CHAVEZ & GERTLER LLP
ATTORNEYS AT LAW
42 MILLER AVENUE
MILL VALLEY, CA 94941
TELEPHONE: (415) 381-5599
FACSIMILE: (415) 381-5572
info@chavezgertler.com

January 3, 2007

VIA HAND DELIVERY

The Honorable Ronald M. George
Chief Justice of the State of California
And Honorable Associate Justices of the California Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Daugherty v. American Honda Motor Co.*
California Supreme Court Case No. S148931
Second Appellate District Case No. B186402
Request for Depublication (California Rule of Court 979)

Dear Chief Justice George and Honorable Associate Justices:

This letter is submitted on behalf of the National Consumer Law Center and the National Association of Consumer Advocates, which appear as *amicus curiae* through the undersigned counsel, to request that the Court order the depublication of *Daugherty v. American Motor Co, Inc.*, 144 Cal.App.4th 824 (2006), a decision issued by the Second District Court of Appeal on October 31, 2006, and ordered published on November 8, 2006.

I. STATEMENT OF INTEREST

The National Consumer Law Center (NCLC) is a national legal resource and advocacy organization focusing on the legal needs of consumers, especially low-income and elderly consumers. NCLC is, among other roles and accomplishments, the author of the widely praised seventeen-volume *Consumer Credit and Sales Legal Practice Series,* which is used by attorneys and advocates who represent consumers on a wide range of issues. The National Consumer Law Center provides expertise and assistance on a pro bono basis to legal services attorneys who represent low income consumers, and also provides consulting services on a fee basis to private attorneys who represent consumers. In addition, NCLC regularly monitors legislation

affecting consumers on the state and federal level, and advocates for the interests of consumers in the legislative process.

The National Association of Consumer Advocates (NACA) is a nationwide, non-profit corporation with over 1,000 members who are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, and whose practices or interests primarily involve the protection and representation of consumers. NACA's mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its *Standards And Guidelines For Litigating And Settling Consumer Class Actions* may be found at 176 F.R.D. 375 (1998).

Approximately 150 NACA members are California consumer attorneys or non-attorney advocates who regularly represent and advocate for consumers residing in California. As such, NACA members represent consumers in cases brought under California's leading consumer protection statutes, including the Consumers Legal Remedies Act and the Unfair Competition Law.

II. REASONS FOR DEPUBLICATION.

NCLC and NACA request depublication of the Court of Appeal's decision in *Daugherty* because the decision appears to hold that the deliberate deception of consumers accomplished by way of the concealment, omission or nondisclosure of material facts is not actionable under the California Consumers Legal Remedies Act, Civil Code §1750, *et seq.*, (the "CLRA"), and does not constitute a "fraudulent" business practice in violation of the California Unfair Competition Law, Business and Professions Code §17200, *et seq.*, (the "UCL").

The CLRA and UCL are two of the most important consumer protection statutes in California law. Both statutes were intended to protect against a broad range of unfair and deceptive practices. *See* Civil Code §1760 (the purpose of the CLRA is to protect consumers against unfair and deceptive practices and to provide efficient and economical procedures to secure such protection); Business and Professions Code §17200. The causes of action and remedies provided by the CLRA and UCL are a crucial means by which consumers obtain access to justice in California courts.

The Court of Appeal's opinion in *Daugherty* with respect to plaintiffs' CRLA and UCL causes of action is contrary to the provisions of these important consumer protection statutes, is inconsistent with prior decisions of the Court holding that the

CLRA and UCL are to be interpreted broadly for the protection of consumers, and defeats the legislative purpose embodied in the CLRA and UCL.

Moreover, the Court of Appeal's holdings with respect to the CLRA and UCL causes of action were tangential to the core issues in the case, which related to breach of warranty claims, and were ultimately unnecessary to the disposition of the action. As such, even assuming the disposition of the action was correct, the decision did not warrant publication, and it constitutes an unnecessary threat to the rights of consumers under California law. Accordingly, the NCLC and NACA respectfully request that the Court order the depublication of *Daugherty* pursuant to California Rule of Court 979.

A. The Court of Appeal Was Primarily Concerned About Whether There Was An Actual Defect That Should Have Been Disclosed.

The plaintiffs in *Daugherty* filed a proposed nationwide class action on behalf of persons who had purchased certain older model (1990-1997) Honda vehicles equipped with a certain type of engine. The Complaint alleged generally that these engines had a design defect that, over time, caused slippage or dislodgement of an oil seal, which in turn caused oil leaks and resulting damage to surrounding engine parts. *Daugherty v. American Honda, supra,* 144 Cal.App.4th at 827.

As alleged, however, the manifestation of this defect, i.e., the appearance of any damage resulting from the failure of the oil seal, occurred, if at all, long after the expiration of Honda's 3-year, 36,000 mile express warranty period. *Daugherty, supra,* 144 Cal.App.4th at 828-29. The plaintiffs alleged damage occurring to their respective vehicles at mileages ranging from 57,000 to 169,000 miles. Seven of the named plaintiffs did not allege any damage at all to their vehicles, i.e., their engines had not yet suffered any oil leak. *Daugherty,* at 828-29. As summarized by the Court of Appeal, "It [was] undisputed that the defect in the F22 engines did not cause any malfunction in the automobiles of the named plaintiffs within the warranty period, and in many cases still has not done so." *Id.,* at 830.

The primary issues in the case were related to the question of whether a breach of express warranty claim could be stated under these factual circumstances. In particular, the plaintiffs contended that because the defect was an "inherent design defect" that existed during the warranty period, and because the manufacturer *knew* of the defect at the time of sale, a claim could be stated even though the defect did not manifest during the warranty period. *Daugherty, supra,* 144 Cal.App.4th at 830.

The Court of Appeal rejected this argument, finding that no claim could be stated for breach of the express warranty, even if a so-called latent defect existed at the time of sale. *Daugherty, supra,* 144 Cal.App.4th at 832 ("Honda 'did not agree, and plaintiffs did not understand it to agree, to repair latent defects that lead to a malfunction after the term of the warranty.'")

What is apparent from the entirety of the Court of Appeal's decision, however, is that it was troubled by the notion that a product could be deemed "defective" if it performed entirely as intended and expected throughout a warranty period, and possibly for many years afterward. As such, the Court of Appeal seems to have been grappling with the broader question of what constitutes a defect, or latent defect, and how the existence of a defect is to be determined, when a product is alleged to have failed long after the expiration of a warranty period.

This view of the case and its underlying facts is evidenced by the Court of Appeal's analysis and by a number of statements in the decision. The decision cites at length from *Abraham v. Volkswagon of America, Inc.*, 795 F.2d 238 (2d Cir. 1986), for the proposition that an express warranty does not cover repairs for allegedly latent defects that do not manifest until after expiration of the warranty period. *Daugherty,* 144 Cal.App.4th at 830, citing *Abraham,* 795 F.2d at 250. Included in the text the Court of Appeal chose to quote from *Abraham* is the following: "'[V]irtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a 'latent defect' that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. . . . [M]anufacturers . . . can always be said to 'know' that many parts will fail after the warranty period has expired.'" *Daugherty,* at 830, quoting *Abraham,* 795 F.2d at 250.

The Court of Appeal repeatedly echoed this concern – whether there was truly a defect – throughout its decision. *See e.g., Daugherty,* 144 Cal.App.4th at 834 ("All of plaintiffs' automobiles functioned as represented throughout their warranty periods, and indeed many still have experienced no malfunction."); at 838 ("The only expectation buyers could have had about the F22 engine was that it would function properly for the length of Honda's express warranty, and it did."); at 839 ("The injury to consumers is not substantial, if indeed it can be characterized as a cognizable at all.")

Regardless of whether the Court of Appeal was correct in its view of the underlying facts, what is important here is that this negative perception appears to

have influenced the Court of Appeal's holdings on plaintiffs' causes of action asserted under the CLRA and UCL. Rather than addressing the question head on of whether any actual *defect* had been alleged and whether that defect was one that should have been disclosed, the Court of Appeal instead side-stepped the issue by holding that the CRLA requires an allegation of an affirmative misrepresentation, and that a mere failure to disclose the alleged defect did not constitute a violation of the statute. *Daugherty,* 144 Cal.App.4th at 836-37 ("Daugherty's complaint 'did not allege a single affirmative representation' by Honda regarding the F22 engine.") This holding was unnecessary, overly broad, and wrong, as discussed more fully below.

With respect to the UCL cause of action, the Court of Appeal was more direct in stating its view, with respect to the "unfair" prong, that no substantial injury to consumers had been alleged. *Daugherty,* 144 Cal.App.4th at 839. With respect to the "fraudulent" prong of the UCL, however, the Court of Appeal held that the failure to disclose the alleged defect was unlikely to deceive, and therefore did not constitute a violation. Again, this holding was overly broad, and unnecessarily restrictive in its interpretation of the UCL.

B. The Court of Appeal Erred in Holding that an Affirmative Misrepresentation is Required To State a Claim Under the CLRA.

The Court of Appeal summarized its holding in *Daugherty* with respect to the plaintiffs' CLRA cause of action as follows: "In short, although a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable *the omission must be contrary to a representation actually made by the defendant*, or an omission of a fact the defendant was obliged to disclose." *Daugherty,* 144 Cal.App.4th at 835 (emphasis added).

This holding – that even a deliberately deceptive omission must be tied to a corresponding affirmative misrepresentation in order to be actionable under the CLRA – is an entirely new rule under the CLRA. It has no basis in the statute itself, or in any prior case law. Moreover, it is contrary to the express directive in the CLRA that the statute be liberally construed to promote its consumer protection purpose.

The CLRA was adopted in 1970, in response to widespread reports of deceptive business practices, as a broad remedial and consumer protection statute. *See Broughton v. Cigna Healthcare Plans of California,* 21 Cal.4th 1066, 1077 (1999). The statute contains an express statement of its legislative purpose: "This title shall be *liberally construed* and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to

provide efficient and economical procedures to secure such protection." Civil Code §1760 (emphasis added).

Section 1770 of the statute specifies that: "[t]he following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale of goods or services to any consumer are unlawful: . . . ." The statute then lists 23 different types of practices that are expressly made unlawful. A number of the practices are described in terms of the making of false representations, but that is not true of all of the prohibited practices. *See e.g.,* §1770(a)(1) ("passing off goods or services as those of another"); §1770(a)(19) ("inserting an unconscionable provision in the contract").

It is also clear that some of the prohibited practices listed in the statute could easily be accomplished by way of deceptive omission, rather than affirmative misrepresentation. For example, Civil Code §1770(a)(6) prohibits "representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used or secondhand." A retailer that simply placed used reconditioned goods on the same shelf as new products, without making any affirmative representation whatsoever as to their condition or source, would in effect be representing that the goods were new and engaging in a deceptive practice, in violation of this section. Under the Court of Appeal's holding, however, a defendant could argue that no claim could be stated against a retailer that engaged in such a practice.

Although the Court of Appeal did hold that a CLRA claim may be stated based on an omission "of a fact the defendant was obliged to disclose," *Daugherty,* 144 Cal.App.4th at 835, it did not elaborate on the obvious question of *which facts* the defendant is "obliged to disclose." Under any liberal construction of the CLRA, a defendant should be required to disclose any facts that, if not disclosed, would be unfair or deceptive for affected consumers. In the *Daugherty* decision, the Court of Appeal obviously concluded that the alleged defect in the Honda engines was not a fact that Honda was obliged to disclose. The decision did not, however, explain the Court of Appeal's reasoning on this issue. As such, this aspect of the holding is likely to create confusion rather than clarification.

C. *The Court of Appeal Overstated Its Holding with Respect to the UCL.*

Finally, NCLC and NACA request that the Court depublish the *Daugherty* decision because of language in the decision concerning the "fraudulent" prong of the UCL. As discussed above, the Court of Appeal was clearly of the view that the alleged engine defect at issue in the case was actually either not a defect at all, or one

of such minor consequence that it was not actionable. *See Daugherty,* 144 Cal.App.4th at 838 ("The only expectation buyers could have had about the F22 engine was that it would function properly for the length of Honda's express warranty, and it did.")

With respect to the "unfair" prong of the UCL cause of action, the Court of Appeal was quite direct in this view, and simply held as a matter of law, that the alleged conduct was not unfair because there was no substantial injury to consumers. *See Daugherty,* at 839 ("In this case, we need not analyze all factors in the section 5 test, because the conduct alleged fails to meet the first factor: The injury to consumers is not substantial, if indeed it can be characterized as a cognizable at all.") While it is questionable as to whether the Court of Appeal should have decided this issue, which is ordinarily a highly factual one, as a matter of law, it did not purport to announce any new rule of law applicable to claims of unfairness under the UCL.

With respect to the allegation that Honda had engaged in a "fraudulent" practice, however, the decision asserts broadly: "We cannot agree that a failure to disclose a fact one has no affirmative duty to disclose is 'likely to deceive' anyone within the meaning of the UCL." *Daugherty,* 144 Cal.App.4th at 838. In other words, the decision purports to announce a new rule that a claim cannot be stated under the UCL for an allegedly fraudulent practice based on omissions or nondisclosures unless there was an "affirmative duty to disclose." Again, this begs the question of what constitutes or creates the "affirmative duty to disclose."

The Court has repeatedly emphasized that the scope and remedial purpose of the UCL are extraordinarily broad. "The Legislature intended [its] 'sweeping language' to include 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" *Stop Youth Addiction, Inc. v. Lucky Stores,* 17 Cal.4th 553, 560, quoting *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1266 (1992); *Barquis v. Merchants Collection Assn.,* 7 Cal.3d 94, 111 (1972). With respect to the "fraudulent" prong of the statute, the Court has held that the elements of common law fraud do not need to be proved, and instead "one need only show that 'members of the public are likely to be deceived.'" *Korea Supply Company v. Lockheed Martin Corporation,* 29 Cal.4th 1134, 1152 (2003) (citations omitted).

Neither the UCL nor the prior case law interpreting its provisions make any distinction between deception created by affirmative misrepresentations and deception created by failures to disclose. And even if the issue were to be conceptualized in terms of whether there is an "affirmative duty to disclose" any particular fact, the duty should be to make disclosures necessary to avoid deception of the public. In that sense, the rule applied by the Court of Appeal is essentially

circular – there is no duty to disclose unless the public is to likely be deceived, and the public is not likely to be deceived unless there is an affirmative duty to disclose. Such a rule does not add any useful analysis to the body of case law interpreting the UCL, will clearly be interpreted as *narrowing* the protections of the UCL for consumers, and at best, and is likely to create unnecessary confusion and additional litigation.

Accordingly, for all of the foregoing reasons, the NCLC and NACA respectfully request that this Court order the depublication of *Daugherty*.

Respectfully Submitted,

CHAVEZ & GERTLER LLP

By: _____
Kim E. Card

Amicus Curiae Counsel for the
National Consumer Law Center and the
National Association of Consumer Advocates

cc: (Via U.S. Mail)
Stephen Gardner (on behalf of NACA)
Carolyn Carter (on behalf of NCLC)
And Attached Service List

PROOF OF SERVICE
(C.C.P. §1013a(3))

STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

I am employed in the County of Marin, State of California. I am over the age of 18 years and not a party to the within action; my business address is Chavez & Gertler LLP, 42 Miller Avenue, Mill Valley, CA 94941.

On January 3, 2007, I served the foregoing documents:

- **REQUEST FOR DEPUBLICATION (California Rule of Court 979) SUBMITTED BY NCLC AND NACA**

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed to each as follows:

SEE ATTACHED SERVICE LIST

[X] **BY MAIL:** I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Mill Valley, California.

Executed on January 3, 2007, at Mill Valley, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Cate L. Coelho

Steven D. Archer Roman M. Silberfeld David Martinez Robins, Kaplan, Miller & Ceresi LLP 2049 Century Park East, Suite 3700 Los Angeles, Ca 90067-3211	James C. Sturdevant Monique Oliver The Sturdevant Law Firm 475 Sansome Street, Suite 1750 San Francisco, Ca 94111
Michael F. Ram Levy, Ram & Olson LLP 639 Front Street, Fourth Floor San Francisco, Ca 94111	Wallace M. Allan Eric Y. Kisirian O'Melveny & Myers LLP 400 South Hope Street Los Angeles, Ca 90071
Ronald A. Reiter Office of the Attorney General 455 Golden Gate Ave. Suite 11000 San Francisco, Ca 94102	John W. Alden, Jr. Of Counsel Honda North America, Inc. 700 Van Ness Ave. Torrance, Ca 90501
Jeffrey L. Fazio Dina E. Micheletti Fazio / Micheletti LLP 4900 Hopyard Road, Suite 290 Pleasanton, Ca 94588	Theodore J. Boutrous, Jr. Gibson, Dunn & Crutcher LLP 333 South Grand Ave. Los Angeles, Ca 90071-3197
Jonathan D. Selbin Lieff, Cabraser, Heimann & Bernstein LLP 780 Third Ave., 48th Floor New York, NY 10017-2024	Eric H. Gibbs Girard Gibbs LLP 601 California Street, 14th Floor San Francisco, Ca 94108-2819
Court of Appeal State of California Second Appellate District, Division 8 Ronald Regan State Building 300 South Spring Street, 2nd Floor Los Angeles, Ca 90013	