence*, *i.e.*, that quality and quantum of evidence necessary to support a jury finding in its favor. *See, e.g., Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 487-488; *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 489. It would be illogical, asymmetrical and unwise to permit summary judgment to be defeated by a proffer of evidence which would be excluded or legally insufficient at trial.

Nothing in *Sargon* suggests that the gatekeeping responsibility is inapplicable, less important, or otherwise altered in the ubiquitous summary judgment context. That the decision arose from an exclusion after an evidentiary hearing does not imply that it is limited to that scenario. It is true that an evidentiary hearing provides more expansive opportunity to explore the foundations of the expert's testimony, and in an appropriate case the trial court has discretion to employ that procedure to decide the issue. But in most cases the foundations for the expert opinions have been explored at deposition and/or through counter-affidavits, and the record is more than adequate to support rigorous gatekeeping scrutiny.

Moreover, *Garrett*'s handling of the risk of inadequate information about the expert's foundation is obtuse, and the resulting incentives are enigmatic. The proponent of the evidence bears the burden of presenting it in admissible form, and in demonstrating its admissibility upon objection. *People v. Kelly* (1976) 17 Cal.3d 24, 30. But in *Garrett*, perversely, the comparative lack of information concerning how the expert came to his opinion was transformed into a reason why it should be subject to *lesser* scrutiny and more easily admitted. *See* Slip Op. at 19-20. Thus, under *Garrett*'s counter-intuitive reasoning, where the affidavit is terse, with little or no explanation of the foundational data and reasoning, the trial court has less license to exclude the evidence. After *Garrett*,

it appears to be unwise in practice for an opponent of summary judgment to present anything other than a conclusory opinion, because elaboration runs the risk of exclusion by giving the opponent, and the putative gatekeeper, more to "shoot at."

This runs counter to fundamental notions of what is and what is not a helpful and admissible expert opinion. "An expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." *Bushling v. Fremont Med. Center* (2004) 117 Cal.App.4th 493, 510. Moreover, an expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury. In this latter circumstance, the jury remains unenlightened in how or why the facts *could* support the conclusion urged by the expert, and therefore the jury remains unequipped with the tools to decide whether it is more probable than not that the facts *do* support the conclusion urged by the expert. An expert who gives only a conclusory opinion does not *assist* the jury to determine what occurred, but instead supplants the jury by *declaring* what occurred. [*Jennings v. Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117-1118 (emphasis in original).]

For these reasons, the Court should accept Review and reverse. The same gatekeeping standards which this Court found necessary to guard against the effects of unreliable, unsupported or speculative expert testimony generally are at least equally necessary in the summary judgment context.

GARRETT'S FURTHER RELAXATION OF THE STANDARDS OF ADMISSIBILITY FOR THE OPINION TESTIMONY OF EXPERTS OPPOSING SUMMARY JUDGMENT IS UNWISE AND UNSUPPORTED

Garrett not only requires application of lesser admissibility standards on summary judgment than at trial, it lowers the gate still further for the testimony of those experts offered to defeat the summary judgment motion. It bases this differential standard on the common law rule requiring trial courts to liberally construe the evidence opposing the motion. Slip Op. at 20. It thus extrapolates from a rule guiding evaluation of the *sufficiency* of the evidence to raise a genuine issue of material fact to a new rule requiring *liberal admissibility*. There is no basis for this extension of a rule for how to interpret the admissible evidence to the threshold question governing whether the evidence is admissible at all.

The *Garrett* opinion never acknowledges that it is prescribing a new rule of admissibility, as it cites *Jennifer C.* and *Powell* for the proposition that the rule of liberal construction applies to admissibility as well as sufficiency. Slip Op. at 20. But neither case states that proposition, nor can they reasonably be read to support it. The *Garrett* opinion also makes no mention of the *Bozzi* case, which stated unequivocally that the horse goes before the cart – the rule of liberal construction is applied only to admissible evidence. 186 Cal.App.4th at 761.

The *Garrett* rule is again at odds with the language of the summary judgment statute, which makes no distinction between the treatment of moving and opposing declarations regarding their admissibility. *See* Code of Civil Procedure §437c(d) (requiring that "supporting and opposing affidavits or declarations ... shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations.").

As discussed above, *Garrett*'s call for application of different, lower standards of admissibility at summary judgment than those which must be met at trial deviates from established law and rational procedure. *A fortiori*, to the extent it *further* lowers the admissibility gate from its height at trial as to the expert for the party opposing summary judgment.

But *Garrett*'s core premise of different standards for admissibility as between experts for the moving party and the opposing party is itself troubling. If unreliable expert testimony is undesirable, then it is equally undesirable on both sides of the *v* and at all stages of the proceedings. Indeed, the Court of Appeal's reliance on the rule of liberal construction suggests that the gap in required rigor between the parties may be even wider (or taller). The corollary to the rule that opposing declarations are liberally construed is that the moving declarations are to be strictly construed. Does this mean that the gate is higher than normal for the expert testimony supporting the motion?

Such a rule finds no basis in *Sargon*, nor in the text of the summary judgment statute, but this uncertainty underscores that the Court of Appeal has taken the rule of liberal construction well beyond its limited purpose. The rule is designed simply to resolve ambiguities in the proof, such as the drawing of inferences, in favor of the existence of a triable issue and denial of the motion. It is a rule of interpretation, not

admissibility. It is not intended to make summary judgments generally more difficult to obtain.[2]

Even as far as it goes, the liberal construction rule originated in an era when summary judgment was considered a "disfavored remedy." But summary judgment "'is no longer a "disfavored remedy." It has been described as having a salutary effect, ridding the system on an expeditious and efficient basis of cases lacking any merit.'" *Bozzi,* 186 Cal.App.4th at 761 (quoting *Nazir v. United Airlines, Inc.* (2009) 178 Cal. App.4th 243, 248). *See also Aguilar v. Atlantic Richfield Co.*(2001) 25 Cal.4th 826, 859-860 (1992 and 1993 amendments to the summary judgment statute were intended to and did "liberalize the granting of motions for summary judgment."). Thus, the rule of liberal construction may in some respects be a vestige of an earlier era. In any event, the modern recognition that summary judgment serves an important purpose is simply at odds with the notion that the rule should be *expanded* to include threshold determinations of admissibility, and to make summary dispositions far more difficult to obtain.[3]

CONCLUSION

The decision of the Court of Appeal calls for exercise of this Court's supervisory role and law-developing function. It creates a conflict with established law, and *Bozzi* in particular; it inappropriately limits the reach of this Court's critical guidance in *Sargon*; and it places unwarranted and unwise obstacles to summary judgment. By lowering the gate to allow unreliable expert testimony at summary judgment, it inefficiently and unfairly allows cases which lack merit to avoid summary judgment and proceed to trial, at great cost both to the system and to moving defendants.

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[2] The difference between questions of admissibility and sufficiency has a substantial pedigree. *See Columbian Ins. Co. v. Lawrence* (U.S. 1829) 2 Pet. 25, 44 ("It is undoubtedly true, that questions regarding the admissibility of evidence, are entirely distinct from those which respect its sufficiency or effect.").

[3] The liberal construction rule derives from a perceived need to protect the right to trial by jury, but the Code of Civil Procedure and the summary judgment statute provide ample opportunity to discover, generate and present the admissible evidence needed to generate a triable issue of fact. *See* Code of Civil Procedure §437c(a) (providing for notice of motion 75 days prior to hearing); §437c(h),(i) (authorizing denial or continuance of motion and further discovery where additional time is needed to produce opposing evidence); *Aguilar*, 25 Cal.4th at 865. Justice is just as frustrated by the unfair requirement of a trial as it is by the unfair deprivation of one. *See* Clark, *The Summary Judgment,* 36 MINN. L. REV. 567, 578 (1952) ("a court has failed in granting justice when it forces a party to an expensive trial of several weeks' duration to meet purely formal allegations without substance fully as much as when it improperly refuses to hear a case at all.").

The Court should grant Review and reverse, to restore *Sargon* to its intended and proper scope, and to assure balance, fairness and efficiency in the operation of the rules of evidence and the summary judgment mechanism.

For the foregoing reasons, PLAC urges this Court to grant the Petition for Review and settle the law on each of these issues.

Respectfully submitted,

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Attachment

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Drinker Biddle & Reath, LLP, 50 Fremont Street, 20th Floor, San Francisco, CA. On May 28, 2013, I served the within document(s):

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☑ MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

SEE ATTACHED SERVICE LIST

☐ OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below via [delivery method] .

☑ HAND DELIVERY – by personally delivering the document(s) listed above to the address set forth below.

CALIFORNIA SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, CA 94102

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 28, 2013, at San Frnacisco, California.

Connie B. Gutierrez

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APPENDIX A

Corporate Members of the Product Liability Advisory Council

as of 5/3/2013

Total: 104

3M
Altec, Inc.
Altria Client Services Inc.
Anadarko Petroleum Corporation
AngioDynamics
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, LLC
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products

Corporate Members of the Product Liability Advisory Council

as of 5/3/2013

Mutual Pharmaceutical Company, Inc.

Navistar, Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

PACCAR Inc.

Panasonic Corporation of North America

Peabody Energy

Pella Corporation

Pfizer Inc.

Pirelli Tire, LLC

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

RJ Reynolds Tobacco Company

SABMiller Plc

Schindler Elevator Corporation

SCM Group USA Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Techtronic Industries North America, Inc.

Teva Pharmaceuticals USA, Inc.

TK Holdings Inc.

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Wal-Mart Stores, Inc.

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.