S129812

IN THE SUPREME COURT OF CALIFORNIA

ROBERT KRUMME, on Behalf of the General Public,
Plaintiff and Respondent,

vs.

MERCURY INSURANCE COMPANY, et al.,
Defendants and Appellants.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR
(NOS. A103046, A103742)

UNFAIR COMPETITION CASE: SERVED ON ATTORNEY GENERAL AND DISTRICT ATTORNEY AS REQUIRED BY BUS. & PROF. CODE § 17209.

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Broker-agent issue: Plaintiff asserts Mercury's petition for review raises no significant insurance law issues. The Insurance Commissioner and the amici curiae disagree. They have recognized that the distinction between insurance brokers and agents that lies at the heart of this case is of ongoing and exceptional importance to California's Insurance market.

The issue whether the Legislature has authorized broker-agents to perform acts on behalf of insurers without thereby losing their status as brokers is, in the Court of Appeal's words, "not free from all doubt." (Typed opn. pp. 1-2.) This court should grant review and resolve those doubts before the injunction becomes final, Mercury is obliged to restructure its business, and

nonparty brokers face disruption or even elimination of their businesses, to the detriment of the many consumers who depend on the brokers when shopping for automobile and homeowners insurance.

Proposition 64 issue: Proposition 64 was approved by the voters four days *after* the Court of Appeal filed its opinion. Mercury properly invoked the proposition in its timely petition for rehearing, but the Court of Appeal denied the petition without explanation. Unless this court grants relief – either by a straight grant of review, a "grant and hold," or a "grant and transfer" – Mercury will have been denied *any* judicial evaluation of its rights under Proposition 64.

Plaintiff challenges Mercury's position on the merits, arguing that the proposition's procedural amendments to the Unfair Competition Law (UCL) should not apply here because the case was tried and appealed before the proposition took effect. Plaintiff's arguments merely confirm that review should be granted – to resolve this important issue.

LEGAL DISCUSSION

I.

PLAINTIFF FAILS TO REBUT MERCURY'S SHOWING THAT THE BROKER-AGENT ISSUE MERITS REVIEW.[1/]

A. The Insurance Commissioner, the amici curiae, and the Court of Appeal have all recognized that the broker-agent issue is vitally important.

Plaintiff's assertion that "the petition raises no significant insurance law issues" (Answer to Petition for Review (APFR) pp. 1, 10, boldface and capitalization omitted) contradicts the views of the Insurance Commissioner, to whom plaintiff asks this court to accord deference (see APFR p. 2). In the Commissioner's opinion, "[t]he distinction between insurance agents and brokers at the heart of [this] case *reverberates through many aspects of insurance law and insurance regulation*," and the Court of Appeal's decision will have "*significant ramifications*" for the price consumers pay for insurance and for the insurer's potential liability for a producer's errors or omissions. (Application for Leave to file *Amicus Curiae* Brief of John Garamendi, etc., pp. 1-2, emphasis added.)

In letters urging this court to grant Mercury's petition, other amici have likewise emphasized the importance of the case. (See letter from J. Alan Frederick to Supreme Court on behalf of amicus curiae American Agents

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1/ Unless otherwise indicated, all statutory references in this brief are to the Insurance Code. Insurance Code section 1704, subdivision (a), is cited as "1704(a)."

Alliance (Dec. 28, 2004) (Frederick letter) pp. 1 [Court of Appeal's interpretation of section 1704(a) "completely belies" plaintiff's assertion "that the opinion is one which did not decide any 'significant' issues of law"], 11 ["The petition and the various letter briefs of Amicus have demonstrated that significant issues are presented by the opinion of the Court of Appeal"]; letter from Jeffrey M. Hamerling to Supreme Court on behalf of amicus curiae Auto Insurance Specialists (Dec. 28, 2004) (Hamerling letter) pp. 4 ["this case does raise significant insurance law issues"], 7 [issue presented is "of major importance to California consumers, brokers and insurers" (boldface and capitalization omitted)].)

Plaintiff concedes "[t]he Court of Appeal's decision will likely affect the ability of some non-Mercury producers to continue to cast themselves as 'brokers' and charge broker fees." (APFR p. 16.) Plaintiff finds this potential disruption in California's insurance market unimportant. Not surprisingly, the producers themselves – who, unlike plaintiff, actually have a stake in the issues – disagree. To them, the likely impact of the Court of Appeal's decision borders on catastrophic. (See Hamerling letter, *supra*, pp. 1 ["The Decision . . . prohibits AIS and the personal lines insurance broker community from continuing to provide its current level of services to California consumers"], 4 [Court of Appeal's decision "alters insurance law in a manner that will drastically impact the personal lines insurance brokerage industry"], 6 [Court of Appeal's statutory interpretation "drastically changes the industry practice"], 9 [Court of Appeal's "decision will substantially disrupt the market"]; Frederick letter, *supra*, pp. 1-2 [Court of Appeal's opinion "threatens upheaval" and "massive and inappropriate changes in the insurance marketplace"; opinion may "wreak havoc" on the insurance industry and consumers; opinion may have "dramatic[ ] effect[ ]" on members of American Agents Alliance].)

Finally, the Court of Appeal itself evidently (and rightly) regarded its decision as significant and the issues presented as important. The court certified its opinion for publication. (See Cal. Rules of Court, rule 976(b).)

B. Plaintiff never comes to grips with the arguments and issues Mercury actually presents.

Plaintiff recasts Mercury's argument, then responds to the argument as recast. Consequently, much of plaintiff's discussion misses the point. Plaintiff fails to respond to the issue and the arguments Mercury actually raises.

According to plaintiff, Mercury's position is that "the agent/broker distinction has vanished from the Producer Licensing Law." (APFR p. 2; see APFR pp. 10 [referring to Mercury's supposed conclusion that "the Legislature eliminated the agent/broker distinction from the Producer Licensing Law"]; 11 [referring to Mercury's supposed "claim that the distinction has vanished from the Producer Licensing Law"].) Having set up this straw man, plaintiff proceeds to knock it down by pointing out that the Insurance Code separately defines "agent" and "broker" and otherwise distinguishes between the two categories of producers. (APFR pp. 10-14.)

Mercury's petition acknowledges the distinction between "brokers" and "agents." (See Petition for Review (Petition) pp. 2-3.) Indeed, the very issue Mercury presents assumes the distinction. The issue is whether the holder of a broker-agent license, which authorizes the licensee to act in *both* capacities (see § 1625), is confined to acting in one or the other capacity throughout a single insurance transaction or, on the other hand, whether the licensee may act as the insurer's agent in certain respects without thereby losing his or her

status as a broker and forfeiting the right to charge a broker's fee. (See Petition pp. 1-2.)

Plaintiff again misstates Mercury's position when he asserts that "Mercury's argument rests on the contention that *Maloney v. Rhode Island Insurance Co.* and section 1732 allowed producers to perform the full range of agency functions without losing 'broker' status." (APFR p. 13, citations omitted.) Mercury's argument rests largely on statutes that were enacted or amended many years after *Maloney* was decided (see Petition pp. 13-15), statutes that "amalgamate[d] the categories of broker and agent" (typed opn. p. 18) and expressly authorized fire and casualty broker-agents to "transact automobile insurance," i.e., to execute automobile insurance contracts (see Petition pp. 14-15).

Citing no authority, plaintiff asserts: "A 'broker' cannot represent the insurance company; if it does, it is classified as an 'agent' for licensing purposes." (APFR p. 11.) Plaintiff never acknowledges the language of section 769, subdivision (a), which refers to "written brokerage contract[s]" under which "the broker-agent represents the insurer."

Plaintiff discusses section 1704(a) without acknowledging that the statute's first sentence, on which the Court of Appeal principally relied, does not apply to "brokers" or "broker-agents"; it applies to "fire and casualty insurance agents" who "act as an agent of an insurer." (§ 1704(a); see Petition pp. 17-18.) Plaintiff assumes section 1704(a) applies to broker-agents, then argues the statute must be construed as mandatory because no insurer would *voluntarily* "make an appointment that will enhance its exposure to vicarious liability[,]" nor would any producer voluntarily "agree to an appointment that will disable it from charging broker fees." (APFR p. 15.)

Nonsense. Some of California's largest insurance companies (see 11 AA 2797) have opted to market their policies thorough stables of agents

appointed under section 1704(a), agents who maintain no broker bond, who voluntarily "disable" themselves from charging broker fees, and for whose conduct the insurers voluntarily assume vicarious liability (see 1 RT 9 [plaintiff's opening statement], 121-123).

Plaintiff, like the Court of Appeal, apparently misunderstands section 1704(a) to *compel* all insurers to follow this business model with respect to producers who perform any act (beyond those specified in section 1732) on the insurer's behalf.[2/] (See APFR p. 15 ["The Court of Appeal correctly interpreted the appointment law . . . as a mandatory duty"].)

Plaintiff's argument not only fails to account for the statutory language (which does not mention "brokers" or "broker-agents") and the practices of many of California's largest insurers, it runs headlong into the following statutory prohibition: "No notice of appointment of a . . . fire and casualty broker-agent, . . . shall be filed under this subdivision [section 1704(a)] unless the licensee being appointed has *consented* to that filing." (§ 1704(a), emphasis added.) Plaintiff's position that the insurer has "a mandatory duty" (APFR p. 15) to appoint agents under section 1704(a) cannot be squared with the statutory provision *forbidding* appointments absent the appointee's

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2/ Between 1990 and 2002, section 1704(a) was indeed a "mandatory" statute – but it imposed a duty on the *producer*, not on the insurer. The pre-2002 version of the statute stated: "'Every *applicant* for a license as a fire and casualty broker-agent to act as an insurance agent . . . *shall have filed* on his or her behalf with the commissioner a notice of appointment to act as an agent executed by an insurer, . . . appointing the applicant . . . its agent within this state.'" (Typed opn. p. 19, emphasis added.) The statute imposed *no duty* on insurers to appoint any broker who was *already licensed*, regardless whether the broker performed acts on behalf of the insurer. The 2002 amendment reworded the statute to make it prohibitory instead of mandatory: "[F]ire and casualty insurance agents *shall not act* as an agent of an insurer . . . ." (§ 1704(a), emphasis added.) But nothing in the legislative history suggests that the Legislature was now focusing on insurers rather than producers or that the Legislature intended to impose a new duty on insurers.

consent. The injunction upheld by the Court of Appeal, which requires Mercury to appoint *every* producer through whom Mercury sells a policy regardless whether the producer consents to the appointment, is defective for the same reason.

A more plausible reading of the statute – one that, unlike the Court of Appeal's reading, gives effect to *all* its provisions – is that section 1704(a) applies to a producer who *chooses* (consents) to dedicate himself or herself to the business of selected insurers, rather than to the interests of consumers seeking the best available coverage from any company in the market. Thus, licensed fire and casualty broker-agents who desire to restrict their roles to that of insurance agents may seek appointment as agents of an insurer under the first sentence of section 1704(a). Those same licensed broker-agents who wish to restrict their roles to that of insurance solicitors may seek appointments as employees under the second sentence of section 1704(a). Both categories of these "appointed" broker-agents revert to the statuses reflected in section 1704(a)(2) once their appointments are released. The "short-hand" analysis the Court of Appeal applied to explain the different terms used in sections 1704(a) and 1704(a)(2) defies conventional rules of statutory construction requiring a common-sense plain reading of the statute's terminology.

The Insurance Commissioner has repeatedly confirmed the propriety of Mercury's analysis and practice in regulatory edicts. (See Petition pp. 15-16) Consistent with the statutory and regulatory provisions allowing brokers to perform a variety of tasks as agents without losing their status as brokers authorized to charge fees for broker tasks, Mercury's brokers are paid the same sales commission as its agents. (C.T. 1826-1840) That compensation is reviewed by the Commissioner as part of the Proposition 103 rate approval process (§ 1861.05(a)), under which Mercury files with the Commissioner, and

seeks his approval of, its acquisition costs. (Cal. Code Regs., tit. 10, § 2644.9.) Those costs must meet the Commissioner's requisite efficiency standard. (Cal. Code Regs., tit. 10, § 2644.12.) Indeed, under California Code of Regulations, title 10, section 2645.5, the Commissioner mandated that brokers' compensation be categorized with independent agents' compensation for the Proposition 103 rate rollback period, and he applies that same analytical framework to post-rollback rate change requests. Under Insurance Code section 1858.07(b), he cannot penalize Mercury for abiding by its approved rate plan. Since insurers are obligated by law to follow their approved rates, the approval process creates a UCL "safe harbor."

Plaintiff argues that "*if a producer is acting as an agent for an insurer*, he or she must either consent to the insurer's filing the action notice, or not sell insurance for the insurer." (APFR p. 15, emphasis added.) This argument begs the question presented, which is whether a broker-agent *is* "acting as an agent of an insurer" and thus subject to section 1704(a) whenever the broker-agent performs an act on the insurer's behalf not specified in section 1732.

A producer who desires to represent consumers rather than insurers, i.e., a broker, should not be *forced* to "consent" to appointment as an insurer's agent simply because, in servicing the consumer, he or she also performs an act on the insurer's behalf. The Court of Appeal's holding to that effect threatens serious economic harm to countless producers, consumers and insurers and therefore merits this court's review.

II.

AS EVEN PLAINTIFF RECOGNIZES, THE ISSUE WHETHER PROPOSITION 64 APPLIES TO PENDING UCL ACTIONS REQUIRES THIS COURT'S ATTENTION.

A. Mercury is entitled to at least one court's determination of its rights under the new UCL provisions.

Plaintiff acknowledges "there are already conflicting Superior Court decisions on the application of [Proposition 64] to cases that have not yet reached either trial or appeal" (APFR p. 17), and plaintiff recognizes this court "will eventually address" the issue "to provide guidance to the trial courts." (APFR pp. 16-17.)

Plaintiff nonetheless urges the court to deny Mercury's petition on the ground "this case is a poor vehicle" for addressing the issue whether Proposition 64 applies to pending actions. (APFR p. 17.) Plaintiff notes that at least one other case before this court offers an opportunity for the court to explore the effect of Proposition 64, and plaintiff argues that case is "a far better candidate than this case." (*Ibid*., citing *Kids Against Pollution v. California Dental Association* (S117156); see also *Poirer v. State Farm Mutual Auto Ins. Co.* (S129439) [petition for review pending; Proposition 64 asserted as one basis for review].) Plaintiff also suggests that this court transfer to itself one of the many cases pending in the lower courts so it can address "'an issue of great public importance that the Supreme Court must promptly resolve'"! (APFR p. 17.)

The fact that other cases currently before or soon to be before this court raise Proposition 64 questions is no basis for *denying* Mercury's petition for

review. On the contrary, it is a basis for *granting* the petition, so this court can decide which of the cases should be the "lead" case(s) and which should be held for resolution in conformity with the ruling this court eventually issues.

Plaintiff's position that review should be denied is, at bottom, a request that this court rely on the parties' summary briefing at the petition for review stage to decide *on the merits* that Mercury is not entitled to rely on Proposition 64. It is important to remember that *no court has yet evaluated Mercury's rights under Proposition 64*. The Court of Appeal – without explanation – refused to address Proposition 64 when, at the first opportunity, Mercury raised the issue in its petition for rehearing just days after the proposition was approved. If review is denied here and this court later decides, in another case, that Proposition 64 *does* apply to actions pending when the proposition took effect, Mercury will have been unfairly deprived of its right to assert the defenses available under this court's decision. In the interest of fairness, review should be granted on the Proposition 64 issue raised by Mercury.

If this court is not inclined to take up this case now to decide Mercury's rights under Proposition 64, this court should issue a "grant and hold" order pending the outcome of another case raising Proposition 64. Or, at the very least, this Court should issue a "grant and transfer" order requiring the Court of Appeal to address the matter in the first instance. In some fashion, Mercury is entitled to its day in court on the Proposition 64 issue.

B. Plaintiff's arguments on the merits demonstrate why review should be granted – to clarify that the cases and theories on which plaintiff relies do not apply here.

Plaintiff's arguments on the merits provide no reason for this court to deny review but rather confirm the need for review and clarification of the law. We briefly address plaintiff's arguments in the order presented in the answer to petition for review.

1. *Plaintiff's reliance on "voter intent" (APFR pp. 18-24) fails in the absence of a "savings clause" or other expression of intent to delay the effect of Proposition 64.*

Plaintiff cannot deny that the voters' unambiguous intent, as reflected in the plain language of Proposition 64, was to eliminate the species of "non-class" representative UCL actions pursued by plaintiffs who, like plaintiff here, never dealt with the defendant.

The only question, then, concerns the voters' intent with respect to *pending* cases. The ballot materials are silent on that question, so the general rule must govern: absent a savings clause, amendments that eliminate statutory rights apply immediately to pending actions. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 109-110.)

Plaintiff cites cases in which this court looked to voter pamphlets and ballot summaries to confirm the court's construction of the language of statutes enacted by voter initiative. (APFR pp. 18-21.) Plaintiff argues the voters who approved Proposition 64 intended to bar only "frivolous" and "shakedown" lawsuits. (APFR 21-22.) But ballot arguments to that effect do not constitute a "savings clause" and have no bearing on the *timing* for enforcement of the new statutory mechanism (barring private non-class representative actions by unharmed consumers) chosen to accomplish the goal

of clamping down on anti-business lawsuits that may not properly advance the general public's interests.

Proposition 64 contains no language delaying its effectiveness. Plaintiff's reliance on isolated phrases in voter materials and on speculative inferences from those phrases cannot overcome the plain terms of what is, in this case, a simple, straightforward amendment eliminating one category of statutory actions while leaving intact the right of injured consumers and government officials to challenge unfair practices in statutorily defined ways.

2. *Contrary to plaintiff's contention (APFR pp. 22-23), the voters' intent to stop "prosecution" of actions like this one would, under a plain reading of the statute, bar continued prosecution of the action throughout the appellate process.*

Plaintiff argues the voters' decision to stop "prosecution" and "pursuit" of certain UCL actions "do[es] not unambiguously include a prevailing plaintiff's *response* to an unsuccessful defendant's brief in an appellate court." (APFR p. 22, emphasis by plaintiff.) Absurd. Plaintiff must be deemed to be "prosecuting" this action until he enforces any final judgment. Indeed, the dictionary definition of "prosecution" that *plaintiff* cites – "'[t]o seek to *obtain or enforce* by legal action'" (APFR p. 22, emphasis by plaintiff) – confirms that the language of Proposition 64 broadly applies to actions like this one, where plaintiff continues to seek to obtain and enforce remedies under the UCL.

3. *Contrary to plaintiff's contention (APFR pp. 24-26), Proposition 64 contains no evidence the voters intended to create an exception to the general rule that repeal of statutory rights is immediately effective and applies to cases pending at any stage.*

Plaintiff denigrates Mercury's reliance on the "repeal rule" as "mechanical" and "inflexible," and plaintiff argues the rule can be overcome

by evidence of voter intent. (APFR p. 24.) Actually, Mercury's petition for review notes that voter or legislative intent, expressed in a "savings clause," may delay the effect of a repeal of statutory rights. (Petition p. 25, citing, e.g., *Governing Board v. Mann* (1977) 18 Cal.3d 819, 822-823 and *Physicians Com. for Responsible Medicine v. Tyson Foods* (2004) 119 Cal.App.4th 120, 125 [unconditional repeal of special remedial statute *without saving clause* stops all pending actions where the repeal finds them].)

Plaintiff asserts that "the measure itself and the supporting ballot argument are evidence of the voters' contrary intent" that "dispels any presumption" raised by the repeal rule. (APFR p. 26.) But plaintiff does not identify the "evidence" supporting this assertion. As Mercury has pointed out, "This amendment not only has no 'savings clause,' but contains plain language that no party may continue to '*prosecute[ ]*' or '*pursue*' a UCL claim without meeting Proposition 64's new requirements, and that Proposition 64 was intended to 'eliminate' such actions." (Petition p. 25.)

4. *Contrary to plaintiff's contention (APFR pp. 26-30), Proposition 64 alters procedural standing rules and imposes procedural class action requirements that apply prospectively to all pending actions.*

Plaintiff does not deny that procedural amendments generally apply immediately to pending actions, nor does he deny that standing and class action rules for pursuing representative actions are fundamentally procedural. Plaintiff nonetheless argues the standing and representative action requirements imposed by Proposition 64 do not apply to actions that have already been tried but are pending on appeal. (APFR pp. 26-30.)

Plaintiff cites no case holding that new procedural amendments do not apply to cases that have been tried and are on appeal. Instead, plaintiff cites language in cases noting that statutory amendments *governing the conduct of trial* apply to trials postdating the amendments, even in actions filed before the

amendments took effect. (APFR pp. 27-28, citing *Aetna Casualty and Surety Co. v. Industrial Accident Commission* (1947) 30 Cal.2d 388; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; *Elsner v. Uveges* (Dec. 20, 2004, S113799) ___ Cal.4th ____ [2004 D.A.R. 15035].)

Unlike the cases on which plaintiff relies, here the statutory amendments address *standing*, a procedural requirement that a plaintiff must satisfy at all stages of the case, not just during trial. (See *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1523 [amendment to standing rule was "procedural only" and thus applied to case pending at time of amendment]; *Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 875 [lack of standing deemed a "procedural ground" for disposal of appeal].) Because "[s]tanding is a jurisdictional issue that may be raised at any time in the proceedings" (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232), applying Proposition 64 now, before the judgment is final, is a proper *prospective* application of the standing requirement.[3/]

Similarly, the new requirement that all private representative UCL actions be prosecuted according to class action procedures – with proper notice to affected consumers and proof that the named plaintiff is an adequate representative of consumers' interests – is a procedural condition for obtaining representative relief, not a rule governing jury voir dire (see *Tapia v. Superior Court, supra*, 53 Cal.3d 282) or a rule of evidence at trial (see, e.g., *Elsner v. Uveges, supra*, ___ Cal.4th ___ [2004 D.A.R. 15035]). Like the new standing requirement under Proposition 64, the new class action rule applies to bar a non-complying action at any stage of the proceedings.

3/ The *Parsons, Personnel Com.* and *Waste Management* cases were discussed in Mercury's petition for review (p. 29), but plaintiff does not address them.

Plaintiff relies on the recent opinion in *Elsner v. Uveges*, *supra*, ___ Cal.4th ___ [2004 D.A.R. 15035]. (APFR p. 28.) There, this court held certain statutory amendments affecting parties' respective common law rights would not apply to actions filed before the amendments' effective date, where the amendments would increase the defendant's exposure to liability and thus improperly applying "the new law of today to the conduct of yesterday." (2004 D.A.R. at p. 15040.) *Elsner* reinforces the well-established rule that an amendment expanding a defendant's *liability* for past conduct is substantive, not procedural. The changes effected by Proposition 64, in contrast, are procedural because they do *not* expand liability or change the legal consequences of past conduct. They merely change the method of prosecuting allegations based on that conduct.

Finally, plaintiff attempts to distinguish a number of appellate decisions holding that procedural amendments apply to cases *on appeal* even though judgment was entered before the effective date of the amendments. (APFR pp. 29-30.) Plaintiff argues these decisions should not be followed where a judgment has been entered after trial, as opposed to after other dispositive proceedings. (*Ibid.*) No language in these opinions supports such a distinction, and this court should not countenance plaintiff's inference of an unstated rationale behind the courts' rulings. What the cases actually say is: "[T]he fact that a party acted in an authorized manner at the time he or she invoked the former version of a procedural or remedial statute *at trial* is no impediment to the appellate court applying the current version of that procedural or remedial statute *when evaluating the appeal* from the trial court's ruling." (*Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 691; accord, *Physicians Com. for Responsible Medicine v. Tyson, Foods, supra,* 119 Cal.App.4th at p. 128 [following

Brenton]; *Metcalf v. U-Haul International, Inc.* (2004) 118 Cal.App.4th 1261, 1266 [same].)

CONCLUSION

For the foregoing reasons and those discussed in Mercury's petition for review, this Court should grant Mercury's petition.

Dated: January 3, 2005

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 28.1(d)(1).)

The text of this reply consists of 4,143 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief.

Dated: January 3, 2005

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Mitchell C. Tilner