No. S148931

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ELIZABETH A. DAUGHERTY, et al.,

Plaintiffs and Petitioners,

v.

AMERICAN HONDA MOTOR CO.,
Defendant and Respondent.

On Review of the Decision of the Court of Appeal,
Second Appellate District, No. B186402
Appeal from the Superior Court of Los Angeles County,
Civil No. BC308570

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

UNFAIR COMPETITION CASE
(See Bus. & Prof. Code § 17209; Cal. R. Ct. 44.5)

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I. INTRODUCTION

Petitioners have requested that this Court depublish or review the Court of Appeal's opinion in *Daugherty v. American Honda Motor Corp.*, 144 Cal. App. 4th 24 (2006), because it departs from well-established law regarding the construction and application of this State's most important consumer-protection statutes, the Consumers Legal Remedies Act ("CLRA"), Civ. Code §§ 1750-1784, and the Unfair Competition Law ("UCL"), Bus. & Prof. Code §§17200-17209.

As Petitioners explained in their opening brief, the Court of Appeal ruled that a consumer has no claim under the CLRA for the concealment of a product defect unless the plaintiff can prove that the defect the manufacturer has concealed poses a threat of physical injury or raises other safety concerns, and that a manufacturer cannot be found liable for violating any of the UCL's three prongs by willfully concealing the existence of a material defect, as long as the defect does not become manifest during the product's limited warranty (in this case, three years or 36,000 miles, whichever comes first).

These are radical departures from settled law, from legislative intent, and from common sense. Despite Honda's expected denials, the Court of Appeal's decision actually does have the effect of encouraging manufacturers to conceal product defects from prospective buyers, and to make sure that they say nothing that will jeopardize their immunity while shortening their limited warranties so that those defects will more likely become manifest after the warranty expires — thereby not only ensuring that they will avoid liability under the CLRA and the UCL, but to save money by foisting on unsuspecting consumers the cost of repairs that

become necessary when the concealed defect becomes manifest after the warranty expires.

Honda tells the Court that this is nothing new, and that it is actually the product of a long line of authority that the Court of Appeal merely reiterated when it issued its opinion in this case. But even if the Court could rely on Honda's word rather than its own understanding of the way the law has developed in this area, it could not rely on Honda's word for long. Once it reviews what Honda told the Court of Appeal when it sought review of its opinion, any doubt about the nature and effect of that opinion would evaporate in any event.

The Court of Appeal's decision is erroneous and, far worse, it establishes a dangerous precedent in an area of law in which ordinary people are highly vulnerable to abuse and sharp business practices. Petitioners respectfully request that this Court order it depublished or grant review.

II. LEGAL DISCUSSION

A. HONDA'S ARGUMENT THAT THE LEGISLATURE CHOSE TO ELIMINATE CONCEALMENT FROM THE UNFAIR AND DECEPTIVE PRACTICES THE CLRA PROSCRIBES HAS NO SUPPORT FROM THE LEGISLATIVE HISTORY, CASE LAW, OR COMMON SENSE

As Petitioners demonstrated in their opening brief, the CLRA was enacted as a means of easing the burden of proving that consumers had fallen victim to deceptive business practices. Petition for Review ("Pet.") at 7 (citing Request for Judicial Notice, Ex. 1b at 8 ("Existing law provides no satisfactory remedy against such practices. The consumer is forced to

sue in an action on the contract — in many of these cases damage is incurred but no contract is consummated — or he must bring an action in fraud, an action which contains some of the most difficult allegations to prove found in our law")). Petitioners also pointed out that the Legislature achieved this objective by including a provision in the CLRA that requires it to be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to promote efficient and economical procedures to secure such protection." Civ. Code § 1760.

Honda responded to these fundamental premises by ignoring them. Quite literally, it says nothing at all about either of these issues. Honda also fails to address the other point Petitioners made in their opening brief: That there are only two ways the CLRA can be construed and applied — liberally, as Section 1760 mandates, so that the term "representation" (as used in Section 1770) is construed at least as broadly as it is at common law; or strictly and literally, so that the term "representation" means just that, and only that. There is only one answer, which appears to be the reason Honda has chosen to ignore the issue.

Honda chooses to focus instead on portions of the CLRA's legislative history in an effort to convince the Court that the Legislature actually sought to eliminate "pure" concealment claims from the CLRA. *See* Answer at 13-16. According to Honda, this is so because the Legislature decided to remove two catch-all provisions from the statute (Sections 1770(q) and 1771), which "would likely have covered pure nondisclosures or concealment claims like those Petitioners argue are made actionable under the CLRA. But the legislature deleted this broad

language, which evidences a clear intent to limit the reach of the statute." Answer at 16.

Honda's argument proves too much. Assuming that the Legislature did precisely what Honda says it did (despite Honda's failure to explain why the Legislature would preclude liability for concealment, notwithstanding its prevalence as a problem in consumer transactions), then concealment would not be actionable under the CLRA in any form — "pure" or otherwise.

Plainly, there is an inherent conflict between Section 1760's admonition to construe and apply the CLRA liberally and Honda's argument that the Legislature eliminated "pure" concealment from the CLRA to ensure that defendants would know exactly what they could and could not get away with under Section 1770. But even if that conflict could be ignored and Honda's view were adopted, it makes no sense to then hold some defendants liable for concealment anyway, simply because they made an affirmative misrepresentation or because they concealed "a safety-related concern." Nothing in the CLRA's legislative history or any of the cases in which the CLRA has been construed or applied explains this rather odd conundrum, which seems to be why Honda doesn't bother to explain it, either.

But Honda's argument also proves too little. Honda attempts to nullify the significance of a statement Petitioners cited in their opening brief by the CLRA's author, who made clear that the examples of conduct prohibited by Section 1770 were included "by way of illustration and not limitation," and that one of those examples involves the failure to disclose. *See* Pet. at 8-9 & n. 3 (discussing author's citation to *F.T.C. v. Colgate*

Palmolive Co., 380 U.S. 374 (1965), and Supreme Court's reliance on *Kerran v. F.T.C.,* 265 F.2d 246 (10th Cir. 1959), in *Colgate*).

According to Honda, *Colgate* and *Kerran* actually prove nothing because they both involved affirmative misrepresentations. Answer at 13 n. 5. Actually, however, that is not true. The significance of *Kerran* is that it involved a refiner's concealment of the fact that it was selling used motor oil as new, which the FTC found violated Section 5 of the FTC Act. *See* 265 F.2d at 267-68. Finding that consumers are entitled to be informed of facts that are likely to have an impact on their purchase decision, the Tenth Circuit agreed that concealment of material facts does violate the FTC Act. *Id.* at 268.

The significance of these cases is twofold. First, in *Colgate,* the Supreme Court relied on *Kerran* for the proposition that the CLRA's author discussed in its legislative history — that subdivision (6) of 1770 encompasses concealment even though a literal reading of its language prohibits only "[r]epresenting that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand."

Second, the significance of the legislative history's reference to cases involving the FTC Act is that, as this Court has observed, the CLRA is California's "little FTC Act." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 197 n. 2 (1999) (Kennard, J., concurring and dissenting). And a concealment claim under the FTC Act has never been conditioned on the defendant making an affirmative misrepresentation or the concealment involving a "safety-related concern." To the contrary, the FTC has made clear that "[t]here are numerous cases

holding that ***it is a violation of Section 5 to fail to disclose material facts*** if the effect of nondisclosure is that substantial numbers of the public are likely to make purchasing decisions based on false beliefs, ***whether those beliefs are attributable to past representations or are likely to result if future advertising is left untouched***." *In the Matter of The Raymond Lee Organization, Inc.*, 92 F.T.C. 489 (1978) (emphasis added).

At bottom, the CLRA's legislative history demonstrates that the statute was enacted to provide consumers with a means of obtaining redress for unfair or deceptive business practices that is easier and more efficient than prosecuting a claim for breach of contract or fraud at common law. As Petitioners demonstrated in their opening brief, the common law recognizes that "intentional concealment of a material fact is an alternative form of fraud and deceit equivalent to direct affirmative misrepresentation." *Stevens v. Superior Court*, 180 Cal. App. 3d 605, 608-09 (1986) (footnote and citations omitted).

As Petitioners also pointed out, in *Stevens*, the Court of Appeal ***reversed*** an order sustaining a demurrer to the plaintiff's concealment claim on the ground that the plaintiff had failed to plead facts supporting a claim of affirmative misrepresentation, whereas in the present case the Court of Appeal ***affirmed*** an order sustaining a demurrer for precisely the same reason. *Compare Stevens*, 180 Cal. App. 3d at 609 *with Daugherty*, 144 Cal. App. 4th at 834-35. The significance of this anomaly, of course, is that the *Daugherty* decision actually makes it more difficult to pursue a claim under the CLRA than it would be if the same claim were pursued at

common law — which is precisely the opposite result that the Legislature intended.[1]

Honda's response to this observation is that *Stevens* is irrelevant because it is not a CLRA case, and because it involved safety issues that are purportedly absent from the present case. *See* Answer at 8. Again, however, Honda has failed to cite any authority that suggests that liability for unfair or deceptive practices under the CLRA is contingent upon a showing that the defendant put the consumer's health or safety in jeopardy. That is because there is none. Although concealment of facts that pertain to safety or health would likely make it easier to establish the materiality of those facts, it simply makes no sense to say that a consumer-fraud statute is inapplicable unless the consumer can prove that the defendant put life or limb in jeopardy.

But Honda's insistence that consumers demonstrate a safety-related problem before being permitted to pursue a concealment claim under the CLRA is problematic for another basic reason: It virtually guarantees that the litigation will veer into a satellite issue, no matter how obvious the safety concern and no matter how much evidence there may be that the problem truly is safety-related.

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[1] Petitioners also pointed out that concealment of the sort at issue in the present case has been recognized as actionable at common law, regardless of the existence of a warranty that purportedly limits the manufacturer's liability. Pet. at 18 (citing *State of New York v. General Motors Corp.*, 466 N.Y.S.2d 124 (N.Y. Sup. Ct. 1985)). Apparently preferring not to address the issue or the *General Motors* case, Honda attempts to simply dismiss it as one that was "not even brought under the CLRA . . . ." Answer at 11 n. 4.

A case Petitioners discussed in their opening brief, *Howard v. Ford Motor Co.*, No. 763795-2 (Alameda Super. Ct., Oct. 11, 2000), provides an apt illustration of the point. During the more than six years that *Howard* was prosecuted, Ford strenuously denied that a defect that caused its vehicles to stall — suddenly and unexpectedly, at any time and at any speed — on the roadway implicated safety concerns, and then offered as a corporate witness on the issue a 26-year veteran of its Automotive Safety Office, who "insisted that 'safe is too subjective' and denied knowledge of any 'written definition of what safe is within Ford Motor Company.'" Request for Judicial Notice (filed 12/19/06), Ex. 2 at 11.[2]

Plainly, this is not what the Legislature had in mind when it admonished the courts to construe the CLRA in a manner that protects consumers against unfair and deceptive business practices, and to "provide efficient and economical procedures to secure such protection." Civ. Code § 1760. Yet the construction that Honda persuaded the Court of Appeal to adopt will only ensure that such diversionary tactics are a requisite aspect of any case involving a claim that a product manufacturer has violated the CLRA by concealing a product defect.

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[2] Honda tells the Court that Petitioners violated Rule of Court 8.1115(a) by citing *Howard*. *See* Answer at 9 n. 2. Honda's argument is misplaced, given that even it recognizes that the Rule applies only to "an opinion of a California Court of Appeal or superior court appellate division" and not an opinion of a trial court. *See id.* But the argument is misplaced for another reason as well. Petitioners did not cite *Howard* as binding authority for a legal proposition, but to show that other courts have found that concealment is actionable under the CLRA, and that there was no basis for the concerns expressed by the courts below about being "harbingers" of change if they allowed such a claim to proceed. *See* Pet. at 16 n. 5 (citing *Daugherty*, 144 Cal. App. 4th at 829).

B. HONDA'S ARGUMENT THAT *DAUGHERTY* MERELY REITERATES EXTANT LAW IS BELIED BY HONDA'S REQUEST FOR PUBLICATION OF *DAUGHERTY*

In a letter dated November 3, 2006 (a copy of which is attached to this brief pursuant to Cal. R. Ct. 8.204(d) at Tab A), Honda's counsel urged the Court of Appeal to publish the *Daugherty* opinion because it would resolve a "disagreement among California consumer law practitioners as to whether, under *Outboard Marine v. Superior Court*, 52 Cal. App. 3d 30 (1975), omissions are actionable under the CLRA." Tab A at 2. Honda argued that the opinion satisfied the requirements of Rule 976(c)(1) and (3), because it

> establishes a rule of law resolving an issue not previously addressed by a California court . . . [¶] interprets and explains *Outboard Marine*, a decision that has been frequently miscited over the years, . . . [¶ and] addresses a legal issue of continuing public interest . . . .

Tab A at 1-2.

Honda's arguments contrast sharply with those it has made in response to this Petition. Honda now tells this Court that "the Court of Appeal's Opinion ***does not*** create new law on the CLRA or the UCL, ***does not*** conflict with any published California decision, and ***does not*** raise any important public policy or institutional concerns that have not already been addressed a number times [*sic*] by California Courts." Answer at 1 (emphasis added).

1. *Honda's Arguments Regarding the Purported Prerequisites to a Concealment Claim Under the CLRA are Legally and Factually Baseless*

Honda's sudden change in position actually underscores the significance of the Court of Appeal's opinion. The "disagreement among California consumer law practitioners as to whether, under *Outboard Marine* . . . omissions are actionable under the CLRA" actually became manifest only in trial courts, where automakers have included that argument in their repertoire for years. Contrary to what Ford suggests here, however, the trial courts that have considered the argument have rejected it.

Petitioners' cited to the trial court's Statement of Decision in *Howard v. Ford Motor Co.* No. 763795-2 (Alameda Super. Ct., Oct. 11, 2000) (attached to RJN as Ex. 2), to illustrate the point. In that case (in which O'Melveny & Myers LLP represented Ford and Fazio | Micheletti LLP lawyers served as lead counsel for the plaintiffs), the trial court rejected the argument Honda makes here, finding that Ford's concealment of a defect violated Section 1770(a)(5) and (7), despite the absence of any allegation that Ford made affirmative misrepresentations. *See* RJN, Ex. 2 at 18.

The same is true of *Chamberlan v. Ford Motor Co.*, in which the trial court ruled that "pure omissions are actionable under the CLRA . . ." 369 F. Supp. 2d 1138, 1144 (N.D. Cal. 2005). Like its response to *Howard*, Honda attempts to diminish the significance of the court's ruling, not by addressing the analysis, but by characterizing it as "nothing more than a passing reference by the district court, in an order denying summary judgment, to a prior (unpublished) order denying a motion to dismiss." Answer at 10.

Because Honda's counsel also served as counsel to Ford in *Chamberlan,* however, they know it cannot be dismissed so easily. That the court rejected the argument a second time in the published decision is significant in and of itself, but even more significant is that Honda's counsel knows all too well that the court rejected ***precisely the same arguments Honda makes here*** in its order denying Fords' motion to dismiss after providing a thorough analysis that cannot be dismissed as a "passing reference." *See* Petitioners' Request for Judicial Notice in Support of Reply Brief (filed herewith), Ex. 1 at 11-16.

Moreover, until the Court of Appeal issued its decision in this case, no appellate court had ever adopted this argument. Notwithstanding Honda's contention that the *Outboard Marine* court said that affirmative misrepresentation is "essential to trigger the defendant's alleged liability for nondisclosure under section 1770[,]" Answer at 5, the Court will search that decision in vain for anything remotely resembling such a rule. The *Outboard Marine* court simply did not say that "pure" nondisclosure claims are not actionable under the CLRA, nor have any of the other courts that Honda discusses in its brief.[3]

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[3] Honda also contends that the plaintiffs' misrepresentation and concealment claims in *Outboard Marine* "were in substance the same . . . ." Answer at 5. But that isn't so, either. In *Outboard Marine,* the plaintiff claimed the defendant had misrepresented its off-road vehicle's ability to climb grades and maneuver over and around obstacles and "rough places," which is hardly the substantive equivalent of the plaintiffs' claim that the defendant had concealed that "the vehicle was unstable and would roll over forward on a downgrade and that its braking system was totally defective." 52 Cal. App. 3d at 34.

Indeed, if those allegations are substantively the same, virtually ***any*** representation about a vehicle's performance would be the "substantive

Footnote continued on next page

For example, Honda contends that the court in *Bardin v. DaimlerChrysler Corp.,* 136 Cal. App. 4th 1255 (2006), dismissed the plaintiffs' claim that the defendant violated the CLRA by "concealing" that it used one type of metal rather than another in its exhaust manifolds because the plaintiffs failed to allege that the defendant also made an affirmative misrepresentation. Again, however, the court did not say that, nor did it say that the plaintiffs had failed to identify a duty to disclose.

To the contrary, the Court of Appeal made clear that "Plaintiffs' claim for violation of the CLRA fails because the second amended complaint did not allege ***facts*** showing DCC was bound to disclose its use of tubular steel exhaust manifolds or the failure to disclose that fact would be otherwise misleading." *Bardin,* 136 Cal. App. 4th at 1261.

In other words, the court simply found that the information that the plaintiffs had alleged the defendant had "concealed" was not material enough to warrant disclosure. And nowhere in *Bardin* did the court rule that the plaintiffs had failed to identify a ***legal*** duty to disclose; again, the court found that the ***facts*** that the plaintiffs alleged were insufficient to state a claim. *Id.* at 1261, 1276. *Cf. In the Matter of Curtis Pub. Co.,* 78 F.T.C. 1472 (1971) ("To warrant Commission action under Section 5, a charge of nondisclosure must be shown to involve material facts, not immaterial facts").

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equivalent" of a claim that the manufacturer concealed the existence of a material defect in the same vehicle, hence Honda's so-called "rule" would be meaningless in any event. Ironically, however, ***that*** is precisely the point that the Court of Appeal made in *Outboard Marine*: That "[t]he offer of goods for sale ***is*** a representation of the characteristics, uses, benefits, or qualities of the goods. 52 Cal. App. 3d at 37 (emphasis added).

No matter how hard it tries, Honda cannot diminish the significance of the Court of Appeal's decision in *Daugherty* by simply characterizing it as yet another in a long line of cases that support the "rule" that Honda persuaded the *Daugherty* court to adopt. There is no such line of authority and there was no such rule until the Court of Appeal granted Honda's request to publish *Daugherty.*

Honda had it right when it told the Court of Appeal that its opinion broke new ground and established new policy. And although Honda flatly denies all of that now, it will take far more than convenient rhetoric and temerity to make it so. In short, *Daugherty* should never have been published, which is why Petitioners have respectfully requested that this Court order it depublished or grant this Petition for Review.

2. *Honda's Argument That the Court of Appeal's Decision is Somehow Immune From Review is Also Baseless*

Honda tells the Court that Petitioners are not entitled to obtain review of the Court of Appeal's decision to affirm the dismissal of their UCL claims because Petitioners "rely on the *same* cases and standard the Court of Appeal applied in upholding the trial court's decision to dismiss their UCL claims . . . ." Answer at 19 (emphasis in original). This is simply another way of making the same argument that Honda makes regarding the CLRA: That the *Daugherty* opinion is nothing more than a reiteration of well-established law.

Nonsense. That the *Daugherty* opinion is anything but a mere echo of extant law was made clear by the announcement Honda's counsel posted

on its website almost immediately after it submitted its request for publication to the Court of Appeal. There, Honda's counsel stated that, as a result of *Daugherty*, in California, "***a manufacturer is not liable for an alleged defect that the manufacturer knows of at the time of sale, if the product functions normally within the express warranty period***." http://www.omm.com/webcode/navigate.asp?nodeHandle=486&idContent=6282 (emphasis added). *See* RJN (filed 12/19/06), Ex. 3.

Although Honda's counsel has since removed that page from its website, the point is that the Court of Appeal's opinion is dangerously flawed, and has the effect of actually encouraging manufacturers to conceal the existence of product defects from consumers with impunity. Put simply, if the Court of Appeal erred in its decision to affirm the dismissal of Petitioners' CLRA claims, it also erred in affirming the dismissal of Petitioners' UCL claims for that reason alone. *See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998) ("unlawful" prong makes violation of underlying statute a violation of UCL itself).

Honda also contends that Petitioners have no basis for seeking review of the Court of Appeal's decision to affirm the dismissal of their UCL claims under the UCL's "fraud" prong, because Petitioners used the same "standards" to support their arguments that the Court of Appeal applied in reaching its decision to affirm the dismissal. Regardless of the "standards" that the Court of Appeal applied to reach its decision, the notion that a manufacturer cannot — as a matter of law — be held liable for violating the UCL by concealing the existence of a serious product defect is an error that not only can be, but must be, corrected by this Court.

And regardless of how Honda may characterize that decision now, the rule that the Court of Appeal established in this case runs counter to a host of decisions by this Court, which has repeatedly held that the standards of proof under consumer-protection statutes like the UCL are lower than those required to establish liability in other areas of the law. *E.g., Cel-Tech*, 20 Cal. 4th at 181; *Committee On Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983); *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442 (1979). The notion that citing these cases somehow immunizes the Court of Appeal's decision from review by this Court is baseless.

The bottom line is that, no matter how Honda attempts to characterize the Court of Appeal's decision now that Petitioners have sought review by this Court, the Court of Appeal limited the scope of the UCL by holding that the UCL does not apply beyond the terms of Honda's express warranty. *Daugherty*, 144 Cal. App. 4th at 838 ("[t]he 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 despite the fact that the standards for liability under the UCL are far less stringent than those that apply to fraud-based claims at common law, the standard that the Court of Appeal applied here is far more restrictive than the standard courts have applied to virtually the same conduct in the context of common-law claims. *See, e.g., General Motors Corp.*, 466 N.Y.S.2d at 126-27.

III. CONCLUSION

Honda's rhetoric notwithstanding, the Court of Appeal's decision should never have been published in the first place. Petitioners respectfully request that this Court rectify that mistake, and either depublish it or grant review.

Dated: January 22, 2006

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by_____
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CERTIFICATE OF WORD COUNT

I, Dina E. Micheletti, hereby certify that there are 4,265 words in the foregoing Petition, exclusive of the tables of contents and authorities, declaration of service, and this certificate. I determined the number of words using the Word Count tool in Microsoft Word, the word processing software that was used to prepare this Petition.

Dated: January 23, 2007

Dina E. Micheletti

DECLARATION OF SERVICE BY OVERNIGHT DELIVERY

RE: No. S148931
Case Title: *Daugherty v. American Honda Motor Co.*

I, the undersigned, am a citizen of the United States, over the age of 18 years, working in the City of Pleasanton, County of Alameda, and not a party to this action. My business address is 4900 Hopyard Rd., Ste 290, Pleasanton, CA, 94588.

On the date appearing below, I served the items identified below, to the persons identified below, by placing a true and correct copy thereof in a sealed envelope or package provided by an overnight-delivery carrier addressed as set forth below. I placed the envelope or package for collection and overnight delivery at an office or regularly-utilized drop box belonging to the overnight-delivery carrier.

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- REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration of service was executed on December 18, 2006, at Pleasanton, California.

_____
Alissa N. Micheletti