Case No. S153846

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PAMELA MEYER and TIMOTHY PHILLIPS, Individually, and on Behalf of all Other Similarly Situated,

Plaintiffs and Appellants,

v.

SPRINT PCS, a Foreign Corporation, SPRINT SPECTRUM, L.P., a California Limited Partnership; and JOHN DOES 1 through 20, Inclusive

Defendants and Respondents.

APPELLANT'S ANSWER TO *AMICUS* BRIEF OF US CHAMBER OF COMMERCE

After Decision by the Court of Appeal, Fourth Appellate District, Division Three, Case No. GO37375
On Appeal from the Superior Court of the State of California for the County of Orange
Honorable Sheila Fell, Judge Presiding
Superior Court Case No. 04CC06254
Service on the Attorney General and Orange County District Attorney required by Section 17209 of the Business and Professions Code and CRC 8.29(a)

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MISCELLANEOUS

A. THE PURPOSE OF THE CLRA IS TO ELIMINATE THE CONDUCT THAT IS MADE UNLAWFUL BY SECTION 1770(a) OF THE CALIFORNIA CIVIL CODE FOR THE PROTECTION OF CONSUMERS, BUT THE INTERPRETATION OF THE CLRA URGED BY *AMICUS* WOULD ENCOURAGE THE PROLIFERATION OF CONDUCT DEEMED UNLAWFUL BY SECTION 1770(a)

Focusing on the standing of a plaintiff to bring a CLRA action, rather than focusing upon the unlawful conduct of the Defendant under Civil Code Section 1770(a)(19), *amicus* argues that if the Appellants were to prevail in this case, enterprising lawyers would extort settlements out of class action defendants based upon frivolous claims. *Amicus* argues that adopting the position of the Appellants in this case would sanction an end-run around the reforms instituted by Proposition 64 with respect to the UCL. *Amicus* asserts that prior to Proposition 64, "attorneys flooded the courts with lawsuits that generated attorneys' fees without providing any public benefit."

Amicus would have us believe that most UCL cases that predated Proposition 64 were "shakedown" lawsuits. However, a review of appellate cases will establish that there were many UCL cases that pre-dated Proposition 64 which were highly meritorious and provided substantial benefit to the general public. Unfortunately, the effect of Proposition 64 was to use a sledgehammer to drive a tack. Proposition 64 was "overkill" of the greatest degree.

Amicus contends that it is the CLRA's standing requirement that has prevented the CLRA from "becoming the mirror-image of the former UCL".

Appellants disagree. First of all, the CLRA does not allow anyone in the general public to bring an action. A CLRA action may only be brought by a consumer who engages in a transaction "intended to result or which results in the sale or lease of goods or services ...". Civil Code Section 1770(a). A consumer is defined as an individual who seeks or acquires by purchase or lease any goods or services for personal, family or household purposes. Civil Code Section 1761(d). A "transaction" is defined as an agreement between a consumer and any other person. Civil Code Section 1761(e). Thus, to state a claim for relief, a Plaintiff must be a consumer who was engaged in a transaction that involved a specific unlawful act identified in Section 1770.

In *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, a case involving a violation of the Unruh Civil Rights Act, the Defendant accused the Plaintiffs of being professional plaintiffs who "shake down" business entities and that the Plaintiffs' attorneys were simply out to make a living, unmotivated by any desire to eliminate discrimination or to redress any actual injury. The Defendant accused the Plaintiffs and their attorneys of being "bounty hunters" who were involved in numerous similar lawsuits. 41 Cal.4th at 178. This Court responded at p. 179 as follows:

> Although we share to some degree the concerns voiced by the trial court and the appellate court below, and by defendant and its *amici curiae* regarding the potential for abusive litigation being brought under the Act, these concerns do not supply a justification for our inserting additional elements of proof into the cause of action defined by the statute.

Proposition 64 and concerns about Proposition 64 have absolutely nothing to do with the issues before this Court. This case is about the proper statutory interpretation of the statutes which comprise the CLRA. These statutes came into existence long before Proposition 64 came into being. There is nothing to suggest that Proposition 64 is connected in any way to the CLRA. Standing rules for actions based upon statute may vary according to the intent of the Legislature and the purpose of the enactment. *Angelucci v. Century Supper Club, supra*, 41 Cal.4th at 175; *Midpeninsula Citizens for Fair Housing v. Westwood Investments* (1990) 21 Cal.App.3d 1377, 1385, 271 Cal.Rptr. 99. Thus, the standing requirements of the UCL have no relationship to the standing requirements under the CLRA.

Amicus ignores the many instances wherein large corporations continue to enforce unconscionable contract provisions in their contracts of adhesion against consumers. For example, in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 and *Gentry v. Superior Court* (2007) 42 Cal.4th 443, this Court found that class action waivers are unconscionable where the disputes between the contracting parties predictably involve small amounts of damages, and when it was alleged that the party with the superior bargaining power had carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. One of the attorneys for *Amicus*, Donald Falk, and/or his law firm, have represented Cingular Wireless LLC in many cases dealing with class action waivers. In *Parrish v. Cingular Wireless LLC*

(2005) 129 Cal.App.4th 601, the Court of Appeal held that the class action waiver was not unconscionable. However, the opinion was ordered depublished by this Court and the Court of Appeal was ordered to reconsider its opinion in light of this Court's decision in *Discover Bank*. Thereafter, in an unpublished opinion of the First District Court of Appeal in *Parrish v. Cingular Wireless LLC*, Case No. A105518, October 3, 2005, the Court of Appeal, upon reconsideration, concluded that the class action waiver in Cingular's customer agreement was unconscionable and unenforceable. Thereafter, Cingular filed a Petition for Writ of Certiorari in the U.S. Supreme Court in a case entitled *Cingular Wireless v. Mendoza, et al.*, Case No. 05-1119. The petition was denied by the U.S. Supreme Court. Attorney Falk was Cingular's attorney for all of these proceedings.

In *Stern v. Cingular Wireless* (C.D. Cal. 2006) 453 F.Supp.2d 1138, the Court found that the Cingular class action waiver was unconscionable. Attorney Falk was Cingular's attorney in *Stern*. In *Schroyer v. New Cingular Wireless Services* (9th Cir. 2007) 498 F.3d 976, an appeal from the Central District of California, the Court found that the class action waiver in Cingular's customer agreement was unconscionable and unenforceable. Again, attorney Falk was one of the attorneys for Cingular.

In *Scott v. Cingular Wireless* (Supreme Court of Washington) No. 77406-4, filed 7-12-07, the Washington Supreme Court held that the Cingular class action waiver was unconscionable and unenforceable, relying upon

Discover Bank. Attorney Falk's law firm was involved in representing Cingular in the *Scott* case.

In *Gatton v. T-Mobile USA* (2007) 152 Cal.App. 4th 571, the Court held that the class action waiver in the T-Mobile customer agreement was unconscionable and unenforceable. In *Lowden v. T-Mobile USA, Inc.* (9th Cir. 2008), 2008 W.L. 170279, the Ninth Circuit found that the class action waiver in T-Mobile's customer agreement was unconscionable and unenforceable.

One would think that these large wireless telephone companies would remove the class action waivers from their customer agreements in light of *Discover Bank* and *Gentry*, and because multiple courts have found their class action waivers to be unconscionable and unenforceable. Yet, Cingular Wireless LLC and T-Mobile USA, Inc. continue to enforce their respective class action waivers. Both Cingular and T-Mobile have acted in total disregard for the law. All of the foregoing cases were appeals from the denial of a motion to compel arbitration. As a consequence, there was no right in any of the Plaintiffs to obtain an injunction to have the class action waiver removed from the customer agreements.

What can be done to make large corporations like Cingular Wireless obey the law? Appellants contend that they have standing under the CLRA to require Sprint Spectrum LP, with the assistance of the Court, to remove the class action waiver from its customer agreement for all Sprint customers in California. Appellants also contend that they can lawfully seek declaratory

relief and injunctive relief to remove the offending unconscionable provisions from Sprint's customer agreement. The bottom line is that the statutes comprising the CLRA should not be construed in a way which allows large corporations to engage in conduct which has been declared unlawful in Section 1770(a) with impunity.

B. THE CONSUMERS LEGAL REMEDIES ACT WAS INTENDED BY THE LEGISLATURE TO PROVIDE A REMEDY TO CONSUMERS WHO ARE VICTIMS OF ANY OF THE ACTS OR PRACTICES DEFINED AS UNLAWFUL IN SECTION 1770 OF THE CIVIL CODE

Section 1750 of the Civil Code provides that "This title may be cited as the Consumers Legal Remedies Act." Thus, the title of the Act suggests that the Legislature intended to provide a legal remedy for those acts and practices described in Section 1770 as unlawful. Section 1752 of the Civil Code provides: "The remedies provided herein for violation of any section (emphasis added) of this Title or for conduct prescribed by any section (emphasis added) of this Title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law." Thus, Section 1752 suggests that under the CLRA, remedies are being provided for violation of any Section, which obviously includes Section 1770. Section1752 further provides: "If any act or practice proscribed under this Title also constitutes a cause of action (emphasis added) in common law ...". This language can only be read to mean that any act or practice proscribed as unlawful under Section 1770 "constitutes a cause of action".

In *Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 Cal.3d 582, 200 Cal.Rptr. 38, 676 P.2d 1060, the Court stated at p. 593: "As it is unlawful to engage in any of the deceptive business practices enumerated in Section 1770, consumers have a corresponding legal right not to be subjected thereto." Thus, in the case at bar, the appellants have a legal right not to be subjected to a contract that contains unconscionable contract provisions. Under *Kagan*, the consumer suffers damage within the meaning of Section 1780 when the consumer has suffered the infringement of any legal right as defined in Section 1770.

Angelucci v. Century Supper Club, supra, is instructive. Male patrons sued the Defendants for violating the Unruh Civil Rights Act claiming that they were charged an admission fee higher than the admission fee charged to women. They sought statutory damages under Civil Code Section 52(a). The Court of Appeal affirmed the judgment of the trial court, holding that Civil Code Section 52 provides a remedy only to those plaintiffs who request non-discriminatory treatment and are refused. This Court reversed the judgment of the Court of Appeal. This Court stated at p. 167:

> As we have declared in past cases, the Act must be construed liberally in order to carry out its purpose. The Act expresses a state and national policy against discrimination on arbitrary grounds. Its provisions were intended as an active measure that would create and preserve a non-discriminatory environment in California business establishments by banishing or eradicating arbitrary, invidious discrimination by such establishments.

The CLRA is similar. The CLRA must be construed liberally in order to carry out its purpose. The provisions of the CLRA are intended to protect consumers against unfair and deceptive business practices, and to provide efficient and economical procedures to secure such protections. Section 1760 Civil Code. The CLRA was intended to produce an environment in which consumers would be free from the acts and practices declared unlawful in Section 1770.

In *Angelucci*, the court found that "The Act serves as a preventative measure, without which it is recognized that businesses might fall into discriminatory practices. 41 Cal.4th at 167. In response to a claim that the discrimination did not cause any injury to the Plaintiff, the Court commented that the act renders arbitrary sex discrimination by businesses per se injurious. The Court stated at p. 174: "Section 51 provides that all patrons are entitled to equal treatment. Section 52 provides for minimum statutory damages for every violation of Section 51, regardless of the Plaintiff's actual damages. The same is true with the CLRA. Section 1780(a)(1) provides for statutory damages of $1,000 irrespective of whether or not there are any actual damages. The Court in *Angelucci* acknowledged that a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct. 41 Cal.4th at p. 175. The court further stated at p. 175: "In general terms, in order to have standing, the plaintiff must be able to allege injury ... that is, some invasion of the plaintiff's legally protected interests." Citing 5 Witkin, *California Procedure, Pleading*, Sec. 862, p. 320, 4th Ed. In the case at bar, the

Appellants suffered an invasion of their legally protected interests under Section 1770 when Sprint inserted unconscionable provisions into the Appellants' contracts.

In *Discover Bank* and *Gentry*, a class action waiver was found to be unconscionable when the Defendants sought to cheat consumers out of small sums of money. This is an acknowledgement that the effect of the class action waiver was to damage the Plaintiffs by forcing them to forego any claims they might have involving small sums of money against parties who insert class action waivers into their contracts of adhesion. In *Gentry v. Superior Court, supra,* this Court acknowledged that some individual employees may not sue because they are unaware that their legal rights have been violated. This Court stated at p. 461:

> The New Jersey Supreme Court recently emphasized the notification function of class actions in striking down a class arbitration waiver in a consumer contract: '[W]ithout the availability of a class-action mechanism, many consumer-fraud victims may never realize they have been wronged. As commentators have noted, often consumers do not know that a potential defendant's conduct is illegal. When they are being charged an excessive interest rate or penalty for check bouncing, for example, few know or even sense that their rights are being violated.'. Citing *Muhammad v. County Bank of Rehoboth Beach, Delaware* (2006) 189 N.J. 1, 912 A.2d 88, 100.

This Court, in *Gentry*, quoted from a Federal District Court case at pp. 461-462:

> In this case, the imposition of a waiver of a class actions may effectively prevent ... employees from seeking redress of FLSA violations. The class action provision thereby circumscribes the

> legal options of these employees, who may be unable to incur the expense of individually pursuing their claim. In this respect, the class action waiver is not only unfair to ... employees, but also removes any incentive for [the employer] to avoid the type of conduct that might lead to class action litigation in the first instance. The class action clause is therefore substantively unconscionable. Citing *Skirchak v. Dynamics Research Corp., Inc.* (D. Mass. 2006) 432 F.Supp.2d 175, 181.

In California, we have seen major corporations, such as Cingular Wireless LLC and T-Mobile USA, Inc. thumb their noses at this Court and other appellate courts, both state and federal, by continuing to enforce class action waiver provisions that have been held to be unconscionable and unenforceable on many occasions. In *Gentry, supra,* the Court acknowledged that class actions not only benefit individual litigants, but also serve the public interest in the enforcement of legal rights and statutory sanctions. 42 Cal.4th at 462. So how can consumers protect themselves from major corporations such as Cingular Wireless LLC and T-Mobiile USA, Inc. if they refuse to obey the law as announced by this Court and other appellate courts? A legal action pursuant to the provisions of the CLRA is the obvious answer. Consumers need the benefit of injunctive relief in order to force these lawless corporations to remove unconscionable contract provisions from their contracts of adhesion.

One of the maxims of jurisprudence adopted by the California Legislature is that "no one can take advantage of his own wrong." Section 3517 Civ. Code. However, that is exactly what major corporations like Cingular Wireless LLC and T-Mobile USA, Inc. are doing when they enforce

their class action waiver against their customers, with the intention of creating an immunity from lawsuits, and allowing said corporations to carry on their unlawful practices with impunity. Section 1770 of the Civil Code defines as unlawful 23 separate unfair or deceptive acts or practices. Another maxim of jurisprudence adopted by the California Legislature is that "for every wrong there is a remedy." Section 3523 Civil Code. This Court has held that under fundamental legal principles, a statute my not be construed as creating a right without a remedy. *Bermite Powder Co. v. Franchise Tax Board of California* (1952) 38 Cal.2d 700, 242 P.2d 9. The Act, with which we are concerned in this appeal was named the Consumers' Legal Remedies Act by the state legislature, and not the Consumers' Protection Act. The very name of the Act suggests that the Legislature intended to provide a remedy for the commission of any act or practice that was defined as "unlawful" under Section 1770(a) of the Civil Code.

The Appellants' interpretation of the CLRA is further supported by the fact that persons or entities alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 have it within their power to avoid any lawsuit under the provisions of Section 1782 of the Civil Code. Under Section 1782, before a consumer can commence an action for damages, the consumer must notify the potential defendant of the particular alleged violations of Section 1770. No action for damages may be maintained if an appropriate remedy is given or agreed to be given within a reasonable time by

the party charged with the violation. Even if a consumer files an action for injunctive relief as the consumer is entitled to do under Section 1782(d), the party being sued can still immediately halt the litigation by agreeing to discontinue the offending acts or practices. Furthermore, under Section 1784 of the Civil Code, no award of damages may be given in any action if the Defendant proves that any violation of Section1770 "was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error" and the defendant makes an appropriate correction, repair or replacement or other remedy of the goods and services. Thus, the Legislature adopted provisions in the CLRA designed to minimize the financial burden of litigation on parties who commit acts or practices in violation of Section 1770.

C. NONE OF THE FEDERAL CASES CITED BY *AMICUS* ARE CONVINCING THAT THE ARGUMENTS OF *AMICUS* ARE CORRECT

Amicus cites *Chavez v. Blue Sky Natural Beverage Co.* (N.D. Cal. 2007) 503 F.Supp.2d 1370. The plaintiff alleged that the defendants represented that the contents of a particular beverage were made in or originated from Santa Fe, New Mexico. Plaintiff alleges that this representation was false, since Blue Sky Beverages were not manufactured or bottled anywhere in New Mexico. The Plaintiff further alleged that he would not have purchased the Blue Sky Beverages had he known that they were not manufactured or bottled in New

Mexico. The Court pointed out that under Section 1780(a) of the Civil Code, the CLRA limits relief to any person who suffers any damage as a result of the use or employment by any person of a method, act or practice declared to be unlawful by the CLRA. The court found that the Plaintiff's alleged injury and damages were nonexistent, because the misrepresentation of the defendants had no value. The Court stated that the plaintiff did not pay a premium for the defendant's beverages because the drinks purportedly originated in Santa Fe, New Mexico. Thus the court construed the word "damage" to mean monetary damage. However, under Section 1780(a), a consumer who has suffered "any damage" may bring an action for restitution. Under the circumstances of the *Chavez* case, the Plaintiff should have been awarded restitution of the amount that he paid for the Blue Sky beverage in reliance upon the misrepresentation of the Defendants that the beverage was made an/or originated from Santa Fe, New Mexico.

In *Lee v. American Express Travel Related Services* (N.D. Cal. 2007), 2007 W.L. 4287557, the defendant brought a motion to dismiss for lack of standing. The motion presented the issue of whether a plaintiff had standing to challenge an unconscionable term in a contract where the challenged unconscionable arbitration provisions had never been implicated in any actual dispute between the parties, and had not had any recognizable impact on the plaintiffs. The Court in *Lee* found that the Plaintiffs could not allege any damage because Plaintiffs did not have a dispute with the Defendants that they

tried unsuccessfully to litigate as a class action. The court rejected the position of the Plaintiff that damage arose from the mere insertion of the unconscionable clauses into the contract. However, it should be pointed out that the court relied upon *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 476, 15 Cal.Rptr.3d 271, where it was held that a court may not presume damages based on the mere insertion of an unconscionable clause into a contract. Of course, the *Wilens* court is the very same court from which Appellants have taken this appeal in the case at bar.

The *amicus* also relies upon *Lozano v. AT&T Wireless Services, Inc.* (9th Cir. 2007) 504 F.3d 718. In *Lozano,* the Plaintiff brought a class action under the CLRA and the UCL challenging the practice of the Defendant of billing its cell phone customers for calls during a billing period other than the billing period in which the calls were made, thereby causing the plaintiff to exceed his allotted airtime minutes in some months, and as a consequence, incur additional charges. The Defendant responded to the complaint by moving to compel arbitration. The District Court refused to compel arbitration on the ground that the arbitration clause contained an unconscionable class action waiver. The Plaintiff subsequently moved for class certification on several theories, including the theory that the defendant included an unconscionable term in its customer agreement, i.e., the class action waiver. The Ninth Circuit reversed the certification of this claim because the class action waiver theory was neither pleaded nor properly considered by the District Court when

granting class certification. The Complaint challenged out-of-cycle billing, not the inclusion of a class action waiver. The Ninth Circuit stated that any class certified under Section 1770(a)(19) necessitates a class definition that includes individuals who sought to bring class actions in California, but were precluded from doing so because of the class action waiver in the customer agreement, and suffered some resulting damage.

Because the Ninth Circuit reversed the certification of the class action waiver class, any discussion of suffering damage is purely dicta. Appellants disagree with the Ninth Circuit's class definition of a class under Section 1770(a)(19) of the Civil Code. Appellants contend that such a class can easily be defined as those consumers/customer who had the same unconscionable provisions inserted into their contracts. While the Ninth Circuit cited *Wilens v. TD Waterhouse Group, Inc., supra,* the court did not specifically deal with an interpretation of the phrase "any damage" in Section 1780(a), since the Court reversed because of the District Court's improper certification of a class based upon the Defendant's insertion of an unconscionable class action waiver in the arbitration agreement.

D. THE ARGUMENT OF *AMICUS* WITH RESPECT TO DECLARATORY RELIEF DEMONSTRATES AN INCREDIBLE LACK OF KNOWLEDGE OF THE LAW CONCERNING DECLARATORY RELIEF, WHICH IS ACCENTUATED BY THE LACK OF ANY AUTHORITIES SUPPORTING ITS ARGUMENTS

Amicus asserts that the Declaratory relief claim of Appellants is a purely

abstract claim. Nothing could be further from the truth. There is nothing abstract about the fact that Sprint inserted several unconscionable contract provisions into its contract of adhesion with the Appellants. The existence of those unconscionable contract provisions is very real. There is nothing hypothetical about them. *Amicus* also asserts that the Appellants have not alleged any actual or threatened harm resulting from the existence of the unconscionable contract provisions. However, it has long been settled that a Plaintiff need not suffer damage in order to bring a declaratory relief action. *Twain Hart Homeowners Assn. v. Patterson* (1987) 193 Cal.App.3d 184, 188, 239 Cal.Rptr. 316.

It is the general rule that in an action for declaratory relief, the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to the rights and duties of the respective parties under a contract and requests that the rights and duties be adjudged. *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 549-550, 305 P.2d 20; *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 947, 148 Cal.Rptr. 379, 582 P.2d 970.

In the following declaratory relief actions, the respective courts found the existence of an actual controversy relating to the rights and duties of the respective parties under a contract. *Application Group, Inc. v. Hunter Group, Inc., supra* [the enforceability of covenants not to compete in a contract]; *Southern California Edison v. Superior Court* (1995) 37 Cal.App.4th 839, 44 Cal.Rptr.2d 227 [determination of the construction or validity of a contract];

Reiner v. Danial (1989) 211 Cal.App.3d 682, 259 Cal.Rptr. 570 [determination of the enforceability of a restrictive covenant]; *Wellenkamp v. Bank of America, supra* [determination of the enforceability of a due-on-sale clause in a deed of trust]; *Rubin v. Toberman* (1964) 226 Cal.App.2d 319, 38 Cal.Rptr. 32 [determination of the enforceability of an indemnity clause in a contract]; *McGuire v. Hibernia Savings & Loan Society* (1944) 23 Cal.2d 719 [actual controversy relating to the legal rights and duties of the respective parties under a written instrument]; *Coruccini v. Lambert* (1952) 113 Cal.App.2d 486, 248 P.2d 457 [sought a declaration that a lease was void]; *Western Gulf Oil Co., supra* [determination of the rights and duties of the respective parties under an indemnity clause].

Amicus also asserts that the Appellants do not have standing to bring a declaratory relief action, because the Appellants do not have standing to bring a CLRA action, which *amicus* refers to as "the underlying action".

There is no legal requirement that any other cause of action exist before a declaratory relief judgment may be imposed. *Southern California Edison Co. v. Superior Court, supra,* 37 Cal.App.4th at pp. 846-847 [the plaintiff may ask for a declaration of rights and duties, either alone or with other relief, and the Court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time.]; *Baxter Healthcare Corporation v. Denton* (2004) 120 Cal.App.4th 333, 360, 15 Cal.Rptr.3d 430 [declaratory relief operates prospectively and not merely for redress of past

wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interest of preventive justice]; *Californians for Native Salmon, etc. Association v. Department of Forestry, supra,* 221 Cal.App.3d at 1426 [declaratory relief is unusual in that it may be brought to determine and declare rights before any actual invasion of those rights have occurred]; *Mycogen Corporation v. Monsanto Co., supra,* 28 Cal.4th at p. 898 [a party may request declaratory relief as a prophylactic measure before a breach occurs]; *Remington v. General Accident Group of Insurance Companies* (1962) 205 Cal.App.2d 394, 397-398, 23 Cal.Rptr. 40 [the purpose of a declaratory judgment is to settle actual controversies before they have ripened into a violation of a contractual obligation; such declaratory judgment may be had before there has been any breach of the obligation in respect to which the declaration is sought]; *Rubin v. Toberman* (1964) 226 Cal.App.2d 319, 326, 38 Cal.Rptr. 32 [declaratory relief exists to enable a party to a contract to determine his rights and liabilities before he has incurred costs, and subjected himself to risks]; *Travers v. Louden* (1967) 254 Cal.App.2d 926, 931, 62 Cal.Rptr. 654; *Roberts v. Reynolds* (1963) 212 Cal.App.2d 824, 827 [the purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation]; *McGuire v. Hibernia Savings & Loan Society, supra,* 23 Cal.2d at pp. 733-734; *Gunn v. Giraudo* (1941) 48 Cal.App.2d 622, 627 [it is the relationship between the parties created by the

contract, and more specifically the interpretation of their respective rights and duties under it which the statute looks to, and not merely whether the breach of one or the other has raised an issue presently]; *Sanctity of Human Life Network v. CHP* (2003) 105 Cal.App.4th 858, 872, 129 Cal.Rptr.2d 708 [a plaintiff may bring an action for declaratory relief before an actual invasion of rights has occurred].

The Court in *Californians for Native Salmon, etc. Association, supra,* stated at p.1426:

> It was a defect of the judicial procedure which developed under the common law that the doors of the Courts were invitingly opened to a plaintiff whose legal rights had already been violated, but were rigidly closed upon a party who did not wish to violate the rights of another, or have his or her own rights violated, thus compelling him or her, where a controversy arose, to wait until the anticipated wrong had been done before an adjudication of their differences could be obtained. This was a penalty placed upon the party who wished to act lawfully and in good faith which the statute providing for declaratory relief has gone far to remove. See *Gunn v. Giraudo, supra,* 48 Cal.App.2d at pp. 626-627.

It should also be pointed out that any lack of standing of the Appellants to bring a CLRA claim would be based solely upon a showing of harm from the unlawful act of inserting unconscionable provisions into Sprint's contract of adhesion in violation of Section 1770(a)(19) of the Civil Code. Sprint's violation of Section 1770(a)(19) is very real. The declaratory relief claim does not depend upon the existence of a valid CLRA claim, and this is particularly so when the opposing party's argument for the invalidity of the CLRA claim is that there was no establishment of harm, and not that there was no unlawful act

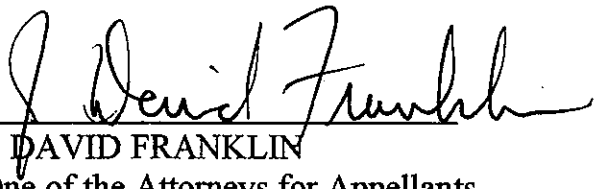
or practice committed under Section 1770(a).

E. CONCLUSION

The decision of the Court of Appeal improperly limiting the express terms of the CLRA and its misreading of *Kagan* poses a serious threat to the strong public policy codified in the CLRA to provide the utmost protection to consumers. For all of the foregoing reasons, the decision of the Court of Appeal should be reversed.

DATED: February 23, 2008

FRANKLIN & FRANKLIN

By: 

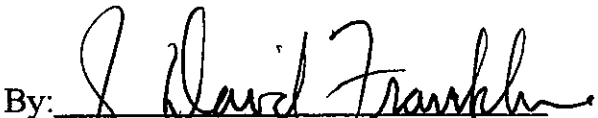
J. DAVID FRANKLIN
One of the Attorneys for Appellants

CERTIFICATE OF APPELLANT'S COUNSEL OF LENGTH OF BRIEF

Counsel for Plaintiff and Appellant certifies that the word count of the computer program used to prepare Appellants' Answer to *Amicus* Brief is 5186 words. The word count in the body of the brief includes page citations in the Appellate record as well as legal authorities cited in the body of the brief.

DATED: February 23, 2008

FRANKLIN & FRANKLIN

By: 

J. DAVID FRANKLIN
One of the Attorneys for
Appellants

Pamela Meyer and Timothy Phillips, Individually and On Behalf of all others Similarly Situated v. Sprint PCS and Sprint Spectrum, LP California Supreme Court, Case No. #S153846

PROOF OF SERVICE

I, J. David Franklin, declare as follows:

1. My business address is 550 West0 "C" Street, Suite 950, San Diego, California 92101. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service; I am over the age of eighteen and I am not a party to this action.

2. On February 25, 2008, I served the following documents:

APPELLANT'S ANSWER TO AMICUS BRIEF OF US CHAMBER OF COMMERCE

on the following parties to this action:

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Fourth Appellate District, Div. Three
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☒ (BY MAIL) C.C.P. § 1013(a)(1) & (3)
I deposited such envelope in the mail at San Diego, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (BY PERSONAL SERVICE) C.C.P. § 1011; I delivered such envelope by and to the addressee.

☐ (BY OVERNIGHT MAIL) C.C.P. § 1013(c); I am readily familiar with the practice of this firm for collection and processing of correspondence for mailing by overnight mail. Pursuant to this practice, correspondence would be deposited in the overnight mail location located at 550 West "C" Street, San Diego, CA 92101 in the ordinary course of business on the date of this declaration.

☐ (BY FACSIMILE) At the time of transmission, I was at least 18 years of age and not a party to this legal proceeding. I transmitted the above-referenced documents by facsimile machine, pursuant to California Rules of Court, Rule 2006. The facsimile machine I used complied with Rule 2003 and no error was reported by the machine. Pursuant to Rule 2006, I caused the machine to print a transmission record of the transmission, a copy of which

is available upon request.

☐ (FEDERAL) 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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 25, 2008, at San Diego, California.

J. David Franklin