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S166435

In the

Supreme Court

Of the State of California

JAMES CLAYWORTH, *et al.*,
Plaintiffs-Appellants,

v.

PFIZER, INC., *et al.*,
Defendants-Respondents.

SUPREME COURT
FILED
OCT - 6 2008
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Deputy

After a Decision By the Court of Appeal
First Appellate District, Division Two
Case No. A116798

REPLY TO ANSWER TO PETITION FOR REVIEW

ALIOTO LAW FIRM
JOSEPH M. ALIOTO (SBN 42680)
JOSEPH M. ALIOTO, JR. (SBN 215544)
555 CALIFORNIA STREET
THIRTY-FIRST FLOOR
SAN FRANCISCO, CALIFORNIA 94104
(415) 434-8900

Counsel for JAMES CLAYWORTH, et al., Plaintiffs-Appellants

(Additional counsel on last page)

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SAN FRANCISCO, CALIFORNIA 94104
(415) 434-8900

Counsel for JAMES CLAYWORTH, et al., Plaintiffs-Appellants

(*Additional counsel on last page*)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

The Defendants' Answer to the Petition is a classic red herring, dragged across the Court's path in hopes of throwing it off the scent. The Defendants conspicuously ignore the fact that the First District's new rule is wholly out of line with the dozen state legislatures and reviewing courts that have rejected the pass-on defense. They conspicuously ignore the fact that the decision below allows guilty defendants to get off scot-free in derogation of the stated intent of the Legislature. Assailing Plaintiffs for ignoring the language of the Cartwright Act, it is in fact *they* who ignore the original 1907 Act's expressed purpose: to "punish" wrongdoers and "promote free competition." (1907 STATS. CH. 530, *id.*) They conspicuously ignore the argument that the pass-on defense flies in the face of not only the policies enumerated by the Legislature, but by this Court as well: deterrence of illicit behavior and the disgorgement of illegal profits. (*California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472.)

Defendants ignore the conflict in decisional law created by the lower court's opinion on the issues of standing and restitution under the post-Proposition 64 Unfair Competition Law ("UCL") and on injury under the Cartwright Act.

In lieu of confronting the Petition's arguments, Defendants attack a series of straw men that Plaintiffs have never argued. In short, Defendants offer little, if anything, to show that the issue presented for review does not amount to an important question of law that must be settled by this Court or that review is necessary to secure uniformity of the decisions below.

Having gone largely without rebuttal, the Petition for Review must be granted. This Court should act decisively to reverse the First District's rogue interpretation of the Cartwright Act and UCL because it runs directly contrary to the policies of this State encouraging vigorous private enforcement of the competition laws.

ARGUMENT

I. THE ISSUE BEFORE THE COURT INVOLVES AN IMPORTANT QUESTION OF LAW BECAUSE THE PASS-ON DEFENSE WILL CHILL ANTITRUST ENFORCEMENT IN DEFIANCE OF THE LEGISLATURE'S INTENT

The important questions of law in this case revolve around whether the First District's interpretation promotes, or inhibits, the stated intent and policies of the California Legislature. The Defendants have largely ignored the Petition's arguments and Plaintiffs' request for review has gone almost entirely without rebuttal.

First, the decision below creates an inherent conflict in policy regarding whether direct purchaser suits should be encouraged in California. Private antitrust actions by direct purchasers were specifically invited by the California Legislature when it amended the Cartwright Act to grant broad standing to plaintiffs "regardless of whether such injured person dealt *directly* or indirectly with the defendant." (CAL. BUS. & PROF. CODE §16750(a) (emphasis added); 1978 STATS. CH. 536, Sec. 1.) This Court and the Courts of Appeal have often identified the Legislature's encouragement of private antitrust actions generally. (*Crown Homes v. Landes* (1994) 22 Cal.App.4th 1273, 1277 ("[P]rivate parties play a pivotal role in aiding government enforcement of the antitrust laws by means of the private action for treble damages."; *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 329-30 ("[P]rivate enforcement is also authorized [under the Cartwright Act], deemed in the public interest, and encouraged.").)

The First District's interpretation allowing the pass-on defense was also ostensibly based on a construction of statutory language, namely the phrase "damages sustained." (*Clayworth v. Pfizer, Inc.* (2008) 165 Cal.App.4th 209, 228.) However, its construction allowing the pass-on defense will *discourage* direct purchasers from suing, since their suits will become bogged down with lengthy and complicated discovery:

> [I]t is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. [¶] Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness. (*Hanover Shoe v. United Shoe Machinery Corp.* (1968) 392 U.S. 481, 493-494.)

Thus, one of the important questions of law and policy this Court must answer is: Whether the First District's construction of the statute conflicts with the policy and intent of the Cartwright Act in encouraging private antitrust enforcement, particularly by direct purchasers?

Defendants ignore this argument. Instead, they attack a straw man by arguing that the decision below will not prevent *indirect purchasers*, i.e. consumers, from bringing actions for violations of the antitrust laws. (Answer to Petition for Review ("Answer") at 14.) They do not contest that the First District's interpretation will chill enforcement generally, and specifically by direct purchasers.

Defendants also assert that the decision below will not "erect any bar to claims of plaintiffs who suffer actual damages." (Answer at 13.) But, Plaintiffs have not argued that the decision creates a rule that will technically prevent claimants from filing suit. Rather, their argument, to which no response has been made, is that the availability of the pass-on defense will act as a disincentive to meritorious claims by injecting lengthy and costly pass-on discovery.

Second, the original drafters of the 1907 Cartwright Act defined it as "[a]n act to …provide for … punishment of corporations, persons, firms and associations, or persons connected with them…." (1907 STATS. CH. 530, *tit.*) Besides punishment, deterrence has also been held to be a purpose of the law. (*Levi Strauss, supra*, 41 Cal.3d at 472.) Yet, the First District's interpretation permits a defendant found liable

for price-fixing to escape punishment, which will encourage rather than deter illegal conduct. Review is needed to clarify that the First District's interpretation confounds the policies of the Act. Defendants say nothing of substance in response. They argue that "Plaintiffs' appeal to the deterrence goals of the Cartwright Act [would] rewrite the statute's requirements," and that Plaintiffs' "various policy arguments cannot override the plain language of the statute." (Answer at 17-18.) But, they ignore the fact that the goal of "punishment" *is* written into the statute, and that this Court has already interpreted the Legislature's intent as including "deterrence" as a policy rationale underlying the Act.

Third, the Legislature has made it clear that a defendant should not be permitted to profit from its wrong. (CAL. CIV. CODE §3517 ("No one can take advantage of his own wrong.").) "[T]he purposes of the private damages action for violations of the Cartwright Act include disgorgement...." (*Levi Strauss, supra,* 41 Cal.3d at 472.) However, the First District's interpretation permits a defendant – even one who has admitted to price-fixing – to escape liability with its illegal profits intact. Defendants ignore the point.

Fourth, the Cartwright Act was created in order to "promote free competition in commerce and all classes of business in this state." (1907 STATS. CH. 530, *ii.*) Yet, the First District's interpretation of the statute has the opposite effect, and rather than promoting free competition, the decision condones the restriction of it. By allowing a defendant to assert a pass-on defense, the decision allows guilty defendants, as here, to fix prices and restrain competition without reprisal. The decision condones illegal restraints of trade by discouraging private plaintiff prosecution. Defendants offer nothing in response.

II. THE DECISION BELOW CREATES A CONFLICT AMONG THE LOWER COURTS CONCERNING "STANDING" UNDER THE UNFAIR COMPETITION LAW AND "INJURY" UNDER THE CARTWRIGHT ACT

Because review is necessary to settle important questions of law, a showing that the decision below has created a conflict among the lower courts is unnecessary. (CAL. RULES OF COURT, rule 8.500(b)(1).) Nevertheless, Defendants have ignored Plaintiffs' argument that the First District's decision creates a conflict on the definition of "standing" under the UCL, and they only peripherally confront the conflict regarding "injury" under the Cartwright Act.

A. The Defendants Ignore The Decisional Conflict Regarding "Standing" Under The UCL Created By The First District

Various decisions from the Courts of Appeal have interpreted the standing requirements of the UCL after passage of Proposition 64 in 2004. These cases, emanating from various appellate districts, are exemplified by *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847 and are cited and discussed at length in the Petition. (*See,* Petition at 24-25.) Under the law of these decisions, a private UCL plaintiff has standing if it "expends money" as a direct result of defendant's acts of unfair competition. The First District's decision, however, creates a third requirement of standing: that the plaintiff not recoup that money from a *third* party.

The Defendants ignore the standing argument and fail to discuss *Hall* or any of the other cited authorities. (Answer at 11-12, ii.) Instead, they assert there is no decisional conflict "as to whether the UCL allows plaintiffs to recover money they have already recouped."[1] (Answer at 11.) They claim that this Court answered that

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[1] Defendants also object to Plaintiffs' prayer for injunctive relief, relying on CAL. RULES OF COURT, rule 8.500(c)(1) and asserting that the issue was not timely raised before the Court of Appeal. (Answer at 12, n.7.) But, the First District reached the issue on its merits, holding that "[t]he same rationale that applies to the restitution

question in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, when it held that restitution was the only available remedy under UCL claims. (Answer at 11-12.) They erroneously state that Pharmacies seek restitution of monies their customers paid to the Defendants. (*Id.*) But, the Defendants misread *Korea Supply*, and the Plaintiffs are not seeking money their customers paid to the Defendants; they seek the overcharges *they* paid and which were previously in *their* possession.

First, *Korea Supply* recognized that the deterrence of unfair practices was "an important goal" of the UCL. (*Korea Supply, supra*, 29 Cal.4th at 1148.) Second, this Court held that disgorgement of illegal profits *is* an available remedy under the UCL, as long as such disgorgement is restitutionary in nature. (*Id.* at 1145.) Third, disgorgement is considered restitutionary if the money sought was previously in plaintiff's possession:

> The remedy sought by plaintiff in this case is not restitutionary because plaintiff does not have an ownership interest in the money it seeks to recover from defendants. First, it is clear that plaintiff is not seeking the return of money or property that was once in its possession. [Plaintiff] has not given any money to [defendant]; instead, it was from the Republic of Korea that [defendant] received its profits. Any award that plaintiff would recover from defendants would not be restitutionary *as it would not replace any money or property that defendants took directly from plaintiff.* (*Id.* at 1149 (emphasis added).)

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analysis would preclude any right to any action for injunction…." (*Clayworth, supra*, 165 Cal.App.4th at 247, n.18.) Rule 8.500(c)(1) applies only "when those issues have not been timely raised in the Court of Appeal or not reached in that court…." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1205, *citing* former rule 29(b) (emphasis added).) Because the issue was reached on the merits below, it is rightly before this Court for review.

Finally, *restitutionary* disgorgement is an available UCL remedy "even though not all is to be restored to the persons from whom it was obtained or those claiming under those persons." (*Kraus v. Trinity Management Svcs.* (2000) 23 Cal.4th 116, 127; *Korea Supply, supra,* 29 Cal.4th at 1145.) This disgorgement serves the UCL's goal of deterring unfair practices. "Section 17203 also grants the court the power to make orders necessary to prevent the use of unfair business. Such orders may encompass broader restitutionary relief, including disgorgement of all money so obtained even when it may not be possible to restore all of that money to direct victims of the practice." (*Kraus, supra,* 23 Cal.4th at 129.) Because the Plaintiffs had possession of the money they seek from Defendants, the disgorgement sought is restituionary.

B. The Defendants Failed To Address The Conflict Created By The Court Below Regarding "Injury" Under The Cartwright Act

Plaintiffs have never argued, as the Defendants assert, that a conflict in decisions exists with respect to whether the pass-on defense is available. (Answer at 8.) Yet, Defendants nevertheless attack that argument, claiming that no decisional conflict exists with respect to that question. They claim that every lower court to consider the issue has "signaled approval of defensive pass-on." (Answer at 8-9, *citing, Global Minerals & Metals v. Superior Court* (2003) 113 Cal.App.4th 836, 852, n.10; *J.P. Morgan & Co. v. Superior Court* (2003) 113 Cal.App.4th 195, 213, n.10; and *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1353.) Yet, those cases did nothing other than state that "the availability of the 'pass-on defense' in antitrust law still remains an open question in California," an open question answered for the first time by the court below. (*Clayworth, supra,* 165 Cal.App.4th at 227, *quoting, J.P. Morgan, supra,* 113 Cal.App.3d at 213, n.10; *Global Minerals, supra,* 113 Cal.App.4th at 852, n.10.) Plaintiffs never argued there was a

decisional split regarding the pass-on defense because the question presented was one of first impression below. (*Clayworth, supra*, 165 Cal.App.4th at 214.)

But, by dragging this red herring across the Court's path, the Defendants evade the real argument presented in the Petition – that the decision below creates a conflict in the lower courts concerning when an antitrust plaintiff suffers "injury" under the Cartwright Act. Plaintiffs argued that the California cases governing injury have consistently held that an antitrust plaintiff suffers injury the moment it purchases a price-fixed product at an artificially high price. (*See,* Pet. at 14.) As the U.S. Supreme Court has stated, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step. … The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events." (*Hanover Shoe, supra*, 392 U.S. at 490, n.8, *quoting, Southern Pacific Co. v. Darnell-Taenzer Lumber Co.* (1918) 245 U.S. 531, 533-34.) Yet, the First District nevertheless held that Pharmacies "sustained no injury," even though they purchased drugs from price-fixing Defendants at the conspiratorially-inflated rate. (*Clayworth, supra,* 165 Cal.App.4th at 228.)

The Defendants fail to address this conflict created by the First District's decision, instead asserting that Plaintiffs have confused the proof of injury at the liability stage with the amount of damages to be assessed at the damages phase. (Answer at 15-16.) In fact, it is the Defendants who are confused. The *purchase* of a price-fixed product *is* the "injury in fact," and the *amount* of the overcharge is the "amount of damages." The decisional split created by the First District lies in the fact that it is undisputed Plaintiffs purchased the price-fixed drugs, yet the court below still held they suffered no injury in fact. (*Clayworth, supra*, 165 Cal.App.4th at 228.)

The Defendants also confuse Plaintiffs' argument that the pass-on defense requires defendants to show the plaintiff could not have increased its prices in the

absence of the conspiracy. The pass-on defense is an affirmative defense and defendants asserting it must prove the plaintiff suffered no injury. *Hanover Shoe*, and later *Kansas v. Utilicorp United, Inc.* (1990) 497 U.S. 199, were clear in their proclamations that a simple showing that the plaintiff passed on the overcharge is insufficient, by itself, to prove the plaintiff suffered no injury. Indeed, the plaintiff in *Utilicorp* was still held to have suffered injury, even though it passed on 100% of the overcharge. (*Utilicorp, supra,* 497 U.S. at 209.) As both *Hanover Shoe* and *Utilicorp* held, "[a]n overcharge may injure a [plaintiff] … even if the [plaintiff] raises its rates to offset its increased costs." (*Utilicorp, supra*, 497 U.S. at 209; *Hanover Shoe, supra*, 392 U.S. at 493, n.9.) *Utilicorp* thus explained that "[t]o show that a [plaintiff] has borne no portion of an overcharge, the [defendant] would have to prove, among other things, that the [plaintiff] could not have raised its rates prior to the overcharge." (*Utilicorp, supra,* 497 U.S. at 209.)

In their Answer, the Defendants assert, without support, that "[w]hether or not a plaintiff can raise its prices absent an overcharge is a classic issue of lost profits." (Answer at 15.) They are wrong. The Supreme Court in *Utilicorp* held, "an overcharge may injure a [plaintiff], *apart from the question of lost business,* even if the [plaintiff] raises its rates to offset its increased costs." (*Utilicorp, supra*, 497 U.S. at 209 (emphasis added).) "In other words," the Court continued, if the plaintiff "could [] have raised its rates prior to the overcharge," it "has borne [] a portion of an overcharge." (*Id.*)

Moreover, Defendants' argument says absolutely nothing about the effect the First District's rule will have on future antitrust actions, where defendants will be required to prove that the Plaintiff "could not or would not have raised his prices absent the overcharge." (*Hanover Shoe, supra*, 392 U.S. at 493.) "Since establishing the applicability of the passing-on defense would require a convincing showing of [this] virtually unascertainable figure[], the task would normally prove

insurmountable," complicating private actions and "substantially reduc[ing their] effectiveness." (*Id.* at 493-494.)

III. REVIEW IS NECESSARY TO PREVENT THE DECISION BELOW FROM USURPING THE WILL OF THE LEGISLATURE

Defendants argue that the Petition should be denied because this Court's review would usurp the power of the Legislature. (Answer at 16.) In fact, the opposite is true. If this Court does not grant review, it will allow the First District's interpretation of the Cartwright Act to run against the express stated intent of the original drafters of the 1907 law. While Defendants ironically accuse Plaintiffs of "ignor[ing] the operative language of the Cartwright Act" (Answer at 17), it is in fact they who ignore the statute's express language that calls for the punishment of wrongdoers and the promotion of free competition:

> An act to define trust and to provide for criminal penalties and civil damages, and punishment of corporations, persons firms, and association, or persons connected with them, and to promote free competition in commerce and all classes of business in this state. (1907 STATS. CH. 530, *itl.*)

Defendants fail to address Plaintiffs' argument that the decision below interprets the Cartwright Act in opposition to these expressed goals. However, Defendants do rightly state that "[t]he issues for *judicial* determination in this case are the proper interpretation of the phrase 'damages sustained.'" (Answer at 16 (emphasis in original).) And, the question before this Court is whether the First District's interpretation runs afoul of the statute's stated purpose and the policies that this Court has long attached to the Cartwright Act. "The court may consider the impact of an interpretation on public policy, for where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663 (internal quotations

omitted).) The problem with the rule created below is that it omits any consideration of the goals of deterrence, disgorgement, punishment, or the promotion of free competition.

Finally, the Defendants claim that the policies of deterrence, punishment and disgorgement are purposes only to be found in representative actions brought by the government's "unbiased state agents." (Answer at 18-19.) They are wrong. Private antitrust plaintiffs have long been considered servants of the public good acting as "private attorneys general" which significantly bolsters resource-strained government agencies. (*Crown Homes, supra*, 22 Cal.App.4th at 1277 ("[P]rivate parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages."); *Chicago Title, supra*, 69 Cal.2d at 329-30 ("[P]rivate enforcement is also authorized, deemed in the public interest, and encouraged.").)

IV. THE PLAIN LANGUAGE OF THE STATUTE DOES NOT COMPEL PERMITTING THE PASS-ON DEFENSE

In lieu of confronting the Petition's arguments why review should be granted, the Defendants assert that permitting the pass-on defense is mandated by the "straightforward application of statutory language." (Answer at 13.) But, there is nothing straightforward about the First District's interpretation of the language "damages sustained," which both the First District and Defendants claim is "unambiguous."

But, "[a]statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable." (*Hughes v. Bd. Of Architectural Examiners* (1998) 17 Cal.4th 763, 776.) Whereas, the First District construed the statute as allowing the pass-on defense, the United States Supreme Court in *Hanover Shoe* construed the operatively identical language of Section 4 of the Clayton Act as *prohibiting* the

defense.[2] (*Hanover Shoe, supra,* 392 U.S. at 488-89.) The language cannot therefore be considered "unambiguous" and extrinsic sources, "including the ostensible objects to be achieved" by the statute must be considered. (*Estate of Griswold* (2001) 25 Cal.4th 904, 911.)

In response to this argument below, the First District asserted that "the Supreme Court did not decide *Hanover Shoe* based on the language of section 4 of the Clayton Act." (*Clayworth, supra,* 165 Cal.App.4th at 232.) The First District was mistaken. "As we made clear in *Illinois Brick*, the issue before the Court in both that case and in *Hanover Shoe* was strictly a question of statutory interpretation – what was the proper construction of §4 of the Clayton Act." (*Clayworth, supra,* 165 Cal.App.4th at 234, *quoting, California v. ARC America Corp.* (1989) 490 U.S. 93, 102-103.) Thus, the proclamations of the First District and Defendants that the language of the statute is unambiguous are incorrect, and since "the decision below turns almost exclusively on the meaning of the words 'damages sustained'" (Answer at 7), the foundation of the opinion falls apart.

Moreover, the court below interpreted "damages sustained" as meaning "actual financial loss suffered." (Answer at 7.) The Defendants hyperbolize the authorities relied upon by the First District as constituting "more than 100 years" of California

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[2] The Cartwright Act reads 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 therefore … and to recover three times the damages sustained by him or her. (CAL. BUS. & PROF. CODE §16750.)

Section 4 of the federal Clayton Act, reads in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore … and shall recover threefold the damages by him sustained. (15 U.S.C. §15.)

law, but their proclamation is hardly that grand.[3] (Answer at 7.) But, even assuming that the phrase "damages sustained" means what the First District says, that conclusion does not mandate allowing the pass-on defense, as Defendants vehemently suggest. The United States Supreme Court has also defined the term "damages by him sustained" as meaning "actual, compensatory damages." (*Local 20, Teamsters Union v. Morton* (1964) 377 U.S. 252, 260, n.15.) The *Local 20* case pre-dates the Supreme Court's 1968 *Hanover Shoe* decision, which interpreted the federal antitrust statute containing the phrase "damages by him sustained." (*Hanover Shoe, supra*, 392 U.S. at 488-489.) But, *Local 20*'s interpretation of "damages sustained" did not stop the Supreme Court in *Hanover Shoe*, *Illinois Brick v. Illinois* (1977) 431 U.S. 720, and *Utilicorp* from prohibiting the pass-on defense, and there is no reason why the First District's interpretation of the phrase "damages sustained" should stop this Court from likewise proscribing the defense. That is because the issue goes well beyond the simplistic reading Defendants urge. The issue rightly concerns vital public policies outlined by this Court and the Cartwright Act itself which have been literally pushed to the side by the First District's conclusion. It is axiomatic that "[i]n the end, a court *must* adopt the construction … most likely to promote rather than defeat the legislative purpose…." (*In re J. W.* (2003) 29 Cal.4th 200, 213 (emphasis

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[3] The court below relied mostly on two Cartwright Act cases: *Krigbaum v. Sbarbaro* (1913) 23 Cal.App. 427 and *Overland P. Co. v. Union L. Co.* (1922) 57 Cal.App. 366. (*Clayworth, supra*, 165 Cal.App.4th at 229.) Its reliance on these early cases is strained. Those cases did not construe the phrase "damages sustained," which the First District conceded, and the language culled from these cases is dicta. (*Clayworth, supra*, 165 Cal.App.4th at 231 ("It is true that *Krigbaum* and *Overland* did not expressly construe 'damages sustained.'")

added).) The First District's interpretation flies in the face of the express goals of the antitrust laws, and it must be reversed.

CONCLUSION

The First District's decision represents a full-galloped retreat from the policies that have driven competition law enforcement in this State for over a century. Rather than promote those policies, the court below has construed the Cartwright Act in violation of them.

The decision below creates conflicts with the Courts of Appeal on the requirements governing standing and restitution under the UCL and injury under the Cartwright Act.

The federal courts and nearly a dozen state jurisdictions that have considered the same issue presented here have arrived at the opposite conclusion as the First District: if defensive pass-on evidence is ever to be permitted, the defense may never be asserted where it defeats the only plaintiff group poised to redress the violation.

For the reasons enumerated herein and in the Petition, review must be granted and the decision below reversed.

Dated: October 6, 2008 Respectfully submitted,

By: _____

Joseph M. Alioto, Jr.
ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104

Attorneys for JAMES CLAYWORTH, et al.,
Plaintiffs, Appellants, and Petitioners.

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court 8.504(d), the undersigned certifies that the foregoing Reply To Answer To Petition For Review contains 4,188 words.

Dated: October 6, 2008

Respectfully submitted,

By: 

Joseph M. Alioto, Jr.

ALIOTO LAW FIRM
555 California Street
Thirty-First Floor
San Francisco, California 94104

Attorneys for JAMES CLAYWORTH, et al.,
Plaintiffs, Appellants, and Petitioners.

COUNSEL FOR PETITIONERS

ALIOTO LAW FIRM
Joseph M. Alioto (SBN 42680)
Theresa D. Moore (SBN 99978)
Angelina Alioto-Grace (SBN 206899)
Joseph M. Alioto, Jr. (SBN 215544)
Thomas P. Pier (SBN 235740)
555 California Street, Suite 3160
San Francisco, California 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200

LAW OFFICES OF JOHN H. BOONE
John H. Boone (SBN 44876)
555 California Street, Ste. 3160
San Francisco, California 94104
Telephone: (415) 434-1133
Facsimile: (415) 434-9200

LAW OFFICES OF JAMES M. DOMBROSKI
James M. Dombroski (SBN 56898)
Post Office Box 751027
Petaluma, California 94975
Telephone: (707) 762-7807
Facsimile: (707) 769-0419

FOREMAN & BRASSO
Russell F. Brasso (SBN 85417)
930 Montgomery Street, Suite 600
San Francisco, California 94133
Telephone: (415) 433-3475
Facsimile: (415) 781-8030

LAW OFFICES OF JEFFERY K. PERKINS
Jeffery K. Perkins (SBN 57996)
1275 Columbus Avenue
San Francisco, California 94133
Telephone: (415) 474-3833
Facsimile: (415) 474-2890

GARY D. MCCALLISTER & ASSOCIATES
Gary D. McCallister (*pro hac vice)*
Thomas A. Kelliher (*pro hac vice)*
Eric I. Unrein (*pro hac vice)*
120 North LaSalle Street, Ste. 2800
Chicago, Illinois 60602
Telephone: (312) 346-0611
Facsimile: (312) 345-0612

PROOF OF SERVICE

James Clayworth, et al. v. Pfizer, Inc., et al.
California Supreme Court No. S166435
Court of Appeal, First Appellate District, Division Two, No. A116798
Alameda County Superior Court Case No. RG04172428

I, Tamara Slye, declare I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the City and County of San Francisco and my business address is 555 California Street, Suite 3160, San Francisco, CA 94104.

On October 6, 2008, I served the attached document described as:

REPLY TO ANSWER TO PETITION FOR REVIEW

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Alameda County Superior Court
24405 Amador Street
Hayward, CA 94544

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First Appellate District, Div. 2
350 McAllister Street
San Francisco, CA 94102

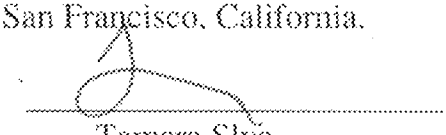
Kathleen Foote
Senior Assistant Attorney General
Attorney General of California
455 Golden Gate Avenue Suite 11000
San Francisco, California 94102-7004

Thomas Greene
Special Assistant Attorney General
Attorney General of California
1300 "I" Street
Sacramento, CA 94244-2550

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

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

Executed on October 6, 2008, at San Francisco, California.



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SERVICE LIST

James Clayworth, et al. v. Pfizer, Inc., et al.
California Supreme Court No. S166435
Court of Appeal, First Appellate District, Division Two, No. A116798
Alameda County Superior Court Case No. RG04172428

COUNSEL FOR DEFENDANTS / RESPONDENTS:

for Defendant **ABBOTT LABORATORIES**

Tyler M. Paetkau
Nicole P. Dogwill
WINSTON & STRAWN LLP
101 California Street, Suite 3900
San Francisco, CA 94111
Tel.: (415) 591-1000; Fax: (415) 591-1400
Email: tpaetkau@winston.com
Email: ndogwill@winston.com

Susan A. Pipal
James F. Hurst
Matthew J. Sullivan
WINSTON & STRAWN
35 W. Wacker Drive
Chicago, IL 60601
Tel.: (312) 558-6500; Fax: (312) 558-5700
Email: spipal@winston.com
Email: jhurst@winston.com
Email: mjsullivan@winston.com

for Defendant **ALLERGAN, INC.**

Jeffrey T. Thomas
James N. Knight
GIBSON, DUNN & CRUTCHER LLP
Jamboree Center, 4 Park Plaza, Suite 1400
Irvine, CA 92614-8557
Tel.: (949) 451-3800; Fax: (949) 451-4220
Email: jtthomas@gibsondunn.com
Email: jknight@gibsondunn.com

for Defendant **AMGEN, INC.**

Steven O. Kramer
John Nadolenco
MAYER BROWN ROWE & MAW LLP
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Tel.: (213) 229-9500; Fax: (213) 625-0248
Email: skramer@mayerbrownrowe.com
Email: jnadolenco@mayerbrownrowe.com

Donald M. Falk
MAYER BROWN ROWE & MAW LLP
2 Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
Tel.: (650) 331-2000; Fax: (650) 331-2060
Email: dfalk@mayerbrownrowe.com

Joseph H. Young
Steven F. Barley
HOGAN & HARTSON LLP
111 South Calvert Street
Baltimore, MD 20201
Tel.: (410) 659-2724; Fax: (410) 539-6981
Email: jhyoung@hhlaw.com
Email: sfbarley@hhlaw.com

for Defendant **ASTRAZENECA LP**

Arthur F. Golden
Amelia T.R. Starr
William J. Fenrich
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
Tel.: (212) 450-4000; Fax: (212) 450-3800
Email: agolden@dpw.com
Email: astarr@dpw.com
Email: wfenrich@dpw.com

Peter A. Strotz
William E. Steimle
FILICE BROWN EASSA & McLEOD LLP
1999 Harrison Street, 18th Floor
Oakland, CA 94612
Tel.: (510) 444-3131; Fax: (510) 839-7940
Email: pstrotz@filicebrown.com
Email: wsteimle@filicebrown.com

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for Defendant **BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.** Anita F. Stork **COVINGTON & BURLING** One Front Street San Francisco, CA 94111 Tel.: (415) 591-6000; Fax: (415) 591-6091 Email: cabrown@cov.com David L. Meyer Thomas J. Cosgrove **COVINGTON & BURLING** 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20004-2401 Tel.: (202) 662-6000; Fax: (202) 662-6291 Email: dmeyer@cov.com Email: tcosgrove@cov.com	for Defendant **BRISTOL-MYERS SQUIBB COMPANY** Paul J. Riehle Matthew A. Fischer **SEDGWICK, DETERT, MORAN & ARNOLD LLP** One Market Plaza Steuart Street Plaza, 8th Floor San Francisco, CA 94105 Tel.: (415) 781-7900; Fax: (415) 781-2635 Email: paul.riehle@sdma.com Email: matthew.fischer@sdma.com Evan R. Chesler Elizabeth L. Grayer Jeffrey B. Korn Marek P. Krzyzowski **CRAVATH, SWAINE & MOORE LLP** Worldwide Plaza, 825 Eighth Avenue New York, NY 10019 Tel.: (212) 474-1000; Fax: (212) 474-3700 Email: echesler@cravath.com Email: egrayer@cravath.com Email: jkorn@cravath.com Email: mkrzyzowski@cravath.com
for Defendant **ELI LILLY & COMPANY** Gary Hansen, Esq. **OPPENHEIMER WOLFF & DONNELLY** Plaza VII, Suite 3300 45 South Seventh Street Minneapolis, MN 55402-1609 Telephone: 612.607.7584 Facsimile: 612.607.7100 Email: ghansen@oppenheimer.com Michele Floyd, Esq. **REED SMITH LLP** Two Embarcadero Center, Suite 2000 San Francisco, CA 94111 Telephone: 415.659.5934 Facsimile: 415.391.8269 Email: mfloyd@reedsmith.com	for Defendant **GLAXOSMITHKLINE** George S. Cary Sara D. Schotland David I. Gelfand Matthew Bachrack **CLEARY GOTTLIEB STEEN & HAMILTON LLP** 2000 Pennsylvania Avenue, N.W. Washington, D.C. 20006 Tel.: (202) 974-1920; Fax: (202) 974-1999 Email: gcary@cgsh.com Email: sschotland@cgsh.com Email: dgelfand@cgsh.com Email: mbachrack@cgsh.com Alexander F. Wiles John C. Keith **IRELL & MANELLA LLP** 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067-4276 Tel.: (310) 277-1010; Fax: (310) 203-7199 Email: awiles@irell.com Email: jkeith@irell.com

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for Defendant **HOFFMANN-LA ROCHE INC.**

H. Christian L'Orange
DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105-2235
Tel.: (415) 591-7500; Fax: (415) 591-7510
Email: chris.lorange@dbr.com

Paul H. Saint-Antoine
Mary E. Kohart
David J. Antczak
Joanne C. Lewers
DRINKER BIDDLE & REATH LLP
One Logan Square
18th and Cherry Streets
Philadelphia, PA 19103-6996
Tel.: (215) 988-2700; Fax: (215) 988-2757
Email: paul.saint-antoine@dbr.com
Email: mary.kohart@dbr.com
Email: david.antczak@dbr.com
Email: joanne.lewers@dbr.com

for Defendants **JANSSEN PHARMACEUTICA, INC., JOHNSON & JOHNSON HEALTH CARE SYSTEMS, INC., ORTHO BIOTECH, INC.,** and **ORTHO-McNEIL PHARMACEUTICAL, INC.**

Beatrice B. Nguyen
Cecilia C. Ogbu
FOLGER LEVIN & KAHN LLP
Embarcadero Center West
275 Battery Street, 23rd Floor
San Francisco, CA 94111
Tel.: (415) 986-2800; Fax: (415) 986-2827
Email: bnguyen@flk.com

William J. Cavanaugh, Jr.
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036
Tel.: (212) 336-2000; Fax: (212) 336-2222
Email: wjcavanaugh@pbwt.com

for Defendant **MERCK & CO., INC.**

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
Email: townsend@hugheshubbard.com
Email: reznick@hugheshubbard.com
Email: christensen@hugheshubbard.com

Rita M. Haeusler
HUGHES HUBBARD & REED LLP
350 South Grand Avenue, 36th Floor
Los Angeles, CA 90071-3442
Tel.: (213) 613-2800; Fax: (213) 613-2950
Email: haeusler@hugheshubbard.com

for Defendant **NOVARTIS PHARMACEUTICALS CORP.**

Aron Arbisser
Bryant S. Delgadillo
KAYE SCHOLER LLP
1999 Avenue of the Stars, Suite 1700
Los Angeles, CA 90067-6048
Tel.: (310) 788-1000; Fax: (310) 788-1200
Email: aarbisser@kayescholer.com
Email: bdelgadillo@kayescholer.com

James A. O'Neal
FAEGRE & BENSON LLP
90 South Seventh Street
Minneapolis, MN 55402
Tel.: (612) 766-8420; Fax: (612) 766-1600
Email: joneal@faegre.com

Saul P. Morgenstern
Karin E. Garvey
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022-3598
Tel.: (212) 836-8000; Fax: (212) 836-8689

Kim J. Walker
FAEGRE & BENSON LLP
801 Grand Ave., Suite 3100
Des Moines, IA 50309-8002
Tel: (515) 248-9002; Fax: (515) 248-9010
Email: kwalker@faegre.com

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for Defendant **PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA)**

Charles H. Samel
Belinda S. Lee
Jennifer A. Carmassi
LATHAM & WATKINS LLP
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
Tel.: (213) 485-1234; Fax: (213) 891-8763
Email: charles.samel@lw.com
Email: belinda.lee@lw.com
Email: jennifer.carmassi@lw.com

Margaret M. Zwisler
Steven H. Schulman
LATHAM & WATKINS LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel.: (202) 637-2200; Fax: (202) 637-2201
Email: Margaret.zwisler@lw.com
Email: steven.schulman@lw.com

for Defendant **PFIZER, INC.**

Peter J. Kadzik
Bernard Nash
Maria Cosley Heard
Milton Marquis
Andres Colón
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
1825 Eye Street, N.W.
Washington, D.C. 20006-5403
Tel.: (202) 420-2200; Fax: (202) 420-2201
Email: kadzikp@dicksteinshapiro.com
Email: nashb@dicksteinshapiro.com
Email: heardm@dicksteinshapiro.com
Email: marquism@dicksteinshapiro.com
Email: colona@dicksteinshapiro.com

Katrina Jane Lee
Michael G. Thornton
NOSSAMAN, GUTHNER, KNOX & ELLIOTT LLP
50 California Street, 34th Floor
San Francisco, CA 94111-4799
Tel.: (415) 398-3600; Fax: (415) 398-2438
Email: klee@nossaman.com

for Defendant **WYETH**

Ronald C. Redcay
ARNOLD & PORTER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Tel.: (213) 243-4000; Fax: (213) 243-4199
Email: Ronald_Redcay@aporter.com

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
Email: Douglas_Wald@aporter.com
Email: Daniel_Waldman@aporter.com
Email: Anne_David@aporter.com
Email: Ryan_Watts@aporter.com

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COUNSEL FOR PLAINTIFFS / APPELLANTS:

ALIOTO LAW FIRM Joseph M. Alioto (SBN 42680) Theresa D. Moore (SBN 99978) Angelina Alioto-Grace (SBN 206899) Joseph M. Alioto, Jr. (SBN 215544) Thomas P. Pier (SBN 235740) 555 California Street, Suite 3160 San Francisco, California 94104 Telephone: (415) 434-8900 Facsimile: (415) 434-9200	**LAW OFFICES OF** **JOHN H. BOONE** John H. Boone (SBN 44876) 555 California Street, Ste. 3160 San Francisco, California 94104 Telephone: (415) 434-1133 Facsimile: (415) 434-9200
LAW OFFICES OF **JAMES M. DOMBROSKI** James M. Dombroski (SBN 56898) Post Office Box 751027 Petaluma, California 94975 Telephone: (707) 762-7807 Facsimile: (707) 769-0419	**FOREMAN & BRASSO** Russell F. Brasso (SBN 85417) 930 Montgomery Street, Suite 600 San Francisco, California 94133 Telephone: (415) 433-3475 Facsimile: (415) 781-8030
LAW OFFICES OF **JEFFERY K. PERKINS** Jeffery K. Perkins (SBN 57996) 1275 Columbus Avenue San Francisco, California 94133 Telephone: (415) 474-3833 Facsimile: (415) 474-2890	**GARY D. MCCALLISTER & ASSOCIATES** Gary D. McCallister (*pro hac vice*) Thomas A. Kelliher (*pro hac vice*) Eric L. Unrein (*pro hac vice*) 120 North LaSalle Street, Ste. 2800 Chicago, Illinois 60602 Telephone: (312) 346-0611 Facsimile: (312) 345-0612