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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 Appellant District, Division Seven
Case No. B212512

REPLY BRIEF ON THE MERITS

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Service on Attorney General and Los Angeles County District Attorney Pursuant to California Business & Professions Code Section 17209

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1. INTRODUCTION

The prohibition on the recovery of damages of any kind is a fundamental feature of the UCL. When enacting that statute, the Legislature had an "overarching" desire for a "streamlined" procedure, and to achieve that result it intentionally restricted the remedies available to equitable relief. This Court has repeatedly advised that such equitable relief includes only injunctive relief and restitution, and not damages, punitive, treble or otherwise. Applying the enhanced Civil Code section 3345 remedy to the UCL would defeat the Legislature's desire.

Had the Legislature intended to abrogate the "no damages" rule of the UCL by the adoption of section 3345, it would have surely said so in unmistakable language. But no such language exists.[1] Accordingly, the conclusion must be that section 3345 does not apply to private UCL actions.[2]

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[1] This is especially true in this instance when SB 1157, the bill that enacted section 3345, also amended other portions of the UCL.

[2] Petitioners' brief makes liberal use of the allegations contained in the operative complaint (**Petitioners Answer Brief on the Merits ("Answer Brief"), pp. 2-3, 5-6)**, suggesting that the sale of the annuities to each of the thousands of class members was improper. National Western disputes that assertion since the annuities have provided and will provide important benefits to the class members, but this is not the place for this dispute. The issue here is whether the trebling remedy of section 3345 should apply to private UCL actions that include seniors as plaintiffs or class members, and the answer to that issue will impact not just this case but all UCL cases in which one or more plaintiffs happens to be a senior.

2. APPLICATION OF SECTION 3345 TO THE UCL IS INCONSISTENT WITH THE UCL's PROHIBITION ON RECOVERY OF DAMAGES, A FUNDAMENTAL PRINCIPLE OF THE UCL

Damages, including punitive damages and treble damages, cannot be recovered in a UCL action. *E.g., Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1148 (2003); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal. 4th 163, 179 (1999). While Petitioners cannot challenge this settled principle, they argue that the prohibition on damages is not, as National Western has advised, a "fundamental principle" of the UCL. **Answer Brief, p. 29.** Petitioners are clearly wrong.

The UCL is not and was never intended to be "an all-purpose substitute for a tort or contract action." *E.g., Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163, 173 (2000). The UCL involves a trade-off between liability and compensation. That is, while it has "limited remedies, the unfair competition law's scope is broad." *Cel-Tech, supra* at 180.[3] This distinction between limited remedies and broad scope is repeated in numerous decisions. *E.g., Cortez, supra at* 1144 ("While the

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[3] When this Court decided *Cel-Tech*, it discussed the limited remedies of the UCL and contrasted them with those found in the Unfair Practices Act, Business & Professions Code section 17000 *et seq.*: the "consequences of violating the Unfair Practices Act can be quite severe. A prevailing plaintiff may receive treble damages and attorney fees," and the "act even provides criminal sanctions." *Cel-Tech, supra* at 179. In contrast, the UCL "is independent of the Unfair Practices Act and other laws" and "[i]ts remedies are 'cumulative . . . to the remedies or penalties available under all other laws of this state' (§ 17205), but its sanctions are less severe than those of the Unfair Practices Act." *Id.* The above quoted language is found immediately before the Court advised as to the UCL: "Prevailing plaintiffs are generally limited to injunctive relief and restitution." *Id.*

scope of conduct covered by the UCL is broad, its remedies are limited."); *Buckland v. Threshold Enterprises, Inc.,* 155 Cal. App. 4th 798, 812 (2007) ("Although the UCL targets a wide range of misconduct, its remedies are limited because UCL actions are equitable in nature."); *Shersher v. Superior Court,* 154 Cal. App. 4th 1491, 1497 (2007) ("Thus, the UCL encompasses a broad range of activity, but provides only limited remedies: restitution and injunctive relief."); *Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th 440, 452 (2005) ("the UCL limits the remedies available for UCL violations to restitution and injunctive relief"). Just days ago, the Second Appellate District confirmed this point in *In re Vioxx Class Cases*, ___ Cal. App. 4th ___, 2009 WL 4806197, *8 (2009) ("Our Supreme Court has stated, '[w]hile the scope of conduct covered by the UCL is broad, its remedies are limited.'") In short, a central feature of the UCL is the sharp contrast between its broad scope and limited remedies. This feature did not occur by accident, as we explain below.

In drafting the UCL, there was an "overarching legislative concern" to create a "streamlined" process. To achieve that result, UCL remedies were intentionally limited. In *Dean Witter Reynolds, Inc. v. Superior Court,* 211 Cal. App. 3d 758, 774 (1989), the court explained: "The exclusion of claims for compensatory damages is also consistent with the overarching legislative concern to provide a ***streamlined*** procedure for the prevention of ongoing or threatened acts of unfair competition." (Emphasis by the court.)

This necessary connection between precluding damages and a streamlined process has been repeatedly emphasized by this Court in the

years following *Dean Witter*. In *Cortez*, this Court noted that the *Dean Witter* court had "explained its conclusion that compensatory damages are not available in a UCL action" on the basis of the "'overarching legislative concern" for a streamlined process. *Cortez, supra* at 173-74 (quoting *Dean Witter*).

In *Korea Supply,* this Court reaffirmed "'that an action under the UCL is not an all-purpose substitute for a tort or contract action'" because of the "'overarching legislative concern'" for a "'streamlined'" UCL procedure. *Korea Supply, supra* at 1150 (quoting *Cortez*). The Court concluded: "***Because of this objective [the streamlined procedure], the remedies provided are limited***." (Emphasis added.)

In addition to arguing that the limitations on monetary remedies is not a fundamental feature of the UCL, Petitioners alternatively argue that applying section 3345 to the UCL will not change this feature. Petitioners argue that penal damages will become recoverable not by virtue of section 17203 but from a separate statute, section 3345. **Answer Brief, p. 30.** This is a difference without meaning. Whether penal damages are expressly permitted by section 17203 or by incorporation of section 3345, a trial judge would still be able to award ***penal damages in a UCL action.*** This result would effectively negate years of California decisions precluding damages of any kind. Moreover, as we explain below, the UCL "borrows" violations but it does not borrow remedies.

In summary, while Petitioners quarrel with National Western's characterization of the limited remedies provision of the UCL as a

"fundamental principle," National Western's characterization is apt. It was not by chance that remedies were limited to restitution and injunctive relief. There was a conscious plan to produce a "streamlined" procedure with limited remedies.

3. APPLICATION OF SECTION 3345 TO THE UCL WOULD UNDERCUT THE "*STREAMLINED*" UCL PROCEDURE

Faced with the unassailable fact that in drafting the UCL the Legislature had an "overarching" desire for a "streamlined" process, Petitioners argue that engrafting section 3345 onto the UCL will not harm that process. To the contrary, application of section 3345 to the UCL would significantly and negatively impact the "streamlined" process.

Petitioners begin their argument noting that a UCL trial will remain a court trial whether or not section 3345 applies to the UCL. **Answer Brief, pp. 36-37.** While true, this wholly misses the point. National Western never suggested that applying section 3345 to the UCL would create a right to a jury trial. National Western's point is that including a penalty of possibly three times the amount of any restitution award necessarily complicates a UCL trial – and not in a minor way.

Presently, the process of determining a restitution award under the UCL is straightforward. A "restitution order under section 17203" consists of "quantifiable sums one person owes to another . . . ." *Cortez, supra* at 178. In other words, an award of restitution under section 17203 "operates only to return to a person those ***measurable amounts*** which are ***wrongfully***

taken by means of an unfair business practice." *Day v. AT&T Corp.,* 63 Cal. App. 4th 325, 338-39 (1998) (emphasis by court); *Colgan v. Leatherman Tool Group Inc.,* 135 Cal. App. 4th 663, 698 (2006). Thus, presently a trial judge having concluded that a violation of the UCL has occurred must only determine the amount wrongfully taken to determine the restitution award.[4]

If section 3345 were applicable to UCL actions, the process would be much more complex. The first sentence of section 3345(b) requires the trial judge to "consider all of the following factors, in addition to other appropriate factors, in determining the amount of fine, civil penalty or other penalty, or other remedy to impose." For the moment, ***if*** we say that restitution is an "other remedy" encompassed by section 3345, then grafting section 3345(b) onto a UCL restitution claim would get very complicated.

Seemingly, the trial judge would be required to consider the three factors of section 3345(b) in deciding the amount of restitution. If so, that would obligate the trial judge to consider, among many other factors, whether the senior lost his house or job as a result of the acts of unfair competition; whether the senior is more vulnerable than other members of the public due to the senior's age, health, impaired understanding, or restricted mobility; and whether the senior "actually suffered substantial physical, emotional, or economic damages resulting from the defendant's

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[4] Petitioners note that in determining such relief, a trial judge may consider any "equitable" factors the defendant presents to reduce or eliminate relief. **Answer Brief, p. 40.** While true, this is a far cry from the situation that would result if section 3345 were applicable to UCL actions.

conduct." Civil Code, § 3345(b)(1)-(3). All of this individualized analysis is far removed miles from the relatively straightforward considerations now involved in a UCL case and, indeed, is clearly inconsistent with the basic notion of a "streamlined" process.

These factors also would need to be considered in deciding the amount of the penalty. Petitioners attempt to minimize this impact by noting that a trial judge must only find that one of the three factors exists,[5] but this attempt fails for several reasons.

First, the penalty is "an amount up to three times greater" than the fine, civil penalty, etc. Because the amount of the penalty is to be decided by the trial judge, counsel for seniors will have every incentive to present what is known in the law of punitive damages as "reprehensibility" testimony. A trial judge would no doubt be more likely to award the full trebling if the senior can demonstrate that she/he "actually suffered substantial physical, emotional or economic damage" or lost a home or job. It is one thing to argue that the plaintiff is a senior and should get a penalty award, but quite another to prove that the senior, for example, lost his job because of the claimed acts of unfair competition.

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[5] **Answer Brief, p. 37.** Petitioners state that the "[i]mposition of enhanced monetary penalties under section 3345 is triggered by a finding of ***any one of the three factors***" (emphasis added), and that "an affirmative finding of only ***one*** of the factors is required to bring section 3345 into play." (Emphasis by Petitioners.) Actually, the language of section 3345(b) is "[w]henever the trier of fact makes an affirmative finding in regard to ***one or more*** of the following factors." (Emphasis added.) And the fact that one factor may trigger the application of section 3345 does not mean that ***all*** factors are not taken into account in determining the amount of the penalty.

Second, if the decisions which have equated the trebling provision of section 3345(b) to punitive damages are correct,[6] then in addition to the factors specified by section 3345(b), the trial judge will also have to consider the constitutional punitive damage factors (degree of reprehensibility, ratio of compensatory damages to punitive damages and comparable civil fines) as well as the defendant's financial condition. *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159, 1172, 1184-85 (2005). Just addressing the two factors of the defendant's financial condition and the reprehensibility of the conduct, the latter of which this Court recently described as "the most important" factor,[7] would require the trial judge to consider matters far beyond the much more straightforward issue of the appropriate amount of restitution.

Finally, a determination that section 3345 applies to UCL actions would mean that it would apply in ***all*** situations in which a section 3345 remedy is sought. That is, the section would apply in actions involving seniors and non-seniors as plaintiffs, in individual actions, and, as in this case, in class actions. While complexity would be introduced in any UCL action, in UCL class actions this problem is particularly striking.[8]

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[6] Both *Ross v. Pioneer Life Ins. Co.*, 545 F. Supp. 2d 1061, 1066-67 (C.D. Cal. 2008), and *In re Felton,* 197 B.R. 881, 892 (N.D. Cal. 1996), found that an award of treble damages under section 3345 was an award of punitive damages.

[7] *Roby v. McKesson Corp.*, ___ Cal.4th ___, 219 P.3d 749, 793 (2009).

[8] That is why this action, which is defined solely in terms of class members 65 and older, may present a less common sort of UCL claim. In cases not so defined, even the first factor of whether the defendant "knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons" may not be a straightforward determination.

There are approximately 4,000 UCL class members in this case. Recognizing that testimony from even a fraction of those class members would derail the process, Petitioners argue that "[o]ne example could suffice to satisfy the requirement for the entire class." **Answer Brief, p. 38.** This suggestion ignores the fact that, as a group, seniors are more diverse than individuals in virtually any other age group one might consider. They are unlike in amounts of wealth, health, varied life experiences, and life expectations. Testimony from a single class member (carefully selected to present the best possible testimony) cannot justify a penalty award for thousands of others whose situations may be wholly unlike that of the selected representative.[9]

This problem is particularly acute with a UCL class action. Recently, this Court reaffirmed that relief may be granted to UCL class members without "individualized proof" of "injury." *In re Tobacco II Cases,* 46 Cal. 4th 298, 320 (2009). Applying section 3345 to "no-injury class actions"[10] would in turn produce "no-injury" penalty damages. Since penalty damages under section 3345 are, at a minimum, "similar in many respects to an award of punitive damages,"[11] such a result could "implicate

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[9] Compounding this problem is that many of the factors of section 3345(b) are inherently individual – loss of a primary residence, loss of principal employment, loss of retirement money, age, poor health, impaired understanding, restricted mobility, physical or emotional damage. That one member of the class testifies that she lost her retirement money by purchasing an annuity tells one nothing about the other class members.

[10] *Tobacco II, supra* at 335 (dissent of Justice Baxter).

[11] *Slip Opinion,* p. 2.

due process concerns." *Kraus v. Trinity Management Services, Inc.*, 23 Cal 4th 116, 137 (2000).[12]

In summary, applying section 3345 to the UCL will necessarily complicate the procedure and in so doing damage the legislatively desired "streamlined" procedure. We shall now demonstrate that the "plain language" of section 3345 does not compel its application to the UCL.

4. THE "PLAIN MEANING" OF SECTION 3345 DOES NOT ENCOMPASS THE UCL

It is a fact that the language of section 3345 directly references the California Legal Remedies Act ("CLRA") but does not directly reference the UCL.[13] It is evident that the Court of Appeal missed this critical point as it incorrectly concluded that section 3345 by "express legislative mandate" applied to the UCL. *Slip Opinion,* p. 16.[14] Because of this conclusion, the Court of Appeal incorrectly held that the "plain meaning" rule of statutory construction required it to find that section 3345 applied to the UCL.

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[12] *Kraus* referenced Justice's Baxter's opinion in *Bronco Wine Co. v. Frank A. Logoluso Farms,* 214 Cal. App. 3d 699 (1989).

[13] The Fourth District made explicit reference to the differing language of the two statutes when it recently quoted them in *Paduano v. American Honda Motor Co.*, 169 Cal. App. 4th 1453, 1468 (2009).

[14] This was not a one-time mistake. It repeated the claim that the "unambiguous language of section 3345 encompasses" the UCL and that "the language of section 3345 itself . . . on its face applies" to the UCL. *Slip Opinion,* pp. 2, 3.

Attempting to defend the Court of Appeal's error, Petitioners argue that National Western's "***word-for-word***" analysis of section 3345 is misguided. **Answer Brief, p. 10.** Petitioners ignore the fact that only the CLRA contains the identical language that is repeated in section 3345. Instead, they assert that both section 3345 and the UCL provide remedies for acts of "unfair methods of competition" (section 3345) and "unfair competition" (UCL), arguing that the difference in wording is irrelevant. **Answer Brief, pp. 9-12.** To the contrary, the difference in wording is ***critical*** because of the striking change in the remedies of the UCL that the application of section 3345 would create.

Since *Chern v. Bank of America,* 15 Cal. 3d 866, 875 (1976), it has been established law that a private plaintiff in a UCL action cannot recover damages, treble damages or punitive damages.[15] Applying section 3345 to the UCL negates that established law. Certainly, the Legislature ***could*** have expanded the scope of the UCL's remedies in private actions, but if such a dramatic change was intended it would have been signaled by the use of explicit, unmistakable language. Yet no such language exists. Rather, the Legislature, in enacting section 3345, used language expressly

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[15] While *Chern* considered the False Advertising Law (Business & Profession Code sections 17500 and 17535, the "FAL"), *Chern* has been interpreted as applying to the UCL as well. *E.g., Bank of the West v. Superior Court,* 2 Cal 4th 1254, 1266 (1992); *Colgan, supra* at 675 n.7. "The two remedy provisions [the FAL and the UCL] are to be interpreted in the same fashion. *In re Vioxx Class Cases*, *supra*, 2009 WL 4806197 at *8.

found in the CLRA and other California statutes,[16] ***but not the language of the UCL.***[17]

At the same time the Legislature added section 3345 to the Civil Code, it also amended the UCL by adding section 17206.1. While courts presume the Legislature is aware of existing law when it acts, in this case it is clear that the Legislature was fully aware of the UCL when it enacted section 3345. Given that, it would have been simple for the Legislature, had it intended section 3345 to apply to private actions under the UCL, to have explicitly so stated. It might have amended the UCL by adding a section 17203.1, stating: "In addition to any relief granted pursuant to section 17203, if the action is brought by or on behalf of senior citizens or disabled persons, relief may also be granted pursuant to section 3345 of the Civil Code." We do not suggest that the foregoing is masterful legislative drafting, but the point is that in one manner or another the Legislature could have directly amended the UCL to make it plain that an award pursuant to section 3345 was available, ***but the Legislature did not so act.***

The "plain meaning" rule is inapplicable for another reason. Regardless of the language focused on by the Court of Appeal (and now Petitioners) in section 3345***(a)***, in order for section 3345***(b)*** to – by "express legislative mandate" – apply to a UCL restitution award, the Court must

[16] For example, sections 325 and 13413 of the Business & Professions Code and section 12599.6 of the Government Code all include the phrase "unfair or deceptive acts or practices."

[17] In addition to the direct cross-references between the CLRA and section 3345, the CLRA – unlike the UCL – does allow for the imposition of the whole gamut of remedies – damages, restitution, punitive damages, and "any other relief that the court deems proper." Civil Code, § 1780(a).

conclude that such an award is a "fine, or a civil penalty or any other penalty, or any other remedy the purpose or effect of which is to punish or deter . . . ." It is far from clear whether restitution under the UCL is a remedy "the purpose of which is to punish or deter," and thus this Court must look beyond the plain meaning rule to other rules of statutory construction. One such rule is the equally "well-settled rule of statutory construction" that the Legislature did not intend to "overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication." *People v. Cardenas,* 31 Cal. 3d 897, 913-14 (1982). This rule has been applied in numerous decisions. *E.g., People v. Licas*, 41 Cal. 4th 362, 367 (2007); *People v. Superior Court,* 23 Cal. 4th 183, 199 (2000); *Fuentes v. Workers' Compensation Appeals Bd.,* 16 Cal. 3d 1, 7 (1976); *Reidy v. City & County of San Francisco,* 123 Cal. App. 4th 580, 591 (2004); *Rincon Del Diablo Mun. Water Dist. v. San Diego County Water Authority,* 121 Cal. App. 4th 813, 819-20 (2004).

In applying this rule of statutory construction, the question is whether, by "express declaration" or "necessary implication," it is clear that the Legislature intended, in this case, to effectively overrule the decision in *Chern* and subsequent cases by permitting the recovery of treble or punitive damages in a UCL action. As we have demonstrated, no "express declaration" appears in the language of section 3345. Moreover, nothing in section 3345 constitutes a "necessary implication" that the section was intended to apply to the UCL.[18] Accordingly, the "plain meaning" rule of

[18] Indeed, since SB 1157 specifically made amendments to the public action aspects of the UCL, and left untouched section 17203, one can conclude

statutory construction does not support any application of section 3345 to the UCL.

Petitioners close their "plain meaning" analysis with the argument that, since section 3345 does reference the CLRA, then by indirection it also references the UCL. **Answer Brief, pp. 11-12.** Specifically, Petitioners argue that, since the UCL "borrows" from other statutes, it borrows section 3345 from the CLRA. How this fits with the requirement of an "express declaration" from the Legislature is a mystery, but the argument fails because the UCL only borrows violations; it does not borrow remedies.

In *Farmers Ins. Exchange v. Superior Court,* 2 Cal. 4th 377, 383 (1992), this Court explained that the UCL borrows "'***violations*** of other laws and treats these violations . . . as unlawful practices independently actionable under section 17200 et seq. ***and subject to the distinct remedies provided thereunder.***" (Emphasis added). *Accord, Inline, Inc. v. A.V.L. Holding Co.,* 125 Cal. App. 4th 895, 900 (2005).

The recent decision in *Davis v. Ford Motor Credit Co.*, ___ Cal. App. 4th ___, 101 Cal.Rptr.3d 697 (2009), underscores the point that ***the UCL does not borrow remedies***. *Davis* involved a claim that Ford had violated the Rees-Levering Motor Vehicle Sales and Finance Act (Civil Code, § 2981 et seq.), and the plaintiff sued under the UCL and the CLRA. Ford prevailed and then sought its attorney's fees, arguing that the Rees-

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that there is a ***negative*** implication that section 3345 was to apply to private actions under the UCL.

Levering attorney's fees provision (Civil Code, § 2983.4) was incorporated into the UCL cause of action. The court rejected this claim, stating that the complaint "alleged a violation of Rees-Levering merely as ***the predicate*** to the claim Ford engaged in unlawful or unfair business practices within the meaning of the UCL," and as such, "Rees-Levering's reciprocal fee provision is inapplicable when an alleged Rees-Levering violation is merely ***a predicate*** to a UCL claim, in that ***the public policy underlying the UCL must prevail*** over the reciprocal fee provision of Rees-Levering." *Davis, supra* at 711, 712. (Emphasis added.)

The limitation on remedies to those set forth in the UCL is clearly intentional since, if remedies could be "borrowed," the UCL could borrow any number of remedy sections of the Civil Code and other codes, thereby eviscerating the expressly limited remedies of the UCL. *See Korea Supply, supra* at 1140 ("The 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"). In short, the "plain meaning" by borrowing argument is also without merit.[19]

5. THE LEGISLATIVE HISTORY DOES NOT CONTAIN ANY HINT THAT SECTION 3345 WAS INTENDED TO APPLY TO THE UCL

Section 3345 was enacted by SB 1157. Petitioners no longer contend that the legislative history of SB 1157 indicates a legislative desire

[19] Even Petitioners' citation to *Brockey v. Moore*, 107 Cal. App. 4th 86, 98 (2003), is surprising since that case only confirms that the UCL "borrows standards of conduct from other statutes," not remedies.

to change the "no damages" rule of the UCL. Rather, Petitioners argue that permitting penal damages in a UCL action is not such a departure from established law as to require "an explicit statement to that effect." **Answer Brief, p. 29.**

With respect to the "departure" argument, above we have explained that the "no damages" rule resulted directly from the "overarching legislative concern" for a "streamlined" UCL process. Again, the Legislature traded broad scope for limited remedies. Petitioners quarrel with National Western's characterization of the "no damages" rule as a "fundamental principle," but whether called a fundamental, central or important principle, it is clear that the prohibition on damages is a principle that has existed since the 1970's and one that this Court has repeatedly stressed. *Cel-Tech, supra* at 179; *Kraus, supra* at 128: *Cortez, supra* at 173; *Korea Supply, supra* at 1148, 1150. By any standard, the "no damages" rule is a well-established rule and, in the absence of an explicit declaration of legislative intent to abrogate that rule, it cannot be presumed that section 3345 was intended apply to the UCL.

Petitioners also challenge National Western's reliance on *De Anza Santa Cruz Mobile Estate Homeowners Ass'n. v. De Anza Santa Cruz Mobile Estates,* 94 Cal. App. 4th 890 (2001), and *Brodie v. Workers' Compensation Appeals Bd.,* 40 Cal. 4th 1313 (2007).[20] National Western relied on those decisions for the proposition that (1) the Legislature knows how to declare an intention to change existing law and (2) silence on the

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[20] **Answer Brief, pp. 30-34**.

topic indicates that the Legislature did not intend to change existing law. **Opening Brief, pp. 15-17.** Not only do *De Anza* and *Brodie* fully support that proposition, so do numerous other decisions. *E.g., People v. Superior Court,* 23 Cal. 4th 183, 199 (2000); *accord, Regency Outdoor Advertising, Inc. v. City of Los Angeles,* 39 Cal. 4th 507, 526 (2006).

In short, while *De Anza*[21] and *Brodie*[22] do involve different facts than this case, the principle they announce – that the Legislature cannot be presumed to intend overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied – is wholly applicable to this case. The "no damages" rule under the UCL is a long-established principle of law and the legislative history of SB 1157 does not contain a clearly expressed intention – indeed, it does not even hint at such an intention – to change that principle of law. In the absence of an expressed intention, it cannot be presumed that the damages remedy of

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[21] Petitioners argue *De Anza* really supports their position since Business & Professions Code section 17205 makes the remedies of the UCL "cumulative" of other remedies and no such similar statute was involved in *De Anza*. From this, Petitioners seem to argue that the Legislature (silently) intended to jettison the "no damages" rule when enacting section 3345. **Answer Brief, pp. 31-32.** Petitioners again miss the point that the UCL does not borrow ***remedies***. Thus, while UCL remedies are cumulative of other remedies, the only remedies of the UCL are the "distinct remedies" contained in the UCL. Quite simply, the claim of a "tacit" expressed declaration is meritless. Had the Legislature intended to change the "no damages" rule, it would have signaled that intent either when enacting 3345 or by amending the private action provisions of the UCL.

[22] The issue in *Brodie* was whether the 2004 legislative changes to the workers' compensation laws changed the long and well-established *Fuentes* rule. Finding only silence on that topic, this Court concluded that the changes did not overthrow the *Fuentes* rule. *Brodie, supra* at 1325-29. That sounds remarkably analogous to this case.

section 3345 was ever intended to apply to private actions seeking restitution under the UCL.

6. A RESTITUTION AWARD UNDER SECTION 17203 IS NOT A "CIVIL PENALTY OR OTHER PENALTY"

Relying on language from *Korea Supply*, Petitioners assert that restitution awards under the UCL are really "monetary penalties" and therefore section 3345 obviously applies to the UCL. **Answer Brief, pp. 15, 20.** National Western is confident that the reference to "monetary penalties" at page 1148 of *Korea Supply* was not intended to mean anything more than that a monetary award, whether tort damages, contract damages or UCL restitution, can be viewed as a "penalty" of sorts by the losing party.[23] Indeed, to the extent there is any doubt as what restitution is meant to accomplish, this Court explicitly stated at page 1149 of *Korea Supply* that "***[t]he object of restitution is to restore the status quo*** by returning to the plaintiff funds in which he or she has an ownership interest." (Emphasis added.) *Accord*, *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1012 (2005); *National Rural Telecommunications Co-op. v. DIRECTV, Inc.*, 319 F.Supp.2d 1059, 1079 (C.D. Cal. 2003).

Moreover, Petitioners' own arguments demonstrate that a restitution award is not a "penalty." Subsequent to the "monetary penalties" argument, Petitioners explain that "a penalty is that 'which an individual is allowed to recover . . . without reference to the actual damage sustained . . .

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[23] At the end of the same paragraph, this Court's footnote distinguished private and public UCL actions, noting that in "public actions, civil penalties may be collected from a defendant." *Korea Supply, supra* at 1148 n.6. *Accord*, *Bradstreet v. Wong*, 161 Cal. App. 4th 1440, 1459 (2008).

.'" **Answer Brief, p. 22.**[24] A "restitutionary order under section 17203" encompasses "quantifiable sums one person owes to another"[25] or "those ***measurable amounts*** which" were "***wrongful taken*** by means of an unfair business practice." *Day, supra,* 63 Cal. App. 4th at 338-39. Thus, a restitution award under the UCL must be based on the amount wrongfully taken from a person, a concept analogous to "the actual damage sustained." Whether from the nature of restitution itself, the specific language of section 17203,[26] or from this Court's own words, a restitution award is not a penalty or fine.

7. PETITIONERS' CONTENTION AS TO NATIONAL WESTERN'S "TEXTUAL ARGUMENTS" MISREADS BOTH SECTION 3345 AND SECTION 17203

In its Opening Brief, National Western demonstrated that the specific language used in section 3345 was inconsistent with the nature of restitution permitted under section 17203 of the UCL. In reply, Petitioners relegate National Western's discussion to three "textual" arguments. Petitioners' assertions do nothing to alter the conclusion that the actual language of these two statutes demonstrates that the trebling remedy of section 3345 cannot be applied to private party UCL restitution.

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[24] A "penalty" "'includes any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done to him by the former.'" *People ex rel. Dept. of Conservation v. Triplett,* 48 Cal. App. 4th 233, 252 (1996), citing *Miller v. Municipal Court,* 22 Cal. 2d 818, 837 (1943).

[25] *Cortez, supra* at 178.

[26] In relevant part, section 17203 provides: "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." (Emphasis added.)

A. The Attempt To Circumvent The *Ejusdem Generis* Doctrine Fails

National Western's Opening Brief carefully explained the well-established statutory construction rule of *ejusdem generis*, and how no fewer than ten decisions – including five from this Court – have used that doctrine to interpret statutes just like section 3345 that use the phrase "or any other" at the end of a string of terms. The rule is that "the general term or category is 'restricted to those things that are similar to those which are enumerated specifically.'" *People v. Giordano*, 42 Cal. 4th 644, 660 (2007) (citing *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1160 n.7 (1991)). In other words, section 3345 is expressly restricted to trebling only fines, penalties, "or any other remedy [like fines or penalties] the purpose or effect of which is to punish or deter." Restitution for UCL private actions does not qualify.

Ignoring these cases, Petitioners contend National Western has misapplied the doctrine of *ejusdem generis*, relying solely on *Texas Commerce Bank v. Garamendi*, 11 Cal. App. 4th 460, 472 (1992). **Answer Brief, p. 21.**[27] However, that court found the statute in question – Insurance Code section 101 – did not even fall within the doctrine because four of its five conditions were not met. *Texas Commerce Bank, supra* at 472 ("[a]pplying this delineation of *ejusdem generis* to section 101, we conclude that conditions (1), (2), (4) and (5) are not met"). In fact, section

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[27] Petitioners' first contention is that this Court, in *Korea Supply*, described restitution under section 17203 as a "monetary penalty," an argument disposed of in the prior section of this brief.

101 does not even use the phrase "or any other" after a string of specific terms, as is found in section 3345 and the cases National Western cited.[28]

Petitioners' next assertion is a convoluted two-part argument that first urges that the phrase "or other penalty" (found in section 3345 just before the phrase "or any other remedy") somehow transforms restitution into a non-compensatory monetary award, and, second, contends that National Western's reliance on the *ejusdem generis* doctrine would render the phrase "or any other remedy" in section 3345 "mere surplusage." **Answer Brief, pp. 22-23**. Neither Petitioners' citation to this Court's decision in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1104 (2007), nor one of the cases relied on by National Western,[29] supports Petitioners' first strained argument. That is, citing cases like *Murphy* that have confirmed that a penalty is satisfaction of a wrong without reference to actual damages sustained and in addition to actual losses does nothing to show that restoration of money or property (i.e., restitution) under section 17203 is a penalty or anything like a penalty.

As for Petitioners' next argument that the "or any other remedy" term is mere surplusage, there are two reasons why this assertion is meritless. First, *ejusdem generis* is used to construe statutes alternatively with the general term at the end of a string of specific terms, ***or vice versa*** with the general term followed by the string of specific terms.[30] In either

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[28] Which is why the court emphasized that section 101 did not "contain the 'specific/general' syntactical structure amenable to *ejusdem generis*." *Texas Commerce Bank, supra* at 473.

[29] *Ross, supra,* 545 F. Supp. 2d at 1067.

[30] "*Ejusdem generis* applies whether specific words follow general words in

event, "application of the general term is restricted to those things that are similar to those which are enumerated specifically." *Martin, supra* at 1437. In other words, the specific terms provide the limitation to the catch-all general term, but that general term is still limited to "include only others of like kind or character." *Id.* (citing *People v. McKean*, 76 Cal. App. 114, 119 (1925)). That no other specific items exist is beside the point; it's just a catch-all.

Second, even the contention by Petitioners that the general term can be "mere surplusage" turns the concept of *ejusdem generis* on its head. As this Court specifically observed, "if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage." *Kraus, supra*, 23 Cal. 4th at 141 (citation omitted). Here, however, the phrase "or any other remedy" is used in its restricted sense, under the doctrine of *ejusdem generis*, to mean non-compensatory awards like fines and penalties, not restitution.

So as to dispel the "mere surplusage" contention, one example of another form of non-compensatory monetary award that would fall within the phrase "or any other remedy" is ***statutory damages***, which are typically awarded ***in addition to*** actual damages. Civil Code section 54.3 provides for "actual damages ***and*** any amount as may be determined by a jury . . . up to a maximum of three times the amount of actual damages, but in no case less than one thousand dollars ($1,000)." (Emphasis added). Similarly,

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a statute ***or vice versa***." *Harris, supra* at 1160, n.7 (emphasis added); *see also Martin v. Holiday Inns, Inc.,* 199 Cal. App. 3d 1434, 1437 (1998).

Civil Code section 52 provides for "actual damages ***and*** any amount that may be determined by a jury . . . up to a maximum of three times the amount of actual damage, but in no case less than four thousand dollars ($4,000)." (Emphasis added). *See Munson v. Del Taco, Inc.*, 46 Cal.4th 661, 677 (2009), where this Court explained that newly-enacted Civil Code section 55.57 "restricts the availability of ***statutory damages*** under sections 52 and 54.3" and further advised that it "also limits ***statutory damages*** to one assessment per occasion of access denial." (Emphasis added). *Accord, Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1227 n.5 (2009). Other statutes providing for "statutory damages" include Code of Civil Procedure section 724.050(e),[31] 47 U.S.C. § 227(b)(3)(B),[32] and state and federal fair debt collection laws.[33] Indeed, in discussing such fair debt collection remedies, one court explained that "[s]tatutory damages are akin to a penalty." *Myers v. LHR, Inc.*, 543 F.Supp.2d 1215, 1218 (S.D. Cal. 2008).

Relevant to this discussion is this Court's decision in *Dyna-Med, Inc. v. Fair Employment & Housing Comm.*, 43 Cal.3d 1379 (1987). There, the Commission sought to impose punitive damages against an employer that retaliated against an employee for filing an employment discrimination complaint, arguing that it had the authority to so impose such damages under Government Code section 12970(a). That statute, however, only

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[31] *See Sanai v. Saltz*. 170 Cal. App. 4th 746, 779 (2009) (trial court "imposed statutory damages/sanctions of $500").

[32] *See Magana Cathcart McCarthy v. CB Richard Ellis, Inc.*, 174 Cal. App. 4th 106, 115 (2009) (Telephone Consumer Protection Act, as amended by the Junk Fax Prevention Act, provides for "remedies [that] include recovery of actual monetary loss or recovery of $500 in damages for each violation, whichever is greater").

[33] *See* 15 U.S.C. § 1692k(a) and Civil Code, § 1788.30(b).

allowed the agency to, *inter alia*, order the employer to cease and desist and to order "hiring, reinstatement or upgrading of employees, with or without back pay, and restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part, and including a requirement for report of the manner of compliance." *Dyna-Med, supra* at 1385. The Court of Appeal found the statute allowed the Commission to award punitive damages, but this Court disagreed and reversed. *Dyna-Med, supra* at 1383, 1404.

In finding that punitive damages could not be imposed, this Court addressed many of the arguments raised in the present briefs, from statutory construction (including the *ejusdem generis* doctrine) to legislative history to the underlying public policy of the statute. Despite an array of arguments asserted by the Commission, the Court observed that "given the extraordinary nature of punitive damages, these factors, in our view, are insufficient to support an inference that the Legislature intended sub silentio to empower the commission to impose punitive damages." *Dyna-Med, supra* at 1389. Moreover, in words that could have been written to analyze whether section 3345 treble damages are allowable under the UCL, this Court advised at page 1393 that "the Legislature's objective in providing for an administrative rather than a judicial resolution of discrimination complaints was to provide a 'speedy and informal' process unburdened with 'procedural technicalities.'"[34]

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[34] And, as also applicable to the present dispute, if "the inability to award such damages deprives [the Commission] of an effective means to redress and prevent unlawful discrimination, it is for the Legislature, rather than this court, to remedy this defect." *Id.*

The final aspect of Petitioners' quest to avoid the *ejusdem generis* doctrine is to embrace that doctrine and revert to the assertion that ***the*** purpose of restitution under section 17203 is "to deter." **Answer Brief, p. 23.**[35] Again citing to the language of this Court's earlier decisions as to the incidental deterrent effect of restitution under the UCL, Petitioners urge that this alone is enough to transform what section 17203 expressly refers to as "restoration" into some sort of penalty comparable to punitive damages. As addressed below, any "incidental" deterrence in awarding restitution under the UCL is nothing more than occurs with any other sort of compensatory damage award – it is not a penalty or a fine or "any other remedy ***the*** purpose or effect of which is to punish or deter." (Emphasis added.)

B. When Analyzing Remedies, Section 17200 is the More Specific Statute and Controls Over Section 3345

National Western, citing several decisions, advised that section 17203, which explicitly allows only restitution as a monetary remedy, is the more specific statute than the broader section 3345, which allows trebling remedies whenever the trier of fact is authorized by a statute to impose a fine, civil penalty, or any other remedy the purpose or effect of which is to

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[35] Petitioners also seek to distinguish *Ross* and another federal decision relied on by National Western, *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398 (9th Cir. 1996), **Answer Brief, pp. 23-24**, but none of this argument detracts from what National Western explained at pages 22 and 23 of its Opening Brief that both of these federal decisions confirm that the "any other remedy" language of section 3345 is limited to remedies tantamount to fines and penalties, which does not include restitution.

punish or deter. **Opening Brief, pp. 17-18.** Petitioners disagree,[36] but offer little evidence to support their contention.[37]

As far as remedies are concerned, section 17203 is limited to ***one and only one*** type of monetary remedy, that of restitution. Section 3345's trebling remedy, on the other hand, seeks to permit, when seniors or disabled persons are involved, an enhanced remedy whenever there is a statutory fine, penalty or any other similar penal remedy at issue. Section 3345 can apply to treble awards of punitive damages permitted under Civil Code section 3294, it can apply to punitive damages or "any other relief" under the CLRA (Civil Code section 1780(a)), or it can apply to any other statute that contains a fine or penalty provision. When considering remedies – the only question posed before this Court – section 3345 is by far the more general provision, and thus the more specific remedy provision of section 17203 controls.

C. Neither Petitioners Nor the Court of Appeal Can Read the Word "The" Out of the Text of Section 3345

Petitioners also challenge National Western's construction of the phrase "or any other remedy ***the*** purpose or effect is to punish of deter," as found in section 3345(b).[38] In response to the Court of Appeal's repeated

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[36] **Answer, pp. 16-17.**

[37] This issue arose due to a comment made by the Court of Appeal. *Slip Opinion*, p. 18, n.13. While National Western disagrees with the Opinion's observations that section 3345 is not a "general authorization of treble damages," even the Court of Appeal refers to the "specific, limited restitution provided in" section 17203.

[38] (Emphasis added.) **Opening Brief, pp. 18-19**; **Answer Brief, pp. 17-20**.

substitution of the article "the" with the article "a,"[39] National Western merely pointed out that this general term in section 3345(b) consistently presented a situation where ***the*** sole purpose or effect of the authorizing statute is to punish or deter and would not include those situations where the statute merely provides for some compensatory award, be it restitution or damages.

In response to this straightforward observation, Petitioners first argue that ***the*** purpose of restitution under the UCL is deterrence.[40] At two points in the Answer Brief (pages 13-14, and 18), Petitioners cite decisions of this Court in which the concept of deterrence is used is connection with section 17203, and announce that section 17203 itself links restitution and deterrence. While National Western admits that case law sporadically contains such language when discussing section 17203 and the concept of restitution, no case has ever concluded that "***the***" purpose of restitution under the UCL is to deter, let alone to punish. *See People v. Black*, 176 Cal. App. 4th 145, 151 (2009) ("It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered" (citing *People v. Knoller*, 41 Cal.4th 139, 154-55 (2007)).

As this Court has observed on more than one occasion, Section 17203 has two separate prongs, one that affords injunctive relief ***to deter*** unlawful practices and one that provides restitution ***to restore*** money or

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[39] *See Slip Opinion*, pp. 2, 14.

[40] Not even Petitioners assert that "the purpose" of restitution is to "punish."

property. While there is always some incidental deterrent effect in imposing any sort of monetary award, even compensatory damages, this is not ***the*** purpose of such an award, and it is not ***the*** purpose of restitution under section 17203. This sentiment was expressly addressed by the Court at page 1140 in *Korea Supply* when it advised that "the 'prevent' prong of section 17203 suggests that the Legislature considered deterrence of unfair practices to an important goal," but that in turning to the "restore" prong, it explained that a "court cannot, under the equitable powers of section 17203, award whatever form of monetary relief it believes might deter unfair practices."[41]

In *Day, supra*, the Court of Appeal was even more explicit on this point, explaining that "[w]hile it may be that an order of restitution will also serve to deter future improper conduct," restitution under the UCL is not "intended as a punitive provision, though it may fortuitously have that sting when properly applied to restore a victim to wholeness." *Day, supra* at 339. (Emphasis added.)

Petitioners essentially ignore the separate prongs of section 17203 and instead focus on the language this Court initially used in *Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442, 449 (1979), stating that a trial court is authorized "to order restitution" in order "to deter future

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[41] *See also Kraus, supra*, 23 Cal. 4th at 151-52 (in a concurring and dissenting opinion, Justice Werdegar distinguishes the text of section 17203: "to deter unfair competition ***or*** restore its proceeds to interested persons"). (Emphasis added.)

violations of the unfair trade practice statute ***and*** to foreclose retention by the violator of its ill-gotten gains." (Emphasis added.)[42]

This Court's quoted language, however, explicitly addresses restitution as having two purposes, to deter future violation ***and*** to foreclose retention of ill-gotten gains by a defendant. More significantly, as with the other cases proffered by Petitioners, the Court was not viewing the issue of restitution and its purposes in the context of the trebling feature of section 3345.[43] Accordingly, the *Fletcher* language in generally describing the nature of Business & Professions Code section 17535 [the counterpart to section 17203] could not have been seeking to analogize UCL restitution to any fine, civil penalty, "or any other remedy ***the*** purpose or effect of which is to punish or deter." (Emphasis added.)[44]

Finally, Petitioners advance some hyper-technical interpretation, where they try to parse the word "purpose" from the word "effect" in the quoted phrase of section 3345: "or any other remedy the purpose or effect of which is to punish or deter." **Answer Brief, pp. 18-19**. As Petitioners would argue, the word "the" only attaches to the word "purpose" and the word "effect" is left in the ether, such that the trebling mechanism can apply if there is only "an" effect of punishment or deterrence. Petitioners'

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[42] Some or all of this language has been cited in later decisions, including *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983); *Bank of the West, supra* at 1267; and *ABC Int'l. Traders v. Matsushita Electric Corp.*, 14 Cal. 4th 1247, 1270 (1997).

[43] Again, "[a]n opinion is not authority for propositions not considered." *Knoller, supra* at 154-55.

[44] Section 3345 was not enacted until nine years after the *Fletcher* decision.

strained reading of the language of section 3345(b) deserves little, if any, consideration. The word "the" must also attach to "effect," and, by the plain context, the words are used interchangeably.[45]

8. CONCLUSION

National Western respectfully requests this Court confirm that the trebling penalty found in Civil Code section 3345 is inapplicable to a claim for restitution in a private action by senior citizens under the UCL.

Dated: December 23, 2009

BARGER & WOLEN LLP
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[45] Petitioners cite *Amador Valley Joint Union High School v. State Bd. of Equalization*, 22 Cal. 3d 208, 245 (1978), to support their assertion that the literal language of statutes may be disregarded to avoid absurd results. This Court also advised at page 245 that a statutory enactment "must receive a liberal, practical common-sense construction" and "should be construed in accordance with the natural and ordinary meaning of its words."

CERTIFICATION OF WORD COUNT PURSUANT TO CALIFORNIA RULES OF COURT 8.520(c)(1)

Larry M. Golub, counsel of record for Real Party In Interest and Petitioner National Western Life Insurance Company, certifies that the foregoing ***Reply Brief on the Merits*** contains approximately 8350 words (including footnotes), based on the "Word Count" of the computer program that was used to prepare this brief. Thus, this brief contains fewer than the 8,400 words permitted under California Rule of Court 8.520(c)(1). The type used to prepare this brief is 13 point Times New Roman, and the lines are double-spaced.

Dated: December 23, 2009 By: _____
Larry M. Golub

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: Barger & Wolen LLP, 633 W. Fifth Street, 47th Floor, Los Angeles, California 90071.

On **December 23, 2009** I served the foregoing document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope addressed as stated in the attached mailing list.

[X] **BY MAIL (as indicated on Service List)**

[ ] I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[X] I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with 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 postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on **December 23, 2009.**

NAME: PAMELA ROSENBERG Pamela Rosenberg
(Signature)

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Court of Appeal Case No. B212512
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