No. S166435

IN THE SUPREME COURT OF CALIFORNIA

JAMES CLAYWORTH, ET AL.,

Plaintiffs and Appellants,

v.

PFIZER INC., ET AL.,

Defendants and Respondents.

On 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

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QUESTIONS PRESENTED

1. In this private action under the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.),[1] Plaintiffs seek recovery exclusively for alleged overcharges they claim were imposed on them as a result of an alleged unlawful price-fixing conspiracy; Plaintiffs have expressly waived recovery of lost profits and lost sales. Have such Plaintiffs "sustained" any recoverable "damages" within the meaning of Section 16750(a) where it is undisputed that they resold the allegedly price-fixed products at a percentage markup above their costs, thereby ensuring that they absorbed none of the alleged overcharges (having passed them on to their customers) and indeed, increased their gross profits whenever prices of the allegedly price-fixed products rose?

2. In this private action under the Unfair Competition Law (§ 17200 et seq.) (UCL), Plaintiffs have passed on 100% of any alleged overcharge to their downstream customers and have been restored to the status quo ante by recouping any amounts they allegedly overpaid. Have such Plaintiffs (a) lost "money or property" within the meaning of section 17204's standing requirement and (b) retained an interest in the alleged overcharge such that restitution is available?

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[1] Statutory references are to the Business and Professions Code unless otherwise stated. Plaintiffs assert claims under section 16750, subdivision (a) (hereafter Section 16750(a)).

INTRODUCTION AND SUMMARY OF ARGUMENT

For 150 years, California law has disallowed damages awards for amounts that plaintiffs have already recouped through transactions with third persons. Petitioners here (Plaintiffs)—seventeen retail pharmacies that admit they passed on to their customers and their customers' insurers 100% of the alleged overcharges at issue in this case—do not contest that this general rule of damages applies to virtually every California contract, tort and statutory action. Nevertheless, they contend that an entirely *different* rule somehow applies to antitrust claims under the Cartwright Act. The Superior Court and the unanimous Court of Appeal panel correctly rejected Plaintiffs' misguided assertion. This Court should end Plaintiffs' effort to rewrite California damages law in a way that would permit them to recover damages they did not sustain.

Plaintiffs' Cartwright Act claims allege a price-fixing conspiracy among Respondent pharmaceutical companies (Defendants) and seek recovery of only one form of damages: "the full extent of the overcharge paid by Plaintiffs—no more or less." Plaintiffs repeatedly and expressly waived claims for any other form of damages, including lost profits and lost sales.

The undisputed record demonstrates, however, that Plaintiffs did not actually sustain any of the overcharge damages they allege. Rather, every time any Defendant raised its prices on any of its drugs to the wholesalers who supplied these middlemen Plaintiffs, Plaintiffs' resale prices for those products increased by at least the same dollar amount as their acquisition costs. Indeed, Plaintiffs'

mathematical pricing formulas ensured that they actually *increased* their gross profits as a direct result of Defendants' price increases.

Plaintiffs' attempt to recover alleged overcharges that they admittedly passed on is prohibited under the plain meaning of Section 16750(a), which provides that "[a]ny 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 ... to recover three times *the damages sustained by him or her* ...." (Emphasis added.) That language—"damages sustained"—has been consistently interpreted by this Court and the Court of Appeal, in all areas of California law, to exclude amounts a plaintiff has already recouped, because the purpose of a "damages" award is compensation for actual pecuniary loss and no more. That is what "damages" meant in California when the Cartwright Act was enacted in 1907, and that is what "damages" means in California today. Plaintiffs' undisputed pass-on of their acquisition costs conclusively establishes that they sustained no actual pecuniary loss from alleged overcharges, and accordingly, Plaintiffs did not sustain and cannot recover damages. Plaintiffs' focus on irrelevant issues—such as whether they have satisfied the distinct, injury-in-fact element of a Cartwright Act claim, or whether the alleged overcharges may have caused them to lose profits (recovery of which they expressly and repeatedly waived)—cannot substitute for the proof of actual damages required by Section 16750(a).

Disregarding this precedent and fundamental principles of construction, Plaintiffs contend that statutory language is not controlling here. Instead, they claim that the Cartwright Act must permit middlemen to recover treble the alleged overcharges they

never sustained, lest price-fixers be permitted to retain the ill-gotten gains of their unlawful conduct. However, the Cartwright Act is enforced by plaintiffs who were actually damaged and by public prosecutors. Enforcement of the Cartwright Act by undamaged plaintiffs like those here is thus unnecessary to deter antitrust violations, and such enforcement is incompatible with the Act's compensatory purpose of providing recoveries to those who actually *have* sustained pecuniary loss from an unlawful conspiracy.

Unable to square their assertions with the plain meaning of the Cartwright Act or the policies it serves, Plaintiffs rely almost entirely on inapplicable *federal* pass-on policies. Plaintiffs' position is based upon an unsupported hypothesis—that California tacitly adopted selected aspects of the United States Supreme Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* (1968) 392 U.S. 481 (*Hanover Shoe*), and of Justice Brennan's dissenting opinion in *Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720 (*Illinois Brick*). *Hanover Shoe* held that defendants in Clayton Act cases may not defeat liability based on a showing that the plaintiff has passed on an overcharge to its customers, while *Illinois Brick* held that indirect purchasers (such as Plaintiffs in this case) may not bring suit to recover alleged overcharges that were passed on to them by direct purchasers in the distribution chain.

But the federal policy choices of *Hanover Shoe* and *Illinois Brick*—and their corresponding rules prohibiting the use of pass-on evidence by both defendants and indirect purchasers in federal antitrust actions—have been rejected in California, and provide no basis for reversing the judgment below. In 1978, the California Legislature amended Section 16750(a) (the 1978 Amendment) to

clarify existing law that any injured plaintiff may bring a Cartwright Act claim, "regardless of whether such injured person *dealt directly or indirectly* with the defendant." (Stats. 1978, ch. 536, § 1, at p. 1693, emphasis added; *id.* § 2, at p. 1696.) In doing so, the Legislature necessarily disavowed the policies that produced *Illinois Brick*'s direct purchaser rule, which, the U.S. Supreme Court has explained, are *exactly* the same policies underlying the rule of *Hanover Shoe*. California, in contrast to federal law, has opted for a framework that serves the purposes of the antitrust laws by allowing all who were actually damaged to recover, but only to recover the damages that each actually sustained (trebled)—exactly the opposite of the result that Plaintiffs advocate.

Plaintiffs' remaining arguments offer no basis to permit recovery of unsustained damages in Cartwright Act cases. Relying on discussions in the *federal* legislative history of a similarly worded federal law, Plaintiffs contend that language prohibiting duplicative recoveries in section 16760—the 1977 statute authorizing the Attorney General to bring *parens patriae* actions on behalf of injured (and damaged) California consumers—shows that the California Legislature tacitly adopted *Hanover Shoe*. But section 16760's *own* text and history do not support this argument. Indeed, Plaintiffs reading, if correct, would render section 16760 self-defeating, because the statute's duplicative liability language would then preclude the Attorney General from recovering any overcharges previously recovered by middlemen such as Plaintiffs, even where those overcharges had been passed on to and absorbed by the very consumers on whose behalf he is empowered to sue. Nor do the widely varying antitrust frameworks of other jurisdictions (none of

which replicates the Cartwright Act) support Plaintiffs' bid to recover windfall profits and their attempt to suppress the presentation of pass-on evidence in California. The differences between those statutes and the Cartwright Act demonstrate that the result Plaintiffs seek can be achieved only through legislative action, which California has never taken.

Plaintiffs' attempt to obtain restitution under the UCL in this case is equally faulty. For exactly the same reasons that they cannot recover overcharge damages, Plaintiffs cannot satisfy the UCL's standing requirement. Plaintiffs have not "lost money or property" within the meaning of section 17204 because they fully recouped their acquisition costs when they passed on the alleged overcharges to their customers and to the entities that reimburse Plaintiffs for such customers' prescription drug purchases. Plaintiffs likewise cannot obtain restitution because, having already recouped the amounts they allegedly overpaid, Plaintiffs have been restored to the status quo ante—there is nothing left to be returned to them.

For all of these reasons, the judgment below should be affirmed in its entirety.

STATEMENT OF FACTS

Plaintiffs are retail pharmacies in California. (See Petitioners' Opening Brief on the Merits (OBM) at p. 1.) Defendants are seventeen companies (1CT/9-11¶¶36-52) that manufacture, market and/or distribute brand-name pharmaceutical products throughout

the United States (1CT/9¶35),[2] as well as the Pharmaceutical Research and Manufacturers of America ("PhRMA"), a U.S.-based nonprofit trade association that represents pharmaceutical research and biotechnology companies. (1CT/11¶¶53-54).[3]

Defendants, their subsidiaries or affiliates also manufacture, market and/or distribute in Canada brand-name pharmaceutical products allegedly identical or similar to those they sell in the United States. (1CT/3¶5.) The Canadian government, unlike the United States, imposes pricing limitations on these products. (1CT/3¶4.) Plaintiffs allege that Defendants have conspired "to eliminate price competition and fix prices" in the U.S. market by, among other things, using Canadian prices as a "floor" or minimum price for Defendants' U.S. products. (1CT/3¶5.) Defendants strongly deny any improper conduct. (1CT/30-2CT/300.) They filed a separate motion for summary judgment on the ground that no conspiracy existed, and that motion was pending when judgment was granted below. (11CT/2638.)

Plaintiffs seek treble the amount of the overcharges that they allegedly paid as a result of Defendants' purported conspiracy. (1CT/22–23.) Plaintiffs expressly waived any claims for damages other than the alleged overcharges—i.e., any claims for damages

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[2] Citations to the Clerk's Transcript on Appeal, filed January 28, 2007, take the form "[Volume]CT/[Page]." Citations to the Stipulated Motion to Augment the Record, filed April 5, 2007, take the form "[Volume]SMAR/[Page]."

[3] Defendant Johnson & Johnson Health Care Systems Inc. does not manufacture, market and/or distribute brand-name pharmaceutical products.

based on alleged lost profits or lost sales. (9CT/2060-2061, 2126-2127, 2209 [Defendants' undisputed fact (DF) #7].)[4]

On the only issue relevant to this appeal—whether Plaintiffs sustained the overcharge damages they allege—the facts are undisputed. (See 9CT/2045-2061, 2126–2127, 2207–2209.)[5] Defendants sell their pharmaceutical products to wholesalers, who then sell to pharmacies such as Plaintiffs pursuant to sales agreements. (9CT/2127-2128, 2213 [Plaintiffs' additional undisputed facts (PF) ##1-2]; 9CT/2045-2047, 2126, 2207 [DF#1]; 4CT/865.) Plaintiffs' cost of acquiring a particular drug from wholesalers is tied to the drug's "average wholesale price" (AWP)—a benchmark price published in compendia by companies unrelated to Defendants. (9CT/2045-2047, 2126, 2207 [DF#1]; 9CT/2128, 2214 [PF#4]; 4CT/865–866.) The published AWP is a fixed percentage above the catalog price charged by Defendants to wholesalers, so as Defendants' prices to wholesalers increase, the compendia increase AWP proportionally. (9CT/2128, 2214 [PF##3-4].) For a given drug, Plaintiffs' acquisition cost is set at, or equates to, a specific percentage below the drug's AWP. (9CT/2045-2047, 2126, 2207 [DF#1].)

Plaintiffs, in turn, sell to two types of customers, also on the basis of AWP: (1) those with "third-party" insurance or drug benefit

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[4] Plaintiffs have not pursued injunctive relief under the Cartwright Act either below or in this Court, and they have failed to timely raise, and have therefore waived, any injunctive relief claim under the UCL (*infra* at p. 52).

[5] Supporting evidence for these undisputed facts appears in the record at 4CT/885-9CT/2036. See references at 9CT/2045-2060.

plans, whether offered by a private entity or the government, which pay customers' claims on their behalf; and (2) uninsured, "cash-paying" customers. (9CT/2048–2055, 2126, 2207-2208 [DF##2–4]; 4CT/865.) The vast majority of Plaintiffs' customers who purchase brand-name drugs are covered by third-party payers. (9CT/2048-2049, 2126, 2207 [DF#2].) When Plaintiffs sell to those customers, the third party reimburses Plaintiffs at a predetermined, contractually or statutorily fixed percentage of AWP, plus a dispensing fee, that ensures Plaintiffs a percentage profit above their acquisition cost. (9CT/2050-2053, 2126, 2208 [DF#3].) For sales of brand-name drugs to cash-paying customers, Plaintiffs charge a set percentage of AWP, and sometimes a dispensing fee, that also results in a price above their acquisition cost. (9CT/2053-2055, 2126, 2208 [DF#4].)

It is undisputed that as a result of these formulaic pricing structures, Plaintiffs automatically pass on their entire cost, including any alleged overcharge, to their customers on each and every sale; in fact, Plaintiffs earn a profit on each sale, regardless of whether the purchasers were members of third-party plans or uninsured. As AWPs increase, Plaintiffs' prices to their customers for brand-name drugs increase by at least the same dollar amount as the increase in their acquisition costs. (9CT/2056-2058. 2126, 2208 [DF#5].) Based on simple mathematics, the higher the AWP, whether because of an alleged overcharge or otherwise, the more Plaintiffs earn in gross profits from their sales of brand-name drugs.[6] (9CT/2058-2060, 2126, 2209 [DF#6].)

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[6] For illustrations of how the calculations work, see 4CT/866-867.

THE DECISIONS BELOW

The Superior Court for Alameda County (Sabraw, J.) granted Defendants' cross-motion for summary judgment on Plaintiffs' Cartwright Act claims because "[t]he undisputed facts demonstrate that if Defendants ever overcharged Plaintiffs as a result of the alleged conspiracy, the Plaintiffs sustained no damages because they increased their prices to their consumers 'by at least the same dollar amount.'" (11CT/2633, quoting DF#5.) The court also granted summary judgment on Plaintiffs' UCL claim, concluding that Plaintiffs lacked UCL standing because they had not "lost money or property," and that they were not entitled to restitution, because they had already been restored to the status quo ante when they passed the entire overcharge on to their customers. (11CT/2634-2636.)

The Court of Appeal, First Appellate District, Division Two, unanimously affirmed the Superior Court's judgment, concluding that "plaintiffs have no 'damages sustained'" within the meaning of Section 16750(a). (*Clayworth v. Pfizer Inc.* (2008) 165 Cal.App.4th 209, 228 (*Clayworth*).) Like the Superior Court, the Court of Appeal held that the phrase "damages sustained" requires plaintiffs to prove they have suffered "actual monetary loss." (*Id.* at pp. 235-36.) In this case, because the claimed overcharges were admittedly passed on, "Plaintiffs suffered no such loss." (*Id.* at p. 236.) For the same reason, the court held that Plaintiffs' UCL claim had no merit. (*Id.* at p. 247; see also *id.* at pp. 245-47.) The court also agreed that Plaintiffs had not lost money or property and thus lacked UCL standing. (*Id.* at p. 247.)

ARGUMENT

I. Plaintiffs Sustained No Damages for Which They Can Recover under the Cartwright Act

A. The Phrase "Damages Sustained" Does Not Permit Recoveries of Alleged Overcharges That Were Passed On and Recouped

The only amounts Plaintiffs seek to recover in this case are the alleged overcharges they paid—"no more or less." (9CT/2126 [Plaintiffs' response to DF#7].) But the plain language of the Cartwright Act and the undisputed record in this case do not permit Plaintiffs to recover, because an injured plaintiff may only "recover three times the damages sustained by him or her ...." (§ 16750(a).) Plaintiffs here sustained no overcharge damages. They admittedly passed on 100% of the alleged overcharges when they resold Defendants' products to their customers at prices pegged to Defendants' prices. (9CT/2050-2060, 2126, 2208-2209 [DF##3-6].) Plaintiffs not only recovered their costs on each sale, but reaped higher profits than they would have had Defendants charged less. (*Ibid.*)

As the Court of Appeal correctly determined, Plaintiffs' admitted total pass-on of the only monetary damages they seek defeats their claims (*Clayworth, supra*, 165 Cal.App.4th at pp. 243-44), because "damages" as used in Section 16750(a) refers only "to actual monetary loss suffered by plaintiffs" (*id.* at p. 230)—the same meaning "damages" has had in virtually every other context in California law for 150 years.

1. Under California Law, "Damages" Excludes Recoveries for Amounts Already Recouped

The Business and Professions Code does not prescribe any special definition for the term "damages sustained," the operative language of Section 16750(a) governing monetary recoveries in private damages actions. Nevertheless, that language—which has remained unchanged in the Cartwright Act since its 1907 enactment—had the same clear and unambiguous meaning under California law then as it has today.

California law has always limited recoveries in "damages" to amounts that are actually necessary to compensate a plaintiff for the pecuniary loss sustained. As far back as 1869, this Court established that absent fraud, "it is always the aim of the Court [to] give damages, and such damages only as will compensate the plaintiff for his loss." (*Utter v. Chapman* (1869) 38 Cal. 659, 663.) In 1872, the Legislature codified this rule in Civil Code section 3281, which provides that "[e]very person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a *compensation* therefor in money, which is called damages." (Civ. Code, § 3281, emphasis added.)

Likewise, California law has always made clear that "damages sustained" by a plaintiff exclude amounts already recouped as a result of a defendant's alleged unlawful conduct. Thus, in *Utter*, where a defendant breached its contract to ship its grain with the plaintiffs, their damages were reduced by what they received for shipping others' grain using the capacity freed up by the defendant's breach. As this Court explained, "the amount received therefor goes to reduce the loss which [plaintiffs] would otherwise *sustain* by the

defendant's breach of the contract." (*Utter v. Chapman, supra*, 38 Cal. at pp. 665-66, emphasis added.) Likewise, in *Hicks v. Drew* (1897) 117 Cal. 305, 314-15, a tort action for water damage to the plaintiff's land, this Court affirmed a jury instruction providing that if "the plaintiff has sustained any damage by the act of the defendant ... and that by the same act she has received benefit, then, in estimating such damage, such benefit should be deducted."

In the 102 years since the Cartwright Act's enactment, the meaning of the phrase "damages sustained" has not changed in California. This Court has routinely reaffirmed that "damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring the plaintiff as nearly as possible to his or her former position, or giving the plaintiff some pecuniary equivalent." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 146-47.) This Court has likewise confirmed that "'[i]f 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, citations omitted.)[7]

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[7] Numerous Court of Appeal decisions are to the same effect. (See, e.g., *Loube v. Loube* (1998) 64 Cal.App.4th 421, 426-27; *Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 468; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 576; *Erler v. Five Points Motors, Inc.* (1967) 249 Cal.App.2d 560, 562; *Mercantile Acceptance Corp. of Cal. v. Globe Indem. Co.* (1962) 210 Cal.App.2d 636, 640-41; *Scally ex rel. Scally v. W.T. Garratt & Co.* (1909) 11 Cal.App. 138, 151.)

These general principles of California damages law preclude any recovery by Plaintiffs. Plaintiffs already recouped 100% of what they claim they overpaid (plus a profit) when they resold Defendants' products at the higher prices that prevailed as a result of Defendants' alleged conspiracy. Therefore, Plaintiffs suffered no actual loss due to the alleged overcharge and are not entitled to any damages from Defendants.

That California law precludes recovery by these undamaged Plaintiffs is not the result of a novel defense that permits Defendants improperly to "escape liability" (see OBM at p. 9); rather, it is simply a function of what it means to have sustained damages. (*Estate of de Laveaga v. Betts, supra*, 50 Cal.2d 480 at pp. 488-89 [reducing recovery by amount previously recouped is the "method of determining the actual damages sustained" and is "implicit in computing the amount of compensation due"]; *Willis v. Soda Shoppes of Cal., Inc.* (1982) 134 Cal.App.3d 899, 905 [reducing plaintiff's damages for breach of lease by higher rents obtained upon reletting premises for unexpired term, because "the allowance for such excess ... is simply a method of determining the actual *damages sustained* by the lessor as a result of the breach" (emphasis added)].) "Unless the total detriment suffered ... exceeds the amount to be received [as a result of the defendants' conduct] ... there is in fact no detriment, and hence no damages." (*Willis*, at p. 905; see also Civ. Code § 3281 [defining "damages" as compensation for "detriment"].)

2. "Damages" in Section 16750(a) Means the Same Thing as "Damages" Generally Means under California Law

Plaintiffs do not claim that "damages" under California law generally means something besides actual pecuniary loss; they simply assert that California's general damages principles do not apply to the Cartwright Act. (OBM at pp. 36, 38.) This is incorrect. Consistent with California damages law, the Cartwright Act would permit anyone actually damaged by Defendants' actions to sue. But the Act does not give these middlemen Plaintiffs a roving commission to pursue recoveries that, if they exist at all, belong to others.

The issue before this Court is one of statutory construction. Therefore, the meaning of Section 16750(a) must be discerned through its words, which "'generally provide the most reliable indicator of legislative intent.'" (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 639-40, quoting *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) Where, as here, the statutory language—given its "'plain and commonsense meaning'"—is "'clear and unambiguous,'" the "'inquiry ends.'" (*Ibid.*)

Plaintiffs fail to identify any authority "suggesting that the term ['damages'] means something different in the antitrust context" from what it normally means under California law. (*Clayworth, supra*, 165 Cal.App.4th at p. 231.) No such authority exists. (See *ibid.*) The 1907 Legislature must be presumed to have intended the established meaning of "damages" when, in the original Cartwright Act, it authorized a private civil plaintiff to recover "two fold the

damages by him sustained." (Stats. 1907, ch. 530, § 11, at p. 987.) There is no contrary indication, and "[i]t is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts." (*City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191.) The Legislature has never altered Section 16750(a)'s "damages sustained" language or specified a unique definition of that term for Cartwright Act purposes. In short, there is no support for the notion that "damages sustained" has a specialized meaning in Section 16750(a) that permits Plaintiffs to recover alleged overcharges they indisputably passed on to their customers and did not absorb.

This conclusion finds further support in two early Court of Appeal decisions construing the Cartwright Act. (*Clayworth, supra*, 165 Cal.App.4th at p. 230.) In *Krigbaum v. Sbarbaro* (1913) 23 Cal.App. 427, the court acknowledged that "damages" under the Act, just like damages in every other context, are intended to compensate for an actual loss. The court stated that an antitrust plaintiff "may maintain an action under the provisions of the anti-trust law for double the damages he has *actually suffered* from the injury so inflicted" as a direct result of a trust's allegedly unlawful restraints on trade. (*Id.* at p. 433, emphasis added.) In *Overland Publishing Co. v. Union Lithograph Co.* (1922) 57 Cal.App. 366, the Court of Appeal—consistent with *Hicks v. Drew*, *supra*, 117 Cal. at pp. 314-15—held that there can be no recovery under the Cartwright Act for alleged conspiracies that *benefit* a plaintiff. The *Overland*

court affirmed judgment for the defendants on demurrer because a plaintiff "cannot maintain an action ... without pleading and proving special damage to his business or property by reason" of the defendants' allegedly unlawful conduct, but "[t]here [were] no facts alleged in the complaint showing [such] damage to plaintiff ...." (*Overland Publ'g Co.*, at p. 375.) Because the plaintiff remained free to compete with the defendants (other publishers who allegedly agreed not to compete with each other), their business practices "*have not injured plaintiff, but have probably meant to it a business opportunity.*" (*Id.* at pp. 374-75, emphasis added.)

Here, as in *Krigbaum*, Plaintiffs did not "actually suffer[]" *any* damages from their alleged overpayment for Defendants' products, because they did not absorb any portion of the alleged overcharge. And the undisputed evidence shows that, as in *Overland*, the alleged conspiracy among Defendants benefited Plaintiffs by enabling them to charge higher prices and garner larger profits.

Plaintiffs fail to distinguish *Overland* at all, but try to distinguish *Krigbaum* by arguing that it used the phrase "damages actually suffered" simply to differentiate "between damages found by the jury ('actual') and damages statutorily awarded ('trebled')." (OBM at p. 37.) However, the "actual" damages to be awarded by the jury in a Cartwright Act case "are intended to compensate the injured plaintiff for actual monetary loss suffered." (*Clayworth*, *supra*, 165 Cal.App.4th at p. 230, citing CACI No. 3440.) Indeed, the Judicial Council of California's Civil Jury Instruction for damages under the Cartwright Act specifically instructs juries to "decide how much money will reasonably *compensate* [*name of plaintiff*] for the harm," and informs jurors, using the language of Civil Code section 3281

(enacted in 1872), that "[t]his compensation is called 'damages.'" (CACI No. 3440, emphasis added.)

Krigbaum itself made clear that "actual" damages available under the Cartwright Act are limited to a plaintiff's actual pecuniary loss, equating the "actual" damages that the plaintiff had pled in his complaint with "the *actual loss or detriment* suffered by *him* by reason of the alleged wrongful acts of the defendants ...." (*Krigbaum v. Sbarbaro, supra*, 23 Cal.App. at pp. 431-32, emphasis added.) It was this actual loss or detriment—i.e., "the amount of damages sustained by [the plaintiff]"—that he claimed was subject to doubling under the Cartwright Act's provisions. (*Ibid.*) The *Krigbaum* court underscored this point when it employed the same formulation of damages in sustaining the plaintiff's common law claim for tortious interference with contract, holding that "the measure of damages in such case is, obviously, the *actual detriment* [the plaintiff] has suffered by reason of said wrong." (*Id.* at p. 436, emphasis added.) The "actual" damages that were subject to statutory doubling under the Cartwright Act were the same "actual" damages that were available in the common law tort action. Consistent with Civil Code section 3281, both reflected the "actual loss or detriment" to the plaintiff—and, as this Court has held for years, not amounts previously recouped.

3. The Meaning of "Damages" in Section 16750(a) Is Not Rendered Ambiguous by This Court's Decision in *California Adjustment* or by the U.S. Supreme Court's Decision in *Hanover Shoe*

Plaintiffs acknowledge that a statute is only ambiguous when "'it is capable of two constructions, both of which are reasonable.'"

(OBM at p. 39, citation omitted.) But the cases that Plaintiffs cite do not make it reasonable to interpret the phrase "damages sustained" differently in Section 16750(a) from its normal and settled definition under California law of actual pecuniary loss.

California Adjustment Co. v. Atchison, Topeka and Santa Fe Railway Co. (1918) 179 Cal. 140 (*Cal. Adjustment*) provides no help to Plaintiffs, who mistakenly cite it for the proposition that "the amount of damages in an overcharge case is the overcharge," regardless of what happens thereafter (OBM at p. 20). *California Adjustment* did not involve allegations or evidence that the railroad rate overcharges at issue were passed on by those who paid them, and thus, it did not address the issue in this case.

Far from announcing a special rule of damages in overcharge cases, *California Adjustment* is not a case about damages at all, and did not construe the phrase "damages sustained." Rather, it concerned the Railroad Commission's lack of primary jurisdiction to investigate rate overcharges in "violation of the long and short haul clause of the [California] constitution ...." (*Cal. Adjustment, supra*, 179 Cal. at p. 145.) That clause made it unlawful for railroads "to charge or receive any greater compensation" for shorter distance trips than longer ones on the same line. (*Id.* at pp. 142-43, quoting Cal. Const., art. XII, § 22.) Based upon this constitutional language, this Court concluded that any rate charged in violation of the clause establishes both liability and the amount of damages, leaving nothing for the Railroad Commission to investigate. (*Id.* at p. 145.) But this reasoning has nothing to do with Section 16750(a), which is worded differently from the long and short haul clause.

Nor does *Hanover Shoe* render Section 16750(a)'s "damages sustained" language ambiguous. While Plaintiffs contend that *Hanover Shoe* construed "the same language" in section 4 of the Clayton Act to exclude pass-on considerations from federal direct purchaser actions (OBM at p. 39), they ignore that *Hanover Shoe* was not decided based on the Clayton Act's language. *Hanover Shoe* rests not on any textual analysis but on policy considerations regarding evidentiary issues and enforcement priorities in federal courts (*Illinois Brick, supra*, 431 U.S. at pp. 731-35 [explaining "principal basis for the decision in *Hanover Shoe*"]; *Clayworth, supra*, 165 Cal.App.4th at p. 232)—considerations that Justice White, the author of *Hanover Shoe* and *Illinois Brick*, specifically recognized that states like California were free to reject (see *Cal. v. ARC Am. Corp.* (1989) 490 U.S. 93, 102-03 (maj. opn. of White, J.)), and which California *did* reject in its 1978 clarification of Section 16750(a) (*infra* at pp. 33-38). Thus, *Hanover Shoe*'s construction of the Clayton Act, however reasonable under federal law, has nothing to do with California law and is not a reasonable, or even viable, reading of Section 16750(a)'s "damages" language.[8]

Moreover, to the limited extent that *Hanover Shoe* discussed damages principles, it relied exclusively on cases applying a privity

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[8] Plaintiffs themselves concede that *Hanover Shoe* turned exclusively on federal antitrust policy, observing that it did not consider prior federal decisions interpreting "damages" to mean compensation for actual loss. (OBM at p. 38.) While Plaintiffs contend that this Court should similarly disregard the Cartwright Act's plain meaning in favor of its supposed purposes (*ibid.*), this Court's precedents prohibit such an approach to statutory interpretation (see *infra* at pp. 28-29).

rule that entirely precluded indirect purchaser suits such as this one. (See *Hanover Shoe*, *supra*, 392 U.S. at pp. 489-90, discussing, *inter alia, S. Pac. Co. v. Darnell-Taenzer Lumber Co.* (1918) 245 U.S. 531, 533-34 [noting that lumber shipper was "only one" who could recover illegal overcharge from railroad because subsequent purchasers had "no privity with the carrier"].) *Hanover Shoe*'s rule is thus incompatible with California's statutory framework, which rejects any privity requirement in antitrust cases, as the 1978 Amendment to the Cartwright Act specified. (See *infra* at pp. 38-40; cf. *Illinois Brick, supra*, 431 U.S. at p. 751 (dis. opn. of Brennan, J.) [recognizing that *Darnell-Taenzer* and similar cases do not directly support *Hanover Shoe*'s rule absent a privity requirement].) Accordingly, for both analytic reasons and because it is not California law, *Hanover Shoe* provides no basis for interpreting Section 16750(a) to permit Plaintiffs to recover overcharges they have already recouped.

B. Defensive Pass-On Evidence Addresses the Element of Damages, Not Injury in Fact

Unable to dispute their lack of overcharge damages, Plaintiffs make inapposite arguments about whether they were "injured in [their] business or property" within the meaning of Section 16750(a). (See OBM at pp. 19-21, 35.) Without authority, they incorrectly assert that "[t]he pass-on defense seeks to prove the plaintiff suffered no injury" (*id.* at p. 35), and that defensive pass-on evidence cannot rebut a supposed presumption that they "suffer[ed] compensable injury the moment [they] purchase[d] a price-fixed product at an inflated rate" (*id.* at p. 19). These assertions are incorrect for at least two reasons.

First, Plaintiffs improperly conflate two distinct elements of a Cartwright Act action: (1) the injury that establishes standing and is required to prove ultimate liability (sometimes referred to as "injury in fact" or "fact of damage"), and (2) the amount, if any, of compensable damages that can be recovered. (See 11CT/2633 (opn. of Sabraw, J.).) While proof of injury is a prerequisite for any claim under the Act, the amount of loss actually suffered as a result of that injury is a wholly separate, and equally essential, element of Plaintiffs' claim. The Court of Appeal decisions on which Plaintiffs rely for their purported inference of injury plainly reflect this distinction. (See, e.g., *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1350, fn.7 [noting that "injury or 'fact of damage,' which must be proved on a class-wide basis, is separate and distinct from the issue of actual damages"]; *Rosack v. Volvo of Am. Corp.* (1982) 131 Cal.App.3d 741, 754 ["Proof of impact at the liability phase is not the same as calculation of damages in the damages phase"].)

Proof of the damages element of a Cartwright Act claim may never be presumed or inferred. As the Court of Appeal has explained, under certain circumstances in a class action (which this case is not), "not the amount of compensable damage, but the fact of damaging impact on the plaintiff or plaintiff class[,] may be established by presumption or inference." (*Cal. Dental Ass'n v. Cal. Dental Hygienists' Ass'n* (1990) 222 Cal.App.3d 49, 61.) But even where classwide injury may properly be inferred based upon proof that an alleged conspiracy had an actual impact on prices, individualized proof of damages is still required, "which necessarily entails the possibility that some class members will fail to prove

damages." (See *In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 414, internal quotation marks and citation omitted.) That is exactly what happened here, where the undisputed factual record establishes that Plaintiffs absorbed no alleged overcharges and thus cannot prove that they sustained the only damages they seek to recover.

Second, Plaintiffs' argument fundamentally misconceives the nature of the presumption of injury discussed in the cases they cite—namely, Plaintiffs are simply wrong that such a presumption can persist where the undisputed record establishes that they sustained no damages, having passed on 100% of the alleged overcharges. (See, e.g., *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, *supra*, 191 Cal.App.3d at p. 1353 [noting possibility that defendants can "*negate injury* by showing plaintiff and the class 'passed on' the overcharge" (emphasis added)]; see also *J.P. Morgan, Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 218 [presumption of classwide injury was inappropriate where evidence of "loss mitigation techniques," including pass-on, established that not all class members absorbed alleged copper overcharges].)[9] As the Court of Appeal observed below, Justice White—the author of *Hanover Shoe*—explained that where, as here, the evidence

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[9] Regardless of whether a plaintiff in some other case might be able to prove other forms of injury even where 100% of an overcharge has been passed on (see, e.g., *B.W.I. Custom Kitchen*, at p. 1353 [noting possibility of proving lost market share or reduced sales]), such potential injuries are irrelevant to *these* Plaintiffs' Cartwright Act claims for damages, because these Plaintiffs have waived recovery of any damages besides the alleged overcharge itself (*infra* at pp. 24-26).

establishes a total and complete pass-on, the plaintiff's "injury is not measured by the amount of the illegal overcharge that it has passed on," and the plaintiff thus may not sue to recover the alleged overcharge. (*Clayworth*, *supra*, 165 Cal.App.4th at p. 234, quoting *Kansas v. Utilicorp United, Inc.* (1990) 497 U.S. 199, 224 (*Utilicorp*) (dis. opn. of White, J.).)

By focusing on their supposed "injury," Plaintiffs have tried to obscure the fact that the courts below, in admitting the undisputed evidence of Plaintiffs' pass-on, merely applied the general rule that each plaintiff must prove its actual damages, which defendants may rebut. (See, e.g., cases cited *supra* at pp. 12-14.) This rule, which applies equally to Cartwright Act cases (see CACI No. 3440 [plaintiff "must prove the amount of [his/her/its] damages"]), fully supports the judgment below. Because these Plaintiffs, faced with *undisputed* evidence that they passed on 100% of any alleged overcharge to downstream purchasers, can never prove that they sustained actual overcharge damages, summary judgment was appropriate.

C. Plaintiffs' Unasserted Lost Profits Claim, Which They Expressly Waived Below, Does Not Affect Their Lack of Overcharge Damages

In a final attempt to circumvent the plain meaning of Section 16750(a), Plaintiffs contend that summary judgment was inappropriate because Defendants "have not and cannot show [*sic*] that [Plaintiffs] would not have been able to raise their rates in the absence of the overcharge and kept the excess profits for themselves." (OBM at p. 23.)

This entire argument is irrelevant, however, because it relates exclusively to an unasserted claim for lost profits that Plaintiffs expressly and repeatedly waived below. (9CT/2126 [Plaintiffs' response to DF#7] ["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" (emphasis altered)]; 6CT/1445-1446 [Plaintiffs' joint special interrogatory responses] ["The only damages claimed by plaintiffs are the damages sustained by reason of the overcharge[,] i.e. *the difference in the price that each plaintiff paid for each drug and the competitive or normal price in a free economy*" (emphasis added)]; see generally 6CT/1441-1496 [evidence supporting DF#7].) As Cartwright Act juries are instructed, lost profits and overcharges are two distinct measures of damage. (See CACI No. 3440 ["The following are the specific items of damage claimed by [*name of plaintiff*]: ¶ 1. [Loss of reasonably anticipated sales and profits]; ¶ 2. [An increase in [*name of plaintiff*]'s expenses]"].) Here, Plaintiffs have sought only the latter. Whether Plaintiffs could have raised their prices and increased their profits further had no alleged overcharges been imposed thus goes to an entirely different type of damages, and does not affect the only recovery Plaintiffs have sought in this case.

Accordingly, Plaintiffs' waived claim for lost profits provides no basis to reverse summary judgment. Because Plaintiffs never sought to establish the damages element of their Cartwright Act claims through proof of alleged lost profits, lost profits were not part of Plaintiffs' case. When Defendants demonstrated through undisputed evidence that Plaintiffs had sustained no overcharge damages,

Defendants carried their summary judgment burden because they showed that Plaintiffs could not establish the damages element of their claims through the only proof that Plaintiffs had offered. (See Code Civ. Proc., § 437c, subd. (p)(2) ["A defendant ... has met [its] burden of showing that a cause of action has no merit if [it] has shown that one or more elements of the cause of action ... cannot be established"].) There was no further requirement for Defendants to show that Plaintiffs lacked proof of lost profits or any other type of unasserted damages. But even if lost profits *were* part of Plaintiffs' case, Defendants still would not have been required to conclusively negate all possibility of such damage, because California law does not "require a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action" to show that the plaintiff cannot establish that element. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 853-54, footnote omitted.) Here, the conclusion that Plaintiffs would not have been able to establish Cartwright Act damages in the form of lost profits is inescapable, because Plaintiffs never presented any proof of such a claim.[10]

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[10] The burden to prove lost profits rests with plaintiffs. (See, e.g., *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.* (2004) 34 Cal.4th 960, 975.) Had Plaintiffs actually claimed lost profits, they would have been required at summary judgment "to make a prima facie showing of the[ir] existence" (*Aguilar v. Atl. Richfield Co.*, *supra*, 25 Cal.4th at p. 850), given their failure to demonstrate lost profits in their discovery responses (see, e.g., 6CT/1442-46). Despite their unambiguous waiver of recovery for lost profits, Plaintiffs belatedly try to meet this evidentiary burden through record citations that supposedly establish the possibility that they would have raised their prices absent the alleged overcharge.

(continued)

Plaintiffs' untimely lost profits argument not only fails based on California procedure, it is also substantively incorrect. Plaintiffs argue, based on the U.S. Supreme Court's decision in *Utilicorp*, that defendants can never prove 100% pass-on because it is practically impossible to show that a plaintiff could not have raised its prices absent an alleged overcharge. (OBM at pp. 23-24.) However, the *Utilicorp* decision—which held that states representing electricity consumers (indirect purchasers) could not assert pass-on claims under the Clayton Act—directly conflicts with Section 16750(a). *Utilicorp*'s entire premise was to avoid "'carv[ing] out exceptions to the [direct purchaser] rule'" established by *Hanover Shoe* and *Illinois Brick*. (*Utilicorp, supra,* 497 U.S. at p. 216, second alteration in original, citation omitted.) California confirmed that it rejected *this very rule* in 1978 when it clarified that indirect purchasers (e.g., Plaintiffs in this case) have a right to sue under the Cartwright Act for any damages they have actually sustained. (See *infra* at pp. 38-40.) The 1978 Amendment shows that California antitrust law takes the view that such proof is manageable—for

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(See OBM at pp. 23-25.) But these citations cannot carry Plaintiffs' burden; they do not show that Plaintiffs would have raised their prices absent increases in AWP—i.e., the undisputed basis of Plaintiffs' pricing formulas to *all* of their customers (9CT/2050-2053, 2126, 2208)—which bears a mathematical relationship to, and only increases with, Defendants' prices (9CT/2128, 2214). Nor do Plaintiffs' citations support their contention that the decrease in the number of their cash-paying customers resulted from any alleged conspiracy. Regardless, Plaintiffs waived these arguments, too, because they never presented their "evidence" to the courts below until their petition for rehearing in the Court of Appeal. (Cal. Rules of Court, rule 8.500(c)(1); see also, e.g., *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726.)

indirect purchasers and defendants alike. (*Infra* at pp. 34-36.)[11] Thus, nothing in *Utilicorp*, let alone California law, supports Plaintiffs' argument that their unasserted and unsupported lost profits claims can overturn summary judgment on Plaintiffs' analytically distinct claims to recover alleged overcharges they indisputably did not sustain.

D. None of Plaintiffs' Remaining Arguments Provides a Basis for Disregarding Section 16750(a)'s Plain Meaning

1. The Policies Underlying the Cartwright Act Do Not Support Plaintiffs' Attempt to Recover Damages They Did Not Sustain

Apparently conceding that the plain meaning of "damages" bars their recovery, Plaintiffs argue that Section 16750(a)'s language must be disregarded because it supposedly conflicts with the Cartwright Act's goals of "punish[ing] wrongdoers" and "promoti[ng] free competition." (OBM at pp. 25-26, 36.) However,

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[11] Moreover, where, as here, 100% of the alleged overcharge itself has indisputably been passed on, separating the effect of that overcharge from the plaintiff's ability to otherwise raise its prices is not especially difficult and is no different from "[the] type of calculation [that] 'has to be done in every case where the plaintiff claims to have lost sales because of the defendant's unlawful conduct and the defendant argues that the loss was partly or entirely due to other factors." (*Utilicorp*, at p. 223 (dis. opn. of White, J.), citation omitted.) Plaintiffs' argument that their pricing formulas add unmanageable complexity here—like the patchwork of local and municipal laws governing rate increases in *Utilicorp* (OBM at pp. 23-24)—defies logic. *All* of Plaintiffs' pricing formulas indisputably bear a simple mathematical relationship to AWP. (9CT/2050-2053, 2126, 2208.) Thus, the Court of Appeal properly found that there were no proof problems apparent in the record here. (*Clayworth*, *supra*, 165 Cal.App.4th at p. 233.)

"[r]egardless of the merit of plaintiffs' argument, public policy alone is insufficient to permit this court to craft ... a rule[] in direct contravention of [a] statute's plain meaning." (*Olson v. Automobile Club of So. Cal.* (2008) 42 Cal.4th 1142, 1156; accord *Meyer v. Sprint Spectrum L.P., supra*, 45 Cal.4th at p. 645 ["[a] mandate to construe a statute liberally in light of its underlying remedial purpose does not mean that courts can impose on the statute a construction not reasonably supported by the statutory language"].) Here, Plaintiffs' policy arguments are meritless, because there is neither a need nor a reason for California to recognize private treble damages actions by undamaged parties as a means of enforcing the Cartwright Act.

Plaintiffs' position is based on a false choice. They contend that the issue of admitting defensive pass-on evidence requires this Court to decide between granting windfalls to undamaged plaintiffs such as themselves or letting price-fixers go free. (See OBM at p. 29.) They ignore the many enforcement mechanisms that already exist under the Cartwright Act, which can all be utilized without rewriting California law to permit suits by undamaged plaintiffs.

There are no practical impediments to bringing Cartwright Act claims in this State, and there is no shortage of antitrust litigation in its courts. Plaintiffs who are actually damaged can and do sue to enforce the Cartwright Act, as demonstrated by numerous recent consumer class actions that have resulted in large settlements. (See *Clayworth, supra*, 165 Cal.App.4th at pp. 243-44, citing *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 710 [approving settlement of $1.1 billion in benefits], *In re Natural Gas Antitrust Cases* (2006) 137 Cal.App.4th 387, 390-91 [$1.55 billion

settlement], *In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1046 [$80 million settlement].) Similarly, the Attorney General and district attorneys may sue as *parens patriae* to recover "on behalf of private individuals who may lack incentive to bring a lawsuit to obtain compensation for their individual injuries." (*Ibid.*; see also § 16760, subds. (a), (g).) Further, the Attorney General and the district attorneys may bring civil enforcement actions or criminal prosecutions for violations of the Cartwright Act (§§ 16754-16755) and may also bring civil damages actions to vindicate the injuries of the state or its subdivisions (§ 16750, subds. (b)-(c), (g)).[12]

Permitting these Plaintiffs to recover unsustained damages would not foster the Cartwright Act's policies. It would ignore the Cartwright Act's statutory purpose of compensation, which this

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[12] The absence of other plaintiffs in this case merely indicates that Plaintiffs' claims lack merit, not any problem with Cartwright Act enforcement; indeed, if the conspiracy alleged in this case had actually occurred, third-party insurers, who pay the bulk of the cost of consumer prescriptions, would have had every incentive to file suit. The nonexistence of any conspiracy is highlighted by Plaintiffs' shifting claims below. Originally, Plaintiffs alleged that it was unlawful for Defendants to restrict their supply of pharmaceuticals from Canada. The trial court—like the U.S. Court of Appeals for the Eighth Circuit (see *In re Canadian Import Antitrust Litig.* (8th Cir. 2006) 470 F.3d 785)—rejected this claim (see 2SMAR/325 [sustaining demurrer with leave to amend]). Plaintiffs then struggled to find a cause of action that would survive demurrer, ultimately alleging that Defendants conspired to fix their U.S. prices by using Canadian prices as a "floor." (1CT/3¶5.) However, as Defendants demonstrated in their separate motion for summary judgment on the merits, the disparity between U.S. and Canadian pharmaceutical prices is due entirely to price controls imposed by the Canadian government, which are not present in the U.S. free-market economy.

Court has recognized as important (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472, citing *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 132 (*Bruno*) [stating that "compensation is the primary rationale of private antitrust lawsuits"]). Plaintiffs' case is not about promoting competition or even lowering pharmaceutical prices in California. In fact, Plaintiffs now claim that they would have charged just as much for Defendants' medicines in the absence of the alleged conspiracy. (*Supra* at pp. 26-27, fn.10.) Plaintiffs simply seek monetary gain, in addition to the profits they have already reaped, by prosecuting claims which, if they exist at all, do not belong to them. Public prosecutors can pursue cases solely for deterrence or to promote competition; private parties cannot—to bring a claim, they (and not someone else) must have sustained damage. (11CT/2637 (opn. of Sabraw, J.).)[13]

By contrast, the decision below effectuates *all* of the Cartwright Act's purposes. Permitting defendants to introduce pass-on evidence to reduce or eliminate the damages alleged by a plaintiff furthers the goal of compensation by ensuring that damages are properly allocated to those in the distribution chain who actually sustained them, and in the amounts actually suffered. The goals of deterrence and punishment are also served, because antitrust plaintiffs who are actually damaged have all of the incentives to bring suit that the

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[13] With respect to punishment and deterrence, in the analogous context of punitive damages (see *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 Cal.4th 303, 313 & fn.1), a plaintiff that is not entitled to compensatory damages cannot obtain an award of punitive damages. (*Kizer v. County of San Mateo*, *supra*, 53 Cal.3d at p. 147 ["In California, as at common law, actual damages are an absolute predicate for an award of exemplary or punitive damages"].)

Cartwright Act makes available, including treble damages, prejudgment interest, attorneys' fees and costs. (§ 16750(a); see also *Clayworth*, *supra*, 165 Cal.App.4th at p. 243.)

Plaintiffs speculate that the decision below will thwart the Legislature's intent by deterring treble damages actions by direct purchasers, "who almost invariably resell the defendant's products." (OBM at p. 28.) However, the Legislature has never authorized suits by undamaged plaintiffs at any point in the distribution chain, and "[a] recovery of damages by someone who has not sustained damages is clearly contrary to the Cartwright Act ...." (*Bruno, supra*, 127 Cal.App.3d at p. 130.)[14] The possibility that additional undamaged direct purchasers might sue more frequently in the future if the law were different is not a basis to reverse the proper grant of summary judgment below. The Court of Appeal's decision does not prohibit any *damaged* plaintiff from suing; indeed, a direct or indirect purchaser "who passed on only *some* of these [alleged over]charges would maintain 'damages' for which it could state a Cartwright Act claim." (*Clayworth*, *supra*, 165 Cal.App.4th at p. 243.) The decision below similarly does not prevent direct or indirect purchasers from bringing claims for lost sales and lost

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[14] Contrary to Plaintiffs' assertion (OBM at p. 34), *Bruno* did not establish that Cartwright Act plaintiffs "are justified in receiving a recovery greater than their injury." Rather, *Bruno*, at pp. 130-31, held exactly the opposite, limiting *recovery of damages* (i.e., the judgment), even in the context of a class action, to those who had sustained them. The language on which Plaintiffs rely relates not to the *recovery* of damages, but to the different issue—not presented here—of whether any monies remaining in a fluid recovery fund can be *distributed* to some noninjured people. (See *ibid.*)

profits, which, if provable, may be asserted even by a plaintiff that passed on 100% of an overcharge—provided such claims are not waived, as they were here.

Plaintiffs dismiss all countervailing policies that conflict with their proposed interpretation of the Cartwright Act. For example, allowing indirect purchasers to establish Cartwright Act claims using pass-on evidence while denying defendants the right to offer the exact same evidence to disprove those claims contravenes the "principle which calls for equal treatment of claims and defenses." (*Clayworth*, *supra*, 165 Cal.App.4th at p. 242, citing, *inter alia*, *Illinois Brick*, *supra*, 431 U.S. at pp. 730-31.) Plaintiffs argue that there is no such parity principle (OBM at pp. 29-31), but by basing their argument on exceptional doctrines that do not apply to this case—such as the collateral source rule and offensive nonmutual collateral estoppel—they prove that legal consistency is the general rule in California, not the exception.

2. The Policy Rationales of *Hanover Shoe* Do Not Support Plaintiffs' Attempt to Recover Damages They Did Not Sustain

The federal pass-on policies identified in *Hanover Shoe* cannot justify Plaintiffs' unsupported interpretation of Section 16750(a). While federal interpretations of federal law can sometimes be "helpful" in interpreting the Cartwright Act, they are "not directly probative of the Cartwright drafters' intent" (*State ex rel. Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1164, overruled in part on other grounds by statute), and need not be followed where they are not persuasive (see *ibid.*; see also *Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal.App.4th 171, 183, fn. 9; *Cellular Plus, Inc. v.*

Superior Court (1993) 14 Cal.App.4th 1224, 1242). Federal decisions are not at all persuasive where, as with *Hanover Shoe* and *Illinois Brick*, they reflect policies that conflict with California's objectives for its own antitrust regime.

As the U.S. Supreme Court has said, California is free to enforce its antitrust laws differently from the federal government. As Justice White explained in *California v. ARC America Corp., supra,* 490 U.S. at pp. 102-103, "[n]either [*Hanover Shoe* nor *Illinois Brick*] contains any discussion of state law"; rather, those cases presented "strictly a question of statutory interpretation—what was the proper construction of § 4 of the Clayton Act." Therefore, "the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes" do not predetermine the policy choices for state legislatures in enacting their own antitrust regimes. (*Id.* at p. 103 [calling it "inappropriate" to treat *Hanover Shoe* and *Illinois Brick* as defining what "States ... [may] do under their own antitrust law"]; accord 11CT/2618.)

Although Plaintiffs contend that public policy requires California to implement the rule of *Hanover Shoe*, just the opposite is true. The policies that produced the decision in *Hanover Shoe* are the same policies that gave rise to the direct purchaser rule of *Illinois Brick*. California has rejected those policies, as demonstrated by the enactment of the 1978 Amendment.

The primary rationale of *Hanover Shoe*, *supra*, 392 U.S. at p. 493, was the concern that a pass-on defense could never be proved on account of "insuperable" evidentiary difficulties. (*Ibid.*) That concern led, in large part, to the corresponding *Illinois Brick*

decision, which precluded suits by indirect purchasers, such as Plaintiffs here, because they would face the same evidentiary hurdles in establishing that an overcharge was passed on to them. (See *Illinois Brick*, *supra*, 431 U.S. at pp. 731-33.) However, the Legislature in 1978 confirmed that California had rejected this view when it clarified existing law that indirect purchasers could bring Cartwright Act claims, but only if they could prove that at least a portion of the overcharge was passed on to them. (*Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 23 (*Union Carbide*).) Because the Cartwright Act requires indirect purchasers to prove their case through offensive pass-on evidence, *Hanover Shoe*'s evidentiary concerns cannot prevent a defendant from using essentially the same pass-on evidence defensively to rebut a plaintiff's showing on damages, as Defendants in this case have done (see 9CT/2050-2060, 2126, 2208-2209).[15]

Plaintiffs contend that *Hanover Shoe*'s evidentiary concerns do *not* apply equally to plaintiffs and defendants, because only defendants must prove that a "plaintiff could not have increased its prices had the overcharge never been implemented." (OBM at p. 15.) However, to the extent such proof were required of defendants under California law, it would *also* be required of plaintiffs in any indirect purchaser case where the direct purchaser

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[15] Plaintiffs argue that the Superior Court's award of $1.2 million in costs shows how onerous defensive pass-on evidence can be. (OBM at p. 27.) In fact, that judgment is almost entirely attributable to Defendants' having to respond to *Plaintiffs'* discovery requests. Both courts below found that Defendants' efforts to discover evidence of Plaintiffs' pass-on were not overly burdensome. (*Clayworth*, *supra*, 165 Cal.App4th at p. 233; 2CT/327¶5.)

had not passed on the entire overcharge, or in any case involving multiple tiers of purchasers where one or more tiers claimed lost profits. This evidentiary problem, considered insoluble in *Hanover Shoe*, was clearly contemplated by the 1978 Amendment's drafters as a challenge that could be met by the California courts. And subsequent to 1978, developments in the use of economic evidence have only further ameliorated the proof problems perceived by the *Hanover Shoe* Court. (*Clayworth*, *supra*, 165 Cal.App.4th at p. 233.)

Plaintiffs' argument that different pass-on proof is required of indirect purchaser plaintiffs and defendants is also refuted by Justice Brennan's dissenting views in *Illinois Brick*—which Plaintiffs otherwise believe to be a reliable guide to interpreting the 1978 Amendment (see OBM at pp. 32, 34, 41-43). Justice Brennan recognized that the evidentiary concerns expressed by the *Hanover Shoe* and *Illinois Brick* majorities were the same, and he found them to be overstated, pointing out that "*Hanover Shoe* itself" required plaintiffs "to prove a probable course of events which would have occurred but for the violation. In essence, estimating the amount of damages passed on to an indirect purchaser is no different from and no more complicated than estimating what the middleman's selling price would have been, absent the violation." (*Illinois Brick*, *supra*, 431 U.S. at pp. 758-59 (dis. opn. of Brennan, J.).) Proof that a middleman plaintiff could not have raised its prices—the showing that Plaintiffs say would be required of defendants—is merely the flip side of the plaintiff's burden in every antitrust case, and it, too, is "no different" and "no more complicated ...." (*Ibid.*)

The second principal rationale of *Hanover Shoe*, *supra*, 392 U.S. at p. 494, was, of course, deterrence—namely, the view that deterrence through private damages actions would be maximized by giving the entire recovery to direct purchasers, thereby ensuring that such purchasers have incentive to sue. But the 1978 Amendment established that while deterrence is also an important goal of the Cartwright Act, California has made different assumptions from federal law about the best way to achieve it and has thus opted for a very different deterrence and enforcement regime from that endorsed by *Hanover Shoe*. *Hanover Shoe* was concerned that permitting defensive pass-on evidence would relegate antitrust enforcement to ultimate consumers who might lack adequate incentives to bring private antitrust suits. (*Ibid.*) This concern led directly to the rule of *Illinois Brick*, where the Supreme Court explained that *Hanover Shoe* rests "on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." (*Illinois Brick*, *supra*, 431 U.S. at pp. 734-35.) But in 1978, the California Legislature confirmed that Section 16750(a) rejected this view: In direct opposition to federal law, California allows every plaintiff injured by an antitrust violation to sue, "regardless of whether such injured person dealt directly or indirectly with the defendant," but such a plaintiff's recovery is limited to three times the actual "damages

sustained by him or her ...." (§ 16750(a).) Thus, *Hanover Shoe* is of no help in construing the Cartwright Act.[16]

3. The 1978 Amendment Does Not Support Plaintiffs' Attempt to Recover Damages They Did Not Sustain

Plaintiffs argue that the legislative history of Assembly Bill No. 3222 (1977-1978 Reg. Sess.)—the 1978 Amendment—shows the Legislature's "intent to specifically adopt *Hanover Shoe*." (OBM at pp. 40-41.) However, Plaintiffs' suggestion is rebutted by what the 1978 Amendment and its legislative history actually say.

First, the statutory text of the 1978 Amendment contains nothing about defensive pass-on evidence. It expressly provides that it "does not constitute a change in, but is declaratory of, the existing law" (Stats. 1978, ch. 536, § 2, at p. 1696), which necessarily includes the existing damages law. The amendment did not alter in *any way* the "damages sustained" language of Section 16750(a), leaving in place the normal meaning of those words. (*Supra* at pp. 15-18.)

Second, the 1978 Amendment's legislative history makes very clear what it was and was not intended to do. Tellingly, Plaintiffs cite virtually *none* of this legislative history—and for good reason. As the Court of Appeal observed, "not once in the numerous pages

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[16] The Court of Appeal properly rejected Plaintiffs' nonsensical argument (OBM at p. 48) that *Hanover Shoe* tacitly became California law in 1968 when the Legislature did not amend the Cartwright Act in response to it. (*Clayworth, supra*, 165 Cal.App.4th at p. 239.) That is simply not how law is made in California. (See, e.g., Cal. Const., art. IV, § 8, subd. (b) ["The Legislature may make no law except by statute and may enact no statute except by bill"].)

of legislative history ... is *Hanover Shoe* even mentioned." (*Clayworth*, *supra*, 165 Cal.App.4th at p. 240; see generally 3CT/532-610.) The purpose of Assembly Bill No. 3222 was actually quite limited—"to prevent a federal case interpretation of the Sherman Act precluding an indirect purchaser's standing to sue in antitrust actions from being applied to actions under the Cartwright Act," and "to clarify matters ... to guarantee the continuation of the consumer's remedy for antitrust violations." (3CT/556-557 [Sen. Comm. on Judiciary, analysis of Assem. Bill No. 3222].) The Legislature's focus remained on ensuring an indirect purchaser's right to sue—frequently termed "standing." (3CT/556 ["This bill would specify that an injured person *has standing to sue* in an antitrust action whether or not such person dealt directly or indirectly with a defendant" (emphasis added)]; 3CT/552 [Assem. Comm. on Judiciary, Bill Digest, Assem. Bill No. 3222] ["This measure specifies, as declarative of existing law, that, for purposes of California anti-trust laws, any person injured in his business or property, independent of whether he dealt directly or indirectly with the defendant, *has standing to sue*" (emphasis added)].)

Thus, the 1978 Amendment's legislative history evinces only one clear intent—to ensure that, *Illinois Brick* notwithstanding, indirect purchasers retained the right to sue under the Cartwright Act to the same extent that they were already permitted under existing law. (See *Clayworth*, *supra*, 165 Cal.App.4th, at p. 239 ["Assem. Bill 3222 was intended simply to codify standing for indirect purchasers under the Cartwright Act"].) The amendment expressly "d[id] not address the potential procedural and evidentiary difficulties

foreshadowed in the majority opinion [in *Illinois Brick*]" (3CT/552), including the majority's focus on "the equal application of the pass-on theory" 3CT/551).

This Court's decision in *Union Carbide* is to the same effect. Plaintiffs misstate dictum in that opinion to argue that the 1978 Legislature adopted Justice Brennan's dissenting view in *Illinois Brick* that the rule of *Hanover Shoe* need not be applied "consistently" to plaintiffs and defendants. (OBM at pp. 43-44.) *Union Carbide*, however, neither discusses the admissibility of defensive pass-on evidence in California nor suggests that the Legislature uncritically imported the *entirety* of Justice Brennan's dissenting opinion. Rather, *Union Carbide* dealt exclusively with the question of whether the defendants were entitled, on a demurrer, to an order joining as indispensable parties all purchasers of industrial gases anywhere in the chain of distribution. In answering this question in the negative, the opinion makes clear precisely which of Justice Brennan's views it believed the Legislature had approved:

> California's 1978 amendment to section 16750 in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick* [citation] *that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution.*

(*Union Carbide, supra*, 36 Cal.3d at p. 20, emphasis added; accord *id.* at pp. 21-22 [opining that the Legislature seems to have endorsed dissenting view that the risk of double recovery does not "justify

erecting a *bar against all recoveries* by indirect purchasers" (emphasis added)].)

Plaintiffs also argue that *Union Carbide* necessarily acknowledged California's preclusion of defensive pass-on evidence, because "*the risk of multiple liability,* even though remote, *only exists in a legal scheme that rejects the pass-on defense and permits indirect purchaser standing*." (OBM at p. 43, emphasis in original.) But this proposition is plainly false. Neither of the risks that *Union Carbide* addressed depended on *Hanover Shoe* being California law. The first risk was that direct purchasers in a separately pending *federal* action in Illinois might recover the entirety of the alleged overcharge, while the end users who sued in California state court would recover their appropriate portion of the same alleged overcharge, assuming they could prove it was passed on to them. (*Union Carbide, supra*, 36 Cal.3d at pp. 22-23.) This Court concluded that such an *inter*-system risk of excessive recovery, which exists because of the inconsistency between California and federal law, cannot give rise to a "substantial" risk of multiple liability within the meaning of the joinder statute (*ibid.*), a conclusion similar to the one the U.S. Supreme Court would subsequently reach in *California v. ARC America Corp., supra*, 490 U.S. at p. 105.

The second risk *Union Carbide*, *supra*, 36 Cal.3d at p. 23, considered was that intermediate suppliers "could sue *separately* under the Cartwright Act for all or part of the overcharges claimed by the end-user plaintiffs, asserting that those overcharges *were absorbed rather than being passed on*." (Emphasis added.) This *intra*-system risk of inconsistent adjudications by two different

California courts is not unique to pass-on cases; it exists any time there are absent parties in interest, which is why it is specifically covered by the compulsory joinder statute that was at issue in *Union Carbide*. (See Code Civ. Proc., § 389, subd.(a)(2)(ii).) This risk, too, was insubstantial, not because *Hanover Shoe* was California law (which would have made it legally irrelevant), but because it was premature to account for this risk at the pleading stage of a single action, before any potentially conflicting second action had been filed, especially when it was unclear whether any intermediate suppliers even existed. (See *Union Carbide*, at pp. 23-24.) Thus, nothing in *Union Carbide* supports Plaintiffs' contention that the 1978 Amendment codified *Hanover Shoe*'s rule and abrogated the right of defendants to offer pass-on evidence.

Plaintiffs' position reduces to the notion that the 1978 Amendment replaced, by implication, a century's worth of decisions interpreting the meaning of "damages" in California with the rule of *Hanover Shoe*. However, the "'Legislature would [not] have silently, or at best obscurely, decided so important ... a public policy matter and created a significant departure from the existing law.'" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, quoting *In re Christian S.* (1994) 7 Cal.4th 768, 782; accord *Regency Outdoor Adver., Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 526; *In re Garcelon's Estate* (1894) 104 Cal. 570, 584; see also *Clayworth*, *supra*, 165 Cal.App.4th at p. 240.)

4. The *Parens Patriae* Statute Does Not Support Plaintiffs' Attempt to Recover Damages They Did Not Sustain

Plaintiffs finally argue that the Legislature implicitly adopted *Hanover Shoe* in 1977, the year before *Illinois Brick* was decided, when it enacted section 16760. That provision authorizes the Attorney General to sue under the Cartwright Act as *parens patriae* "on behalf of natural persons [i.e., consumers] residing in the state," but excludes from the recoverable award "any amount of monetary relief ... which duplicates amounts which have been awarded for the same injury." (§ 16760, subd. (a)(1).) The obvious purpose of this provision, as recognized by the Court of Appeal below, is to prevent the Attorney General from seeking recovery on behalf of consumers (as to whom a pass-on defense could never apply) who have already recovered for their injuries through different litigation or settlement—as, for example, through a consumer class action or through an action by a group of plaintiffs asserting only individual claims. (See *Clayworth*, *supra*, 165 Cal.App.4th at p. 238.)

Plaintiffs claim that because section 16760 was patterned on the *parens patriae* provision of the federal Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), the California Legislature tacitly imported the legislative history of the federal law, which discussed *Hanover Shoe*. (OBM at pp. 44-47.) But section 16760's own legislative history never mentions *Hanover Shoe* and certainly does not evince any legislative intent to adopt that decision in California. (See generally 1SMAR/54-120.) The mere fact that the California Legislature found the federal *parens patriae* provision to be a good model for California's does not and cannot mean that the

Legislature adopted every aspect of federal law referenced in the HSR Act's legislative history.[17]

Furthermore, Plaintiffs' reading of section 16760's duplicative liability language produces absurd results. The purpose of the Attorney General's *parens patriae* authority is to file suit when consumers lack incentive to bring class actions to pursue their own claims. (See *State v. Levi Strauss & Co.*, *supra*, 41 Cal.3d at pp. 477-78.) Yet if *Hanover Shoe* is California law, and an undamaged indirect purchaser (like these Plaintiffs) sues first and recovers the entire overcharge, then, pursuant to section 16760's duplicative liability language, the natural persons whose interests the Legislature specifically appointed the Attorney General to vindicate (i.e., consumers) would be unable to recover that overcharge. In amending the Cartwright Act to better protect consumers, the Legislature clearly did not intend, tacitly or otherwise, to adopt a rule that would defeat or impair any recovery by those same consumers. Plaintiffs' argument to the contrary must be rejected.

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[17] Contrary to Plaintiffs' argument (OBM at p. 46), *People v. Butler* (1996) 43 Cal.App.4th 1224 does not stand for any general proposition that when the Legislature enacts a statute patterned on a federal law, it vicariously imports the federal statute's entire legislative history into California law. The *Butler* court looked narrowly to federal legislative history to define a specific term ("access card") in a California statute that the Legislature had said was defined identically to a similar term ("access device") in a federal statute. (See *id.* at pp. 1236-37.) Here, by contrast, there is no dispute about any defined term in section 16760.

5. Other States' Approaches to Pass-On Issues Do Not Support Plaintiffs' Attempt to Recover Damages They Did Not Sustain

What other states have done in construing their own antitrust statutes, many of which are structurally and textually different from the Cartwright Act, is irrelevant to the correct interpretation of Section 16750(a). Moreover, Plaintiffs' assertion that the admissibility of pass-on evidence has been "universally rejected" by all jurisdictions that have considered it (OBM at p. 49) is simply untrue. Indeed, Plaintiffs entirely ignore two judicial decisions concerning Michigan and Wisconsin law that allowed defendants to offer pass-on evidence in intermediate indirect purchaser actions. (See *In re Vitamins Antitrust Litig.* (D.D.C. 2003) 259 F.Supp.2d 1, 7-9 [construing Michigan law]; see also 11CT/2602-2603 [*J&R Ventures v. Rhone Poulenc S.A.* (Wis. Cir. Ct. Dec. 4, 2006, No. 00-1143) (construing Wisconsin law)].)

Plaintiffs also greatly overstate the uniformity of other states' treatment of defensive pass-on evidence. The vast majority of states have either never considered the issue, or seemingly apply *Illinois Brick*'s direct purchaser rule, rendering both offensive and defensive pass-on theories inapplicable. Nine jurisdictions have addressed the admissibility of pass-on evidence by statute.[18] But there is no

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[18] D.C. Code § 28-4509(b) [**District of Columbia**]; Haw. Rev. Stat. § 480-13(c) [**Hawaii**]; Md. Code Ann., Com. Law § 11-209(b) [**Maryland**]; Neb. Rev. Stat. § 59-821.01(1) [**Nebraska**]; N.M. Stat. Ann. § 57-1-3(C) [**New Mexico**]; N.Y. Gen. Bus. Law § 340(6) [**New York**]; N.D. Cent. Code § 51-08.1-08(4) [**North Dakota**]; Utah Code Ann. § 76-10-919(6) [**Utah**]; Wyo. Stat. Ann. § 40-4-114(c) [**Wyoming**].

consensus among these states, as Plaintiffs claim (OBM at pp. 49-50), to limit defensive pass-on evidence to cases involving both direct and indirect purchasers. New Mexico's pass-on provision, for instance, merely states that its purpose is to "avoid duplicative liability." (N.M. Stat. Ann. § 57-1-3(C).) This apparently explanatory phrase, having never been interpreted, does not support Plaintiffs' purported limitation. The same language appears in Maryland's statute (Md. Code Ann., Com. Law § 11-209(b)(2)(ii)), where it also has not been interpreted. Maryland's statute authorizes only government entities to bring indirect purchaser suits, yet permits defendants in *any* civil damages action to "prove that ... an alleged overcharge was ultimately passed on to" the government. (*Ibid.*) Thus, Maryland's statute does not support Plaintiffs' claimed limitation, either.

Only one state, Minnesota, has addressed defensive pass-on issues through an authoritative decision of its highest court, which found that the Minnesota legislature intended to prohibit defensive pass-on evidence based solely on Minnesota's enactment of an *Illinois Brick* "repealer" statute.[19] (*Minnesota ex rel. Humphrey v. Philip Morris Inc.* (Minn. 1996) 551 N.W.2d 490, 497.) Plaintiffs strain to apply the sparse reasoning of that case to the present action; but the intent of the Minnesota legislature in enacting a statute in 1984 can have no bearing on the California Legislature's well-

[19] Plaintiffs miscite an intermediate appellate decision from Arizona as rejecting defensive use of pass-on evidence. That case concerned contract claims, not antitrust, and rested in part on a privity rationale. (See *N. Ariz. Gas Serv., Inc. v. Petrolane Transp., Inc.* (Ariz. Ct. App. 1984) 702 P.2d 696, 705.)

documented, exclusive intent to preserve indirect purchaser standing in enacting the 1978 Amendment six years earlier. (*Supra* at pp. 38-40.)

Thus, only two generalizations can be made about other jurisdictions' pass-on law. First, most states that have addressed pass-on issues have permitted it in some form. Second, the states that have limited the admissibility of defensive pass-on evidence to cases where multiple tiers of plaintiffs are involved have all done so by statute, with explicit language to that effect. The California Legislature has never enacted any such language.

II. Plaintiffs Lack UCL Standing and Are Not Entitled to Restitution

A. Plaintiffs Lack UCL Standing Because They Did Not "Lose Money or Property"

The Court of Appeal correctly held that Plaintiffs lack standing to sue under the UCL because they have not "lost money or property" as now required by section 17204. (*Clayworth*, *supra*, 165 Cal.App.4th at p. 247.) This standing requirement exists to "prevent *uninjured* private persons from suing for restitution on behalf of others." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232, emphasis in original.) Plaintiffs, who by their own admission have recouped the full extent of the alleged overcharges (plus a profit), have experienced no losses and therefore cannot satisfy this requirement. (*Clayworth*, *supra*, 165 Cal.App.4th at p. 247, citing *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 853.)

Plaintiffs erroneously claim that they "lost money" for purposes of UCL standing because the alleged overcharge "was *previously* in their possession." (OBM at p. 56.) However, the previous

possession of money by itself is plainly insufficient to establish UCL standing. (See, e.g., *Peterson v. Cellco P'ship* (2008) 164 Cal.App.4th 1583, 1592 ["In plaintiffs' view, a person has lost money when the money is 'no longer in their possession.' But this proposed definition encompasses every purchase or transaction where a person pays with money"].) Rather, the requirement of "lost money or property" imposes a requirement of actual "loss"—which, under section 17204, can only mean "'[a]n undesirable outcome of a risk; the disappearance or diminution of value, usu[ally] in an unexpected or relatively unpredictable way.'" (*Hall v. Time Inc., supra*, 158 Cal.App.4th at p. 853, quoting Black's Law Dict. (8th ed. 2004), p. 963; see also *Peterson*, at p. 1592.)

Here, Plaintiffs admit that they recouped what they paid, as well as an additional profit, when they resold Defendants' products, and that their gross profits increased as their acquisition costs increased. (9CT/2066-2077, 2126, 2210-2211.) Thus, Plaintiffs have already recovered the monetary value that they claim to have parted with as a result of Defendants' conduct and have experienced no "disappearance or diminution of value" that would entitle them to sue under the UCL.

B. Because They Have Recouped Their Payments for Defendants' Products, Plaintiffs Are Not Entitled to Restitution

Plaintiffs' UCL claim also fails because the monetary remedy they seek—the "return" of money in which they have no "ownership interest"—is not restitutionary and therefore is unavailable under the UCL. (See § 17203; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144 [restitution is only monetary remedy

under UCL]; *id.* at p. 1149 [restitutionary awards under UCL are limited to monies in which plaintiff has "ownership interest" (quoting *Kraus v. Trinity Mgmt. Servs., Inc.* (2000) 23 Cal.4th 116, 126-27) (*Kraus*)].) As the Court of Appeal correctly held below, "[o]nce plaintiffs resold defendants' products, and thereby recovered all of their costs, plaintiffs relinquished any ownership interest in the claimed overcharges—and forfeited any possible UCL claim." (*Clayworth*, *supra*, 165 Cal.App.4th at p. 247.)

Plaintiffs implausibly contend that they retain an ownership interest in the amount of the alleged overcharge simply because it was "in their possession" at one point. (See OBM at p. 57.) However, an ownership interest under the UCL is no different from any other ownership interest in property. (See *Kraus*, *supra*, 23 Cal.4th at p. 127 & fn.11.) In other words, the right to restitution follows the ownership interest in the property as to which restitution is being sought—in this case, the brand-name pharmaceuticals resold by Plaintiffs. Once Plaintiffs resold Defendants' products and recovered their full acquisition costs (plus a profit) from their customers, Plaintiffs passed title to the products—and with it, any "ownership interest" in the alleged overcharge—to those customers. (See Com. Code, § 2401, subd. (2) ["title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods"].) Plaintiffs thus ceased to be "person[s] in interest" under section 17203 and were no longer eligible for any restitution.

The Restatement of Restitution makes this clear: "A person under a duty of restitution to another is discharged from his liability to the other for the restitution of the subject matter or its value if

subsequent to his receipt of the subject matter ... the other transfers his entire interest therein to a third person ...." (Rest., Restitution, § 141, subd. (2)(a).) That is exactly what happened when Plaintiffs transferred their entire interest in Defendants' products upon reselling them to their customers for a profit, and those transfers defeat Plaintiffs' claims for restitution here. (See *Clayworth*, *supra*, 165 Cal.App.4th at p. 247.)[20]

The purpose of restitution under the UCL is to make the victim of an unfair practice "whole," rather than to punish or deter a violator. As the Court of Appeal recognized, "courts ordering restitution under the UCL are not concerned with restoring the

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[20] Plaintiffs argue that a different paragraph of the Restatement of Restitution, section 141 applies here. (OBM at pp. 59-60.) That paragraph states that a defendant "cannot defeat the claim of the other for restitution merely because of such superior interests" of a third party. (Rest., Restitution, § 141, subd. (1).) However, that paragraph addresses a scenario where the third party *already* has a superior interest in the property at the time the defendant obtains or receives it from the plaintiff. (See, e.g., Rest., Restitution, § 141, subd. (1) [describing situation where a defendant "has taken" property "in which a third person *has* an interest which is superior and antagonistic" to the plaintiff's (emphasis added)]; see also, e.g., *id.* § 141, cmt., illus. 3 ["A cannot defend against B's action ... by proving that *before the transfer to him*, B had effectively contracted to transfer the land to C" (emphasis added)].) Here, Plaintiffs' customers did not have a preexisting interest in Defendants' products, or the money obtained by Defendants in exchange for their products, at the time Plaintiffs purchased those products for resale. *Palmtag v. Doutrick* (1881) 59 Cal. 154, a case about bailments that Plaintiffs cite, is likewise irrelevant because Plaintiffs' purchases and subsequent resales of Defendants' products are regular contracts for the sale of goods, not bailments. (See *Wilson v. Brawn of Cal., Inc.* (2005) 132 Cal.App.4th 549, 558 ["The ordinary retail sales contract is not a bailment"].)

violator to the status quo ante. The focus is instead on the victim." (*Clayworth*, *supra*, 165 Cal.App.4th at pp. 246-47, citations and internal quotation marks omitted.) Thus, restitution under the UCL can provide no remedy to Plaintiffs, who have already recovered their losses and been restored to the status quo ante.

The UCL simply does not authorize courts to award nonrestitutionary disgorgement just because it might deter more bad conduct. (See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p. 1148 ["A court cannot, under the equitable powers of [the UCL], award whatever form of monetary relief it believes might deter unfair practices"]; *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 a monetary sanction merely to achieve [a] deterrent effect"]; see also *Clayworth*, *supra*, 165 Cal.App.4th at p. 247.)

The cases that Plaintiffs cite as supposed authority for a contrary rule are either irrelevant or support Defendants' position. For example, *Kraus*, *supra*, 23 Cal.4th at pp. 137-38—which held that nonrestitutionary disgorgement into a fluid recovery fund was impermissible in representative UCL actions—does not support Plaintiffs' attempt to obtain what amounts to nonrestitutionary disgorgement in this direct action. *Shersher v. Superior Court* (2007) 154 Cal.App.4th 1491, 1499-1500 is similarly inapposite, because it held only that consumers can bring UCL claims against manufacturers with whom they did not deal directly, so long as they overpaid the retailer for the product. Here, Defendants never argued that UCL remedies were unavailable to Plaintiffs because they were indirect purchasers. Rather, Defendants have argued that when

Plaintiffs resold Defendants' products and were thereby fully compensated for any monetary loss, Plaintiffs relinquished whatever ownership interest they had in the alleged overcharge. On this question, *Shersher* has nothing to say. (*Clayworth*, *supra*, 165 Cal.App.4th at p. 247.) Thus, no authority suggests that restitution is available to Plaintiffs where they have already been restored to the status quo, and summary judgment on their UCL claim was properly granted.

C. Plaintiffs Have Waived Any Claim for Injunctive Relief, Which They Lack Standing to Assert

Finally, Plaintiffs have waived their perfunctory and untimely claim for injunctive relief (see OBM at p. 62), because they never raised it in the courts below during the multiple rounds of briefing over the last three years. (Cal. Rules of Court, rule 8.500(c)(1); *Wilson v. 21st Century Ins. Co.*, *supra*, 42 Cal.4th at p. 726; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1022 [finding that "plaintiff's arguments concerning injunctive relief come too late, having been made for the first time in his reply brief"].)

Moreover, Plaintiffs' injunctive claim under the UCL would fail on its merits for the same reason their UCL claim for restitution fails—Plaintiffs have not "lost money or property" as a result of the alleged overcharges and therefore cannot meet the UCL's standing requirements. (See § 17204; *Clayworth*, *supra*, 165 Cal.App.4th at p. 247, fn.18.)

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court affirm the decision of the Court of Appeal.

DATED: May 11, 2009

Respectfully,

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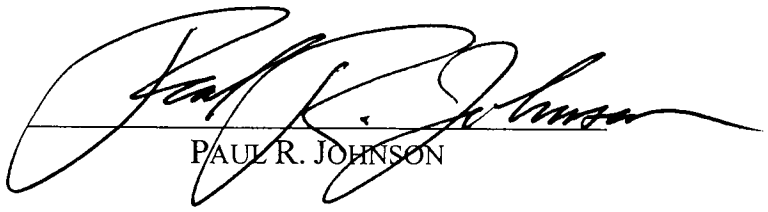
CERTIFICATION OF WORD COUNT

I hereby certify that the computer program with which this ANSWER BRIEF ON THE MERITS has been prepared has generated a total count (for headings, main text and footnotes) of 13,894 words for the portion of the brief subject to the length limitation set forth in rule 8.520(c)(1) of the California Rules of Court, excluding the portions referenced in rule 8.520(c)(3) (i.e., the tables and this certificate) and the attached proof of service.

Dated: May 11, 2009



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.

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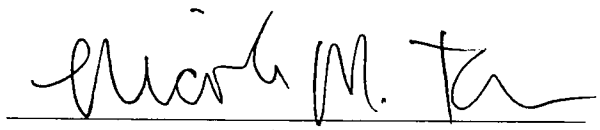

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