S174229

IN THE SUPREME COURT OF CALIFORNIA

JAMES A. CLARK, et al.
Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

NATIONAL WESTERN LIFE INSURANCE COMPANY,
Real Party in Interest.

After a Decision by the Court of Appeal
Second Appellate District, Division Seven

PETITIONERS ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The purpose of the Legislature in enacting Civil Code section 3345 as part of SB 1157 was "to strengthen unfair business practices laws and to provide greater protection for senior and disabled persons against consumer fraud," *Hood v. Hartford Life and Accident Insurance Co.* (E.D.Cal.2008) 567 F.Supp.2d 1221 at 1228, specifically through the provision of "greater personal remedies in the

actions brought by those consumers... (Senior Assist.Atty.Gen. Herschel T.Elkins, mem. to Assist.Atty.Gen.Jeff Fuller, re: Sen.Bill No. 1157(1987-1988 Reg.Sess.) May 12, 1987, p. 3) quoted at Slip Opinion, p. 8)." Section 3345 achieves that purpose by enhancing monetary remedies to seniors and the disabled in statutory actions aimed at unfair and deceptive business practices, Civil Code 3345(a).

The question here is whether, given the language and purpose of section 3345, the Court of Appeal was correct in holding it applicable to cases such as this, in which seniors seek restitution under the UCL (Business & Professions Code section 17203). Based on the plain language of the statute and its purpose, the Court of Appeal was correct, and its decision should be affirmed.

The plain language of section 3345 makes it applicable to actions brought by and on behalf of seniors and the disabled "to redress unfair or deceptive acts or practices or unfair methods of competition." That language fits Petitioners' action perfectly. It is brought by seniors, on behalf of a class comprised entirely of seniors (Ex. A[1], p. 11). As certified, it is a class action under the UCL for illegal, deceptive and unfair marketing of annuities specifically designed to be marketed to seniors, and to evade the California laws designed to protect seniors from such

[1]All references to Exhibits are to the Exhibits supporting Petitioners' Petition for Writ of Mandate filed in the Court of Appeal.

deceptive practices (Ex. A; Ex. B, p. 34). It alleges a scheme in which the sale of annuities with the highest surrender charges in the industry (25% to be paid upon surrender or death), were driven by the highest sales commissions in the market (up to 17%). It is also alleges that National Western issued the annuities through sham group insurance set up under the law of another state in an effort to evade the California statutes requiring prominent notice of such penalties to seniors (Insurance Code sections 10127.10 and 10127.13) (Ex. A, pp. 3-).

Section 3345 provides in such cases brought by or on behalf of seniors and the disabled that, where a trier of fact is authorized by statute to impose "either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter...," that remedy may be increased to up to three times the amount otherwise authorized, taking account of certain stated factors.

Business & Professions Code section 17203 explicitly states, and this Court has repeatedly recognized, see, *e.g. Korea Supply Co. v. Lockheed Martin Co.* (2003) 29 Cal.4th 1134, 1138, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1257, that deterrence is a major purpose of the restitution remedy it authorizes. Restitution under the UCL is, therefore, a "remedy the purpose or effect of which is to punish or deter...," falling within the plain meaning of section 3345.

None of National Western's textually-based arguments (OB 12-14, 17-23) to the contrary have merit. The fact that the specific terminology of section 3345 is borrowed from the CLRA rather than the UCL (OB 12-14) in no way detracts from the fact that UCL actions such as this one fall within the "plain meaning" of that terminology (*infra*, pp. 10-12). National Western's *ejusdem generis* argument (OB 20-21) fails because it would limit the residual category of "any other remedy" to cases already falling within the specifically enumerated instances that precede it, making the phrase "any other remedy" mere surplusage (*infra*, pp. 20-25). The argument that use of the term "*the* purpose" rather than "*a* purpose" reflects an intent to limit section 3345's application to remedies the *sole* purpose of which is to punish or deter must also fail (OB 19), because it would render the words "or effect" in the phrase "any other remedy the purpose or effect of which is to punish or deter" meaningless (*infra*, pp. 18-20). Finally, the contention that section 17203 is a more specific statute than section 3345, and must therefore govern (OB 17-18), fails because a statute applicable only to unfair and deceptive marketing actions when brought by seniors and the disabled is more specific than one which applies to such actions when brought by anyone (*infra*, pp. 16-18).

National Western also makes two more policy-oriented arguments, neither of which is persuasive. The claim that application of section 3345 to awards in

private UCL actions would violate the ban on damages in private UCL actions (OB 14-17) must be rejected because, as pointed out by the Court of Appeal (Slip Opinion, p. 16), the enhanced remedy at issue is sought, not under the UCL, but under section 3345, a separate statute (*infra*, pp.29-35). The claim that section 3345's application would defeat the "streamlined" process the Legislature provided for private UCL actions (OB 8-12) fails because, as shown in detail below (*infra*, pp. 35-42), the application of 3345 will have no such effect.

In short, the plain meaning of section 3345 compels its application to restitution under the UCL, the Legislature's purposes in enacting section 3345 and the UCL will be served by its application to such actions, and there is no good reason to block that application, denying seniors and the disabled the enhanced remedies and protection the Legislature intended them to have in such a case as this. The Court of Appeal's decision should be affirmed.

STATEMENT OF THE CASE AND OF THE FACTS

A. PROCEDURAL BACKGROUND

Petitioners' operative Third Amended Complaint alleges that National Western paid extremely high commissions to sales agents to market its deferred annuities to seniors, making up for the cost by imposing high surrender costs (25% graduated, and payable on death) and long surrender periods on the annuities (15

years). Aware that the surrender costs would deter seniors from purchasing the annuities, National Western omitted the notices of surrender penalties required by Insurance Code sections 10127.10 and 10127.13. National Western purported to get around those requirements by selling the annuities in the form of certificates under sham group annuities policies issued in Wyoming for that purpose.[2] It sought to enhance sales further by providing the agents with deceptive contracts and marketing materials (Ex. A, pp. 3-7).

The complaint included causes of action for fraud, breach of contract, and breach of the implied covenant, and violation of the UCL (Ex. A, p. 2). The class members for which Petitioners sought relief were limited to those who bought the annuities when 65 or older (Ex. A, p. 11). In addition to restitution, other equitable relief and damages, the prayer included a request for treble recovery under Civil Code section 3345 (Ex. A, pp. 28-29).

Respondent Court certified the class action against National Western only as to Petitioners' UCL cause of action (Ex. B, p. 34). On November 14, 2008, Respondent Court granted National Western's motion for judgment on pleadings

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[2]These purported "group" annuities were issued to a sham entity called the "Consumers Nationwide Trust", created specifically for National Western for the purpose of marketing their annuities. This "group" violates California's prohibition of discretionary groups solely intended for the marketing of insurance (*Insurance Code* §10204.5(a)(5)), and the law of Wyoming (mandating that group insurance confer economies of administration and be in the public interest (*Wyoming Code* §26-17-127(a)).

to dismiss the claim for treble recovery under section 3345 (Ex. V, pp. 672-73). In response to Petitioners' Petition for Writ of Mandate, the Court of Appeal issued its writ directing Respondent Court to deny the order and restore the section 3345 claim (Slip Opinion, p. 24). This Court granted National Western's petition for review on September 8, 2009.

B. CIVIL CODE SECTION 3345.

In its original form, as sponsored by the Department of Consumer Affairs and introduced on March 5, 1987, SB 1157 was directed solely at enacting a new section of the UCL (Business and Professions Code section 17206.1) providing increased civil penalties in public UCL actions in which seniors were the victims (Ex. P, p. 457). According to the Department, the purpose of the bill in that form was to "encourage law enforcement agencies to investigate and prosecute unfair business practices that are employed to victimize senior citizens because it would increase the civil penalty available to agencies that successfully prosecute unfair business practices (Ex. P, p. 482; AB 7-8)."

As finally enacted, the bill was expanded in response to the suggestion of Senior Assistant Attorney General Herschel T.Elkins that "greater personal remedies in the actions brought by those consumers might be helpful" as well (Slip Opinion, p. 8). The expanded legislation includes, not only a revised

version of Business and Professions Code section 17206.1 (applicable to cases involving the disabled as well as seniors), but also an amendment to section of the CLRA (Civil Code section 1780), providing for an additional award to seniors and the disabled in such actions, and the new Civil Code section 3345 at issue here.

Unlike the other two provisions enacted by SB1157, section 3345 was not made a part of one of the existing statutory schemes for consumer protection. Rather, it applies to enhance ***any*** statutory remedies for seniors or the disabled in actions brought to "redress unfair or deceptive acts or practices or unfair methods of competition." Civil Code section 3345(a).

In such a case, where "a trier of fact" is authorized by the statute to impose "either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter...," that trier of fact is to consider the three factors, along with "other appropriate factors" in setting the remedy: (1) whether the unfair or deceptive conduct is directed at one or more seniors or disabled persons, (2) whether one or more seniors or disabled persons suffered loss or encumbrance of certain specified assets or sources of income due to defendant's conduct, or (3) whether "one or more seniors or disabled persons" who are substantially more vulnerable than other members of the public actually suffered "...substantial physical, emotional, or economic damage" due to the defendant's

conduct. " Civil Code section 3345(b).

A trier of fact making an affirmative finding as to any one of the three factors can award the senior or disabled plaintiffs up to three times the amount that would otherwise be awarded. Civil Code section 3345(b)

ARGUMENT

I. THE PLAIN MEANING OF CIVIL CODE SECTION 3345 MAKES IT APPLICABLE TO RESTITUTION UNDER THE UCL.

National Western argues that section 3345 does not by "its very terms" apply to UCL restitution actions (OB 12-14). Petitioners will show that it does. UCL actions are indeed among those designed "to redress unfair or deceptive acts or practices or unfair methods of competition", section 3345(a), and restitution under the UCL falls within section 3345(b)'s enumeration of "fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter...."

A. APPLICATION TO THE UCL.

By its terms, Civil Code section 3345 applies to all actions brought by, or on behalf of, seniors and the disabled "to redress unfair or deceptive practices or unfair methods of competition." By *its* terms, the UCL provides for actions against those who engage in "unfair competition," which includes "any unlawful,

unfair or fraudulent business act or practice, and unfair, deceptive, untrue or misleading advertising...." Business & Professions Code section 17200.

Comparison of the language as to the reach of the two statutes can leave no doubt that section 3345 is, by "the plain meaning of [its] language," *Day v. City of Fontana* (2001) at 272, applicable to UCL actions brought by or for the benefit of seniors and disabled persons. Actions brought against those who engage in "unfair competition," and, specifically, "unfair or fraudulent business act or practice, and unfair, deceptive, untrue or misleading advertising..." *are* directed to "redress unfair or deceptive practices or unfair methods of competition."

That was the conclusion of the Court of Appeal (Slip Opinion, p. 2). It was also the conclusion of all concerned in *Hood v. Hartford Life and Accident Insurance Co.*, *supra*, 567 F.Supp.2d 1221. The *Hood* court, and all parties to that case, took it for granted that section 3345 applies to actions by seniors and the disabled under both the UCL and the CLRA. The *only* question was whether its application was limited to actions under those two statutes. The court decided that it was not. 567 F.Supp.2d 1221, 1227.

National Western's claim that section 3345 is not by "its very terms" made applicable to UCL actions rests, not on an examination of the "the plain *meaning* of the language" of each of the statutes, *Day v. City of Fontana, supra,* 25 Cal.4th

at 272 (emphasis added), but simply on the fact that the language of the two statutes is not *word-for-word* the same.

National Western points out that the phrases "unfair and deceptive practices" and "unfair methods of competition" appear in section 3345 and in the CLRA (in Civil Code section 170[a]), but not in Business & Professions Code section 17200 (OB 12-13). However, National Western does not, and could not seriously argue based on the *meaning* of those terms that UCL actions, including the underlying case, are not designed "to redress unfair or deceptive practices or unfair methods of competition."

This Court has held that the language of section 17200 encompassing "any unlawful, unfair or fraudulent business act or practice" is "sweeping" in its coverage. It embraces "anything that can properly be called a business practice and that at the same time is forbidden by law," as well as any practice which, though not otherwise unlawful, is unfair, or fraudulent. "In other words, a practice is prohibited as 'unfair' or deceptive even if not 'unlawful' and vice versa." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163 at 180. The "sweeping" language of section 17200, which is aimed at "any unlawful, unfair or fraudulent business act or practice," necessarily includes the redress of "unfair or deceptive practices or unfair methods

of competition."

In any case, National Western has, by its own insistence that section 3345 applies to the CLRA (OB 13), established its application to the UCL. This Court has construed the "unlawful" prong of the UCL as "borrowing" its meaning from other statutes, *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal. 4th 377, 383, so that any business practice or method of competition forbidden by any other statute also warrants a remedy under the UCL. It follows that any unfair or deceptive which violates the CLRA also necessarily gives rise to an action under the UCL. *Brockey v. Moore* (2003)107 Cal. App.4th 86, 98.

In sum, it is inconceivable that the Legislature did not contemplate in adopting section 3345 that UCL actions would be among those brought "to redress unfair or deceptive practices or unfair methods of competition" to which that section would apply.

B. APPLICATION TO RESTITUTION UNDER THE UCL.

1. THE PLAIN MEANING OF SECTION 3345 MAKES IT APPLICABLE TO RESTITUTION UNDER SECTION 17203 AS INTERPRETED BY THIS COURT.

The "plain meaning" of section 3345 also establishes its specific applicability to individual actions for restitution under the UCL.

Section 3345 applies by its terms to actions "to redress unfair or deceptive

practices or unfair methods of competition" whenever a trier of fact is authorized by statute to impose either a "fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter...." Restitution under section 17203 is a remedy falling within that provision.

The very language of section 17203 links restitution and deterrence as the goals of equitable relief under that section. It authorizes such orders

> as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.
>
> Business & Professions Code section 17203.

Further, this Court has repeatedly emphasized the importance of restitution under the UCL as a means of deterring unfair and deceptive practices.

In *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, this Court affirmed that courts may order restitution under the UCL (and other statutes aimed at "false, unfair, misleading, or deceptive advertising") "without individualized proof of deception, reliance, and injury, if it 'determines that such a remedy is necessary 'to prevent the use or employment' of the unfair practice.'" 35 Cal.3d at 211, quoting *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442 at 453.

In *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, this Court stated "[t]he purpose" of restitution orders under Business & Professions Code section 17203 as being "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gain." 2 Cal.4th at 1267, quoting *Fletcher v. Security Pacific National Bank*, *supra*, 23 Cal.3d at 449. Again, this Court made the point that no individualized proof of deception or reliance is necessary to support a restitution award "if necessary *to prevent the use or employment of an unfair practice*." 2 Cal.4th at 1268 (emphasis added).

In *International Traders, Inc. v. Matsushita Electric Corp. of America* (1997) 14 Cal.4th 1247, this Court further demonstrated its understanding of the importance of restitution under section 17203 to the deterrence of unfair and deceptive business practices. Matsushita there argued that section 17203 authorized restitution only when ancillary to an injunction. In rejecting that argument, this Court (quoting the Attorney General's brief) reasoned that the trial court must be free to "conclude that deterrence is more effectively accomplished through restitution than through an injunction of little practical significance." 14 Cal.4th at 1271. Matsushita's interpretation would, this Court continued, "frustrate the deterrent purposes of restitution by allowing a defendant who successfully opposed an injunction to retain its illicit profit." *Id.*

In *Korea Supply Co. v. Lockheed Martin Co.* (2003) 29 Cal.4th 1134, this Court held that non-restitutionary disgorgement of profits cannot be imposed under section 17203. In doing so, this Court commented that the Legislature "considered deterrence of unfair practices to be an important goal..." of that section, but pointed to the unavailability of attorney's fees and damages under that section as "clear evidence" that "deterrence by means of monetary penalties is not the act's *sole* objective (emphasis added)." Finally, this Court concluded that

> [t]he fact that the "restore" prong of *section 17203* is the only reference to monetary penalties in this section indicates that the Legislature intended to limit the available monetary remedies under the act.
>
> 29 Cal.4th at 1148.

That language is significant for this case for two reasons. First, this Court identified restitution under section 17203 as being in the category of "monetary penalties," bringing it within the ambit of section 3345 (b) (which applies whenever there is "a fine, or a civil penalty or other penalty"). Second, the language reaffirms that deterrence is a major goal of individual actions under 17203, though the only "monetary penalties" authorized by that section are restitutionary awards.

In sum, the plain meaning of section 3345 makes it applicable to restitution under section 17203 as interpreted by this Court.

2. NATIONAL WESTERN'S TEXTUAL ARGUMENTS TO THE CONTRARY ARE WITHOUT MERIT.

National Western makes three specific textual arguments against the application of section 3345 to restitution under the UCL. First, it argues that section 17203 is a more specific statute that controls over the more general language of section 3345 (OB 17-18). Second, it argues that because section 3345 applies to actions "*the* purpose or effect of which is to punish or deter," as opposed to "*a* purpose or effect of which is to punish or deter," its application is limited to those remedies that have punishment and deterrence as their *sole* purpose (OB 19). Third, it contends that the doctrine of *ejusdem generis* compels that result (OB 20-23).

None of the arguments have merit.

(A). SECTION 3345 IS A MORE SPECIFIC STATUTE THAN SECTION 17203.

National Western contends that section 3345 is inapplicable to UCL restitution because section 17203 of the UCL is a specific statute which controls the more general section 3345. *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310 (OB 17-18).

But National Western has failed to show why section 17203 should be regarded as the more specific of the two statutes. In support of that contention,

National Western provides only a truncated quote from a footnote to the Court of Appeal opinion (Slip Opinion, p. 18, n.13). The quote states that "[w]ere section 3345 merely a general authorization of treble damages in civil actions brought by senior citizens..., we would agree the general authorization would not trump the specific, limited restitution remedy provided in...section 17203 (OB 18)."

Contrary to National Western's assertions, the Court of Appeal did *not* "acknowledge" that such was the case. Rather, it went on to make it clear that the quoted language was intended to be hypothetical and counterfactual, and affirmed that in reality section 3345 is *not* "a general authorization of treble damages in civil actions brought by senior citizens." Rather, the opinion continues, it is specifically limited to actions brought "to redress unfair or deceptive acts or practices or unfair methods of competition (Slip Opinion, p. 18, n.13)."

The Court of Appeal was right. The remedy section 3345 provides *only to seniors and the disabled* who seek to "redress unfair or deceptive acts or practices or unfair methods of competition" is more specific than section 17203's provision of restitution to *anyone* victimized by conduct which falls within the "sweeping" language of section17200 ("any unlawful, unfair or fraudulent business act or practice").

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(B). SECTION 3345 CANNOT BE LIMITED TO THOSE ACTIONS WHICH HAVE PUNISHMENT OR DETERRENCE AS THEIR *SOLE* PURPOSE.

National Western argues that the use of the phrase "the purpose," rather than "a purpose" in section 3345 shows the Legislature's intention to limit that section's application to actions which have punishment or deterrence as their *only* purpose, and have "no compensatory element (OB 19)." That argument too is meritless.

First, National Western's argument is in direct conflict with this Court's usage with regard to the very remedy at issue here. As already noted, this Court wrote the following in *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at 1267, quoting *Fletcher v. Security Pacific National Bank*, *supra*, 23 Cal.3d at 449:

> *The purpose* of [section 17203 restitution] orders is "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains [emphasis added]."

By that language, this Court made it clear that it does not, in this context, understand the phrase "*the* purpose" to be reseved for instances in which only one purpose is at issue.

Further, National Western's argument fails to take account of the fact that section 3345 applies to actions "the purpose *or effect* of which is to punish or deter (emphasis added)."

This Court has held that "[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." *Arnett v. Dal Cielo* (1996) 14 Cal. 4th 4 at 22. If the Legislature had intended to include only actions with the *sole* purpose of punishment or deterrence, then the reference to "effect" would be mere "surplusage."

Because it must be assumed that any statute which has punishment or deterrence as its purpose will also have that "effect", the addition of the term "effect" makes sense only if the Legislature intended courts to consider applying section 3345 to actions which do *not* have punishment or deterrence as their sole purpose – or even among their stated purposes.

If, therefore, the term "effect" is to have any meaning in section 3345, that section must be read to apply to a remedy that has the *effect* of punishing or deterring, even though it had a different stated purpose. And if an action would be covered by section 3345 because it had the *effect* of punishing or deterring, even though that was not among its stated purposes, it would be absurd to exclude a remedy which had the *effect* of punishing or deterring, just because punishment or deterrence was also one among a number of its stated purposes.

This Court has held that absurd results are to be avoided even where a literal reading of a statute appears to require them. *Amador Valley Joint Union High*

Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 245. Certainly absurdity should be avoided where, as here, it is not required by the literal terms of the statute. Section 3345 must be read to apply, not only to remedies which have punishment or deterrence as their sole purpose, but also to remedies such as restitution under section 17203, which has as its stated purposes, both to "prevent" unfair and deceptive practices through deterrence, and to "restore" to consumers what they have lost to those who engage in such practices.

(C). NATIONAL WESTERN'S CONTENTION IS NOT HELPED BY THE DOCTRINE OF *EJUSDEM GENERIS.*

National Western also argues that the doctrine of *ejusdem generis* supports its conclusion that restitution under the UCL is not covered by section 3345. National Western asserts that the general terms in section 3345 – "or any other remedy the purpose of which is to punish or deter" – must be "limited in meaning to those remedies that precede it...." Because a 17203 restitution award is neither a "fine," nor a "civil penalty," nor "other penalty," National Western asserts, section 3345 does not apply to it (OB 21-22).

That argument is also without merit.

First, as already noted (*supra*, p. 15), this Court, in *Korea Supply Co. v. Lockheed Martin Co.*, *supra*, 29 Cal.4th at 1148, described the language

authorizing restitution in section 17203 as "the only reference to monetary penalties in this section," indicating this Court's understanding that 17203 restitution is a "penalty" that would in any case fall within the "other penalty" rubric of section 3345.

Second, National Western misapplies the doctrine in asserting that the general reference to "any other remedy" in section 3345(b) is to be "limited in meaning to" the specifically enumerated instances that precede it (OB 22).

The doctrine applies where "the statute contains an enumeration by specific words" which "suggest a class," but "the class is *not exhausted* by the enumeration, and there is, therefore, "a general reference supplementing the enumeration...." *Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460 at 472, quoting Sutherland, *Statutory Construction* (5th ed. 1992) section 47.33, p. 270 (emphasis added).

Here, however, National Western's argument depends on the contention (at AB 21) that the general class of "any other remedy" *is* exhausted by the specific terms "fine," "civil penalty" and "other penalty." The problem is that acceptance of that contention would deprive the "general reference supplementing the enumeration..." – in this case the phrase "any other remedy" – of any function, making it mere "surplusage."

Case law confirms that the "non-compensatory monetary award[s]" (including punitive and treble damages) to which National Western would limit section 3345's application, are all "penalties" and therefore fall within the specific term "other penalty" in section 3345(b).

According to this Court in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094 at 1104, a penalty is that "'which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained ... .'" 40 Cal. 4th at 1104, quoting *County of Los Angeles v. Ballerino* (1893) 99 Cal. 593, 596, specifically including "'recovery of damages additional to actual losses incurred, such as double or treble damages.... '" 40 Cal. 4th at 1104, *quoting Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236, 1242.

So too, the court in *Ross v. Pioneer Life Insurance Co.* (C.D.Cal.2008) 545 F.Supp.2d 1061 at 1067, citing this Court's opinion in *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, held that section 3345 applies to treble punitive damages under Civil Code section 3294, because "[p]unitive damages are 'fines and penalties' within the meaning of Civil Code section 3345."

If, therefore, National Western were correct in limiting section 3345's application to such "non-compensatory monetary award[s]," the general phrase,

"any other remedy" would be mere "surplusage," a result which, as already seen, should be avoided. *Arnett v. Dal Cielo*, *supra*, 14 Cal. 4th at 22. National Western's approach must be rejected, therefore, and "any other remedy" must be understood to encompass, not just penalties, but other remedies intended to punish or deter as well.

As already seen, this Court has repeatedly held that "the purpose" of restitution under section 17203 is, for one thing, "to deter" unfair and deceptive trade practices. *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at 1267; *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra,* 35 Cal.3d 197, 211; *Korea Supply Co. v. Lockheed Martin Co.*, *supra*, 29 Cal.4th 1134, 1148. Those holdings bring 17203 restitution within the ambit of the general phrase "any other remedy the purpose or effect of which is to punish or deter" in section 3345 (b).

The federal decisions cited by National Western (at AB 22-23) do not hold to the contrary.

The Ninth Circuit held in *Sanchez v. Monumental Life Ins. Co.* (9th Cir.1996) 102 F.3d 398, that section 3345 does not apply to treble contract damages. But that holding by no means provides support for National Western's assumption that it does not apply to treble 17203 restitution awards.

Petitioners agree that contract damages are not subject to enhancement under section 3345. That is so for two reasons. First, contract damages are aimed *solely* at compensation, and not, like 17203 restitution awards, at deterrence of future wrongdoing as well. Second, contract damages are a common law remedy, not, like civil penalties, punitive damages, or UCL restitution, a remedy "authorized by a statute" as required for the application of section 3345. Civil Code section 3345(b); 102 F.2d at 405.

So too, the *Ross* decision held section 3345 applicable to punitive damage awards under Civil Code section 3294. 545 F.Supp.2d 1061, 1066. However, National Western's claim that the *Ross* court found the legislative history of section 3345 to be "*consistent with* the conclusion that 'other remedy' is limited in meaning to those remedies that precede it" is either vacuous or erroneous (OB 22-23; emphasis added).

The claim is vacuous (though true) if it means only that the *Ross* court's view of the legislative history is not *inconsistent* with that conclusion. But nothing in *Ross* indicates support of National Western's position. The *Ross* court's reference to legislative history is comprised of a quote from that history explicitly endorsing section 3345's application to punitive damages. The quote does not, as National Western implies, endorse National Western's contention that

the general language "any other remedy" is "limited in meaning to those remedies that precede it.... (OB 22)."

In any case, resort to legislative history is appropriate only if the meaning of a statute cannot be discerned from the plain language, *People v. Licas* (2007) 41 Cal. 4th 362, 367, and here the plain language establishes that section 3345 applies to restitution under the UCL.

C. IN SUM, THE PLAIN LANGUAGE OF SECTION 3345 ESTABLISHES ITS APPLICATION TO SECTION 17203 RESTITUTION.

Quoting (at AB 13) this Court's decision in *Hodges v. Superior Court* (1999) 21 Cal.4th 109 at 113, National Western contends with regard to section 3345's application to UCL restitution that "[t]he language is not pellucid." A comparison of the language analyzed in *Hodges* with that it issue here demonstrates the contrary. Compared to Civil Code section 3333.4, the subject of the *Hodges* language, Civil Code section 3345 is indeed "pellucid."

In *Hodges*, the question was whether an action against an automobile manufacturer for injuries arising from a product defect was an "action to recover damages arising out of the operation or use of a motor vehicle" under section 3333.4. The *Hodges* court found it impossible to determine from the plain language of section 3333.4 whether "a defect that became manifest during

'operation or use'" of the vehicle *arises out of* that "operation or use." It found the phrase "arising out of" in itself too indeterminate to validate a decision either way. 21 Cal.4th at 887-88.

Such is not the case with the language of section 3345 – "to redress unfair or deceptive acts or practices," and "a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter" – as applied to UCL restitution.

As shown above, there can be no doubt that UCL actions are intended "to redress unfair or deceptive acts or practices." Further, once it has been established that the language "a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter" cannot be limited to those remedies which have punishment or deterrence as their *sole* purpose, and that the phrase "any other remedy the purpose or effect of which is to punish or deter" must include something beyond the enumeration of "fine, or a civil penalty or other penalty" which precedes it, it is apparent that restitution under section 12703 – the purpose of which this Court has repeatedly held is "to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains," – falls within that language as it appears in section 4435.

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II. APPLICATION OF SECTION 3345 IN SECTION 17203 RESTITUTION CASES WILL NOT REQUIRE DEPARTURE FROM ANY FUNDAMENTAL PRINCIPLE OF LAW, OR FROM THE "D" CHARACTER OF PRIVATE ACTIONS UNDER THE UCL.

National Western admits that its argument that section 3345 does not by "its very terms" apply to UCL restitution actions does not end the inquiry. Rather, National Western contends that we must go beyond the statutory language "to 'extrinsic sources' including 'legislative history (OB 14)'" to determine its meaning. As National Western indicates (at OB 13, f.n. 17), the aim of such an exploration beyond the statutory language as such is to determine "whether the literal meaning of a statute comports with its purpose...." *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909 at 943.

As already seen (*supra,* pp. 12-15), Petitioners do not agree that any resort to sources beyond the language of the statute is necessary. Further, neither of National Western's two forays beyond the statutory language focus on ensuring that the purpose of section 3345 is fulfilled. Rather, they are based on policy concerns related to the structure of private actions under the UCL. National Western argues that section 3345 should not apply to restitution awards under section 17203 because to do so would be (1) contrary to the "fundamental principle that damages are not permitted in a UCL action (OB 16)," and (2)

destructive of the "streamlined" process the Legislature provided for private UCL actions (OB 11).

As will be shown below, neither argument is sound. Application of section 3345 to enhance restitution awards under the UCL will neither breach the ban on damages in private UCL cases, nor damage the "streamlined" process operative in those cases. Beyond that, however, any such concerns for the effective operation of the UCL must be balanced against the value of applying section 3345 in accordance with its terms to the achievement of *that* statute's purpose.

As noted above (p. 1 *supra),* the Legislature's purpose in adopting SB 1157, including section 3345, was "to strengthen unfair business practices laws and to provide greater protection for senior and disabled persons against consumer fraud." *Hood v. Hartford Life and Accident Insurance Co.*, *supra*, 567 F.Supp.2d at 1228. Specifically, section 3345 is to contribute to that purpose through the provision of "greater personal remedies in the actions brought by those consumers... (Slip Opinion, p. 8)."

As already seen, this case lies at the heart of that purpose. The complaint alleges the fraudulent marketing of a product designed specifically to appeal to seniors, and to take advantage of their vulnerabilities and concerns as seniors (*supra*, pp. 5-6). If Petitioners prove their case, they will have established that

National Western was engaged in precisely the kind of conduct the Legislature intended to punish and deter, and that Petitioners are precisely the kind of individuals to whom the Legislature intended to provide enhanced protection, in enacting section 3345. National Western has given this Court no good reason to bar section 3345 from serving the Legislature's purpose in this context.

A. APPLICATION OF SECTION 3345 TO SECTION 17203 RESTITUTION ACTIONS IS NOT SUCH A DEPARTURE FROM ESTABLISHED PRINCIPLE AS WOULD REQUIRE AN EXPLICIT LEGISLATIVE STATEMENT.

Citing decisions of this Court from *Chern v. Bank of America* (1976) 15 Cal.3d 866, 875, to *Korea Supply Co. v. Lockheed Martin Co.*, *supra*, 29 Cal.4th 1134, 1148, National Western describes it as "a fundamental principle that damages are not permitted in a UCL action (OB 16)." National Western then goes on to assert (OB 14-16) that the application of section 3345 to 17203 restitution actions would be an abrogation of this "fundamental principle," which cannot be presumed in the absence of an explicit statement to that effect. It then supports that contention with discussions of two case: *De Anza Santa Cruz Mobile Estates Homeowners Ass'n* (2001) 94 Cal.App.4th 890, 911-12, and *Brodie v. Worker's Compensation Appeals Board* (2007) 40 Cal.4th 1313, 1329 (AOB 15-17).

National Western's argument must be rejected. First, the exclusion of

damages from among the remedies under section 17203 is not a "fundamental principle" Second, *De Anza* and *Brodie* are inapposite.

Nowhere in the cases cited by Western General does this Court describe the limit on remedies under section 17203 as a "fundamental principle," or anything similar. Rather, this Court has simply stated its understanding that the Legislature intended to limit the remedies authorized by that section as adopted to those afforded by equity, including restitution, excluding remedies at law such as damages. See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal. 4th 163, 179-80; *Korea Supply Co. v. Lockheed Martin Co.*, *supra*, 29 Cal.4th 1134, 1148. That was also the understanding of the Department of Consumer Affairs, the sponsor of SB 1157, before section 3345 was added to the bill. In describing the UCL at that time, the Department stated that private litigants could not "recover civil penalties or damages" under it (see Ex. P, p. 482).

The question here, however, is not whether this Court should read that limitation of remedies out of the UCL and hold that section 17203 authorizes the award of damages. Rather, it is whether the award of additional monetary remedies under *another* statute, such as Civil Code section 3345, would violate some fundamental principle. It would not. In *Korea Supply*, 29 Cal.4th at 1148, this Court "found nothing to indicate that the Legislature intended" by adopting

section 17203 to authorize courts to order disgorgement of profits. In section 3345, on the other hand, the Legislature made clear its intention to enhance statutory remedies otherwise available to seniors victimized by schemes such as that alleged here.

In *De Anza*, the issue was whether punitive damages under Civil Code section 3294 could be awarded in an action for violation of the Mobilehome Residency Law (Civil Code section 798, *et seq.*). Civil Code section 798.86 provides for statutory penalties of up to $500 for each wilful violation of the Mobilehome Residency Law, "in addition to damages afforded by law." 94 Cal.App.4th 890 at 909. The question for the *De Anza* court was whether the Legislature intended "damages afforded by law" to be limited to actual damages, or whether it referred to any form of damages provided by the law, including the punitive damages provided under section 3294.

The *De Anza* court found the language of section 798.86 to "reasonably susceptible of either interpretation," and therefore turned to legislative history and "other interpretive aids" to resolve the problem. 94 Cal.App.4th at 910. Among those "aids" was the fact that a closely related statute included language which "specifically states that the remedy provided for therein is 'nonexclusive.'" In the absence of any similar language indicating that the remedy provided in section

798.85 was intended to be "nonexclusive or cumulative," the *De Anza* court found that "its silence on the subject therefore indicates a contrary intent." *Id.* At 911.

Contrary to National Western's argument, the *De Anza* court's reasoning on that point is supportive of Petitioners position here. For, while section 798.85 includes not declaration that the remedy it provides is "nonexclusive or cumulative" of other remedies, there is such a declaration in the UCL. It explicitly provides that its remedies are "cumulative... to the remedies or penalties available under all other laws of this state." Business & Professions Code 17205; *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179. In that respect, therefore, *De Anza* supports the conclusion that section 17203 does *not* bar the imposition of additional remedies provided by other statutes, such as section 3345, in private UCL actions.[3]

Nor does *Brodie* support National Western's position here. *Brodie* involved the impact of the "omnibus reform of the worker's compensation system" enacted by the Legislature in 2004 on the method of apportionment between current and prior disability adopted by this Court in *Fuentes v. Workers' Compensation*

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[3]Of course, that does not mean that punitive damages under section 3249 can be awarded in section 17203 actions. Punitive damages can be awarded only "in addition to actual damages," and are not recoverable when compensatory damages are not, as is the case under section 17203. Civil Code section 3249 (a); *Contractor's Safety Association v. California Compensation Insurance Co.* (1957) 48 Cal.2d 71, 77.

Appeals Bd.(1976) 15 Cal.3d 1, and known as "formula A." 40 Cal.4th at 1322.

This Court found in *Brodie* that, while "the plain language of the new sections 4663 and 4664 demonstrates they were intended to reverse" other features of the prior system relevant to apportionment, 40 Cal.4th at 1327, that language was inconclusive as to the Legislature's intent regarding "formula A" as articulated in *Fuentes*. The Court therefore turned to legislative history with the understanding that such a change "if intended, would likely be remarked upon." The Court found, however, "only silence," which offered "no reason to believe the Legislature intended to abandon the settled application of formula A." 40 Cal.4th at 1329.

Further, this Court noted that, as the reform measure was "designed to alleviate a perceived crisis in skyrocketing workers' compensation costs," it was

> especially unlikely the Legislature would intend to adopt a new formula giving rise to significant increases in awards without saying so much as a word in either the text of the statute or the analyses of the proposed changes. 40 Cal.4th at 1330.

In *Brodie*, then, the Supreme Court was faced with a broad reform of a single statutory scheme which was silent on a particular aspect of existing case law (*Fuentes* and its "formula A"), but which had an overall purpose which would have been *disserved* by the abrogation of "formula A."

Here, on the contrary, the question is not whether a revision of the UCL should be interpreted as having abrogated the ban on damages under section 17203. Rather, it is whether a *separate* statute (section 3345), with an independent but compatible purpose (giving additional protection to seniors and the disabled from unfair and deceptive business practices), can be applied to enhance the restitution remedy provided by the UCL where seniors and the disabled are victimized.

Unlike *Brodie*, then, this is not a case in which an explicit reference was required to establish that new legislation changed prior law. Section 3345 is simply a separate statute which provides a remedy for a specified class (seniors and the disabled) *in addition to* that offered by the UCL, and the question is whether there is an implied prohibition of such additional remedies in the UCL. Given the explicit provision declaring UCL remedies to be "cumulative... to the remedies or penalties available under all other laws of this state," Business & Professions Code 17205, and the absence of any contrary indication in the UCL, there is no basis for finding the recovery of such additional remedies barred in private UCL actions.

In sum, application of section 3345 to enhance restitution under section 17203 in no way breaches the bar of damage awards under the UCL as such, let

alone violate any "long-standing principle of law" enunciated by the Legislature, or by this or any other California court. Rather, it is based on a recognition that, while the Legislature did not intend section 17203 to authorize courts to impose "monetary penalties" other than restitution, it did, in adopting section 3345, express an intention to authorize a "monetary penalty" for the benefit of seniors and the disabled in addition to the remedies authorized by such statutes as section 17203.

B. APPLICATION OF SECTION 3345 IS NOT INCONSISTENT WITH THE MAINTAINING A "STREAMLINED" PROCESS IN PRIVATE UCL ACTIONS.

National Western makes much of this Court's comments to the effect that, in enacting the UCL, the Legislature "deliberately traded the attributes of tort law for speed and administrative simplicity," so that a case can be made without the "need to plead and prove a tort. " *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at 1266. Thus, compensatory damages were excluded consistent with "an overarching legislative concern to provide a *streamlined* procedure...." *Cortez v. Purolator Air Filtration Products Co., supra*, 23 Cal.4th at 174.

Specifically, this Court concluded that the purpose of "deter[ring] future violations of the unfair trade practice statute and... foreclos[ing] retention by the violator of its ill-gotten gains" are so important that they justify "restitution

without individualized proof of deception, reliance, and injury." *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at 1267, quoting *Fletcher v. Security Pacific National Bank*, *supra*, 23 Cal.3d at 449.

National Western insists that the "streamlined" process will "disappear," or be "destroyed," if section 3345 is applied in UCL cases. National Western also predicts that the harm would be most dire in class actions like the present one (OB 11).

Those claims are baseless. Application of section 3345 would work no such fundamental change in the "streamlined" process about which National Western purports to be concerned.

First, it is not true that section 3345 will make UCL actions into "an all-purpose substitute for a tort or contract action." *Cortez v. Purolator Air Filtration Products Co., supra*, 23 Cal.4th at 173.

One of the things that sets the "streamlined" UCL process apart from tort and contract actions is that there is no right to jury trial. *Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 284-85; *People v. Witzerman* (1972) 29 Cal.App.3d 169. The addition of enhanced remedies under section 3345 would not change that. Neither the civil penalties in public UCL actions, *People v. Witzerman*, *supra,* 29 Cal.App.3d 169, 176-77, nor the equitable remedies available in private

UCL actions (even if the violation for which they are imposed is "borrowed" from a cause of action which otherwise bears a right to jury trial), *Hodge v. Superior Court*, *supra*, 145 Cal.App.4th 278, 284-85, give rise to a jury trial right.

Indeed, according to a leading commentator on the UCL, even where a UCL claim is accompanied by related claims for damages at law, there is no right to jury trial, though the court may in its discretion empanel an advisory jury. Stern, *Business & Professions Code section 17200 Practice* (2009) 7:280.

Given that neither the imposition of civil penalties, nor the award of damages on related claims give rise to a right to a jury trial, there is no reason to believe that the application of section 3345 would do so either.

Second, contrary to National Western's assertions (OB 11), the application of section 3345 would not import into UCL actions the need for the "individualized proof of deception, reliance, and injury" required in common law civil actions. " *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at 1267.

Imposition of enhanced monetary penalties under section 3345 is triggered by a finding of any one of the three factors enumerated in section 3345(b): (1) the direction of unfair or deceptive conduct to one or more seniors or disabled persons, (2) loss or encumbrance of certain specified assets or sources of income suffered by one or more seniors or disabled persons, resulting from defendant's

conduct, or (3) "...substantial physical, emotional, or economic damage" actually suffered by one or more seniors or disabled persons who are substantially more vulnerable than other members of the public, "resulting from the defendant's conduct."

National Western focuses on the provision allowing for proof of actual damage caused by the defendant's conduct as a basis for enhancing the remedy (OB 11). But an affirmative finding of only *one* of the factors is required to bring section 3345 into play.

In the instant case, for example, it is integral to Petitioners claims that National Western marketed the annuities to seniors, and therefore that National Western "knew or should have known that [its] conduct was directed to one or more senior citizens." Civil Code section 3345(b)(1). Proof of that fact alone will justify the enhanced remedy under section 3345, without any need to prove actual loss or damage to anyone.

It is true that, once there is a finding triggering the application of section 3345, the court can take all three factors into account in setting the precise extent of the enhanced remedy up to triple the amount of restitution for each senior or disabled person. Civil Code section 3345(b). Still, taking the losses or damages of "one or more" examples of seniors into account in setting the level of the

enhanced remedy under section 3345 is far from having to try the individual claim for damages of each and every plaintiff or class member in a case, including "individualized proof" of "injury...(OB 11)."

So too, far from creating especially serious problems for the trial of class actions, section 3345 is tailor-made for them. Rather than requiring proof of damage or loss by each class member, section 3345 provides only that the judge should take into account the losses of "one or more" seniors or disabled persons. One example could suffice to satisfy the requirement for the entire class. Nor would proof of a specific amount of damages for anyone be required. It would be enough to show that there were seniors who suffered substantial loss of income or emotional damage, for example, without having to specify or prove the extent of the loss or damage in dollar terms.

Of course, the open-ended nature of the factors allowing for a showing that "one or more" seniors were injured or suffered loss might tempt some plaintiffs' counsel into seeking the introduction of a large body of such evidence regarding a number of senior or disabled victims.

As is always the case, however, the trial courts can be relied upon to regulate the presentation of such evidence in the exercise of their "inherent power... to exercise reasonable control over all proceedings connected with

pending litigation ... in order to insure the orderly administration of justice." *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 at 967. As to section 3345's application in section 17203 cases, that control would be exercised to ensure that the advantages of the "streamlined" process established by the UCL are maintained. There is nothing in section 3345 that would prevent trial courts from doing so.

In fact, the introduction of the process provided by section 3345 would not involve any significant change in the "streamlined" UCL as it currently operates. That process already requires that the trial court take account of numerous factors other than the amount of money to be restored to the plaintiff or class members in deciding restitution claims under section 17203.

Thus, it is already the case that, because the action is equitable in nature, "the court may consider equitable factors in deciding which, if any, remedies authorized by the UCL should be awarded." *Olson v. Cohen* (2003)106 Cal.App.4th 1209 at 1214.

In *Olson,* the defendant attorney had failed to register his law corporation with the State Bar. Even assuming that the defendant was operating unlawfully, however, the *Olson* court decided that there should be no restitution of the fees it had collected, because "there is no allegation that any client relied upon the

existence of a corporate entity in seeking legal advice or was injured by the delay in registration." 106 Cal.App.4th at 1214. If such factors can be taken into account currently to deny restitution without disrupting the "streamlined" UCL process, then there is no reason to believe that taking account of the factors enumerated in section 3345 would be disruptive either.

So too, this Court held in *Cortez* that while equitable defenses cannot wholly defeat UCL claim arising out of illegal conduct, "what would otherwise be equitable defenses may be considered by the court when the court exercises its discretion over which, if any, remedies authorized by section 17203 should be awarded." 23 Cal.4th at 180.

Thus, in remanding the case before it to consider whether plaintiff and those she represented had a right to recover unpaid wages, this Court could not "foreclose the possibility that defendant has evidence that the trial court should consider when, on remand, it fashions a remedy for plaintiffs unfair business practice." 23 Cal.4th at 181.

More generally, as this Court further said in *Cortez*, "[a] court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute." 23 Cal.4th at 180. The factors enumerated in section 3345 (b)(1-3) would surely be relevant to those equities. They are, therefore, the very

kinds of considerations which trial courts may take into account in fashioning remedies under section 17203, without regard to section 3345 or any other statute. The fact that section 3345 specifically articulates them as factors to be considered "in addition to other appropriate factors, in determining the amount" of the remedy to be imposed does not change the essential character of the proceeding. Civil Code section 3345 (b).

Finally, as already indicated, there are those cases in which the joining of other causes of action which do provide for the award of damages to a UCL action already changes the character of the proceeding, allowing for the award of damages and even advisory juries. See Stern, *Business & Professions Code section 17200 Practice*, *supra*, 7:280.

Thus, the current "streamlined" process for UCL private actions already allows for consideration of a broad range of factors – including such factors as those enumerated in section 3345 where relevant – in fashioning remedies, but is far from becoming "an all-purpose substitute for a tort or contract action." *Cortez v. Purolator Air Filtration Products Co., supra*, 23 Cal.4th at 173. National Western's alarmist warning that the application of section 3345 will result in the "destruction" of the "streamlined" UCL process as it currently operates is a gross exaggeration.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the decision of the Court of Appeal herein be affirmed.

DATED: December 4, 2009

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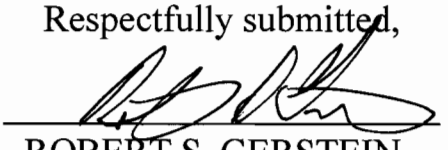
STATEMENT OF COMPLIANCE

Pursuant to Rule of Court 14(c)(1), I certify that the **PETITIONER'S ANSWER BRIEF ON THE MERITS** is proportionately spaced, has a typeface of 14 points or more, and contains 9,387 words.

DATED: December 7, 2009

Respectfully submitted,



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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 12400 Wilshire Boulevard, Suite 1300, Los Angeles, California 90025.

On December 7, 2009, I served the foregoing document described as **PETITIONER'S ANSWER BRIEF ON THE MERITS** on the parties interested in this action by enclosing true copies thereof in sealed envelopes with postage thereon fully prepaid, and by providing for their deposit in the United States Mail at Los Angeles, California, addressed as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed December 7, 2009, at Los Angeles, California.

Patsy V. Herron

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