Re Civil Court 10-16

S166435

No. S166435

IN THE SUPREME COURT OF CALIFORNIA

JAMES CLAYWORTH, ET AL.,

Plaintiffs and Appellants,

v.

PFIZER INC., ET AL.,

Defendants and Respondents.

On Petition for Review of the Decision of the Court of Appeal
No. A116798 (Div. 2)
Alameda County Super. Ct. No. RG04172428
Hon. Ronald M. Sabraw, Judge
Hon. Harry R. Sheppard, Judge

ANSWER TO PETITION FOR REVIEW

PETER A. STROTZ, State Bar No. 129904
PAUL R. JOHNSON, State Bar No. 115817
WILLIAM E. STEIMLE, State Bar No. 203426
FILICE BROWN EASSA & MCLEOD LLP
1999 Harrison Street, 18th Floor
Oakland, CA 94612
Tel.: (510) 444-3131
Fax: (510) 839-7940

ARTHUR F. GOLDEN*
WILLIAM J. FENRICH*
DANIEL J. SCHWARTZ*
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
Tel.: (212) 450-4000
Fax: (212) 450-3800
**not admitted in California*

Attorneys for Defendant and Respondent
ASTRAZENECA LP
(*Additional Parties and Counsel Listed inside Cover*)

Service on the Attorney General and the District Attorney
required by Business and Professions Code section 17209

NICOLE P. DOGWILL
State Bar No. 211653
WINSTON & STRAWN LLP
101 California Street, Suite 3900
San Francisco, California 94111
Tel.: (415) 591-1000
Fax: (415) 597-1400
Attorneys for Defendant and Respondent
ABBOTT LABORATORIES

JEFFREY T. THOMAS
State Bar No. 106409
JAMES N. KNIGHT
State Bar No. 219651
GIBSON, DUNN & CRUTCHER LLP
Jamboree Center, 4 Park Plaza
Irvine, California 92614-8557
Tel.: (949) 451-3800
Fax: (949) 451-4220
Attorneys for Defendant and Respondent
ALLERGAN, INC.

DONALD M. FALK
State Bar No. 150256
MAYER BROWN LLP
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, California 94306-2112
Tel.: (650) 331-2000
Fax: (650) 331-2060
Attorneys for Defendant and Respondent
AMGEN INC.

JAMES F. HURST*
SUSAN A. PIPAL*
MATTHEW J. SULLIVAN*
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, Illinois 60601
Tel.: (312) 558-5600
Fax: (312) 558-5700
Attorneys for Defendant and Respondent
ABBOTT LABORATORIES

STEVEN O. KRAMER
State Bar No. 079626
JOHN NADOLENCO
State Bar No. 181128
MACK ANDERSON
State Bar No. 229035
MAYER BROWN LLP
350 South Grand Avenue, 25th Floor
Los Angeles, California 90071-1503
Tel.: (213) 229-9500
Fax: (213) 625-0248
Attorneys for Defendant and Respondent
AMGEN INC.

THEODORE VOORHEES, JR.*
THOMAS J. COSGROVE*
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
Tel.: (202) 662-6000
Fax: (202) 662-6291
Attorneys for Defendant and Respondent
BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC.

PAUL J. RIEHLE
State Bar No. 115199
MATTHEW A. FISCHER
State Bar No. 191451
SEDGWICK, DETERT,
MORAN & ARNOLD LLP
One Market Plaza
Steuart Tower, 8th Floor
San Francisco, California 94105
Tel.: (415) 781-7900
Fax: (415) 781-2635
Attorneys for Defendant and Respondent
BRISTOL-MYERS SQUIBB COMPANY

MICHELE FLOYD
State Bar No. 163031
KIRSTEN J. HANDELMAN
State Bar No. 215346
REED SMITH LLP
Two Embarcadero Center, Suite 2000
San Francisco, California 94111-3922
Mailing Address:
P.O. Box 7936
San Francisco, California 94120-7936
Tel.: (415) 543-8700
Fax: (415) 391-8269
Attorneys for Defendant and Respondent
ELI LILLY & COMPANY

ANITA F. STORK
State Bar No. 142265
COVINGTON & BURLING
One Front Street
San Francisco, California 94111
Tel.: (415) 591-6000
Fax: (415) 591-6091
Attorneys for Defendant and Respondent
BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC.

EVAN R. CHESLER*
ELIZABETH L. GRAYER*
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
Tel.: (212) 474-1000
Fax: (212) 474-3700
Attorneys for Defendant and Respondent
BRISTOL-MYERS SQUIBB COMPANY

GARY HANSEN*
DAVID GRAHAM*
OPPENHEIMER WOLFF & DONNELLY LLP
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, Minnesota 55402-1609
Tel.: (612) 607-7000
Fax: (612) 607-7100
Attorneys for Defendant and Respondent
ELI LILLY & COMPANY

ALEXANDER F. WILES
State Bar No. 73596
JOHN C. KEITH
State Bar No. 229755
IRELL & MANELLA LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Tel.: (310) 277-1010
Fax: (310) 203-7199
Attorneys for Defendant and Respondent GLAXOSMITHKLINE PLC

H. CHRISTIAN L'ORANGE
State Bar No. 71730
DRINKER BIDDLE & REATH LLP
50 Fremont Street
San Francisco, California 94105-2235
Tel.: (415) 591-7500
Fax: (415) 591-7510
Attorneys for Defendant and Respondent HOFFMANN-LA ROCHE INC.

GEORGE S. CARY*
DAVID I. GELFAND*
CLEARY GOTTLIEB
STEEN & HAMILTON LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Tel.: (202) 974-1500
Fax: (202) 974-1999
Attorneys for Defendant and Respondent GLAXOSMITHKLINE PLC

PAUL H. SAINT-ANTOINE*
MARY E. KOHART*
DAVID J. ANTCZAK*
JOANNE C. LEWERS*
DRINKER BIDDLE & REATH LLP
One Logan Square, 18th & Cherry Streets
Philadelphia, Pennsylvania 19103-6996
Tel.: (215) 988-2700
Fax: (215) 988-2757
Attorneys for Defendant and Respondent HOFFMANN-LA ROCHE INC.

WILLIAM F. CAVANAUGH, JR.
State Bar No. 133461
CECILIA B. LOVING*
PATTERSON BELKNAP
WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Tel.: (212) 336-2000
Fax: (212) 336-2222
Attorneys for Defendants and Respondents JANSSEN PHARMACEUTICA INC., JOHNSON & JOHNSON HEALTH CARE SYSTEMS, INC., ORTHO BIOTECH INC., AND ORTHO-MCNEIL PHARMACEUTICAL, INC.

BEATRICE B. NGUYEN
State Bar No. 172961
TRACY E. REICHMUTH
State Bar No. 215458
CECILIA C. OGBU
State Bar No. 227103
STEVEN E. WILSON
State Bar No. 240843
FOLGER LEVIN & KAHN LLP
Embarcadero Center West
275 Battery Street, 23rd Floor
San Francisco, California 94111
Tel.: (415) 986-2800
Fax: (415) 986-2827
Attorneys for Defendants and Respondents JANSSEN PHARMACEUTICA INC., JOHNSON & JOHNSON HEALTH CARE SYSTEMS, INC., ORTHO BIOTECH INC., AND ORTHO-MCNEIL PHARMACEUTICAL, INC.

ATON ARBISSER
State Bar No. 150496
BRYANT S. DELGADILLO
State Bar No. 208361
KAYE SCHOLER LLP
1999 Avenue of the Stars, Suite 1700
Los Angeles, California 90067
Tel.: (310) 788-1000
Fax: (310) 788-1200
Attorneys for Defendant and Respondent NOVARTIS PHARMACEUTICALS CORPORATION

JOHN M. TOWNSEND*
ROBERT P. REZNICK*
SCOTT H. CHRISTENSEN*
HUGHES HUBBARD & REED LLP
1775 I Street, N.W.
Washington, D.C. 20006-2401
Tel.: (202) 721-4600
Fax: (202) 721-4646
Attorneys for Defendant and Respondent MERCK & CO., INC.

RITA M. HAEUSLER
State Bar No. 110574
HUGHES HUBBARD & REED LLP
350 South Grand Avenue,
36th Floor
Los Angeles, California
90071-3442
Tel.: (213) 613-2800
Fax: (213) 613-2950
Attorneys for Defendant and Respondent MERCK & CO., INC.

SAUL P. MORGENSTERN*
KARIN E. GARVEY*
KAYE SCHOLER LLP
425 Park Avenue
New York, New York 10022
Tel.: (212) 836-8000
Fax: (212) 836-8689
Attorneys for Defendant and Respondent NOVARTIS PHARMACEUTICALS CORPORATION

KATRINA JUNE LEE
State Bar No. 191142
NOSSAMAN, GUTHNER,
KNOX & ELLIOTT, LLP
50 California Street, 34th Floor
San Francisco, California 94111-4799
Tel.: (415) 398-3600
Fax: (415) 398-2438
Attorneys for Defendant and Respondent
PFIZER INC

DOUGLAS L. WALD*
DANIEL R. WALDMAN*
ANNE P. DAVIS*
RYAN Z. WATTS*
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
Tel.: (202) 942-5000
Fax: (202) 942-5999
Attorneys for Defendant and Respondent
WYETH

CHARLES H. SAMEL
State Bar No. 182019
JENNIFER A. CARMASSI
State Bar No. 221592
LATHAM & WATKINS LLP
355 South Grand Avenue
Los Angeles, California 90071-1560
Tel.: (213) 891-8964
Fax: (213) 891-8763
Attorneys for Defendant and Respondent
PHARMACEUTICAL RESEARCH AND
MANUFACTURERS OF AMERICA

PETER J. KADZIK*
BERNARD NASH*
MARIA COLSEY HEARD*
DICKSTEIN SHAPIRO LLP
1825 Eye Street, N.W.
Washington, D.C. 20037-1526
Tel.: (202) 420-2200
Fax: (202) 420-2201
Attorneys for Defendant and Respondent
PFIZER INC

RONALD C. REDCAY
State Bar No. 67236
ARNOLD & PORTER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Tel.: (213) 243-4000
Fax: (213) 243-4199
Attorneys for Defendant and Respondent
WYETH

**not admitted in California*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioners ("Plaintiffs") offer no legitimate reason why Supreme Court review of the Court of Appeal's decision in this case is necessary or appropriate. There are no conflicts among the decisions of the Court of Appeal, and the decision below represents a routine application of settled California damages law in a narrow factual setting.

This case presents a simple question: May an antitrust plaintiff who has sustained no actual financial loss recover damages under the Cartwright Act or restitution under the Unfair Competition Law ("UCL")? The unanimous Court of Appeal answered "no," affirming the Superior Court's grant of summary judgment. That result, dictated by the language of the relevant statutes, is correct and does not warrant review.

Under the Cartwright Act, a private plaintiff is entitled to recover "three times the damages sustained by him or her." (Bus. & Prof. Code, § 16750, subd. (a).) Here, the only monetary damages Plaintiffs seek are overcharges they allege to have paid; they expressly waived all other possible forms of monetary damages. But because Plaintiffs—who are neither direct purchasers nor end-users—conceded that they passed on 100% of the alleged overcharges to downstream customers and insurers, they have sustained no damages within the meaning of the Cartwright Act. By giving the term "damages sustained" its plain meaning of actual financial loss, the Court of Appeal's holding is consistent with more than 100 years of decisional law on the meaning of "damages" in

California and effectuates the Legislature's intent in accommodating the various policies of the Cartwright Act.

The analysis of Plaintiffs' UCL claim is equally simple. The same factual record that establishes that Plaintiffs sustained no damages also establishes that they are not entitled to restitution (the only monetary remedy the Legislature provided for a UCL violation). Even assuming the existence of the alleged price-fixing conspiracy, Plaintiffs already have restored to the status quo ante.

The Court of Appeal's decision thus reflects a conventional application of the relevant statutory provisions to the unique and undisputed factual record in this case. It leaves undisturbed the rights of *all* plaintiffs who suffer financial loss as a result of an antitrust violation to recover three times the damages they actually sustain. It does not, as Plaintiffs suggest, establish a special rule and a "complete defense to price-fixing and unfair competition" in all cases. (See, e.g., Petition for Review ["Petition" or "Pet."] at pp. 1, 29.) The reason *these* Plaintiffs cannot recover is not because of some special rule created by the Court of Appeal, but because they concededly did not suffer the only loss for which they sought recovery.

Perhaps because the fundamental issue in the case—the meaning of the Cartwright Act's "damages sustained" language—is so straightforward, Plaintiffs ignore it. They fail to quote that language even once, let alone offer any reason why the language should be given anything other than its plain meaning of actual pecuniary loss. Instead, Plaintiffs attempt to manufacture issues for review by mischaracterizing the undisputed factual record and the legal bases

for the Court of Appeal's rulings. For example, Plaintiffs devote much of their attention to an argument that their case should proceed because *Defendants* failed to establish that Plaintiffs could not have raised their prices absent the alleged overcharge, and thus did not foreclose the possibility that Plaintiffs lost profits that they otherwise would have reaped. But as Plaintiffs have acknowledged at every level, they are only seeking damages for the amount of the alleged overcharge that they paid; they have expressly waived their right to pursue damages based upon any other theory, including lost profits. As a result, the Court of Appeal was not called upon to, and did not, address or rule on whether Plaintiffs might have been able to prove that they could have raised prices in the absence of the alleged overcharge.

Finally, Plaintiffs advance a slew of policy arguments (based largely on federal law and statutes of other states) that ignore the language of the Cartwright Act and ask this Court to pick and choose from among the laws of other jurisdictions that they prefer. Those arguments are properly directed to the Legislature, rather than to this Court.

The Petition for Review should be denied.

BACKGROUND

The Court of Appeal's decision accurately and completely recites the procedural history and underlying facts. (*Clayworth v. Pfizer, Inc.* ["*Clayworth*"] (2008) 165 Cal.App.4th 209, 215-20.) In short, Plaintiffs, seventeen retail pharmacies in California, sued Respondents ("Defendants"), seventeen pharmaceutical companies, one healthcare company and a pharmaceutical trade association, in

August 2004 alleging violations of the Cartwright Act (Bus. & Prof. Code, § 16270, et seq.) and the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.). Plaintiffs alleged that Defendants engaged in a price-fixing conspiracy by using the prices that they or their affiliates charge for their products in Canada, which imposes government price controls on pharmaceuticals, as a "floor" for Defendants' U.S. prices. (*Clayworth, supra,* 165 Cal.App.4th at p. 216.) Plaintiffs' complaint sought treble damages under the Cartwright Act as well as monetary and injunctive relief under the UCL.

Defendants denied Plaintiffs' allegations and also asserted, as an affirmative defense, that Plaintiffs had sustained no damages resulting from Defendants' alleged conspiracy because Plaintiffs "passed on" any alleged overcharges to their customers. (*Ibid.*)

As the Court of Appeal summarized, it was "undisputed" (in fact, Plaintiffs conceded) that "plaintiffs passed on to their customers all claimed overcharges." (*Id.* at p. 218.) This finding was based on Plaintiffs' failure to dispute the following facts:

- "Plaintiffs' prices to all of their customers for brand name drugs increase by at least the same dollar amount as their acquisition costs increase when AWP[1] increases" (IX Clerk's Transcript ("CT") 2206, 2208 [Defs.' fact 5]); and
- "The higher the AWP, either because of the alleged overcharge or otherwise, the more money in gross profit

[1] "AWP," or "Average Wholesale Price," is a published benchmark price for a drug that is tied mathematically to the price charged by the manufacturer for that drug. (*Clayworth, supra,* 165 Cal.App.4th at p. 217.)

plaintiffs earn from their sales of brand name drugs" (IX CT 2209 [Defs.' fact 6]).

Plaintiffs do not dispute these facts here. (Pet. at p. 6 ["In sum, the Pharmacies passed-on the overcharge to their customers. None of these facts are contested."].)

Moreover, Plaintiffs also agreed that they "waived any claims for damages not based on the alleged overcharge," and were "claiming no lost or delayed sales, or any other diminution in business."[2] (*Clayworth*, *supra*, 165 Cal.App.4th at p. 218.) As Plaintiffs put it below, "Plaintiffs' damages are the full extent of the overcharge paid by Plaintiffs—no more or less." (IX CT 2173, 2175 [Pls.' Resp. to Defs.' fact 7].) Plaintiffs continue to acknowledge their waiver of all damages claims other than the overcharge, even as they seek review based upon claims that have been waived. (Pet. at p. 5, fn. 3.)

---

[2] In particular, in their statement of undisputed facts, Defendants asserted:

- "Plaintiffs have expressly waived any claims for damages not based on the alleged overcharge, including lost sales and diminished business damages." (IX CT 2044, 2060-61.)

Plaintiffs responded:

- "Undisputed as written, though immaterial and irrelevant. Plaintiffs have waived their right to collect money damages on lost profits. Plaintiffs' damages are the full extent of the overcharge paid by Plaintiffs—no more or less. However, Plaintiffs have never stated they were not 'damaged in fact' by Defendants' overcharge, which put them at a competitive disadvantages vis-à-vis other pharmacies; they simply choose not to collect monies owed them for lost profits." (IX CT 2173, 2175.)

On December 19, 2006, the Superior Court issued a twenty-six-page opinion holding that the pass-on defense was available to antitrust defendants in California and granting Defendants' motions for summary judgment on Plaintiffs' Cartwright Act and UCL claims. (*Id.* at p. 219.)[3]

Plaintiffs appealed, arguing that they were entitled to monetary relief under both the Cartwright Act and UCL. On July 25, 2008, a unanimous Court of Appeal affirmed summary judgment for Defendants. The Court of Appeal subsequently modified its opinion, including removal of a section discussing "cost plus" contracts, and denied Plaintiffs' petition for rehearing. (*Clayworth v. Pfizer, Inc.* (Aug. 19, 2008) 2008 Cal.App. Lexis 1325.) The Court of Appeal's decision became final on August 24, 2008.

[3] The entry of summary judgment for Defendants, based on the undisputed evidence that Plaintiffs lacked damages, rendered moot Defendants' separate, pending motion for summary judgment on the merits of Plaintiffs' claims, which argued, among other things, that there was no evidence of a conspiracy to fix prices. (*Clayworth, supra*, 165 Cal.App.4th at p. 218, fn. 6.)

ARGUMENT

I. The Court of Appeal Opinion Does Not Meet the Criteria for Review by This Court

The Petition all but ignores the language of Business & Professions Code, section 16750, subdivision (a) ("Section 16750"), the cornerstone of the Court of Appeal's opinion. Instead, the Petition focuses on the difficulty of disproving lost profits claims—an issue that, as a result of Plaintiffs' waiver of such claims, was not decided by either court below.

The decision below turns almost exclusively on the meaning of the words "damages sustained" in Section 16750, which provides, in relevant part:

> "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor . . . and to recover three times the damages sustained by him or her . . . ."

Applying traditional tools of statutory interpretation, the Court of Appeal concluded that "damages sustained" means "actual financial loss suffered"—a conclusion consistent with more than 100 years of California decisional law on damages. (*Clayworth, supra*, 165 Cal.App.4th at p. 228.) Accordingly, the Court of Appeal held that—just as in every other area of California law—a defendant may offer proof to show that an overcharged plaintiff's recoverable damages are actually less than claimed because that plaintiff passed on some or all of the overcharge.

As explained below, review of the decision by the Court of Appeal is not necessary either "to secure uniformity of decision or to

settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

A. Review Is Not Necessary to Secure Uniformity of Decision

As an initial matter, there are no conflicting decisions within the California courts on the question at issue. Plaintiffs have never cited a single California case that supports the interpretation of the Cartwright Act they advance, i.e., one that would rewrite California damages law to create a special rule for antitrust cases and preclude a defendant from offering proof that a plaintiff seeking overcharge damages has no "damages sustained" (or less "damages sustained" than claimed) because that plaintiff passed on some or all of the alleged overcharge to downstream purchasers.

To the contrary, in the forty years since *Hanover Shoe v. United Shoe Machinery Corp.* (1968) 392 U.S. 481 held that federal antitrust defendants could not assert a pass-on defense to direct purchaser claims under the Clayton Act, the issue of whether a defendant can offer pass-on evidence under California law has been mentioned but three times in decisions of the Courts of Appeal. In each instance the court signaled approval of defensive use of pass-on evidence, even as it stated that the question remained open.[4] (See

---

[4] Federal precedent—*Hanover Shoe* and its progeny—concerns the proper construction of, and the implementation of the federal policies underlying, the federal antitrust law, and thus does not dictate, and provides no direct guidance on, interpretation of the Cartwright Act. (See *California v. ARC America Corp.* (1989) 490 U.S. 93, 102-03; *State ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1164, *overruled in part on other grounds by statute* [noting that while judicial interpretations of the federal antitrust laws can sometimes be "helpful" in interpreting the Cartwright Act, they

Global Minerals & Metals v. Superior Court (2003) 113 Cal.App.4th 836, 852, fn. 10; *J.P. Morgan & Co. v. Superior Court* (2003) 113 Cal.App.4th 195, 213, fn. 10; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1353.) Indeed, as the Court of Appeal recognized in this case, two of these three decisions decertified Cartwright Act classes because the possibility of defensive pass-on precluded classwide determination of injury and damage. (*Clayworth*, *supra*, 165 Cal.App.4th at p. 227 [citing *Global Minerals*, *supra*, 113 Cal. App.4th at p. 857; *J.P. Morgan*, *supra*, 113 Cal.App.4th at p. 218].) Meanwhile, the third recognized that in cases such as this, involving resale by middlemen of an allegedly overcharged product in substantially unchanged form, proof of an overcharge will be easy and the concerns that led *Hanover Shoe* to preclude pass-on will be inapplicable. (*Clayworth, supra,* 165 Cal.App.4th at p. 226 [citing *B.W.I.*, *supra*, 191 Cal.App.3d at p. 1352].)

Plaintiffs themselves have conceded the lack of conflict among the decisions of the Court of Appeal. Below, they noted "the rarity of the occasions (*B.W.I.* and *J.P. Morgan* only) in which the issue

---

are "not directly probative of the Cartwright drafter's intent"].) Thus, while in some instances one may look to federal law for guidance in interpreting the Cartwright Act, it does not make sense to do so where California and the federal system have taken fundamentally different approaches. (See *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 427 [declining to follow federal cases applying the Federal Rules of Civil Procedure where the California Legislature has enacted a statutory scheme, "which is not based upon any federal enactments"].) This is one such area, as evidenced by the California Legislature's clear pronouncement in 1978 that, whereas federal law bars suits by indirect purchasers, the Cartwright Act grants indirect purchasers standing to sue.

has arisen," and have never suggested any conflict between those decisions. (Appellants' Reply Brief at p. 19.) Thus, there is no conflict among the lower courts regarding pass-on that needs to be addressed by this Court. [5]

The absence of conflicting decisions from the Court of Appeal regarding the issue of defensive pass-on should come as no surprise. In holding that Plaintiffs suffered no "[actual monetary] loss" from the alleged overcharge that they had passed on (*Clayworth*, *supra*, 165 Cal.App.4th at pp. 235-36), the court below simply applied the rule, long approved by this Court, that when "the wrongful act of the defendant at once confers a benefit and inflicts an injury, the loss actually caused will be the net result of the act to the plaintiff; and this net result will be the measure of damages." (*Estate of de Laveaga v. Betts* (1958) 50 Cal.2d 480, 488-89 [citations omitted]; (*Utter v. Chapman* (1869) 38 Cal. 659, 665-66 [holding that an

---

[5] Plaintiffs' argument that review by this Court is necessary in order to create uniformity or consistency with *other* states' pass-on laws requires little discussion. What other states have chosen to do based on their own statutes and public policies, which in many cases are different from California's, has no bearing on the only issues relevant to this case—what the language of Section 16750 and the UCL mean. Indeed, as the Superior Court's ruling indicates, there is not even consensus among other states on pass-on issues. In many states, defensive pass-on is not an issue at all, because only direct purchasers (which Plaintiffs are not) can sue, while in other states, such as Maryland—which Plaintiffs count as part of their supposed consensus—indirect purchaser actions are very limited, because the government alone can sue as an indirect purchaser. (Respondents' Brief at pp. 46-49.) Regardless, the decision to further the consistency between California's antitrust regime and the legislatively-enacted regimes of other states is one for the California Legislature alone.

offsetting transaction with a third party "goes to reduce the loss which [a plaintiff] *would otherwise sustain* by the defendant's breach of the contract" (emphasis added)].) The same rule has been applied in countless Court of Appeal cases, including this case, to reduce or eliminate recoverable damages.[6] (*Clayworth, supra*, 165 Cal.App.4th at pp. 230-31 [collecting cases].) And the rule has long been assumed to apply to Cartwright Act claims. (*Id.* at pp. 228-230 [discussing *Krigbaum v. Sbarbaro* (1913) 23 Cal.App. 427; *Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366; California Civil Jury Instructions (CACI) No. 3440].)

Similarly, there is no conflict as to whether the UCL allows plaintiffs to recover money they have already recouped. This Court settled that issue in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1145, when it held that restitution was the

---

[6] See also, e.g., *Loube v. Loube* (1998) 64 Cal.App.4th 421, 426 (denying legal malpractice claims where clients already received excessive award due to allegedly defective representation in underlying action); *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 467 (reducing plaintiff's damages for breach of joint venture contract by net profits plaintiff made when it set up separate office in response); *Willis v. Soda Shoppes of California, Inc.* (1982) 134 Cal.App.3d 899, 905 (interpreting Civil Code section 1951.2, subdivision (a), to require a landlord's recovery from a tenant who abandoned a lease to be reduced by any rents the landlord obtained by reletting the property); *Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562 (holding that defendant employer was permitted to offset damages for wrongful termination by amount of income plaintiff had earned from other sources during period remaining under the contract); *Mercantile Acceptance Corp. of California v. Globe Indemnity Co.* (1962) 210 Cal.App.2d 636, 640-41 (reducing defrauded plaintiff's damages for out-of-pocket losses from purchase of car without title by amounts it recovered from resale of car after acquiring title).

only monetary remedy provided by the UCL. (Accord *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1013 [citing *Korea Supply, supra*, 29 Cal.4th at p.1145 [discussing *Kraus v. Trinity Mgmt. Servs., Inc.* (2000) 23 Cal.4th 116]].) Plaintiffs, who concede that they have already recouped 100% of the overcharges that they allegedly incurred, cannot seek restitution. Indeed, Plaintiffs' latest argument—that they should be able to recover moneys Defendants allegedly took from Plaintiffs' customers (Pet. at p. 28)—makes clear that they seek nonrestitutionary disgorgement, which courts have consistently held to be unavailable under the UCL. (*Korea Supply, supra*, 29 Cal.4th at p. 1145; see also *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 460.) None of the cases Plaintiffs cite holds that someone can recover under the UCL once he or she has been restored to the status quo ante. Accordingly, the Court of Appeal's UCL holding also provides no basis for review. (See *Kraus, supra*, 23 Cal.4th at p. 138; *Feitelberg, supra*, 134 Cal.App.4th at p. 1013.)[7]

---

[7] Plaintiffs also attempt to renew their prayer for injunctive relief in their Petition. (Pet. at p. 28.) Because Plaintiffs did not raise their request for injunctive relief the Court of Appeal—indeed, not even in their summary judgment papers in the trial court—Plaintiffs have waived this claim. (See Cal. Rules of Court, rule 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal."]; see also *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726 [declining to address an issue of statutory interpretation that was "not timely raise[d]...in the Court of Appeal"]; *Feitelberg, supra*, 134 Cal.App.4th at pp. 1021-22 [holding that plaintiffs' request for injunctive relief was untimely when plaintiffs failed to raise it until their reply brief at the Court of Appeal].)

B. Review Is Not Necessary to Settle an Important Question of Law

1. The Petition Vastly Overstates the Breadth and Impact of the Decision Below

The judgment entered against these Plaintiffs is not the result, as they now contend, of a new rule—or "rogue interpretation" of the Cartwright Act and UCL (Pet. at p. 29)—that will erect a bar to legitimate claims of damaged antitrust plaintiffs and further review is not necessary to remove this nonexistent threat. The Court of Appeal's opinion does not prevent the only parties alleged to have sustained overcharge damages—Plaintiffs' customers and their insurers—from recovering the damages sustained by them, if any. Rather, the decision is a straightforward application of statutory language to the unique record that Plaintiffs knowingly created on summary judgment below. Plaintiffs, with no "damages sustained," had no basis for recovery under the Cartwright Act, and no moneys to recover as restitution under the UCL. It is as simple as that.

The Court of Appeal opinion does not erect any bar to the claims of plaintiffs who suffer actual damages (of any variety). As has always been the case, and as the Court of Appeal stated, Cartwright Act plaintiffs at all levels of the distribution chain are free to bring claims to recover (a) overcharges that they absorbed and did not pass on and/or (b) other types of damages that they sustained, such as lost profits, lost sales, increased expenses, etc. (*Clayworth*, *supra*, 165 Cal.App.4th at p. 243 ["Finally, we cannot help but note that the only thing that would keep plaintiffs from having 'damages sustained' is that they have passed on all the claimed overcharges. A plaintiff who passed on only some of these charges would maintain

'damages' for which it could state a Cartwright Act claim."]; *id.* at p. 233 [suggesting that even those who sustained no overcharges might be able to recover for lost profits, had they not waived such claims].)

Furthermore, suits by consumers to recover for alleged overcharges upstream are not affected by the Court of Appeal's decision. Consumers, by definition, do not resell and will never have their recovery reduced or face an affirmative defense that they "passed on" any overcharges.

2. Plaintiffs Seek Review of Waived Claims That the Court of Appeal Did Not Consider or Resolve

The Petition focuses on issues that are not presented in this case and which the Court of Appeal consequently did not address. Plaintiffs' knowing waiver of all non-overcharge damages renders their discussions about the "near impossibility" of disproving lost profits claims and their ability to establish a presumption of injury irrelevant; it is the admitted lack of damages that is fatal to their claims, irrespective of any presumption of injury. (See Pet. at pp. 16-19.) Ordinarily, this Court will not review issues that the Court of Appeal has not decided. (See, e.g., *Barsamyan v. Appellate Division* (2008) 44 Cal.4th 960, 973, fn. 2; *People v. Monge* (1997) 16 Cal.4th 826, 845.) There is no reason for the Court to deviate from its usual practice here.

Plaintiffs' contention now—that review should be granted because the Court of Appeal supposedly overlooked "proof" that Plaintiffs might have imposed price increases in the absence of the alleged conspiracy (Pet. at pp. 6, 17)—amounts to nothing more than

a belated and speculative claim for lost profits. Whether or not a plaintiff can raise its prices absent an overcharge is a classic issue of lost profits. There was no such proof—and there was no such claim.[8] Plaintiffs sought only the alleged overcharges—"no more or less." (IX CT 2175 [Pls.' Resp. to Defs.' fact 7].)

Plaintiffs likewise assert that review is proper because Plaintiffs offered proof that they were "injured" the moment they paid the overcharge. Plaintiffs use that as a jumping-off point to argue that, under California law, suffering an "injury in fact" somehow prohibits admission of defensive pass-on evidence.

Plaintiffs, however, confuse a presumption of "injury in fact" with one of recoverable damages. Because Defendants established that Plaintiffs have passed on the entirety of any alleged overcharge, that showing negated Plaintiffs' alleged injury with respect to the overcharge. (See, e.g., *B.W.I. Custom Kitchen v. Owens-Illinois Inc.*, *supra*, 191 Cal.App.3d at p. 1353 [finding that it is an open question whether defendants can "negate injury by showing plaintiff and the class 'passed on' the overcharge"].) The cases Plaintiffs cite stand for nothing more than the unremarkable proposition that injury in fact—*but not recoverable damages*—may be inferred from the payment of an overcharge in certain circumstances (such as class actions) that are inapplicable here. Even where such a presumption

---

[8] The federal (not California) cases on which Plaintiffs principally rely, *Hanover Shoe, Inc. v. United Shoe Manufacturing Corp.*, *supra*, 392 U.S. 481; *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720; and *Kansas v. UtiliCorp United Inc.* (1990) 497 U.S. 199, all spoke of difficulties of proof as a reason for rejecting pass-on, but those discussions exclusively concerned proof of lost profits, *the very remedy which Plaintiffs here have expressly waived.*

applies, it cannot substitute for proof of actual, compensable damages. (See, e.g., *Rosack v. Volvo of America Corp.* (1982) 131 Cal.App.3d 741, 754 ["[p]roof of impact [i.e., injury-in-fact] at the liability phase is not the same as calculation of damages in the damages phase."]; *B.W.I. Custom Kitchen, supra,* 191 Cal.App.3d at p. 1350, fn. 7 ["Courts and commentators have taken great pains to point out that injury or 'fact of damage,' which must be proven on a class-wide basis, is separate and distinct from the issue of actual damages."].)[9]

C. The Court Should Reject Plaintiffs' Request That This Court Usurp the Legislature's Function

Ultimately, the Petition should be denied because it is simply directed at the wrong institution. The issues for *judicial* determination in this case are the proper interpretation of the phrase "damages sustained," as that phrase has been used by the California Legislature in the Cartwright Act, and the availability of non-restitutionary remedies under the UCL. But the outcome Plaintiffs seek under the statutes is not based on their actual language, or any

---

[9] This case has nothing to do with the questions presented in *In re Tobacco Cases II* (No. S147345) and *O'Brien v. Camisasca Automotive Manufacturing* (No. S163207). In their Petition (pp. 23, 25), Plaintiffs reference—but do not discuss—these two UCL cases, which are pending before this Court. *Tobacco Cases II* involves issues about class actions—whether all class members or only class representatives must have incurred injury in fact or have relied on a manufacturer's representations. *O'Brien* involves these questions and those in *Meyer v. Sprint Spectrum* (No. S153846), which concerns whether under the Consumer Legal Remedies Act (Civ. Code, § 1780, subd. (a)), a person has suffered "damage" by being a party to an agreement containing an unconscionable term, even though no effort has been made to enforce the unconscionable term, and whether such a person has standing to seek declaratory relief.

California authority, but rather on what Plaintiffs wish the statutes would say. Courts interpret statutes as they find them, not as they could be rewritten. (See *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal.App.4th 575, 588 ["To rewrite the statute is a legislative, rather than judicial, prerogative."] [quoting *Hofer v. Young* (1995) 38 Cal.App.4th 52, 57].)

The Petition itself contains ample evidence that the results Plaintiffs seek require statutory amendments, not interpretation. For example, Plaintiffs not only ignore the operative language of the Cartwright Act, they instead direct the Court's attention to the *statutes* of *other* jurisdictions. Relying on these statutes, Plaintiffs contend that nine states have adopted their view that pass-on should only be permitted when there are both direct and indirect purchaser plaintiffs in the same action. (Pet. at p. 14.) Plaintiffs' argument is unavailing. Those states' legislatures have created a statutory scheme for their states to address pass-on in cases involving multiple tiers of plaintiffs. To the extent a state wishes to affirmatively prohibit the use of pass-on evidence in certain cases, this action properly should be (and has been) taken by its legislature, not by the courts. The California Legislature has never taken such an action.

Nor can Plaintiffs' appeal to the deterrence goals of the Cartwright Act as a means to rewrite the statute's requirements. Although deterrence is an important aim of the Cartwright Act, compensation is the primary rationale of the Cartwright Act's private right of action. (*Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 132.) This Court, too, has recognized compensation as an important purpose of the Cartwright Act: (*California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472.)

By giving *no weight* to the goal of compensation, Plaintiffs' argument also misconstrues the process of statutory interpretation. However one assigns relative weight to the compensatory, deterrent and disgorgement aims of the Cartwright Act, the statute should be interpreted in a way that gives effect to all three, as the Court of Appeal's decision here does. It preserves, for all cases, the ability of a plaintiff who suffers actual financial loss to recover those damages, thereby serving the aim of compensation, while also fostering deterrence by permitting such a plaintiff to recover treble damages, attorneys' fees and prejudgment interest.

And in any event the various policy arguments cannot override the plain language of the statute. Plaintiffs cannot eliminate the statutory requirement of actual "damages sustained" by claiming a need for deterrence that somehow overrides the Legislature's will as expressed in the text of the Cartwright Act. (See *MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, at p. 1083 ["If the statutory language is clear and unambiguous, our task [of interpretation] is at an end . . . "].) Contrary to Plaintiffs' claims (e.g., Pet. at p. 2), the goal of deterrence simply does not authorize *them* to sue here just because the only private parties who allegedly *did* sustain damages—Plaintiffs' customers and their insurers—have chosen not to.

The Cartwright Act already authorizes governmental authorities—not undamaged private parties who happen to be in the chain of distribution—to sue where the proper private plaintiffs cannot or do not come forward. The framework of the Act locates civil and criminal enforcement authority with the Attorney General and District Attorneys, and authorizes the Attorney General and

District Attorney to bring *parens patriae* actions on behalf of individuals injured and damaged. (*Clayworth, supra*, 165 Cal.App.4th at p. 243.) That the responsible governmental authorities also have chosen not to sue *in this case* is not an argument in favor or allowing these Plaintiffs—who concededly passed on 100% of the alleged overcharges and so have no claims of their own—to enforce someone else's potential claims.

Pure deterrence (basic law enforcement) is, as contemplated by the Cartwright Act, best left to unbiased state agents—not to private lawyers or other parties that seek windfall recoveries in connection with damages that they did not suffer. As this Court has held in a similar context, "[a] court cannot, under the equitable powers of [the UCL], award whatever form of monetary relief it believes might deter unfair practices." (See *Korea Supply Co v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1148; see also *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 339 ["[I]n the absence of a measurable loss [the UCL] does not allow the imposition of monetary sanction merely to achieve [a] deterrent effect."].) Likewise here, the conceded importance of deterrence is not license to rewrite the Cartwright Act to permit Plaintiffs to recover damages sustained, if at all, by someone else, or to receive restitution under the UCL of money they have already recouped.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court deny the Petition for Review of the Court of Appeal's decision.

DATED: September 25, 2008

Respectfully,

FILICE BROWN EASSA & MCLEOD LLP

By: _____
PETER A. STROTZ
PAUL R. JOHNSON
WILLIAM E. STEIMLE

AND

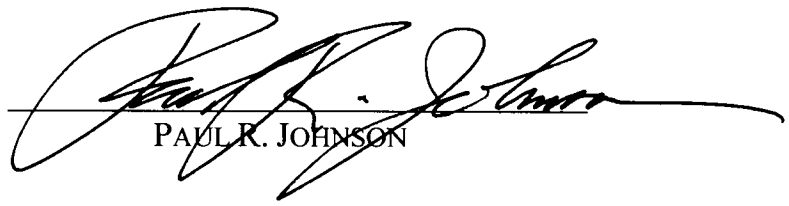
DAVIS POLK & WARDWELL
ARTHUR F. GOLDEN
WILLIAM J. FENRICH
DANIEL J. SCHWARTZ

Attorneys for Defendant and Respondent ASTRAZENECA LP, and jointly on behalf of all Defendants and Respondents

CERTIFICATION OF WORD COUNT

I hereby certify that the computer program with which this ANSWER TO PETITION FOR REVIEW has been prepared has generated a total count (for headings, main text and footnotes) of 6,413 words for the portion of the answer subject to the length limitation set forth in rule 8.504(d)(1) of the California Rules of Court, excluding the portions referenced in rule 8.204(c)(3) (i.e. the tables and this certificate) and the attached proof of service.

DATED: September 25, 2008



PAUL R. JOHNSON

PROOF OF SERVICE

James Clayworth, et al. v. Pfizer, Inc., et al.
No. S166435
Court of Appeal No. A116798 (Div. 2)
Alameda County Super. Ct. No. RG04172428

I am a citizen of the United States, over 18 years of age, and not a party to the within action. My business address is Filice Brown Eassa & McLeod LLP, 1999 Harrison Street, 18th Floor, Oakland, CA 94612.

On September 25, 2008, I served the within **ANSWER TO PETITION FOR REVIEW** on the parties in this action by causing a true copy to be distributed to ALL COUNSEL BY ELECTRONIC TRANSMISSION [Service List attached]. I caused such copy to be served electronically on counsel of record by transmission to Lexis-Nexis File and Serve, as designated on the Transaction Receipt located on the LexisNexis File & Serve website.

I also served one copy each of such document, by mail addressed to:

Clerk
California Court of Appeal
350 McAllister Street
San Francisco, CA 94102

Hon. Ronald M. Sabraw, Judge
Judge of the Superior Court (Ret.)
c/o Clerk
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

Hon. Harry R. Sheppard
Judge of the Superior Court
c/o Clerk
Alameda County Superior Court
24405 Amador Street
Hayward, CA 94544

Ronald A. Reiter
Supervising Deputy Attorney General
Office of the Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Hon. Thomas J. Orloff
Alameda County District Attorney
1225 Fallon Street, Room 900
Oakland, CA 94612

BY U.S. MAIL, FIRST-CLASS POSTAGE PREPAID: I am readily familiar with this firm's practice of processing correspondence for mailing. Under that practice, such correspondence is deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, in the ordinary course of business.

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

Executed on September 25, 2008, at Oakland, California.

Nicole M. Tavis

James Clayworth, et al. v. Pfizer, Inc., et al.
Alameda County Superior Court No. RG04172428
Court of Appeal No. A116798 (Div. 2); Supreme Court No. S166435

SERVICE LIST

PLAINTIFFS' COUNSEL			
ALIOTO LAW FIRM Joseph M. Alioto, Esq. Theresa D. Moore, Esq. Angelina Alioto-Grace, Esq. Joseph M. Alioto, Jr., Esq. Thomas P. Pier, Esq. 555 California Street, Suite 3160 San Francisco, CA 94104	sexton@alioto.com tdmoore@alioto.com jaliotojr@aliotolaw.com	T: **F:**	(415) 434-8900 **(415) 434-9200**
LAW OFFICES OF JOHN H. BOONE John H. Boone, Esq. 555 California Street, Suite 3160 San Francisco, CA 94104	jboone@dc.rr.com	T: **F:**	(415) 434-1133 **(415) 434-8900**
LAW OFFICES OF JAMES M. DOMBROWSKI James M. Dombroski, Esq. P.O. Box 751027 Petaluma, CA 94975	jdomski@aol.com	T: **F:**	(707) 762-7807 **(707) 769-0419**
FOREMAN & BRASSO Russell F. Brasso, Esq. 930 Montgomery Street, Suite 600 San Francisco, CA 94133	jackofdi@aol.com brasso@foremanandbrasso.com	T: **F:**	(415) 433-3475 **(415) 781-8030**
GARY D. MCCALLISTER & ASSOCIATES Gary D. McCallister, Esq. Thomas A. Kelliher, Esq. Eric I. Urein, Esq. 120 North LaSalle Street, Suite 2800 Chicago, IL 60602	gdm@gdmlaw.com	T: **F:**	(312) 346-0611 **(312) 345-0612**
LAW OFFICES OF JEFFERY K. PERKINS Jeffrey K. Perkins, Esq. 1275 Columbus Avenue, Suite 208 San Francisco, CA 94133	jefferykperkins@aol.com	T: **F:**	(415) 474-3833 **(415) 474-2890**
DEFENSE COUNSEL			
ABBOTT LABORATORIES			
EIMER STAHL KLEVORN & SOLBERG LLP David M. Stahl, Esq. J. Cunyon Gordon, Esq. Adam Oyebanji, Esq. 224 South Michigan Avenue, Suite 1100 Chicago, Illinois 60604	dstahl@eimerstahl.com cgordon@eimerstahl.com aoyebanji@eimerstahl.com	T: **F:**	(312) 660-7600 **(312)692-1718**

WINSTON & STRAWN LLP Tyler M. Paetkau, Esq. Nicole P. Dogwill, Esq. 101 California Street, Suite 3900 San Francisco, CA 94111-5802	ndogwill@winston.com tpaetkau@winston.com	T: **F:**	(415) 591-1000 **(415) 591-1400**
ALLERGAN, INC.			
GIBSON, DUNN & CRUTCHER LLP Jeffrey T. Thomas, Esq. James N. Knight, Esq. 3161 Michelson Drive Irvine CA 92612-4412	jtthomas@gibsondunn.com jknight@gibsondunn.com	T: **F:**	(949) 451-3800 **(949) 451-4420**
AMGEN INC.			
AMGEN INC. Jill L. Karpa, Esq. One Amgen Center Drive Mail Stop 27-4-A Thousand Oaks, CA 91320	jkarpa@amgen.com	T: **F:**	(805) 447-1000 **(805) 480-9941**
MAYER BROWN LLP Steven O. Kramer, Esq. John Nadolenco, Esq. 350 South Grand Avenue, 25th Floor Los Angeles, CA 90071	skramer@mayerbrownrowe.com jnadolenco@mayerbrownrowe.com	T: **F:**	(213) 229-9500 **(213) 625-0248**
ASTRAZENECA LP			
DAVIS POLK & WARDWELL Arthur Golden, Esq. William Fenrich, Esq. Daniel J. Schwartz, Esq. Sean Knowles, Esq. 450 Lexington Avenue New York, NY 10017	golden@dpw.com astarr@dpw.com william.fenrich@dpw.com daniel.schwartz@dpw.com sean.knowles@dpw.com	T: **F:**	(212) 450-4388 **(212) 450-3388**
FILICE BROWN EASSA & MCLEOD LLP Peter A. Strotz, Esq. Paul R. Johnson, Esq. William E. Steimle, Esq. 1999 Harrison Street, 18th Floor Oakland, CA 94612	pstrotz@filicebrown.com paul.johnson.service@ filicebrown.com wsteimle@filicebrown.com	T: **F:**	(510) 444-3131 **(510) 839-7940**
BOEHRINGER INGELHEIM PHARMACEUTICALS			
COVINGTON & BURLING Theodore Voorhees, Jr., Esq. Thomas J. Cosgrove, Esq. David L. Meyer, Esq. 1201 Pennsylvania Avenue, NW Washington, DC 20004-2401	tvoorhees@cov.com tcosgrove@cov.com dmeyer@cov.com	T: **F:**	(202) 662-5236 **(202) 778-5236**
COVINGTON & BURLING Anita F. Stork, Esq. One Front Street San Francisco, CA 94111	astork@cov.com	T: **F:**	(415) 591-6000 **(415) 591-6091**

BRISTOL-MYERS-SQUIBB COMPANY			
CRAVATH, SWAINE & MOORE LLP Evan R. Chesler, Esq. Elizabeth L. Grayer, Esq. Jessica Burturla, Esq. Worldwide Plaza 825 Eighth Avenue New York, NY 10019	echesler@cravath.com egrayer@cravath.com jburturla@cravath.com jkorn@cravath.com	T: **F:**	(212) 474-1000 **(212) 474-3700**
SEDGWICK, DETERT, MORAN & ARNOLD LLP Paul J. Riehle, Esq. One Market Plaza Steuart Tower, 8th Floor San Francisco, CA 94105	paul.riehle@sdma.com	T: **F:**	(415) 781-7900 **(415) 781-2635**
ELI LILLY AND COMPANY			
OPPENHEIMER WOLFF & DONNELLY Gary Hansen, Esq. David P. Graham, Esq. Plaza VII, Suite 3300 45 South Seventh Street Minneapolis, MN 55402-1609	ghansen@oppenheimer.com dgraham@oppenheimer.com	T: **F:**	(612) 607-7584 **(612) 607-7100**
REED SMITH LLP Michele Floyd, Esq. Two Embarcadero Center, Suite 2000 San Francisco, CA 94111	mfloyd@reedsmith.com	T: **F:**	(415) 543-8700 **(415) 391-8269**
GLAXOSMITHKLINE			
CLEARY GOTTLIEB STEEN & HAMILTON LLP George S. Cary, Esq. David I. Gelfand, Esq. 2000 Pennsylvania Avenue, NW Washington, DC 20006	gcary@cgsh.com dgelfand@cgsh.com	T: **F:**	(202) 974-1500 **(202) 974-1999**
IRELL & MANELLA LLP Alexander F. Wiles, Esq. John C. Keith, Esq. 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067-4276	awiles@irell.com jkeith@irell.com	T: **F:**	(310) 277-1010 **(310) 203-7199**
HOFFMAN-LA ROCHE INC.			
DRINKER BIDDLE & REATH LLP H. Christian L'Orange, Esq. 50 Fremont Street, 20th Floor San Francisco, CA 94105-2235	chris.lorange@dbr.com	T: **F:**	(415) 591-1730 **(415) 591-7510**
DRINKER BIDDLE & REATH LLP Paul H. Saint Antoine, Esq. David J. Antczak, Esq. Joanne C. Lewers, Esq. One Logan Square 18th & Cherry Streets Philadelphia, PA 19103-6996	paul.saint-antoine@dbr.com david.antczak@dbr.com joanne.lewers@dbr.com	T: **F:**	(215) 988-2700 **(215) 988-2757**

JOHNSON & JOHNSON; JANSSEN PHARMACEUTICA; ORTHO –McNEIL PHARMACEUTICAL; ORTHO BIOTECH			
FOLGER LEVIN & KAHN LLP Beatrice B. Nguyen, Esq. Tracy E. Reichmuth, Esq. Cecilia C. Ogbu, Esq. Embarcadero Center West 275 Battery Street, 23rd Floor San Francisco, CA 94111	bnguyen@flk.com	T: **F:**	(415) 986-2800 **(415) 986-2827**
PATTERSON BELKNAP WEBB & TYLER LLP William F. Cavanaugh, Jr., Esq. 1133 Avenue of the Americas New York, NY 10036	wfcavanaugh@pbwt.com	T: **F:**	(212) 336-2000 **(212) 336-2222**
MERCK & CO., INC.			
HUGHES HUBBARD & REED LLP John M. Townsend, Esq. Robert P. Reznick, Esq. Scott H. Christensen, Esq. 1775 "I" Street, NW Washington, DC 20006-2401	townsend@hugheshubbard.com reznick@hugheshubbard.com christen@hugheshubbard.com	T: **F:**	(202) 721-4640 **(202) 721-4646**
HUGHES HUBBARD & REED LLP Rita M. Haeusler, Esq. 350 South Grand Avenue Los Angeles, CA 90071	haeusler@hugheshubbard.com	T: **F:**	(213) 613-2800 **(213) 613-2950**
NOVARTIS PHARMACEUTICALS CORPORATION			
FAEGRE & BENSON LLP James A. O'Neal, Esq. Kim J. Walker, Esq. 2200 Wells Fargo Center 90 South Seventh Street Minneapolis, MN 55402-3901	joneal@faegre.com kwalker@faegre.com	T: **F:**	(612) 766-8420 (800) 328-4393 **(612) 766-1600**
KAYE SCHOLER LLP Aton Arbisser, Esq. Bryant Delgadillo, Esq. 1999 Avenue of the Stars, Suite 1700 Los Angeles, CA 90067-6048	aarbisser@kayscholer.com bdelgadillo@kayescholer.com	T: **F:**	(310) 788-1000 **(310) 788-1200**
KAYE SCHOLER LLP Saul P. Morgenstern, Esq. Karin Garvey, Esq. Jeremiah L. Frei-Pearson, Esq. 425 Park Avenue New York, NY 10022	smorgenstern@kayescholer.com kgarvey@kayescholer.com jfrei@kayescholer.com	T: **F**	(212) 836-8000 **(212) 836-6333**
PFIZER INC.			
BINGHAM McCUTCHEN LLP Terry J. Houlihan, Esq. Three Embarcadero Center, Suite 1800 San Francisco, CA 94111	terryhoulihan@bingham.com	T: **F**	(415) 393-2022 **(415) 393-2286**

DICKSTEIN, SHAPIRO LLP Peter J. Kadzik, Esq. Maria Colsey Heard, Esq. Andres Colon, Esq. 1825 Eye Street, N.W. Washington, DC 20006-5403	kadzikp@dicksteinshapiro.com heardm@dicksteinshapiro.com colona@dicksteinshapiro.com	T: **F:**	(202) 420-2200 **(202) 420-2201**
NOSSAMAN LLP Katrina J. Lee, Esq. 50 California Street, 34th Floor San Francisco, CA 94111-4707	klee@nossaman.com	T: **F:**	(415) 398-3600 **(415) 398-2438**
PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA [PhRMA]			
LATHAM & WATKINS LLP Margaret M. Zwisler, Esq. 555 Eleventh Street, N.W., Suite 1000 Washington, DC 20004-1304	margaret.zwisler@lw.com	T: **F:**	(202) 637-2200 **(202) 637-2201**
LATHAM & WATKINS LLP Charles Samel, Esq. Jennifer Carmassi, Esq. Belinda Lee, Esq. 355 South Grand Avenue, Suite 4000 Los Angeles, California 90071-1560	charles.samel@lw.com jennifer.carmassi@lw.com belinda.lee@lw.com	T: **F:**	(213) 891-8964 **(213) 891-8763**
WYETH			
ARNOLD & PORTER LLP Ronald C. Redcay, Esq. 777 South Figueroa Street, 44th Floor Los Angeles, CA 90017-2513	ronald_redcay@aporter.com	T: **F:**	(213) 243-4000 **(213) 243-4199**
ARNOLD & PORTER LLP Douglas L. Wald, Esq. Anne P. Davis, Esq. Ryan Watts, Esq. 555 Twelfth Street, NW Washington, DC 20004-1206	douglas_wald@aporter.com anne_davis@aporter.com ryan_watts@aporter.com	T: **F:**	(202) 942-5112 **(202) 942-5999**