Case No. S153846

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PAMELA MEYER and TIMOTHY PHILLIPS, Individually,
and on Behalf of all Other Similarly Situated,

Plaintiffs and Appellants,

v.

SPRINT PCS, a Foreign Corporation, SPRINT SPECTRUM, L.P., a California Limited Partnership; and JOHN DOES 1 through 20, Inclusive

Defendants and Respondents.

APPELLANT'S OPENING BRIEF

After Decision by the Court of Appeal, Fourth Appellate District, Division Three, Case No. GO37375
On Appeal from the Superior Court of the State of California for the County of Orange
Honorable Sheila Fell, Judge Presiding
Superior Court Case No. 04CC06254
Service on the Attorney General and Orange County District Attorney required by Section 17209 of the Business and Professions Code and CRC 8.29(a)

Franklin & Franklin, APC
J. David Franklin (SBN 041659)
550 West "C" Street, Suite 950
San Diego, California 92101
Telephone: (619) 239-6300
Facsimile: (619) 239-6369

Law Offices of Anthony A. Ferrigno
Anthony A. Ferrigno (SBN 061104)
501 No. El Camino Real, Suite 200
San Clemente, California 92674-5799
Telephone: (949) 366-9700
Facsimile: (949) 366-9797

Counsel for Plaintiffs-Appellants

Case No. S153846

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PAMELA MEYER and TIMOTHY PHILLIPS, Individually,
and on Behalf of all Other Similarly Situated,

Plaintiffs and Appellants,

v.

SPRINT PCS, a Foreign Corporation, SPRINT SPECTRUM, L.P., a California Limited Partnership; and JOHN DOES 1 through 20, Inclusive

Defendants and Respondents.

APPELLANT'S OPENING BRIEF

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

DOCKETED CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

STATEMENT OF THE CASE

Susanne Ball, on behalf of the general public, filed a complaint against Defendants Sprint PCS and Sprint Spectrum, L.P. on May 27, 2004. (AA 001). The Complaint alleged several violations of the Unfair Competition Law (UCL), Section 17200, *et seq.* of the California Business & Professions Code. The first cause of action alleged unlawful business practices, alleging the Defendants included within their standard form Customer Service Agreement (hereinafter "CSA") certain provisions which the Defendants knew to be unlawful, unconscionable, and/or which violated California public policy. The second cause of action alleged unfair business practices against the same Defendants involving the same provisions contained within the standard form CSA of the Defendants.

After Proposition 64 was enacted in November, 2004, the trial court permitted the Plaintiff to amend the Complaint to name Pamela Meyer and Timothy Phillips, individually, and on behalf of all others similarly situated, to be substituted as Plaintiffs in place and instead of Susanne Ball.

On or about February 10, 2006, Plaintiffs Meyer and Phillips filed their Fourth Amended Complaint for damages, restitution, nominal damage, injunctive relief and declaratory relief as a putative class action. (AA 018). The first cause of action seeks restitution and injunctive relief under Section 17200 *et seq.* of the California Business & Professions Code for unlawful business practices, alleging violations of Sections 1770 (a)(14) and 1770(a)(19) of the California Civil Code. (Consumers Legal Remedies Act). (AA 025). The plaintiffs alleged that the Defendants inserted into

their standard form pre-printed CSA nine separate contractual provisions which the Plaintiffs allege are illegal and/or unconscionable or violate strong California public policy. (AA 025-030).

The second cause of action of the Fourth Amended Complaint alleges violations of Sections 1770(a)(14) and 1770(a)(19) of the California Civil Code, the Consumers Legal Remedies Act (AA 031). The third cause of action of the Fourth Amended Complaint seeks declaratory relief pursuant to Section 1060 of the California Code of Civil Procedure, seeking a declaration that the Defendants' CSA contains contractual provisions that are illegal and/or unconscionable. (AA 033).

On March 17, 2006, the Defendants filed a demurrer to the Plaintiffs' Fourth Amended Complaint. (AA 053). On April 5, 2006, the Plaintiff filed opposition to the Defendants' demurrer to the Plaintiffs' Fourth Amended Complaint. (AA 083). On April 18, 2006, the Court sustained the demurrer of the Defendants to the Fourth Amended Complaint without leave to amend. (AA 263). Judgment was entered in favor of the Defendants and against the Plaintiffs on May 12, 2006. (AA 067). Notice of entry of judgment was mailed to Plaintiffs on May 18, 2006. (AA 265-271). Plaintiffs filed their notice of appeal on July 14, 2006. (AA 273).

The Court of Appeal of the State of California for the Fourth Appellate District, Division Three, issued its decision on May 16, 2007, affirming the judgment of the trial court and holding that the Plaintiffs lacked standing under Civil Code Section 1780(a) to assert a CLRA claim. The Court of Appeal also held that the Plaintiffs could not maintain a claim for declaratory relief where the Plaintiffs failed to state a claim under either the UCL or the CLRA, because Plaintiffs lacked standing

to do so, and there were no other facts that revealed an actual controversy existed between the parties.

In *Meyer v. Sprint Spectrum L.P.* (2007) 150 Cal.App.4th 1136, the Court of Appeal acknowledged that "the inclusion of an unconscionable provision in a contract is an unlawful act," citing Section 1770, subdivision (a)(19). 150 Cal.App.4th at 1139. The Court of Appeal also acknowledged that "While Plaintiffs do not have to allege a monetary loss to have standing under the CLRA, they must suffer some damage as a result of Sprint's conduct." 150 Cal.App.4th at 1139. The Court of Appeal then stated that "Plaintiffs have failed to allege any damage caused by the inclusion of certain contract terms, and, therefore, Plaintiffs lack standing to pursue a claim under the CLRA." 150 Cal.App.4th at 1139.

The Court of Appeal further stated that "Plaintiffs were not injured in fact because of the inclusion of contractual provisions that have not been enforced, or threatened to be enforced against them." 150 Cal.App.4th at 1143-1144. The Court of Appeal also stated that: "Plaintiffs did not claim any of the allegedly illegal and/or unconscionable contract provisions were ever asserted against them, or prevented them from asserting their rights." 150 Cal.App.4th at 1144.

These statements by the Court of Appeal directly contradict the allegations contained in the Fourth Amended Complaint that Sprint enforced the illegal and/or unconscionable provisions of Sprint's CSA against its subscribers, including the Plaintiffs. Since this issue arose by way of demurrer, the Court of Appeal was required to assume that the facts alleged in the Fourth Amended Complaint were true. Obvioulsy, the Court of Appeal ignored that rule. There is currently pending in the

Contra Costa County Superior Court the case of *Meyer and Phillips v. Sprint PCS, et al.*; Case No. C03-03044. The Contra Costa County case involves identically the same parties as the case at bar. (Plaintiffs' Request for Judicial Notice, Exhibit A). In the Contra Costa County case, the Sprint Defendants filed a motion to compel arbitration pursuant to the terms of the Sprint CSA on May 18, 2006. (Plaintiffs' Request for Judicial Notice, Exhibit B). The Contra Costa County Superior Court denied Sprint's Motion to Compel Arbitration, because it found that the class action bar contained in the CSA was unconscionable. (Plaintiffs' Request for Judicial Notice, Exhibit C). Thus, not only have the Plaintiffs alleged in the Fourth Amended Complaint that Sprint enforced the unconscionable provisions of its CSA, but Plaintiffs have established that Sprint has in fact enforced those unconscionable provisions against the Plaintiffs in the Contra Costa County case.

In the case at bar, the Court of Appeal took into consideration the case of *Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 Cal.3d 582, 200 Cal.Rptr. 38, 676 P.2d 1060, and more specifically, considered the following language from the *Kagan* case:

> We thus reject Gibraltar's effort to equate pecuniary loss with the standing requirement that a consumer "suffer any damage". As it is unlawful to engage in any of the deceptive business practices enumerated in Section 1770, consumers have a corresponding legal right not to be subjected thereto. Accordingly, we interpret broadly the requirement of Section 1780 that a consumer "suffer any damage" to include the infringement of any legal right as defined by Section 1770.

The Court of Appeal attempted to distinguish the *Kagan* case from the case at bar, but the attempt was very unconvincing.

STATEMENT OF FACTS

The Fourth Amended Complaint alleges that the Defendants require its subscribers, including the Plaintiffs, to enter into a standard form pre-printed CSA which contains multiple contractual provisions which are unlawful and/or unconscionable. The Plaintiffs alleged both procedural unconscionability and substantive unconscionability with respect to the Defendants' CSA.

In paragraphs 10 through 14 of the Fourth Amended Complaint, the Plaintiffs allege procedural unconscionability with respect to Defendants' CSA. (AA 020-022). It is alleged that the CSA is in full force and effect with respect to each of the subscribers of the Defendants in California, including the Plaintiffs. In paragraph 11, it is alleged that the CSA is a contract of adhesion, with no opportunity for subscribers to negotiate or modify any of the terms of the standard form CSA. In paragraph 12, it is alleged that the CSA is in full force and effect, and that Sprint does not negotiate the terms of the CSA. It is further alleged that Sprint has never waived enforcement of any of the provisions in its CSA. Finally, in paragraph 13, it is alleged that the CSA is presented to subscribers on a take it or leave it basis, and that there is a great inequality in bargaining power in favor of the Defendants.

In the Fourth Amended Complaint, the Plaintiffs further allege that in the standard form pre-printed CSA of the Defendants, there are at least nine contractual provisions which are substantively unconscionable. (AA 025-030). The nine contractual provisions which Plaintiffs contend are substantively unconscionable are as follows:

1. The CSA provides that "You and Sprint further agree that neither

Sprint nor You will join any claim with the claim of any other person or entity in a lawsuit, arbitration or other proceeding; that no claim either Sprint or You has against the other shall be resolved on a class-wide basis; and that neither Sprint nor You will assert a claim in a representative capacity on behalf of anyone else." (AA 043). Thus, The Defendants' CSA contains a class action bar.

2. The Defendants' CSA further provides: "If for any reason this arbitration provision does not apply to a claim, we agree to waive trial by jury." (AA043) Thus, the Defendants' CSA requires subscribers to waive their right to a jury trial with respect to any claim that is not subject to arbitration prior to any dispute arising between contracting parties which waives the right to trial by jury is unenforceable.

The Defendants' CSA contains a provision for splitting the costs of arbitration as follows: "We agree to pay our respective arbitration costs, except as otherwise required by rules of JAMS or NAF, but the arbitrator can apportion these costs as appropriate." (AA 043).

3. The Defendants' CSA contains contract provisions which provide for limitation of liability, limitation of damages, and limitation of remedies. The limitation of liability provisions provide that the Defendants are not liable for any damages arising out of or in connection with any providing or failing to provide services, traffic or other accidents, or any health-related claims, arising from the use of services, any wireless devices or related accessories, any interruption or failure in accessing or attempting to access emergency services from the subscribers telephone, including 911. (AA 042) The limitation of damages provision provides: "In the

event we are found to be responsible to you for monetary damages relating to the Services (including wireless devices), you agree that any such damages will not exceed the pro-rated monthly recurring charge for your services during the affected period." (AA 042). The limitation of remedies provision provides:

> Under no circumstances are we liable for any incidental, consequential, punitive or special damages of any nature whatsoever arising out of or in connection with providing or failing to provide services, phones or other equipment used in connection with the services, including, without limitation, lost profits, loss of business, or cost of replacement products and services."

4. The Defendants' CSA does not specifically provide for discovery with respect to arbitration proceedings, except that if there is an arbitration proceeding, the "then-applicable rules" of JAMS or NAF apply. However, it is impossible to know at the time a subscriber enters into the Defendant's CSA what discovery, if any, will be provided sometime in the future when an arbitration proceeding occurs, under the then-applicable arbitration rules of JAMS or NAF. See *Armendariz v. Foundation Health Psychcare Services, Inc., supra*, holding that employees are entitled to sufficient discovery as a means of vindicating their claims in arbitration. 24 Cal.4th at pp. 104-106. Also see *Fitz v. NCR Corporation* (2004) 118 Cal.App.4th 702, 715, 13 Cal.Rptr.3d 88.

Other contractual provisions of the standard form pre-printed CSA of the Defendants which the Plaintiffs allege are illegal and/or unconscionable or violate strong public policy are a 60-day statute of limitations, an early termination fee of $150 for each line of service, which Plaintiffs allege is an unlawful liquidated damages provision, and unilateral amendment of the CSA by the Defendants, which

necessarily allows for unilateral modification by the Defendants of the arbitration provisions.

In this case, the Court of Appeal made the following statement in its decision: "Here, too, Plaintiffs were not injured in fact because of the inclusion of contractual provisions that have not been enforced, or threatened to be enforced, against them." 150 Cal.App.4th 1136-1137. This statement by the Court of Appeal is at odds and contrary to the allegations contained in Plaintiffs' Fourth Amended Complaint. In paragraph 1 of the First Amended Complaint, it is alleged:

> Plaintiffs allege violations of statutory provisions with respect to unconscionable and illegal provisions contained within the standard form Customer Service Agreement (CSA) of Defendants Sprint PCS and Sprint Spectrum LP, which said Defendants have and continue to enforce in this State, causing injury and/or damage to their subscribers in this state. (AA 018-019)

In paragraph 10 of the Fourth Amended Complaint, it is alleged:

> The standard form CSA is in force and effect with respect to each of the subscribers of Defendants' wireless telephone service within the State of California, including the Plaintiffs. However, the standard form CSA is void and unenforceable as an illegal agreement and/or unconscionable agreement because it contains multiple provisions which are unlawful and/or unconscionable under California law. The Defendants enforced this illegal and/or unconscionable agreement against all of its subscribers in California, including the Plaintiffs. (AA 020-020A).

In paragraph 12 of the Fourth Amended Complaint, it is alleged:

> The Defendants have also admitted in discovery responses that the Defendants had never initiated arbitration against any consumer wireless subscribers, but Defendants have moved to compel arbitration when consumer wireless subscribers in California has sued Sprint. Sprint has never waived enforcement of any of the provisions in their CSA, including any of the arbitration provisions at any time. (AA 021).

In paragraph 26 of the Fourth Amended Complaint, it is alleged: "The

enforcement by the Defendants of their illegal and/or unconscionable standard form pre-printed CSA against all of its subscribers in California, including the Plaintiffs, constitutes an unlawful business practice ...". (AA 030). In paragraph 31 of the Fourth Amended Complaint, it is alleged:

> Commencing at a time three years prior to the filing of the original complaint in this action, and continuing to the present time, the Defendants have enforced an illegal and/or unconscionable CSA against all of its subscribers in California, including the Plaintiffs. (AA 032).

In paragraph 34 of the Fourth Amended Complaint, it is alleged that "...Plaintiffs and the absent class members contend that the Defendants' CSA is illegal and/or unconscionable, and that the Defendants are enforcing against the Plaintiffs and other class members this illegal and/or unconscionable CSA ..." (AA 033).

QUESTIONS PRESENTED

1. **Whether the Court of Appeal's interpretation of the Consumers Legal Remedies Act was in error where the Court refused to allow the Plaintiffs injunctive relief to remove illegal and/or unconscionable provisions from the Defendants' Customer Service Agreement (CSA), holding the Plaintiffs had no standing because Plaintiffs had not suffered monetary damage.**

2. **Whether the Court of Appeal erred in refusing to allow the Plaintiffs to pursue a class action lawsuit for declaratory relief and injunctive relief under CCP Section 1060 for the purpose of requiring removal of certain illegal and/or unconscionable provisions from the Defendants' Customer Service Agreement (CSA).**

ARGUMENT

I. WHEN REVIEWING A DEMURRER ON APPEAL, AN APPELLATE COURT GENERALLY ASSUMES THAT ALL FACTS PLEADED IN THE COMPLAINT ARE TRUE. BUT IN THIS CASE, THE COURT OF APPEAL REFUSED TO ASSUME AS TRUE THE PLAINTIFFS' ALLEGATION IN THE FOURTH AMENDED COMPLAINT THAT "THE DEFENDANTS HAVE ENFORCED AN ILLEGAL AND/OR UNCONSCIONABLE CSA AGAINST ALL OF ITS SUBSCRIBERS IN CALIFORNIA, INCLUDING THE PLAINTIFFS"

The rules by which the sufficiency of a complaint is tested against a general demurrer is well settled. The demurrer is treated as admitting all material facts properly pleaded. *Quelimaine Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38, 77 Cal.Rptr.2c 709, 960 P.2d 513. It is not the ordinary function of a demurrer to test the truth of the Plaintiff's allegations or the accuracy with which the Plaintiff describes the Defendant's conduct.. A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint. The question of the Plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court. *Quelimaine Co. v. Stewart Title Guaranty Co., supra*, 19 Cal.4th at p. 47. When reviewing a demurrer on appeal, appellate courts generally assume that all facts pleaded in the complaint are true. *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 806; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877, 6 Cal.Rptr.2d 151.

In several paragraphs of the Fourth Amended Complaint, the Plaintiffs allege that Defendants have enforced, and continue to enforce in this State, the unconscionable and/or illegal provisions contained within Sprint's CSA. See paragraphs 1, 10, 12, 26, 31 and 34 of the Fourth Amended Complaint. (AA 018-109; 020-020A; 021, 030, 032 and 033). Notwithstanding the foregoing allegations

in the Fourth Amended Complaint, the Court of Appeal in this case stated: "Here, too, Plaintiffs were not injured in fact because of the inclusion of contractual provisions that have not been enforced, or threatened to be enforced against them." 150 Cal.App.4th at pp. 1143-1144. The Court of Appeal further stated: "Plaintiffs did not claim any of the allegedly illegal and/or unconscionable contract provisions were ever asserted against them, or prevented them from asserting their rights." 150 Cal.App.4th at p. 1144. Thus, the Court of Appeal committed a serious error in failing to following the rules applicable to demurrers when an appellate court reviews a demurrer on appeal. Apparently, a statement by counsel for Defendants in a legal brief that Sprint was not enforcing these unconscionable provisions was sufficient for the Court of Appeal in this case to completely ignore Plaintiff's allegations in the Fourth Amended Complaint. This breach of the rules relating to demurrers by the Court of Appeal must not be tolerated in this case.

II. THE PROPER STATUTORY INTERPRETATION OF THE CONSUMERS LEGAL REMEDIES ACT DOES NOT PRECLUDE A CLAIM FOR INJUNCTIVE RELIEF BY A CONSUMER WHO HAS BEEN THE VICTIM OF ONE OR MORE VIOLATIONS OF SECTION 1770 OF THE ACT, EVEN THOUGH THE CONSUMER HAS NOT YET SUFFERED ANY MONETARY DAMAGE

This case presents an issue of statutory interpretation with respect to the statutory provisions comprising the CLRA. In *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358, 371, this Court stated: "When used in a statute, words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." This Court further stated at p. 372:

> Where more than one statutory construction is arguably possible, our policy has long been to favor the construction that leads to the more reasonable result. This policy derives largely from the

> presumption that the Legislature intends reasonable results consistent with its apparent purpose. Thus, our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting, rather than defeating, the statute's general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.

This Court further stated at p. 373: "It is a settled principal of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."

Section 1760 of the Civil Code provides: "This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." In *Broughton v. Cigna Healthplans* (1999) 21 Cal.App.4th 1066, 90 Cal.Rptr.2d 334, 988 P.2d 67, the Court looked to the nature and purpose of the CLRA. The Court stated at p. 1077: "The CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices, which were identified in the 1969 Report of the National Advisory Commissioned on Civil Disorders." In *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, the Court stated at p. 14: "The CLRA is a legislative embodiment of a desire to protect California consumers and further a strong public policy of this State." See *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 868-870, 118 Cal.Rptr.2d 770.

Thus, under Section 1760, the CLRA has two underlying purposes. The first purpose is to protect consumers against unfair and deceptive business practices by enumerating those practices and making them unlawful. The second purpose under

Section 1760 is to provide efficient and economical procedures to secure such protection. *Wang v. Massey Chevrolet, supra,* 97 Cal.Appp.3th at 869; *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 135, 142 Cal.Rptr. 325.

Section 1770(a) provides: "The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful ...". Thereafter, in Section 1770, the Legislature sets forth 23 separate provisions which the Legislature deems to be unlawful acts. For example, Section 1770(a)(19) makes it unlawful to insert an unconscionable provision into a contract. Section 1750 of the Civil Code provides: "This title may be cited as the Consumers Legal Remedies Act." This title would suggest that it was the intent of the Legislature to provide a remedy for the commission of any act defined to be unlawful in Section 1770 Civil Code.

Thus, the CLRA was intended by the Legislature to provide a remedy for all the unlawful acts set forth in Section 1770, irrespective of whether or not the unlawful act caused monetary damage. The Court must adopt the construction that best effectuates the purpose of the law. *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715. Where more than one interpretation of the statute is possible, the applicable of rule of statutory construction is that the purpose sought to be achieved and evils to be eliminated have an important place in ascertaining the legislative intent. *Freedland v. Greco* (1955) 45 Cal.2d 462, 467.

It is evident from the language and structure of the CLRA that its legislative purpose is to protect consumers from the enumerated unfair and deceptive practices,

not simply to provide monetary compensation to those who have suffered financial loss as a result of such practices. The broad remedial provisions of the statute, which include specific provisions for injunctive relief, etc., bolster this conclusion, as does the prohibition of any waiver of consumer rights under the statute. One should also consider the express authorization of consumer class actions as a means of enforcement. The decision of the Court of Appeal thwarts, rather than furthers, the broad consumer protection purposes of the CLRA. As between two reasonable interpretations of the CLRA, one more protective of consumers and one less, there is the presumption that the more protective interpretation is correct.

In *Broughton v. Cigna Healthplans, supra*, this court stated that the "CLRA identifies as actionable certain deceptive business practices," citing Section 1770 of the Civil Code. 21 Cal.App.4th at 1077. Thus, as it is unlawful to engage in any of the unlawful practices enumerated in Section 1770, consumers have a corresponding legal right not to be subjected thereto. *Kagan v. Gibraltar Savings & Loan Assn., supra,* 35 Cal.3d at 593; *Wang v. Massey Chevrolet, supra,* 97 Cal.App.4th at 869.

The court further stated in *Broughton* at p. 1080:

> On the other hand, the evident purpose of the injunctive relief provision of the CLRA is not to resolve a private dispute, but to remedy a public wrong. Whatever the individual motive of the party requesting injunctive relief, the benefits of granting injunctive relief, by and large, do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the Plaintiff suffered.

In a public injunctive action, a Plaintiff acts in the purest sense as a private attorney general. *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 312.

The Legislature had the authority to allow these unlawful practices to be

enjoined without first requiring that consumers be harmed. If the goal is consumer protection, it makes no sense that the Legislature would require consumers to wait until they are actually harmed rather than preventing the harm preemptively. Specifically, as it relates to Section 1770(a)(19), why would the Legislature permit something unconscionable to occur before allowing consumers to enjoin the unlawful practice? It is not promoting the purposes of the CLRA to allow Defendants to engage in conduct made unlawful by Section 1770 of the Civil Code with impunity. The Court of Appeal acknowledged in its opinion that "The inclusion of an unconscionable provision in a contract is an unlawful act." Citing Section 1770(a)(19). *Meyer v. Sprint Spectrum L.P.* (2007) 150 Cal.app.4th 1136, 1139.

A. Section 1770 of the Civil Code Establishes the "Standing Requirements" For A Consumer Who Wishes To Bring A CLRA Action

In *Buckland v. Threshold Enterprises, Ltd.*, (2007) 155 Cal.App.4th 798, 813, the Court stated that standing goes to the existence of a cause of action. The Court also acknowledged that standing requirements vary from statute to statute, and must be assessed in light of the intent of the statute at issue. Article III of the United States Constitution obliges Plaintiffs in federal courts to show, at a minimum, an "injury in fact" that is, as a result of the Defendant's actions, they have suffered a distinct and palpable injury. *Warth v. Seldin* (1975) 422 U.S. 490, 501, 45 L.Ed.2d 343, 95 Sup.Ct. 2197. The requisite injury is defined as an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560 119 L.Ed.2d 351, 112 Sup.Ct. 2130. As the U.S. Supreme Court has explained, the

"injury in fact" requirement under Article III of the United States Constitution turns on the nature and source of the claim asserted, and in some cases, an injury in fact may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. *Warth v. Seldin, supra,* 422 U.S. at pp. 500-510.

With respect to the CLRA, an injury in fact exists solely by virtue of Section 1770 of the Civil Code creating legal rights, the invasion of which creates standing under the CLRA. That Section 1770 creates standing under the CLRA is supported by Section 1783 of the Civil Code. That Section provides: "Any action brought under the specific provisions of Section 1770 shall be commenced not more than three years from the date of the commission of such method, act, or practice." Thus, the statue of limitations for a CLRA claim is pegged to an action brought under the specific provisions of Section 1770. Thus, the prerequisite to bringing a CLRA action is exposure to an act which the Legislature has declared unlawful in Section 1770. The Plaintiffs in the case at bar have precisely that exposure. A contract of adhesion was imposed upon them by Sprint as a result of unequal bargaining power, and into which Sprint inserted unlawful/unconscionable provisions.

The Court of Appeal, in interpreting Section 1780(a) of the Civil Code held that said Section imposed a "standing requirement" and therefore, in order for a consumer to file a claim under the CLRA, the consumer must have suffered monetary damage. This very same court previously held in *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754, 15 Cal.Rptr.3d 271 that relief under the CLRA is specifically limited to those who suffered damage, meaning monetary damage.

Section 1780(a) of the Civil Code does not establish "standing requirements"

for a consumer who wishes to bring a CLRA action. Rather, Section 1780(a) defines what type of remedies a consumer who suffers "any damage" may obtain in an action against a person who employs a method, act, or practice declared to be unlawful by Section 1770. Subdivision (a) of Section 1780 provides:

> Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against such person to recover or obtain any of the following: (1) Actual damages, but in no case shall the total award of damages in a class action be less than $1,000. (2) An order enjoining such methods, acts or practices. (3) Restitution of property. (4) Punitive damages. (5) Any other relief which the court deems proper.

Thus, under Section 1780, a consumer who suffers "any damage" may recover actual damages, may obtain injunctive relief, may obtain restitution of property, and may obtain an award of punitive damages, among other things. There is no specific language within Section 1780 that states that a consumer that suffers no damage as a result of a violation of Section 1770 may not bring an action. If Section 1780 was simply intended to limit standing only to those persons who suffered "any damage", why did the Legislature go on in Section 1780 to enumerate the types of relief that were available to a person who had suffered "any damage"? If Section 1780 was intended to establish "standing requirements", surely the Legislature would have indicated words to the effect that an action under Section 1750 *et seq.* (CLRA) can only be brought by a consumer who suffers "any damage".

Section 1780 should be compared with Section 17203 and 17204 of the California Business & Professions Code, which clearly are statutes that establish "standing requirements" for bringing a UCL action. Section 17203 provides: "Any

person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the CCP ...". Section 17204 provides: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction ... by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Thus, under the UCL, in order for a private plaintiff to bring an action for injunctive or restitutionary relief, that private plaintiff must establish that he or she has suffered injury in fact and has lost money or property .

Section 1780 does not state that a consumer who has not suffered any damage cannot bring an action for injunctive relief. In fact, the Legislature has made it clear that the right to seek injunctive relief is expressly unaffected by the existence or non-existence of actual damages. Subdivision (d) of Section 1782 provides:

> An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with the provisions of subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with subdivision (a), a consumer may amend his complaint without leave of court to include a request for damages.

Thus, under Section 1782 of the Civil Code, the Legislature clearly establishes the right of a consumer to bring an action for injunctive relief that is not dependent on either showing or seeking actual damages.

B. Plaintiffs Have Suffered "Damage" As A Result Of Unconscionable Contract Provisions Inserted Into Sprint's CSA, Because Said Contract Provisions Violate Their Rights Under The Consumers Legal Remedies Act

In *Kagan v. Gibraltar Savings & Loan Assn., supra,* the plaintiff alleged that

the defendant bank violated the CLRA by falsely advertising that customers who opened an IRA at the bank would not be charged management fees. The plaintiff was looking for a financial institution would not charge fees for administering an IRA account. After the plaintiff had established her IRA account at the defendant bank, the bank sent her a notice that it was changing its past policy, and would now charge a management fee of $7.50 per year, to be deducted from all IRA accounts. After the plaintiff sent a letter to defendant bank pursuant to Section 1782 of the CLRA, Defendant bank advised plaintiff that no management fees had been deducted from her IRA account.

Defendant bank argued that plaintiff had suffered no damages cognizable under the CLRA as no fees were ever deducted from her account, and therefore, plaintiff was not a member of the class she purported to represent. Defendant bank argued that the plaintiff was precluded from bringing either an individual action or a class action, since her account was never debited for the management fee, and hence, she did not suffer any damage as required by Section 1780 of the Civil Code. The Court acknowledged that an individual action may be brought pursuant to Section 1780(a), and that a class action can be brought pursuant to Section 1781(a), which provides that any consumer entitled to bring an action under Section 1780(a) may, if the unlawful method, act or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

The Defendant bank contended that since the contested management fee was not deducted from the plaintiff's account, she no longer suffered any damage as

required for bringing an individual action under Section 1780. Therefore, argues the defendant, the plaintiff is also precluded from bringing a class action under Section 1781, which is expressly limited to any consumer entitled to bring an action under Section 1780. The court held that the plaintiff may properly bring the action on behalf o herself and as a representative of the class. 35 Cal.App.3d at p. 592. At p. 593, the court stated:

> We thus reject Gibraltar's effort to equate a pecuniary loss with the standard requirement that a consumer 'suffer any damage'. As it is unlawful to engage in any of the deceptive business practices enumerated in Section 1770, consumers have a corresponding legal right not to be subjected thereto. According, we interpret broadly the requirement of Section 1780 that a consumer 'suffer any damage' to include the infringement of any legal right as defined by Section 1770.

Since the foregoing quoted language relates specifically to Section 1780, it has reference to the plaintiff's ability to bring an individual action against the defendant bank.

In footnote 3 at page p. 593, the court in *Kagan* cited 15 U.S.C. Section 1640(TILA). At the time *Kagan* was decided, it was well established that TILA punished lenders for statutory violations even where no one suffered any actual damage as a result of the violation. *Gambardella v. G. Fox & Co.* (2nd Cir. 1983) 716 F.2d 104; *Brown v. Marquette Savings & Loan Assn.* (7th Cir. 1982) 686 F.2d 608; *Davis v. Werne* (5th Cir. 1982) 673 F.2d 866; *Hinkle v. Rock Springs National Bank* (10th Cir. 1976) 538 F.2d 295; *Demando v. Morris* (9th Cir. 2000) 206 F.3d 1300, 1303; *Edwards v. Your Credit, Inc.* (5th Cir. 1998) 148 F.3d 427, 432. Damage awards in TILA actions were in the nature of civil penalties, not compensation for actual losses. This reference by the court in *Kagan* to federal consumer statutes

makes it clear that *Kagan* was holding that a consumer would "suffer any damage" upon the infringement of any legal right of that consumer as defined by Section 1770 of the Civil Code.

Gibraltar further argued that permitting the plaintiff to bring a class action was contrary to the well recognized rule that a class representative be a member of the class which she purports to represent. The court pointed out at p. 593: "This argument ignores the clear legislative intent that prospective defendants under the Act not avert a class action by exempting or 'picking off' prospective plaintiffs one-by-one through the provision of individual remedies." The *Kagan* court found that Section 1782(c) provided that settlement with named plaintiffs will not preclude those plaintiffs from further prosecuting the action on behalf of the remaining members of the class.

In *Meyer v. Sprint Spectrum, supra,* the court stated at p. 1139:

> We also hold plaintiffs' claim under the CLRA fails for lack of standing. To have standing to assert a claim under the CLRA, an individual plaintiff must be a "consumer who suffers any damage as a result of" an act declared unlawful by Civil Code Section 1770. (Civ. Code §1780 subd. (a)). The inclusion of an unconscionable provision in the contract is an unlawful act. (Id. § 1770, subd. (a)(19). While plaintiffs do not have to allege a monetary loss to have standing under the CLRA, they must suffer some damage as a result of Sprint's conduct.

Thus, in the case at bar, the Court of Appeal acknowledged that the Plaintiffs did not have to allege a monetary loss in order to have standing under Section 1780 of the Civil Code. The Court of Appeal also adopts the definition of "injury in fact" from Black's Law Dictionary, 8th Ed. (2004) p. 801 as follows: "An actual or imminent invasion of a legally protected interest, in contrast to an invasion that is conjectural or

hypothetical." 150 Cal.App.4th at 1141. Thus, under this definition, an injury in fact can be an actual or imminent invasion of a legally protected right. With respect to the CLRA, Section 1770 establishes legally protected rights which are unwaivable. For example, as it relates to Section 1770(a)(19), a consumer has a right not to be subjected to a contract which contains unconscionable contract provisions.

In the case at bar, the Court of Appeal uses Webster's 3d New International Dictionary and Black's Law Dictionary to define "damage". Damage is defined as "loss due to injury: injury or harm to person, property or reputation"; in Webster's 3d New International Dictionary. 150 Cal.App.4th at 1146. "Damage" is defined as "loss or injury to person or property" in Black's Law Dictionary. 150 Cal.App.4th at 1146. As stated previously, "injury" is defined as "an actual or imminent invasion of a legally protected interest." Thus, using the definitions relied upon by the Court of Appeal, it is obvious that the definition of the word "damage" reaches far beyond "pecuniary damage".

What was the purpose of this Court in refusing to "equate pecuniary loss with the standing requirement that a consumer 'suffer any damage'"? 35 Cal.3d at p. 593. What was the purpose of this Court in utilizing the language that "We interpret broadly the requirement of Section 1780 that a consumer "suffer any damage" to include the infringement of any legal right as defined by Section 1770? 35 Cal.3d at p. 593. Defendant Gibraltar contended that the plaintiff was precluded from bringing an individual action since her account was never debited for the management fee, and therefore, she did not "suffer any damage" as required by Section 1780. Defendant Gibraltar also pointed out that before a person may bring a class action pursuant to

the provisions of Section 1781(a), that person must also be qualified to bring an individual action under Section 1780(a). Plaintiffs contend that the court in *Kagan* set forth in the language on p. 593 what it means for a consumer to "suffer any damage" that would justify that consumer in bringing an individual action against a defendant for a violation of Section 1770 of the Civil Code. Therefore, in order to bring an individual under Section 1780(a), all that is required is that a consumer suffer the infringement of any legal right as defined by Section 1770.

The Court in *Kagan* was also concerned with whether or not the Plaintiff was qualified to bring a class action on behalf of herself and as a representative of the class against Defendant Gibraltar. The court was specifically concerned with Defendant Gibraltar "picking off" prospective class action plaintiffs. The court found that Section 1782(c) established a clear legislative intent that prospective defendants under the CLRA not avert a class action by exempting or "picking off" prospective plaintiffs one-by-one through the provision of individual remedies. However, this part of the Court's decision had no bearing on the standing of a consumer to bring an individual action against a defendant pursuant to the provisions of Section 1780(a) of the Civil Code.

The Court of Appeal in the case at bar made a feeble attempt to distinguish *Kagan*. In that regard, the court in *Meyer* stated at p. 1148: "In *Kagan*, the plaintiff was damaged even though she personally suffered no pecuniary loss, because she opened an account at Gibraltar rather than some other bank as a result of material written and oral misrepresentations ...". First of all, there is no indication in *Kagan* that the Plaintiff ever claimed damage as a result of being unable to open an IRA

account at some other bank as a result of the misrepresentations. Furthermore, Defendant Gibraltar did not charge the plaintiff a management fee, nor is there any indication that Gibraltar would charge plaintiff a management fee in the future. Thus, the plaintiff in *Kagan* could show no damage as a result of having her IRA account at Gibraltar, which charged her no management fee, as opposed to having her IRA account at some other bank, which would also charge her no management fee.

The attempt by the Court in *Meyer* to distinguish *Kagan* is totally speculative, and does not make any sense whatsoever: *Kagan* is not distinguishable, since Kagan had never suffered any damage beyond the violation of her rights under Section 1770. She alleged that Gibraltar misrepresented its fees, but she had never paid any of the disputed fees. Therefore, *Kagan* squarely involved the question of whether a violation of Section 1770 constitutes any "damage" for purpose of Section 1780(a). The *Kagan* language at p. 593 was essential to the Court's ruling, and it is a holding worthy of respect in *stare decisis*.

The purpose of the CLRA strongly supports *Kagan's* reading of the statute. The CLRA is a broad, remedial statute which is meant to protect consumers, and which courts are required to construe liberally. In interpreting the CLRA, if there are two reasonable interpretations of the CLRA, one more protective of consumers, and one less protective, there is a presumption that the more protective interpretation is correct. The *Meyer* court's narrow, cramped reading of the term "damages" in the CLRA severely limits the number of adversely affected consumers who will have standing to seek relief under the CLRA. This narrow reading thwarts, rather than furthers, the broad consumer protection purposes of the CLRA.

In this case, Plaintiffs have alleged that the Sprint defendants violated Section 1770(a)(19) by inserting into the Sprint CSA at least nine contractual provisions which are unconscionable under California law. For example, if Sprint customers believe that the "class action bar" is enforceable, there may be occasions where Sprint is liable to its customers on a claim that is worth a small amount of damages. If the Sprint customers believe that the class action bar is valid, then no consumer is going to bring an individual action to recover on a claim for a small amount of damages because the costs of suit would exceed the recovery. Another specific example would be where Sprint and a customer have agreed to arbitrate a claim. The customer would have no way of knowing that splitting the arbitration fees and costs equally is unconscionable under California law. Therefore, the customer would be damaged by having to pay arbitration costs and fees that the customer should not have had to pay under California law. The presence of unconscionable provisions in a contract have a chilling effect on consumers.

The chilling effect on consumers is demonstrated in *Martinez v. Master Protection Corporation* (2004) 118 Cal.App.4th 107, 12 Cal.Rptr.3d 663 where the Defendant conceded that the cost-sharing provision in its arbitration agreement was problematic, but insisted that it was a "non-issue" because the Defendant had agreed to modify the agreement and bear the cost of arbitration. The Court found that the Defendant's purported modification failed to cure this significant defect. The Court stated that "... The risk that a claimant may bear substantial costs of arbitration, not just the actual imposition of those costs, may discourage an employee from exercising the constitutional right of due process." 118 Cal.App.4th at 116. Thus, the Court

acknowledged the "chilling effect" upon consumers who would be reluctant to file for arbitration of claims. See *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 280, 132 Cal.Rptr.2d 116 [employer's belated willingness to bear all costs of arbitration proceeding does not alter the fact that the arbitration provision is substantively unconscionable. The Court in *Martinez* specifically stated at p. 117: "The mere inclusion of the cost provision in the arbitration agreement produces an unacceptable chilling effect, notwithstanding Firemaster's belated willingness to excise that portion of the agreement."

In *People v. McHale* (1979) 25 Cal.3d 626, the Defendants contended that the inclusion of unlawful provisions in the Park's Rules and Regulations did not constitute an unlawful or unfair business practice because the Defendants did not attempt to enforce their rules and regulations. The court found that the Defendants' requirement constituted an unfair and deceptive business practice, since tenants were likely to believe a park has the authority to enforce rules it requires its tenants to acknowledge. The Court found that when a mobile home park operator requires tenants to sign park rules and regulations which the park is prohibited by law from enforcing,, those tenants are likely to be deceived. 25 Cal.3d at p. 635.

In *Gentry v. Superior Court, supra*, this Court acknowledged that many consumers are unaware that their legal rights have been violated. 42 Cal. 4th at p. 461. The court stated at p. 461:

> Without the availability of a class action mechanism, many consumer fraud victims would never realize that they have been wronged. As commentators have noted, often customers do not know that a potential defendant's conduct is illegal. When they are being charged an excessive interest rate or a penalty for check bouncing, for example, few know or even sense that their rights are being violated.

The court further stated at p. 462:

> Class actions may be needed to assure the effective enforcement of statutory policies, even though some claims are large enough to provide an incentive for individual action. While employees may succeed under favorable circumstances, in recovering unpaid overtime through a lawsuit or a wage claim filed with the Labor Commissioner, a class action may still be justified if these alternatives offer no more than the prospect of random and fragmentary enforcement of the employer's legal obligation to pay overtime. By preventing a failure of our justice system, the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights and statutory sanctions. In other words, absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime.

Thus, as it relates to the case at bar, each of the unconscionable contract provisions complained of in the plaintiffs' Fourth Amended Complaint are also contained in the contracts that Sprint has with each of its customers in California. This involved several million contracts, all containing the same unconscionable contract provisions. It is extremely important that this class action lawsuit be allowed to proceed in order that this violation of the CLRA may be rectified by the removal of the unconscionable provisions from the millions of contracts that Sprint has with its customers in California.

Under the terms of Sprint's standard form CSA, Sprint has reserved to itself the authority to unilaterally change the CSA at any time. Thus, the fact the Sprint's CSA still contains provisions that are contrary to the decisions of California Appellate Courts over the last several years is something that is solely and completely under Sprint's control. Sprint has consciously chosen to retain these unconscionable and/or unlawful provisions in its standard form CSA for both new and existing customers.

Why? Presumably, to continue to deceive its customers into believing that their rights are more limited than they really are. This is clearly not a situation where Sprint in good faith included a provision in a single long-term contract which has since been shown to be unconscionable and unenforceable, and which Sprint has no intention of trying to enforce. Sprint is fully aware that its deliberate use of unconscionable contract provisions in its CSA exploits consumer unsophistication, and that is why it was reasonable for the Legislature in Section 1770(a) of the Civil Code to provide a cause of action to halt such harmful practices.

C. Consumers Are Entitled To Have The Courts Provide A Remedy For Any Unlawful Acts Enumerated In Section 1770 In Order To Carry Out The Intent Of The Legislature In Enacting The CLRA

The maxims of jurisprudence provide that "For every wrong, there is a remedy." Civil Code Section 3523. The maxims of jurisprudence also provide that "No one can take advantage of his own wrong." Civil Code Section 3517. Where a legal wrong has been committed, a court must grant appropriate relief. *Taylor v. S&M Lamp Co.* (1961) 190 Cal.App.2d 1700, 12 Cal.Rptr. 323. The legislative policy of the state is to provide a remedy for every legal wrong by whomever or upon or against whomsoever committed. *Murdoch v. Murdoch* (1920) 49 Cal.App. 775, 194 Pac. 762. Under fundamental legal principals, a statute may not be construed as creating a right without a remedy. *Bermite Powder Co. v. Franchise Tax Board of California* (1952) 38 Cal.2d 700, 242 P.2d 9. Where persons are subjected by others to conduct which is deemed unfair and contrary to public policy, the courts may afford necessary protection in the absence of statute. *Williams v. International Brothers of Boilermakers, Iron Shipbuilders and Helpers of America (1946) 27*

Cal.2d 586, 162 P.2d 903.

Courts have broad equitable powers to fashion whatever remedies are needed to redress obvious wrongs. *Crane v. Electronic Memories and Magnetics Corporation* (1975) 50 Cal.App.3d 509, 123 Cal.Rptr. 419. Where a question of a violation of declared public policy in a statute is involved, courts of equity are invested with the power to design their decrees so as to enforce rights and compel performance of the duty described therein. Where the right is present, the remedy exists. *Elsis v. Evans* (1958) 157 Cal.App.3d 399, 321 P.2d 514.

The Court of Appeal thought it was significant that the Defendants claimed that they had not actively enforced, or threatened to actively enforce, the illegal and/or unconscionable contract provisions against the Plaintiffs. This apparently entered into the Court's reasoning that the Plaintiffs had not suffered any monetary damage. The analysis of the Court of Appeal is incorrect. The act which is made unlawful by Section 1770(a)(19) is simply inserting an unconscionable provision into a contract. Thus, the unlawful conduct occurred at the very moment that the Defendants placed the alleged illegal and/or unconscionable provisions into the Sprint standard form CSA. Whether there was any attempt to enforce any of those provisions or not is simply irrelevant to the occurrence of the violation.

The Defendants have argued to the Courts that the Defendants have never sought to enforce any of the unconscionable provisions in Sprint's CSA against the Plaintiffs. This assertion is simply not true. In the case of *Meyer and Phillips v. Sprint PCS, et al.,* Case No. C03-03044, currently pending in the Contra Costa County Superior Court, the Defendants filed a motion to compel arbitration pursuant

to the terms of the Sprint CSA. That motion was filed on May 18, 2006. (Plaintiffs' Request for Judicial Notice). The Contra Costa County Superior Court denied Sprint's Motion to Compel Arbitration, because it found that the class action waiver contained in the CSA was unconscionable. (Plaintiffs' Request for Judicial Notice). In Defendants' Answer to Petition for Review, Defendants' counsel made the following statement at p. 24:

> It follows that even if Meyer and Phillips had alleged facts sufficient to constitute a declaratory relief cause of action, the Superior Court would have been well within its discretionary powers in declining to decide in a vacuum the purported unconscionability of form contract terms that had not been applied or enforced against them or anyone else."

This statement was written on July 16, 2007, more than a year after the same Defendants had filed their motion against these same Plaintiffs in the Contra Costa County Superior Court. Plaintiffs contend that this Court should sanction counsel for Defendants for what appears to be an intentional misrepresentation of the truth.

D. The Decision Of The Court Of Appeal Allows Large Corporations Who Regularly Require Consumers to Enter Into Standard Form Contracts Of Adhesion To Ignore Decisions of the Courts in this State That Have Found Certain Contractual Provisions To Be Illegal And/Or Unconscionable

The Court of Appeal's decision in *Meyer* promotes continued premeditated violations of the provisions of Section 1770 Civil Code at the expense of California consumers. Instead of protecting consumers, the decision of the Court of Appeal protects those large corporations who continue to insert unconscionable contract provisions into their standard form contracts of adhesion. This allows those corporations to project a deliberately misleading status of California law to consumers for the purpose of their own economic gain.

Class actions are often the only effective way to halt corporate wrongdoing, and the *Meyer* decision severely impacts the ability of consumers to eliminate unconscionable provisions from the contracts of adhesion that are regularly presented to consumers by large corporations. A perfect example of this is the "Class Action Bar", which Plaintiffs contend to be unconscionable. In considering whether class action bars are unconscionable, this court in *Discover Bank v. Superior Court, supra*, emphasized that class actions are often the only effective way to halt corporate wrongdoings. 36 Cal.4th at p. 161.

In *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 97 Cal.Rptr.2d 179, 2 P.3d 27, the Court stated at p. 435:

> "By establishing a technique where the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress. Generally, a class suit is appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer. (Emphasis added).

The Court in *Linder* further stated at p. 445:

> "Not only do class actions offer consumers a means of recovery for modest individual damages, but such actions often product "several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims.

The Court in *Linder* emphasized the role of the class action in deterring and redressing wrongdoing. 23 Cal.App.4th at pp. 445-446. The Court pointed out that problems which arise in the management of a class action lawsuit involving numerous small claims does not justify a judicial policy that would permit a defendant to retain

the benefits of its wrongful conduct and to continue that conduct with impunity.

In *State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472, 224 Cal.Rptr. 605, 715 P.2d 564, the court affirmed the principle that defendant should not profit from their wrongdoing "simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts.

The main purpose of the Plaintiff in filing this lawsuit was to force the Defendants to remove from their standard form CSA many provisions which Plaintiffs believe to be unconscionable under California law. This would affect millions of currently existing consumer contracts between Sprint and its customers. Despite the existence of clear law to the contrary, Sprint still insists upon placing these unconscionable provisions into its CSA.

As an example, large corporations, including Sprint, have continued to enforce the "class action bar" provision in their contracts, notwithstanding the Court decisions in *Discover Bank v. Superior Court, supra; Gentry v. Superior Court, supra; Aral v. Earthlink, Inc.*(2005) 134 Cal.App.4th 544; *Independent Association of Mailbox Center Owners v. Superior Court* (2005) 133 Cal.App.4th 396; *Klussman v. Cross-Country Bank*(2005) 134 Cal.App.4th 1283; *Gatton v. T-Mobile USA* (2007) 152 Cal.App.4th 571; *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862; *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1151; and *Laster v. T-Mobile USA, Inc., supra.* There are many other cases too numerable to cite all dealing with the issue of the unconscionability of "class action bars" post-*Discover Bank.* However, it should be specifically noted that in the Contra Costa County case

involving exactly the same parties as the parties in this case, after the trial court found Sprint's class action bar to be unconscionable, the Sprint Defendants have made no effort to remove the class action waiver from their CSA.

Another example is the contractual provision requiring the pre-dispute waiver of trial by jury with respect to claims not subject to arbitration. This court held such a provision to be unlawful and/or unconscionable. *Grafton Partners v. Superior Court*, (2005) 36 Cal.4th 944. Notwithstanding this Court's decision in *Grafton Partners*, the Sprint Defendants still seek to enforce its unlawful jury trial waiver.

Yet a third example may be found in *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, where the Court affirmed the District Court's conclusion that the legal remedies provision contained in AT&T's CSA was unconscionable and unenforceable under California law because it contained limitations of liability, limitations on damages, and limitations on remedies. In this case, the Sprint CSA contains provisions that are almost identical to the legal remedies provision contained in AT&T's CSA. Notwithstanding the *Ting* decision, the Sprint defendants continue to enforce those provisions which limit liability, limit damages and limit remedies.

In *Discover Bank v. Superior Court, supra*, the Court discussed exculpatory contract clauses that are contrary to public policy, citing Section 1668 of the California Civil Code. 36 Cal.4th at p. 162. In *Ting v. AT&T* (ND Cal. 2002) 12 F.Supp.2d 902, 924, AT&T included in its CSA contractual provisions almost identical to the contractual provisions in this case that were designed to limit the subscribers' rights and remedies in the event of a dispute. The Court in *Ting* found that those contract provisions limiting liability, damages and remedies were illegal

and/or unconscionable. Other cases have held that damage limitations are contrary to public policy and unlawful. See *Armendariz v. Foundation Health Psychcare Services. Inc., supra,* 24 Cal. 4th at p. 100, 104; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1529, 1554; *Gavin W. V. YMCA of Metropolitan Los Angeles* (2003) 106 Cla.App.4th 662, 671, 131 Cal.Rptr.2d 168; *Garnder v. Downtown Porsche Audo* (1986) 180 Cal.App.3d 713, 716, 225 Cal.Rptr. 757; *Healthnet of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 6 Cal.Rptr. 3d 235.

Yet a fourth example is the fact that Defendant Sprint continues to enforce a provision in its CSA which calls for the splitting of the costs of arbitration. In *Armendariz v. Foundation Health PyschCare Services, Inc.* (2000) 24 Cal.4th 83, the Court stated at pp. 110-111: "We conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in Court." The Court found that the payment of large, fixed forum costs, especially in the face of expected meager awards, served as a significant deterrent to the pursuit of FEHA claims. 24 Cal.4th at 111. The Court in Armendariz also acknowledged that under arbitration rules, an employee may be obligated to pay arbitrator's fees ranging from $500 to $1000 per day or more, a $500 filing fee, and administrative fees of $150 per day, in addition to room rental and court reporter fees. 24 Cal.4th at 107.

In *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th

495, the Court suggested at p. 507 that the holding in *Armendariz* can be extended beyond the employment arena to cover other types of unwaivable claims based on or tethered to statutes. In the case at bar, we are dealing with the CLRA, an act which establishes public rights, and under Section 1751 of the California Civil Code, "Any waiver by a consumer of the provisions of this title is contrary to public policy, and shall be unenforceable and void.

Even when a large corporation loses a case on the ground that their CSA contains illegal and/or unconscionable provisions, said corporations do not, and will not, remove those provisions from their Standard Form CSA. Thus, the only way to enforce the law is to pursue the matter as a class action and have the Court remove the unconscionable provisions from the corporation's contracts in California.

The decision of the Court of Appeal in this case is a tremendous blow to class action litigation, particularly when the right to seek class action relief in consumer cases has been extolled by California courts. *America Online, Inc. v. Superior Court, supra,* 90 Cal.App.4th at p. 17; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964; *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1500.

E. The Meyer Decision Requires Those Consumers Who Have Been The Victims Of Any Of The Unlawful Practices Enumerated In Section 1770 Civil Code But Who Did Not Suffer Any Monetary Damage As A Result Thereof To Involuntarily Waive Provisions Of The CLRA In Violation Of Section 1751 Of The Civil Code

In *Wang v. Massey Chevrolet, supra,* automobile lessees brought an action

held Plaintiffs' claims of alleged misrepresentation on the part of Lessor to be barred

by the parol evidence rule. The Court of Appeal reversed, holding that the CLRA claim was not barred by the parol evidence rule. The Court stated: "Thus, not only are the provisions of the Act to be liberally construed (Civil Code Section 1760), but any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void. (Civil Code Section 1751)." 97 Cal.App.4th at 869. The Court further stated that permitting a parol evidence bar or defense would be tantamount to a waiver of the protections of the CLRA, which waiver is contrary to public policy. 97 Cal.App.4th at 870.

In *Gentry v. Superior Court, supra*, the court had occasion to determine whether a class action or class arbitration bar would undermine the Plaintiff's statutory rights. The case involved minimum wage and overtime laws, which by statute are unwaivable. This court found that, under some circumstances, a class action/arbitration bar would lead to a de facto waiver of statutory rights, and would impermissibly interfere with an employee's ability to vindicate unwaivable rights and to enforce the overtime laws. 42 Cal.4th at p. 457.

In the case at bar, the *Meyer* decision in essence requires any consumer who has been a victim of any act declared unlawful by Section 1770 of the Civil Code, but who has not suffered any monetary damage, to waive any such violation of Section 1770. This is contrary to the "anti-waiver" provisions of Section 1751 of the Civil Code. The Court of Appeal cannot force an involuntary waiver by a consumer of the provisions of the CLRA, because such a waiver is contrary to public policy, and is unenforceable and void. In this case, the Plaintiffs and the putative class members have had multiple unconscionable contract provisions inserted into the Defendants'

CSA. Under the CLRA, or California law in general, Plaintiffs and the putative class members should have the right to have the unlawful provisions removed from the CSA. To deny Plaintiffs and the putative class members that right constitutes an involuntary waiver pursuant to the provisions of Section 1751 of the Civil Code.

III. THE COURT OF APPEAL ERRED IN REFUSING TO ALLOW THE PLAINTIFFS TO PURSUE A CLASS ACTION LAWSUIT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF UNDER CCP SECTION 1060 FOR THE PURPOSE OF REQUIRING REMOVAL OF CERTAIN ILLEGAL AND/OR UNCONSCIONABLE PROVISIONS FROM THE DEFENDANTS' CUSTOMER SERVICE AGREEMENT (CSA)

Section 1060 of the California Code of Civil Procedure provides in pertinent part as follows:

> A person interested ... under a contract ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the Superior Court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. ...The declaration may be had before there has been a breach of the obligation in respect to which said declaration is sought.

Section 1060 authorizes an "original action". This means that the Plaintiffs do not need some other cause of action in order to maintain an action for declaratory relief, contrary to the ruling of the Court of Appeal. Thus, Plaintiffs need only show that they are "under a contract" that they "desire a declaration of their rights and duties with respect to another" and that there is an "actual controversy. It is beyond dispute that the Plaintiffs are under a contract with Sprint. It is also beyond dispute that the Plaintiffs desire a declaration of their rights and duties with respect to Sprint.

CCP Section 1060 confers standing upon any person interested under a contract to bring an original action for declaratory relief in cases of actual controversy relating to the legal rights and duties of the respective parties. *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 892, 72 Cal.Rptr.2d 73; *Brown Field v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 256 Cal.Rptr. 240; *Maguire v. Hibernia Savings & Loan Society* (1944) 23 Cal.2d 719, 728, 146 P.2d 653; *Columbia Pictures Corp. v. DeToth* (1945) 26 Cal.2d 753, 760, 161 P.2d 217.

A complaint for declaratory relief must show the following: (a) A proper subject of declaratory relief within the scope of CCP Section 1060; (b) an actual controversy involving justiciable questions relating to the rights or obligations of the parties. 5 Witkin, *California Procedure, Pleading,* Section 809, pp. 264-265, 4th Ed.; *City of Tiburon v. Northwestern Pacific Railroad Co.* (1970) 4 Cal.App.3d 160, 170, 84 Cal.Rptr. 569. CCP Section 1060 specifically provides for a declaration of rights under a written contract. 5 Witkin, *California Procedure, Pleading*, Section 815, p. 269, 4th Ed.

The purpose of declaratory relief is to eliminate uncertainties and controversies that may result in future litigation, and hence, to quiet or stabilize an uncertain or disputed legal relation by permitting a prompt adjudication of the respective rights and obligations of the parties. *Marina Development Co. v. County of Los Angeles* (1984) 155 Cal.App.3d 435, 443, 202 Cal.Rptr. 377; *City of Tiburon v. Northwestern Pacific Railroad Co., supra,* 4 Cal.App.3d at 173. Declaratory relief enables the parties to shape their future conduct so as to avoid the breach of an

obligation. *Babb v. Superior Court* (1971) 3 Cal.3d 841, 848, 92 Cal.Rptr. 179, 470 P.2d 379; *Watson v. Sansone* (1971) 19 Cal.App.3d 1, 3, 96 Cal.Rptr. 387.

There is a unanimity of authority to the effect that the declaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to settle controversies at risk before they lead to repudiation of obligations, invasion of rights or commissions of wrongs. In short, the remedy is to be used in the interests of preventative justice, to declare rights rather than execute them. *Travers v. Louden* (1967) 254 Cal.App.2d 926, 931, 67 Cal.Rptr. 654; *Baxter Healthcare Corporation v. Denton* (2004) 120 Cal.App.4th 333, 360, 15 Cal.Rptr. 3d 430. In *Mycogen Corporation v. Monsanto Co.* (2002) 28 Cal.4th 888, 898, 123 Cal.Rptr.2d 432, 51 Pac.3d 297, the court stated: "Under the provisions of the Act, a declaratory judgment may be brought to establish rights once a conflict has arisen, or a party may request declaratory relief as a prophylactic measure before a breach occurs. In an action for declaratory relief to test the enforceability of covenants or servitudes asserted against property, the Court stated that the restrictions need not be violated before initiating an action. *Riner v. Danial* (1989) 211 Cal.App.3d 682, 688-689, 259 Cal.Rptr. 570. The declaratory relief action is unusual in that it may be brought to determine and declare rights before any action invasive of those rights has occurred. 5 Witkin, *California Procedure, Pleadings,* Section 806, pp. 262-263, 4th Ed. For example, the interpretation of a contract is clearly a proper subject of declaratory relief. *Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 846-847, 44 Cal.Rptr.2d 227.

In Paragraph 24 of the Fourth Amended Complaint, the Plaintiffs set forth with

specificity each of the nine contract provisions in the Defendant's CSA which the Plaintiffs have alleged to be illegal and/or unconscionable. (AA 025-030). The provisions of the Defendants' standard form pre-printed CSA which the Plaintiffs allege are illegal and/or unconscionable are as follows: (1) A class action waiver; (2) a pre-dispute jury trial waiver when the arbitration clause does not apply to a particular claim; (3) limitations on liability, damages, and remedies; (4) a 60-day statute of limitations; (5) an early termination fee of $150 for each line of service which is an unlawful liquidated damage provision; (6) arbitration cost-splitting requirements that are both illegal and/or unconscionable; (7) no pre-arbitration discovery whatsoever; which is illegal and/or unconscionable under applicable California law; (8) unilateral amendment of the CSA by the Defendants which allows for unilateral modification by the Defendants of the arbitration provisions.

In *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 216 Cal.Rptr. 345, 702 P.2d 503, the Plaintiff asserted a cause of action for a judicial declaration that certain bank charges were oppressive and unconscionable. The court held that the Plaintiff's second cause of action for declaratory relief on the ground that the bank's NSF charges were oppressive, unreasonable or unconscionable stated a viable cause of action. The court in *Perdue* pointed out that in 1979, the Legislature enacted Civil Code Section 1670.5, which codified the established doctrine that a court can refuse to enforce an unconscionable provision in the contract. 38 Cal.3d at p. 925.

In *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1134 the Plaintiffs brought a state class action against AT&T for declaratory and injunctive relief, alleging that the legal remedies provisions violated California's consumer protection and contract

laws, finding AT&T's CSA unconscionable, and in violation of California public policy. The district court issued a permanent injunction against enforcement of certain sections of the CSA. The contract provisions enjoined were those banning class actions against the carrier, requiring customers to split arbitration fees with the carrier, and requiring any arbitration to remain confidential. 319 F.3d at 1130. The court in *Ting* pointed out that in California, a contract or clause is unenforceable if both procedurally and substantively unconscionable, citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 Cal.Rptr.2d 745; 6 P.3d 669, 690; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138, 145.

The court in *Ting* affirmed the district court's conclusion that the legal remedies provisions were unenforceable as unconscionable under California law. 319 F.3d at p. 1152.

In *Baker Pacific Corp. v. Suttles* (1990) 220 Cal.App.3d 1148, 1154, 269 Cal.Rptr. 709, the court stated that "Requiring prospective employees to sign an illegal agreement as a condition of employment is contrary to law." In *Baker Pacific,* the Plaintiff brought an action for declaratory relief to determine whether or not the agreement was illegal. Likewise, in the case at bar, the Plaintiffs have filed a declaratory relief action to determine whether or not the Defendants' CSA contains illegal and/or unconscionable contract provisions that are unenforceable.

In paragraph 34 of the Fourth Amended Complaint, the Plaintiffs set forth with specificity the "actual controversy between the Plaintiffs and the Defendants". The Plaintiffs contend that the Defendants' CSA contains illegal and/or unconscionable contract provisions. It is alleged that the Defendants dispute those

contentions and contend that their CSA contains no illegal and/or unconscionable contract provisions. (AA 033).

The Court of Appeal made a serious error in this case when it stated that there was no actual controversy between the Plaintiffs and the Defendants because the contract terms which the Plaintiffs challenge as illegal and/or unconscionable were never affirmatively asserted against the Plaintiff. *Meyer,* 150 Cal.App.4th at 1139. The Court of Appeal also erroneously stated that the declaratory relief action was based entirely upon allegations of violations of the CLRA and the UCL because of the fact that the Plaintiffs incorporated by reference all other allegations of the Fourth Amended Complaint into their cause of action for declaratory relief. The Court of Appeal determined that because the Plaintiffs had no standing to bring a UCL claim or a CLRA claim, since they had not suffered monetary loss, that this precluded plaintiffs from pursuing their declaratory relief action. Apparently, the Court of Appeal believed that one must suffer damage in order to assert a declaratory relief action. Such an assertion is contrary to law. It is not necessary to plead damages in an action for declaratory relief. *Twain Harte Homeowners' Assn. v. Patterson* (1987) 193 Cal.App.3d 184, 188, 239 Cal.Rptr. 316.

The Plaintiffs were not relying on violations of the CLRA with respect to their claim that nine provisions of the Defendants' CSA were unconscionable. In paragraph 18 of the Fourth Amended Complaint, one of the common questions of law and fact alleged by Plaintiffs was "whether the standard form CSA is unconscionable and unenforceable under Section 1670.5 of the California Civil Code. Section 1670.5 provides in pertinent part as follows:

> If a court as a matter of law finds a contract or any clause of the contract to have been unconscionable at the time it was made, the Court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Section 1752 of the Civil Code provides: "Class actions by consumers brought under the specific provisions of Chapter 3 (commencing with Section 1770) of this Title shall be governed exclusively by the provisions of the Chapter 4 (commencing with Section 1780); however, this shall not be construed so as to deprive a consumer of any statutory or common law right to bring a class action without resort to this title." In paragraph 16 of the Fourth Amended Complaint, it is alleged: "This action has been brought and may be properly maintained as a class action, pursuant to the provisions of CCP Section 382 and Civil Code Section 1781 ...". Obviously, the Plaintiffs were not relying exclusively on Section 1781, but were also relying upon Section 382 CCP as a basis for bringing this class action. Thus, the Court of Appeal was in error when it stated that the Plaintiffs' declaratory relief action was based entirely upon a violation of the CLRA.

Sprint argues that there is no actual controversy here because Sprint has not yet enforced the disputed contract provisions. This contention is contrary to law because it would require the Plaintiffs first to breach the contract, then wait to see whether Sprint attempts to enforce the terms. Section 1060 flatly authorizes a party to seek a declaration of rights before breaching a contract. See CCP Section 1060. The "actual controversy" standard is meant to prevent courts from issuing advisory opinions on speculative legal questions that may not arise. Sprint attempts to turn this

standard on its head: It asks the Court to decline to decide concrete questions presented in this case – the validity of certain contract terms – based on the speculation that Sprint might choose not to enforce them. If Sprint is serious about declining to enforce the provisions, it can always moot this controversy by binding itself in new contracts with the Plaintiffs that do not contain the disputed provisions. But Sprint cannot moot the action by asserting that the Plaintiffs must wait to see whether or not Sprint decides to enforce provisions that are currently in effect.

It also should be pointed out that in Sprint's Answer to Petition for Review, at pp. 22-23, Sprint admits that declaratory relief claims are just as available as they always have been. However, Sprint states that Meyer and Phillips had not even attempted to allege facts establishing any such non-UCL/CLRA claim. A close reading of the Fourth Amended Complaint establishes otherwise.

IV. CONCLUSION

For all of the reasons set forth hereinabove, this Court should reverse the decision of the Court of Appeal and reverse the judgment of the trial court, and direct that this case once again proceed in the trial court.

DATED: November 7, 2007

FRANKLIN & FRANKLIN

By: _____
J. DAVID FRANKLIN
One of the Attorneys for Plaintiffs/
Appellants

CERTIFICATE OF APPELLANT'S COUNSEL OF LENGTH OF BRIEF

Counsel for Plaintiff and Appellant certifies that the word count of the computer program used to prepare Appellants' Opening Brief is 11,174 words. The word count in the body of the brief includes page citations in the Appellate record as well as legal authorities cited in the body of the brief.

DATED: November 7, 2007

FRANKLIN & FRANKLIN

By: 

J. DAVID FRANKLIN
One of the Attorneys for Plaintiffs and Appellants

Pamela Meyer and Timothy Phillips, Individually and On Behalf of all others Similarly Situated v. Sprint PCS and Sprint Spectrum, LP
California Supreme Court, Case No. #S153846

PROOF OF SERVICE

I, J. David Franklin, declare as follows:

1. My business address is 550 West "C" Street, Suite 950, San Diego, California 92101. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service; I am over the age of eighteen and I am not a party to this action.

2. On November 12, 2007, I served the following documents:

APPELLANTS' OPENING BRIEF

on the following parties to this action:

Michelle Floyd, Esq.
REED SMITH LLP
Two Embarcadero Center
Suite 2000
San Francisco, CA 94111-3922
Tel: (415) 543-8700
Fax: (415) 391-8269
Attorneys for Defendants and Respondents

Attorney General of the State of California
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-3664

Orange County District Attorney's Office
Attn: Consumer Protection
400 Civic Center Drive West
Santa Ana, CA 92701

Hon. Sheila Fell
Judge of the Superior Court
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

Clerk, Court of Appeal
Fourth Appellate District, Div. Three
925 N. Spurgeon Street

Santa Ana, CA 92

☒ (BY MAIL) C.C.P. § 1013(a)(1) & (3)
I deposited such envelope in the mail at San Diego, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California 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.

☐ (BY PERSONAL SERVICE) C.C.P. § 1011; I delivered such envelope by and to the addressee.

☐ (BY OVERNIGHT MAIL) C.C.P. § 1013(c); I am readily familiar with the practice of this firm for collection and processing of correspondence for mailing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight mail location located at 550 West "C" Street, San Diego, CA 92101 in the ordinary course of business on the date of this declaration.

☐ (BY FACSIMILE) At the time of transmission, I was at least 18 years of age and not a party to this legal proceeding. I transmitted the above-referenced documents by facsimile machine, pursuant to California Rules of Court, Rule 2006. The facsimile machine I used complied with Rule 2003 and no error was reported by the machine. Pursuant to Rule 2006, I caused the machine to print a transmission record of the transmission, a copy of which is available upon request.

☐ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 12, 2007, at San Diego, California.

J. David Franklin