No. S153846

In the Supreme Court of the State of California

PAMELA MEYER et al.,

Plaintiffs and Appellants

vs.

SPRINT SPECTRUM, L.P.,

Defendant and Respondent.

After Decision by the Court of Appeal, Fourth Appellate District,
Division Three, Case No. G037375
On Appeal from the Superior Court of the State of California, 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 California Business and Professions Code Section 17209 and California Rule of Court 8.29(a)

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, rules 14.5, 56(i), 57(c) and 59(d))

The undersigned certifies that the SPRINT-NEXTEL CORP. is an interested entity that must be listed under rule 14.5(d) and is the ultimate holding company for Defendant and Respondent SPRINT SPECTRUM, L.P. SPRINT-NEXTEL CORP. has an ownership interest of 10 percent or more in SPRINT SPECTRUM, L.P.

DATED: December 12, 2007.

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I.

INTRODUCTION

The issues before the Court ask what is required for a plaintiff to have standing to bring a cause of action under the Consumers Legal Remedies Act [Cal. Civ. Code § 1750 et seq. ("CLRA")] based on the insertion of an allegedly unconscionable provision in a contract [*id.* § 1770(a)(19)] and under the Declaratory Judgment Act [Cal. Civ. Proc. Code § 1060 et seq.].[1]

According to plaintiffs and appellants Pamela Meyer and Timothy Phillips ("plaintiffs"), *nothing* is required for a plaintiff to have standing under either Act. Under their view, the moment a provision is inserted in a form contract that *any* consumer believes is unconscionable, *anyone* could assert a claim *under any circumstances*, constrained—so to speak—only by whim.

This is not correct. By its terms, the CLRA confers standing only on a "consumer who suffers . . . damage as a result

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1 We use the following abbreviations in this brief: "AA" for the Appellants' Appendix filed by plaintiffs in the Court of Appeal; "AOB" for the Appellants' Opening Brief in the Court of Appeal; "ARB" for the Appellants' Reply Brief in the Court of Appeal; "slip op." for the Court of Appeal's slip opinion; "Petn. for Review" for the Petition for Review filed by plaintiffs in this Court; "OBM" for the plaintiffs' Opening Brief on the Merits in this Court; "ARJN" for the Appellants' Request for Judicial Notice in this Court; ORJN" for Sprint's Opposition to Request for Judicial Notice in this Court and ARRJN for plaintiffs' Reply to Sprint's ORJN.

of" allegedly unlawful business conduct. Cal. Civ. Code § 1780(a). Likewise, the Declaratory Judgment Act requires the plaintiff to be involved in an "actual controversy" with the defendant "relating to [their] rights and duties." Cal. Civ. Proc. Code § 1060.

The terms challenged here, which appear in a form customer service agreement used by defendant and respondent Sprint Spectrum L.P. ("Sprint") in providing cellular telephone service, can affect a consumer only if specified events occur. For example, one of the challenged terms is a clause requiring the arbitration of disputes. That clause would not affect a consumer unless a dispute arose between that consumer and Sprint, and unless either Sprint or the consumer sought to arbitrate the dispute. But in that event, the dispute in which arbitration was sought would provide an appropriate forum for challenging the arbitration term.

Plaintiffs here, however, seek to challenge the lawfulness of the terms in the abstract and removed from any of the events that trigger any of the terms in question. This attempt to challenge the terms on the face of the contract does not satisfy the "damage" and "actual controversy" requirements of the CLRA and Declaratory Judgment Act for standing. Because plaintiffs failed to allege facts establishing standing under either measure following several attempts, the trial court dismissed their action after sustaining a demurrer by Sprint without leave to amend and the

Court of Appeal affirmed. Because plaintiffs cannot demonstrate any prejudicial error, this Court should affirm the Court of Appeal.[2]

II.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In presenting the background, we follow the opinion of the Court of Appeal, Fourth Appellate District, Division Three, with incorporation of supplementary information from the record for the sake of completeness and clarity. *See Miller v. Department of Corrections*, 36 Cal. 4th 446, 453 n.3 (2005).

A. Plaintiffs' Predecessor Brings An Action Against Sprint Spectrum L.P. ("Sprint"), Based On Sprint's Insertion Of Allegedly Unconscionable Terms In Its Form Customer Service Agreement

On May 27, 2004, the original plaintiff, Susanne Ball, brought this action in the Orange County Superior Court against Sprint, both correctly as Sprint Spectrum L.P. and erroneously as "Sprint PCS." (AA 1-15; *see* slip op. at 3) Admitting that she was *not* a Sprint customer, she sued Sprint purportedly on behalf of the

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2 Plaintiffs have asked this Court to take judicial notice of certain documents filed in a different action, now entitled *Pamela Meyer and Timothy Phillips v. Sprint PCS, et al.*, which was filed in the Contra Costa County Superior Court under No. C 03-03044 ("the Contra Costa action"). (ARJN at 1-3; *id.*, Exs. A, B, & C). Sprint has opposed the request. (ORJN at 1-9; *id.*, Exs. 1-4) Because this Court has yet to dispose of the matter, Sprint will address its substance at appropriate points in the body of this brief.

general public, including two causes of action under the Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code § 17200 et seq.) (AA 3-6; *see* slip op. at 3) She alleged that Sprint had inserted unconscionable terms in its form customer service agreement for wireless telephone service and had thereby engaged in unlawful business conduct. (AA 3-6)[3] She did not allege any dispute independent of the presence of the challenged terms in the form contract but instead maintained that the mere inclusion of those terms in the contract gave rise to causes of action. (*Id.*) Sprint answered, generally denying the complaint's allegations. (AA 283)

B. Plaintiffs Amend The Complaint To Assert CLRA And Declaratory Judgment Act Causes Of Action; Sprint Demurs On Lack Of Standing Grounds And The Trial Court Sustains The Demurrer With Leave To Amend

In November 2004, California voters approved an initiative statute, designated on the ballot as Proposition 64, which

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[3] As ultimately specified following amendments to the complaint, the allegedly unconscionable terms that Sprint inserted in its form agreement were these: (1) a provision requiring the parties to submit disputes under the agreement to binding arbitration pursuant to the rules of Judicial Arbitration and Mediation Services, the National Arbitration Forum, or an organization chosen by the parties; (2) a provision waiving the right to resolve disputes through a jury trial; (3) a provision waiving class actions in arbitration; (4) the absence of any provision for discovery before arbitration; (5) a provision splitting the cost of arbitration; (6) a provision disclaiming warranties and limiting liability; (7) a provision allowing Sprint to change the terms of the customer service agreement unilaterally; (8) a provision imposing a 60-day limitation period for initiating billing disputes; and (9) a provision imposing a $150 early termination fee. (AA 25-30; *see* slip op. at 3)

amended the UCL. *See Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 227 (2006). Following the amendment, the UCL grants standing *only* to public prosecutors and to private persons who have "suffered injury in fact and ha[ve] lost money or property as a result of . . . unfair competition." Cal. Bus. & Prof. Code § 17204, as amended by Prop. 64, § 3, approved Nov. 2, 2004, eff. Nov. 3, 2004. The purpose of the voters in limiting standing was "to limit . . . abuses by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact[,]' " and thereby to " '[c]lose the frivolous shakedown lawsuit loophole.' " *Californians for Disability Rights*, 39 Cal. 4th at 228, 229 (italics omitted).

Following the enactment of Proposition 64, Ball withdrew from the litigation; Meyer and Phillips were substituted in as plaintiffs. (Slip op. at 3)

In July 2005, plaintiffs filed a second amended complaint against Sprint, for themselves and purportedly for a class of similarly situated persons. (AA 138, 286) The complaint was based on Sprint's insertion of allegedly unconscionable terms in its form customer service agreement and included causes of action under the CLRA and the Declaratory Judgment Act. (*Id.*)

Sprint demurred. (AA 132-52, 286) As one ground, it asserted that plaintiffs failed to state facts establishing standing. (AA 141-44) As another, it asserted that they failed to state facts

establishing the unconscionability of any of the terms. (AA 144-51) Plaintiffs opposed the demurrer [AA 153-81, 286] and Sprint replied [AA 182-96, 287].

In October 2005, as corrected nunc pro tunc, the trial court issued an order sustaining Sprint's demurrer on the grounds of lack of standing and lack of unconscionability, and granted plaintiffs leave to amend. (AA 197-99, 287)

C. Plaintiffs File A Third Amended Complaint Containing UCL, CLRA, And Declaratory Judgment Act Causes of Action; Sprint Demurs On Grounds Including Lack Of Standing, And The Trial Court Sustains The Demurrer With Leave To Amend

In November 2005, plaintiffs filed a third amended complaint against Sprint, yet again for themselves and purportedly for a class, and yet again based on Sprint's insertion of allegedly unconscionable terms in its form customer service agreement. (AA 205, 287) The complaint now included a resurrected cause of action under the UCL alongside causes of action under the CLRA and the Declaratory Judgment Act. (*Id.*)

Sprint demurred, claiming, among other grounds, that plaintiffs failed to state facts constituting a cause of action under the UCL, the CLRA, or the Declaratory Judgment Act, as to either standing or unconscionability. (AA 200-21, 287) Again, plaintiffs opposed [AA 222-47, 287] and Sprint replied [AA 248-57, 287].

On January 26, 2006, the trial court issued an order sustaining Sprint's demurrer on the grounds indicated above, and granted plaintiffs leave to amend one last time. (AA 258-59, 287)

D. Plaintiffs File A Fourth Amended Complaint Containing UCL, CLRA, And Declaratory Judgment Act Causes of Action, Sprint Demurs On Grounds Including Lack Of Standing; The Trial Court Sustains The Demurrer Without Leave To Amend And Enters Judgment Of Dismissal, And Plaintiffs Appeal

On February 10, 2006, again for themselves and purportedly for a class, plaintiffs filed against Sprint a fourth—and final—amended complaint, which was essentially the same as the third one, again based on Sprint's insertion of allegedly unconscionable terms in its form customer service agreement, and again including cause of actions under the UCL, the CLRA, and the Declaratory Judgment Act. (AA 18-52, 288; *see* slip op. at 2, 3)

On March 16, 2006, Sprint demurred to the fourth amended complaint, claiming, among other grounds, that plaintiffs failed to state facts constituting a cause of action as to either standing or unconscionability. (AA 53-82, 288; *see* slip op. at 2, 3) In opposition, plaintiffs did not request leave to amend. (AA 83-128, 288; slip op. at 4) Again, Sprint replied. (AA 129-260, 288)

On April 18, 2006, noting that plaintiffs' fourth amended complaint was "essentially the same as" the third, and without reaching the ground of lack of unconscionability of any of

terms in Sprint's form customer service agreement, the trial court sustained Sprint's demurrer without leave to amend on the ground of lack of standing. (AA 263, 268-69, 288; *see* slip op. at 3)

On May 12, 2006, the trial court entered judgment of dismissal in favor of Sprint and against plaintiffs. (AA 267-268, 288; *see* slip op. at 4) Six days later, Sprint filed notice of entry of judgment. (AA 265-71, 288)

On July 20, 2006, plaintiffs filed a notice of appeal. (AA 272-76; *see* slip op. at 4)

E. The Court Of Appeal Affirms The Trial Court's Judgment Of Dismissal, Concluding That Plaintiffs Lacked Standing Under The UCL, The CLRA, And The Declaratory Judgment Act

In the Court of Appeal, plaintiffs contended that the trial court's order sustaining Sprint's demurrer to the fourth amended complaint without leave to amend was erroneous as to all of the causes of action, under the UCL, the CLRA, and the Declaratory Judgment Act. (AOB at 1-51; ARB at 1-18)

On May 16, 2007, the Court of Appeal affirmed the trial court's judgment. (Slip op. at 1-18) It subjected the underlying order sustaining Sprint's demurrer to independent or de novo review and discerned no error in the order. (*Id.* at 2-4, 4-18) It concluded that plaintiffs had failed to state facts establishing standing under the

UCL. (*Id.* at 4-11) Rejecting plaintiffs' reliance on *Kagan v. Gibraltar Sav. & Loan Assn.*, 35 Cal. 3d 582 (1984), it arrived at the same conclusion as to the CLRA. (*Id.* at 11-17) And it did the same as to the Declaratory Judgment Act as well. (*Id.* at 17-18) The Court of Appeal also found no error in the sustaining of the demurrer without leave to amend, noting "[p]laintiffs did not request leave to amend from the trial court, and they do not argue on appeal that the trial court erred by denying leave to amend." (*Id.* at 4)

F. On Plaintiffs' Petition Presenting Issues Of Standing Under The CLRA And The Declaratory Judgment Act, This Court Grants Review

On June 26, 2007, plaintiffs filed a petition for review in this Court presenting issues involving standing under the CLRA and the Declaratory Judgment Act [Petn. for Review at 1]. *Meyer v. Sprint Spectrum*, No. S153846, Docket (Register of Actions), *available at* http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=477917&doc_no=S153846 (visited December 12, 2007).

After Sprint answered and plaintiffs replied, this Court granted review. *Id.* Although the Court did not specify issues for review, it described the issues presented as involving standing under the CLRA and the Declaratory Judgment Act. *Id.*, Case Summary (visited December 12, 2007).

III.

ARGUMENT

A. Plaintiffs Were Required To Allege Facts With Specificity That Demonstrated Their Standing To Sue

A defendant may demur on the ground that a complaint "does not state facts sufficient to constitute a cause of action." Cal. Civ. Proc. Code § 430.10(e). The demurrer does not "test" the truth of the complaint's facts, but instead tests their "legal sufficiency." *Donabedian v. Mercury Ins. Co.*, 116 Cal. App. 4th 968, 994 (2004); *accord, e.g., Rakestraw v. California Physicians' Service*, 81 Cal. App. 4th 39, 43 (2000).

Although a court must liberally construe the complaint's factual allegations, the plaintiff must state "facts" [Cal. Civ. Proc. Code § 430.10(e)], not "[c]ontentions, deductions or conclusions of fact or law." *Young v. Gannon*, 97 Cal. App. 4th 209, 220 (2002); *accord, e.g., Levy v. Nat. Auto. & Cas. Ins. Co.*, 86 Cal. App. 2d 632, 634 (1948) (an "allegation" that is "but a conclusion of the pleader" does not state a "fact"); *see, e.g., Serrano v. Priest*, 5 Cal. 3d 584, 591 (1971) (demurrer admits "all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law"). In addition, the "facts" stated "must be . . . specific, not vague or conclusionary" [*Rakestraw*, 81 Cal. App. 4th at 44] or "generic" [*Casey v. U.S. Bank N.A.*, 127 Cal. App. 4th 1138, 1153 (2005)]. *See, e.g., Faulkner v. Cal. Toll Bridge Authority*, 40 Cal.

2d 317, 330 (1953) (plaintiffs "must allege much more than mere conclusions of law; they must aver the specific facts from which the conclusions entitling them to relief would follow").

Although the defendant brings a demurrer, it is the plaintiff who bears the burden to show that he or she has stated facts constituting a cause of action. *See, e.g., Rakestraw*, 81 Cal. App. 4th at 43. "[I]t is well settled that the presumptions are always against the [plaintiff], and all doubts are to be resolved against him, for it is to be presumed that he stated his case as favorably as possible to himself . . . ; if a fact necessary to the . . . cause of action is not alleged it must be taken as having no existence . . . ." *Feldesman v. McGovern*, 44 Cal. App. 2d 566, 570-71 (1941); *accord Richmond Redevelopment Agency v. Western Title Guaranty Co.*, 48 Cal. App. 3d 343, 349 (1975). The plaintiff also bears the burden to show that it is reasonably possible that he or she could state facts constituting a cause of action if granted leave to amend. *E.g., Hendy v. Losse*, 54 Cal. 3d 723, 742 (1991); *Goodman v. Kennedy*, 18 Cal. 3d 335, 349 (1976).

A cause of action necessarily encompasses facts that establish the plaintiff's right to sue in the first place—that is, the plaintiff's "standing." *See Powers v. Ashton*, 45 Cal. App. 3d 783, 787 (1975) (to state facts constituting cause of action, plaintiff must state facts establishing "standing"); *Parker v. Bowron*, 40 Cal. 2d 344, 351 (1953) ("[T]he question of standing" implicates the "right to relief," and "goes to the existence of a cause of action. . . .

Where the complaint states a cause of action in someone, but not in the plaintiff, a . . . demurrer for failure to state a cause of action will be sustained."); *see also Blumhorst v. Jewish Family Services of Los Angeles*, 126 Cal. App. 4th 993, 1001 (2005).

Under the independent review standard that this Court applies to court of appeal determinations [*see Smiley v. Citibank*, 11 Cal. 4th 138, 146 (1995)], we shall show that the Court of Appeal correctly concluded that plaintiffs failed to state facts in their fourth amended complaint establishing standing under either the CLRA or Declaratory Judgment Act.

The Court of Appeal was also required to examine the trial court's order denying plaintiffs leave to amend their fourth amended complaint for "abuse of discretion" [*Hendy*, 54 Cal. 3d at 742; *accord Goodman*, 18 Cal. 3d at 349]—which entails deference so long as the denial does not "exceed[ ] the bounds of reason" [*Shamblin v. Brattain*, 44 Cal. 3d 474, 478 (1988)]. The reviewing court asks whether plaintiffs "demonstrate[d]" that there was a "reasonable possibility" that they could state facts constituting a cause of action "by amendment" [*Hendy*, 54 Cal. 3d at 742; *accord Goodman*, 18 Cal. 3d at 349].

The Court of Appeal apparently reviewed de novo the denial of leave to amend and did not examine it merely for abuse of discretion, inasmuch as it referred to the former standard but not the

latter. (Slip op. at 4) We shall show that the Court of Appeal's conclusion on this point was also correct.

B. The Court Of Appeal Correctly Affirmed The Trial Court's Judgment Of Dismissal On Plaintiffs' CLRA And Declaratory Judgment Act Causes Of Action Because Plaintiffs Failed To State Facts Establishing Standing

1. Plaintiffs Failed To State Facts Establishing Standing For Their CLRA Cause Of Action

a. The CLRA Confers Standing Only On Those Who Have Suffered Damage As A Result Of Allegedly Unlawful Business Conduct

The CLRA is designed "to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Cal. Civ. Code § 1760; *accord, e.g., Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1077 (1999). To that end, it declares certain conduct to be "unlawful" in any "transaction" involving the "sale or lease of goods or services to any consumer," including "[i]nserting an unconscionable provision in [a] contract." Cal. Civ. Code § 1770(a)(19). It provides for individual actions [*id.* § 1780] and class actions [*id.* § 1781], and provides for relief in both sorts of action, including actual damages, injunction, restitution, and punitive damages [*id.* §§ 1780(a), 1780(a) & 1781(a)]. The evils it aims to "alleviate" are the various "economic" and attendant "social" "problems stemming from [unfair and] deceptive business practices." *Broughton*, 21 Cal. 4th at 1077.

The CLRA requires a plaintiff to have standing to bring a cause of action whether individually or as a representative for a class. *See, e.g., Aron v. U-Haul Company of California*, 143 Cal. App. 4th 796, 802 (2006) (determining whether plaintiff had "standing to assert a claim" under the CLRA); *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1303 (S.D. Cal. 2003) ("A violation of the CLRA may only be alleged by a consumer.").

To have standing to bring a cause of action, either individually or as a representative for a class, the CLRA requires that the plaintiff be a "consumer who suffers . . . damage as a result of" business conduct "declared to be unlawful." Cal. Civ. Code § 1780(a); *see id.* § 1781(a); *see also Wilens v. TD Waterhouse Group, Inc.*, 120 Cal. App. 4th 746, 754 (2003) ("[r]elief under the CLRA is specifically limited to those consumers who suffer damage"); *Mass. Mut. Life Ins. Co. v. Super. Ct.*, 97 Cal. App. 4th 1282, 1292 (2002) (the "limitation on relief" in the CLRA "requires that plaintiffs . . . show . . . that a defendant's [unlawful] conduct . . . caused them harm").

The CLRA imposes the same requirement on a plaintiff bringing a cause of action for a class, because it provides for a class claim only by a "consumer" who is "entitled to bring" an individual claim [*id.* § 1781(a)], meaning a "consumer who suffers . . . damage as a result of" such conduct [*id.* § 1780(a)].

In construing the CLRA's "damage" requirement, this Court undertakes a single "fundamental task" [*Day v. City of Fontana*, 25 Cal. 4th 268, 272 (2001)], which is to "ascertain the intent of the Legislature" [*Cummins, Inc. v. Super. Ct.*, 36 Cal. 4th 478, 487 (2005)], that is to say, to determine the statute's "meaning" [*Diamond Multimedia Sys., Inc. v. Super. Ct.*, 19 Cal. 4th 1036, 1055 (1999)]. In doing so, the Court sets out to "effectuate" the statute's "purpose." *Cummins,* 36 Cal. 4th at 487.

As stated, the CLRA's purpose focuses on protecting consumers against unlawful conduct *involving the sale or lease of goods or services*. *See* Cal. Civ. Code §§ 1760, 1770(a). In light of that purpose, "damage" is reasonably taken to mean not "*any* loss," but instead "*economic* loss." *See Aron*, 143 Cal. App. 4th at 803 (construing "damage" as "*economic* injury" (italics added)).

Although the CLRA should be "liberally construed" [Cal. Civ. Code § 1760], any such construction could not extend beyond the evils it aims to "alleviate," which were at bottom "economic problems." *Broughton*, 21 Cal. 4th at 1077. Since it targets "*economic* problems," "damage" must reasonably be read to mean "*economic* loss." *See Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal. App. 3d 1377, 1385 (1990) (standing under a statute is "based upon . . . the purpose for which the . . . statute was enacted").

To read the CLRA to require a plaintiff to state facts establishing an economic loss is reasonable. Such a reading of the statute avoids rendering any provision "nugatory." *Troppman v. Valverde*, 40 Cal. 4th 1121, 1135 n.10 (2007) (internal quotation marks omitted). At the same time, it does not immunize any unlawful business conduct from challenge. That is because even if any given private person lacked standing, another private person might. And even if *no* private person had standing, that would not end the matter. Under the UCL, public prosecutors are authorized to bring a cause of action against *any* business [Cal. Bus. & Prof. Code § 17204] for "*any* [allegedly] unlawful . . . business" conduct [*id.* § 17200 (italics added)].

Indeed, after Proposition 64, it would be unreasonable to read the CLRA any other way. As stated, the voters amended the UCL to limit standing to public prosecutors and to private persons who have "suffered injury in fact and ha[ve] lost money or property as a result of . . . unfair competition." Cal. Bus. & Prof. Code § 17204, as amended by Prop. 64, § 3, approved Nov. 2, 2004, eff. Nov. 3, 2004. The voters did so to " '[c]lose the frivolous shakedown lawsuit loophole.' " *Californians for Disability Rights*, 39 Cal. 4th at 229 (italics omitted). To read the CLRA *not* to require a plaintiff to have suffered an economic loss as a result of allegedly unlawful business conduct would open a new "loophole" not long after that of the UCL was closed, and would open one more dangerous still. Whereas the UCL has never made "damages" of any sort available as relief [*id.* at 232], the CLRA has always done

so, providing not only for "[a]ctual damages" but for "punitive damages" as well [Cal. Civ. Code § 1780(a)(1), (4)]. If unlimited standing under the UCL invited an intolerable threat of "frivolous shakedown lawsuits" even without the availability of any damages, unlimited standing under the CLRA would invite a threat even more intolerable with its provision for punitive as well as actual damages.

This is likely why the Legislature has never sought to amend the CLRA to loosen its standing requirement in response to intermediate appellate authority holding that a cause of action under the CLRA may only be brought by a consumer who has suffered damage. *Wilens*, 120 Cal. App. 4th at 754; *Mass. Mut. Life Ins. Co.*, 97 Cal. App. 4th at 1292. And the voters who approved the Proposition 64 amendments to the UCL would surely have approved a corresponding standing requirement in the CLRA had there been *any* reasonable debate as to whether the CLRA included such a requirement. Since the language of the CLRA plainly stated such a requirement, and case law had so held, there was no need to include parallel amendments to the CLRA in Proposition 64.

Not to the contrary is *Kagan v. Gibraltar Sav. & Loan Assn.* *Kagan* held that the CLRA does not permit a class action defendant to "pick off" a prospective class action plaintiff by remedying, after the fact, the damage that gave the plaintiff standing in the first place. 35 Cal. 3d at 587-95. That issue is not presented here and turns on a CLRA provision that specifies when an action may continue after the defendant has remedied a prospective class action plaintiff's

damage. Cal. Civ. Code § 1782(a). In analyzing this distinct issue, *Kagan* acknowledged that the Act imposes a "standing requirement" that demands that the plaintiff "suffer[ ] . . . damage as a result of" [Cal. Civ. Code § 1780(a)] allegedly unlawful conduct. 35 Cal. 3d at 593. Although section 1782(a) made it unnecessary to determine what suffices as "damage," *Kagan* added that "damage" was not limited to "pecuniary loss," but extended to the "infringement of any legal right" against unlawful conduct. *Id.*

In *Kagan*, the plaintiff suffered "damage as a result of" such conduct, because she suffered economic transaction costs in dealing with the defendant and opportunity costs in *not* dealing with others. *Id.* at 587-89. Consequently, *Kagan* cannot be read to hold that standing does *not* require damage as a result of allegedly unlawful business conduct. Nor has it been so read by any of the numerous reported decisions that have cited it since it was decided more than 20 years ago.[4] There is no reason to read it in that fashion now.

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4 *See Fairbanks v. Super. Ct.*, 154 Cal. App. 4th 435, 443 n.5 (2007); *First American Title Ins. Co. v. Super. Ct.*, 146 Cal. App. 4th 1564, 1575 (2007); *Best Buy Stores, L.P. v. Super. Ct.*, 137 Cal. App. 4th 772, 779 (2006); *Smith v. Wells Fargo Bank, N.A.*, 35 Cal. App. 4th 1463, 1474 (2005); *Wilens*, 120 Cal. App. 4th at 755; *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 869 (2002); *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 624 (1996); *Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 422 (1987); *Estate of Migliaccio v. Midland Nat'l. Life Ins. Co.*, 436 F. Supp. 2d 1095, 1109 (C.D. Cal. 2006); *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1147 (N.D. Cal. 2005); *Leardi v. Brown*, 394 Mass. 151, 161 (1985); *Cassano v. Gogos*, 20 Mass. App. Ct. 348, 352 (1985); *Tietsworth v. Harley-Davidson, Inc.*, 261 Wis. 2d

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b. Plaintiffs' Arguments Against The CLRA's Standing Requirement Are Unpersuasive

Plaintiffs claim that the CLRA does not limit standing to consumers who have suffered damage as a result of unlawful conduct. (OBM at 11-37) They first argue that the CLRA's purpose compels a reading of the Act as not requiring damage for standing. (*Id.* at 11-15; *see id.* at 24) But there is nothing in the statute's consumer protection purpose [Cal. Civ. Code § 1760] that precludes the imposition of any standing requirements. In any event, the statute's purpose does not operate independently of its provisions—that is to say, the "ends" it seeks do not negate the "means" by which it seeks them. Indeed, as this Court has declared, the "purpose" of a statute is "not a mantra" that can be "invoke[d]" to avoid the statute's provisions. *In re Young*, 32 Cal. 4th 900, 909 (2004) (internal quotation marks omitted). So it is here. The CLRA's consumer-protection purpose does not trump its express provision imposing standing requirements on consumers.

Plaintiffs then argue that by declaring certain business conduct "unlawful" [Cal. Civ. Code § 1770], the CLRA authorizes any person to bring a cause of action—at least any person who has been "expos[ed]" to such conduct. (OBM at 16) They also assert that by providing that a "consumer who suffers . . . damage as a

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755, 766 n.4 (Wis. App. 2003), *reversed on another ground*, 270 Wis. 2d 146 (Wis. 2004).

result of" allegedly unlawful business conduct "may bring [a cause of] action . . . to recover or obtain" any of the "relief" specified [Cal. Civ. Code § 1780(a)], the statute "does not establish 'standing requirements,' " but merely "defines what type of remedies" are available. (OBM at 16-17)

Plaintiffs' assertions are empty. On its face, the CLRA establishes "standing requirements," since it makes the "remedies" it "defines" available *not* to any person who might seek them, but *only* to a "consumer who suffers . . . damage as a result of" allegedly unlawful business conduct. Cal. Civ. Code § 1780(a).

Also empty is plaintiffs' assertion that by providing that an "action for injunctive relief brought" against a business "may be commenced without compliance" with certain requirements for notifying the business of the conduct in question and demanding its rectification [Cal. Civ. Code § 1782(d)], the CLRA authorizes an *uninjured* person to bring a cause of action for injunctive relief. (OBM at 18) The Act's plain language is to the contrary. The Act authorizes injunctive relief as follows: "Any consumer *who suffers any damage as a result of* [conduct prohibited by Section 1770] may bring an action against that person to recover or obtain any of the following: . . . [¶] (2) An order enjoining the methods, acts or practices." *Id.* § 1780(a) (italics added). Thus, injunctive relief likewise may be sought only by those who have suffered damage.

Plaintiffs then argue that *Kagan* read the CLRA not to require damage as a result of allegedly unlawful business conduct for standing, and did so correctly. (OBM at 18-28) We have shown that *Kagan* acknowledged that the Act imposes a "standing requirement" that demands that the plaintiff "suffer[ ] . . . damage as a result of" [Cal. Civ. Code § 1780(a)] allegedly unlawful conduct [35 Cal. 3d at 593]. True, *Kagan* stated that "damage" was not limited to "pecuniary loss," but extended to the "infringement of any legal right." *Id.* But in *Kagan*, there was "damage" of the requisite sort—meaning economic loss—in the form of transaction and opportunity costs, and the Court's discussion of the "damage" requirement was unnecessary to its decision because the plaintiff had standing under the CLRA's "pick off" provision [Cal. Civ. Code § 1782(a)]. *Id.* at 587-89. Had *Kagan* read the statute as plaintiffs argue, for the reasons stated, it would have read it incorrectly.

Plaintiffs next argue that the CLRA should be construed not to require damage as a result of allegedly unlawful business conduct, in order to provide "remedies" for "wrongs." (OBM at 28-30) Plaintiffs beg the fundamental question: For what "wrongs" does the statute provide "remedies"? The statute itself gives the answer. It provides "remedies" only for "wrongs" *resulting in damage to a consumer*. For without such damage, no person "may bring [a cause of] action," whether individually or as a representative for a class, and, a fortiori, no person may "recover or obtain" "[a]ny . . . relief." Cal. Civ. Code § 1780(a) (individual action); §§ 1780(a), 1781(a) (class action).

As the voters concluded with respect to the UCL, to license private persons who have not suffered any economic loss to bring a cause of action to "remedy" perceived wrongs imposes considerable costs on our courts and society. The language of the CLRA shows that the Legislature struck the same balance in this statute that the voters would later strike in the UCL—standing to bring claims is limited to private persons who have suffered economic loss, while public prosecutors retain the right to bring enforcement actions to police business conduct that is otherwise not reached through private actions.

Lastly, plaintiffs argue that to read the CLRA to require damage as a result of allegedly unlawful business conduct for standing would lead to " 'absurd consequences.' " (OBM at 12 (quoting *Catholic Mutual Relief Society v. Super. Ct.*, 42 Cal. 4th 358, 373 (2007)); *see id.* at 30-37) One "absurd consequence," according to plaintiffs, would be to allow businesses to engage in unlawful conduct, including the insertion of unconscionable provisions in contracts, without check. (*Id.* at 30-35; *see id.* at 25-27 (supposed "chilling effect on consumers" of unlawful business conduct notwithstanding the absence of resulting damage))

But the Legislature presumably targeted business conduct that is likely to cause economic harm to consumers, and thus the conduct the Legislature had in mind likely will trigger standing. If any given business conduct turns out not to result in damage, however, it would hardly merit suit by anyone. And if any

business conduct inflicts no economic loss on anyone, yet it somehow amounts to a significant "wrong," public prosecutors could sue under the UCL. Cal. Bus. & Prof. Code § 17204.

According to plaintiffs, another "absurd consequence" of reading the CLRA to require damage as a result of the challenged conduct for standing would be to effect a "waiver" by consumers of some "provision" of the statute. (OBM at 35-37) To be sure, the statute declares any "waiver" of any "provision" to be "contrary to public policy and . . . unenforceable and void." Cal. Civ. Code § 1751. But no such "waiver" appears. There is no provision of the Act granting standing to consumers who do *not* suffer damage as a result of allegedly unlawful conduct, and hence no provision of that sort that would be subject to "waiver." There is nothing "absurd" about reading the Act in accordance with its provisions.[5]

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5 In the course of their "absurd consequences" argument, plaintiffs devote much effort to arguing that, along with other terms, the arbitration clause in Sprint's form customer service agreement is in fact unconscionable. (OBM at 32-34; *see id.* at 27-28) The point, however, is outside the issues on review, which involve *standing* to bring a cause of action based on the insertion of an allegedly unconscionable provision in a contract. Although the trial court at one point held that plaintiffs failed to state facts establishing that the challenged provisions were unconscionable (AA 258), the Court of Appeal did not reach that issue. That potential ground for affirming the trial court's judgment, therefore, would be a matter for the Court of Appeal if, and only if, plaintiffs can show error in the lack of standing ground on which the Court of Appeal affirmed.

Reduced to its essence, plaintiffs' claim that the CLRA does not require a plaintiff to suffer damage as a result of allegedly unlawful conduct is a complaint that the Legislature was unwise in inserting its standing requirement into the Act. But "[c]ourts do not sit as super-legislatures to determine the wisdom . . . of statutes enacted by the Legislature." *Estate of Horman*, 5 Cal. 3d 62, 77 (1971). Plaintiffs should take their complaint to the Legislature.

c. Plaintiffs Failed To State Facts Establishing Standing For Their CLRA Cause Of Action

(1) Plaintiffs Failed To State Facts Establishing Any Damage Resulting From Any Allegedly Unlawful Conduct

As noted, plaintiffs were required to state "*facts*" that demonstrated that they suffered any damage as a result of Sprint's insertion of an allegedly unconscionable term in its customer service agreement. *Robinson Helicopter v. Dana Corp.*, 34 Cal. 4th 979, 993 (2004) (italics in original; internal quotation marks omitted); *see, e.g.*, *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 46-47 (1998) (plaintiff must state facts); *cf. Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1097 (N.D. Cal. 2006) (for CLRA cause of action, plaintiffs must state facts with "some specificity").

Plaintiffs failed to do so. Rather, in conclusionary, vague and generic fashion, they alleged only that Sprint has "collect[ed] money" from customers who subscribed to Sprint's

service. (AA 20A; *accord* AA 32; *see* AA 31) But this allegation does not state any fact establishing that plaintiffs or indeed any customer suffered any damage. For one party to an agreement to obtain payment from another for service the former provides is not to inflict "damage," but simply to receive consideration.

Neither did plaintiffs state any facts establishing damage *as a result of* Sprint's insertion of any allegedly unconscionable term in its form agreement. Quite the contrary. Plaintiffs alleged that Sprint does "not normally provide prospective [customers] with a copy of the [customer service agreement] prior to the time that the prospective [customers] . . . agree to become [customers]." (AA 21; *see* AA 31) Even assuming for these purposes that this allegation is correct, the insertion of any allegedly unconscionable term could not logically result in what plaintiffs deem to be the "damage" of causing customers to subscribe to, and pay for, cellular service. The many customers who supposedly had not been given the customer service agreement prior to subscription would have subscribed *in ignorance of* the allegedly unconscionable terms—and therefore not *because of* them. By contrast, the few customers who had supposedly been given the agreement prior to subscription would have subscribed *with knowledge of* the terms—and therefore *in spite of* them. Finally, the customers' choice to continue service after receipt of the terms also belies any claim of damage.

Most importantly, plaintiffs never alleged a proper link between the insertion of the challenged clauses in the form contract

and any resulting damage. As the Court of Appeal put it, "Plaintiffs paid for and received cellular telephone service. Plaintiffs did not allege that they did not receive cellular telephone service or that the service was defective. Plaintiffs did not allege they had to pay any more for their cellular telephone service than they would have in the absence of the offending provisions." (Slip. op. at 9)

Although a cause of action under the CLRA should be "liberally construed" [*Aron*, 143 Cal. App. 4th at 802; *see* Cal. Civ. Code § 1760], a plaintiff bringing such a cause of action must nevertheless state facts establishing damage as a result of allegedly unlawful business conduct. Plaintiffs failed to do so.

(2) Plaintiffs' Contrary Arguments Are Unpersuasive

While mostly claiming they were not required to state facts establishing that they suffered damage, plaintiffs also claim that they in any event stated such facts. (OBM at 10-11, 25)

Plaintiffs contend that Sprint's insertion of the challenged terms in its form agreement in and of itself triggers standing because "there may be occasions" in which a customer might find him or herself in a dispute with Sprint and might be "chill[ed]" from asserting his or her rights. (*Id.* at 25) But the vast majority of Sprint's customers likely will *never* have any occasion to experience the effect of any of these terms. The CLRA does not

grant standing to any person who alleges a *theoretical possibility* of damage, but instead grants standing only to a "consumer" who *actually* "suffers . . . damage." Civ. Code § 1780(a); *cf. Trujillo v. First American Registry, Inc.*, __ Cal.App.4th __, 2007 WL 4226918 (Dec. 3, 2007) (rejecting argument that mere commission of act prohibited in Consumer Credit Reporting Agencies Act established "inherent harm" and hence standing under Act; "if the Legislature thought inaccurate reports were inherently harmful, it would not have required that CCRAA plaintiffs have 'suffer[ed] damages as a result of a violation. . . .' [Citation] Actual damage, not inherent harm is required to state a CCRAA cause of action").

Accordingly, to the extent the CLRA authorizes any consumer to bring a cause of action based on the purported "chilling effect" of some allegedly unlawful conduct, plaintiffs were required to state facts establishing that they were "chilled" in some way that resulted in "damage." *Id.* They did not do so.[6]

Plaintiffs also argue that the Court of Appeal "committed a serious error in failing to following [sic] the rules applicable to demurrers when an appellate court reviews a demurrer

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6 None of the decisions plaintiffs cite in their "chilling" argument [OBM at 25-27] provide any support. *Gentry v. Super. Ct.*, 42 Cal. 4th 443 (2007), *People v. McHale*, 25 Cal. 3d 626 (1979), *Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107 (2004), and *O'Hare v. Municipal Resource Consultants*, 107 Cal. App. 4th 267 (2003), do not arise under the CLRA, and hence do not address standing under the CLRA.

on appeal" by failing to assume the truth of plaintiffs' allegations that Sprint had enforced its form customer service agreement against its customers, including them. (OBM at 11)

The Court of Appeal, however, did not err. Its *holding* was that plaintiffs failed to state facts establishing that they suffered any damage as a result of any Sprint conduct involving the insertion of any unconscionable term in its form agreement. (Slip op. at 2-3) It is true that the record below does not specifically reflect—and the Court of Appeal apparently did not know—that plaintiffs have been involved in litigation with Sprint elsewhere, and that Sprint moved to compel plaintiffs to arbitrate other litigation. (*See* ORJN at 2-9 & Exs. 1-4)[7] But two points render that fact irrelevant.

First, plaintiffs were required to state facts establishing that the challenged conduct had resulted in *damage*—that is, economic loss. To the extent, plaintiffs asserted that any attempt to compel *them* to arbitrate had damaged *them*, they were required to state *facts* establishing the damage. Plaintiffs' vague, conclusionary, and generic allegations about "enforcement" of the *form contract* in their fourth amended complaint were not accompanied by any facts establishing damage. (AA 18-35) Far from it, the specific example

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7 Because this Court has not yet ruled on plaintiffs' request for judicial notice, Sprint first explains why the request, even if granted, makes no difference to the outcome. Sprint then notes why the Court would be justified in declining to consider the judicial notice facts on the ground that they were not raised in the courts below.

of "enforcement" that plaintiffs alleged consisted merely of Sprint billing them for cellular service while the terms in its form customer service agreement remained in effect. (*See* AA 20A) As noted, this allegation did not establish that plaintiffs lost the money they paid "as a result of" the insertion of the challenged terms in the customer service agreement. The same is true of the other main type of "enforcement" alleged—that the challenged terms were "in force and effect." (AA 20-21) That allegation likewise did not establish that plaintiffs suffered damage "as a result" of either the "force" or "effect" of those terms. Nor did plaintiffs allege damage in their other "enforcement" allegation, namely that Sprint has "moved to compel arbitration when . . . [customers] have sued Sprint." (AA 21) Not only did this allegation omit to mention that *plaintiffs themselves* were among the customers who have sued Sprint and been met with a motion to compel arbitration, but more to the point, it failed to allege facts establishing that plaintiffs had suffered any damage from Sprint moving to compel arbitration.

Second, plaintiffs did not bring to the attention of the courts below that Sprint moved to compel plaintiffs to arbitrate in any other action.[8] Plaintiffs hence may not be heard to raise any complaint based on that point in this Court.

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8 As explained in Sprint's opposition to plaintiffs' request for judicial notice, plaintiffs failed to state in any of their complaints that Sprint had moved to compel *them* to arbitrate in other litigation, nor did they seek judicial notice in the courts below of that fact, nor

Continued on following page

d. Plaintiffs Did Not Attempt To Demonstrate They Could Amend Their Complaint To State Facts Establishing Standing For Their CLRA Cause Of Action

It was plaintiffs' burden to demonstrate, if they could, that there was a reasonable possibility that they could state facts establishing standing for their CLRA cause of action if they were granted leave to amend. *Hendy*, 54 Cal. 3d at 742; *accord Goodman*, 18 Cal. 3d at 349. To carry their burden, plaintiffs had to make their demonstration to the trial court in the first instance or to the Court of Appeal. *See, e.g., Ross v. Creel Printing & Publishing Co.*, 100 Cal. App. 4th 736, 748 (2002); *see also Goodman*, 18 Cal. 3d at 349-50 (noting the failure of plaintiffs therein to carry burden before trial court and on appeal).

After multiple demurrers, plaintiffs did not request leave to amend their fourth amended complaint either in the trial court or in the Court of Appeal. As a consequence, they waived any claim that either court had erred in denying such leave. *Cf. Colores v. Board of Trustees*, 105 Cal. App. 4th 1293, 1301 n.2 (2003).

Continued from previous page

did they point out that fact in their petition for review to this Court. Sprint's counsel lacked knowledge of that fact prior to receiving plaintiffs' judicial notice request in this Court. (ORJN at 4) Sprint has apologized for any confusion on this point to which it may have contributed by statements Sprint made. (*Id.* at 6-7)

But even if plaintiffs had not disabled themselves by waiver, they could not have shown any entitlement to a grant of leave to amend. It has been held proper to deny leave to amend a *third* amended complaint [*see Deauville v. Hall*, 188 Cal. App. 2d 535, 548 (1961)], and even a *second* amended complaint [*see Tietz v. Los Angeles Unified School Dist.*, 238 Cal. App. 2d 905, 912 (1965); *Kennedy v. Bank of America*, 237 Cal. App. 2d 637, 650 (1965)], under circumstances in which the plaintiff—like plaintiffs here—possessed an opportunity to state facts establishing a cause of action, if any cause of action existed, but failed to do so. A fortiori, it was proper to deny plaintiffs leave to amend their *fourth* amended complaint. Having failed to state facts establishing standing on *six* previous tries—in their original complaint and in their first, second, third, and fourth amended complaints and again in the Court of Appeal—there is no basis to grant plaintiffs yet another try.

2. Plaintiffs Failed To State Facts Establishing Standing For Their Declaratory Relief Cause Of Action

a. The Declaratory Judgment Act Requires Standing For A Plaintiff To Bring A Cause Of Action, Including An Actual Controversy

The Declaratory Judgment Act is a purely procedural measure designed "to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." *Maguire v. Hibernia Sav. & Loan Soc.*, 23 Cal. 2d 719, 729 (1944) (internal quotation marks omitted). It serves that end by authorizing a court to issue a mere declaration of the "legal relationship between the

parties" without any "coercive relief." *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 898 (2002). And it serves that end *practically* by limiting its scope to "actual controvers[ies]." Cal. Civ. Proc. Code § 1060.

The Act requires a plaintiff to have standing to bring a cause of action for declaratory relief. *See, e.g., Sherwyn v. Department of Social Services*, 173 Cal. App. 3d 52, 58 (1985) (the "standard for the granting of declaratory relief . . . is in the nature of . . . standing"); *Savient Pharmaceuticals, Inc. Department of Health Services*, 146 Cal. App. 4th 1457, 1465 (2007) (concluding that plaintiff lacked standing to seek declaratory relief).

To have standing, the Act requires the plaintiff to be involved with the defendant in an "actual controversy relating to [their] legal rights and duties" in a specified subject matter, including a "contract." Cal. Civ. Proc. Code § 1060.

Even though the Declaratory Judgment Act "should be liberally construed" [*In re San Joaquin Light & Power Corp.*, 52 Cal. App. 2d 814, 825 (1942)], any such "liberal construction" cannot negate the Act's limitation on its own scope. The Act, by its terms, is confined to "actual controvers[ies]." Cal. Civ. Proc. Code § 1060; *see, e.g., Sanctity of Human Life Network v. Cal. Highway Patrol*, 105 Cal. App. 4th 858, 872 (2003) ("controversy" that is not "ripe" is not "actual"); *BKHN, Inc. v. Dep't of Health Services*, 3 Cal. App. 4th 301, 308 (1992) (same); *Pittenger v. Home Sav. &*

Loan Assn., 166 Cal. App. 2d 32, 36 (1958) ("controversy" that is "moot" is not "actual"). And by its terms it authorizes only judicial "declaration[s]" of "legal rights and duties" [Cal. Civ. Proc. Code § 1060] and not mere "advisory opinions" [*e.g.*, *Sherwyn*, 173 Cal. App. 3d at 57 (internal quotation marks omitted); *Wilson v. Transit Authority of the City of Sacramento*, 199 Cal. App. 2d 716, 722 (1962) (same)].

b. Plaintiffs Failed To State Facts Establishing Standing For Their Declaratory Judgment Act Cause Of Action

(1) Plaintiffs Failed To State Facts Establishing An Actual Controversy

The "concept of unconscionability" is a "principle of equity," which was originally "judicially developed" but subsequently "bec[a]me a part of . . . statutory law," and is "applicable to all contracts generally." *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820 & n.19 (1981) (per curiam); *see* Cal. Civ. Code § 1670.5 (incorporating concept of unconscionability into statutory law); *see also Perdue v. Crocker National Bank*, 38 Cal. 3d 913, 925 (1985) (Cal. Civ. Code section 1670.5 "codified the established doctrine that a court can refuse to enforce an unconscionable provision in a contract").

In its application, the concept of unconscionability is complex and necessarily dependent upon the peculiar facts of each case. *See, e.g.*, *Gentry*, 42 Cal. 4th at 462 (unconscionably cannot

be determined "categorically"). " '[U]nconscionability has both a "procedural" and a "substantive" element,' the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 114 (2000) (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486-87 (1982)).

In its purpose, by contrast, the concept of unconscionability is legally simple. "[U]nconscionability" is a legal mechanism by which courts may "den[y] enforcement" to any contract, or any term of any contract, that they find so tainted. *Graham*, 28 Cal. 3d at 820; *see* Cal. Civ. Code § 1670.5(a) (courts "may refuse to enforce" any contract or clause they find "unconscionable"); *see also* West's Ann.Cal.Civ.Code § 1670.5, Legis. Comm. Com.–Assem. (Westlaw 2007) ("Section 1670.5 is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable.").

Importantly, "there is no cause of action for unconscionability . . . ; that doctrine is only a defense to contract enforcement." *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527, 1539 (2003); *California Grocers Assn. v. Bank of America*, 22 Cal. App. 4th 205, 217 (1994) (to same effect).

Thus, an actual controversy *about unconscionability* is by definition an actual controversy *about a particular enforcement of*

a particular contract term in a particular context. There is *no* actual controversy *about unconscionability* if the court is not attempting to determine whether a particular term can be enforced in a particular context. For example, the arbitration clause in Sprint's customer service agreement would hardly give rise to an "actual controversy" as to unconscionability in a given dispute if the customer preferred to arbitrate that dispute, but might do so in another dispute with another customer whose preferences were different.

Plaintiffs failed to state facts establishing any actual controversy regarding any allegedly unconscionable term in Sprint's customer service agreement. Rather, in vague and generic fashion, they alleged only that Sprint has "never waived enforcement" of any allegedly unconscionable term. (AA 21, 31) An allegation of that sort, however, does not establish that there is a concrete dispute against which the court can determine whether to enforce the challenged terms. The *absence* of *waiver* of enforcement does not translate into a *present and immediate* attempt to resolve a particular dispute that establishes an actual controversy. Accordingly, plaintiffs failed to state facts establishing that a "controversy" with Sprint was "ripe" and, as such, "actual." *See Sanctity of Human Life Network*, 105 Cal. App. 4th at 872 (a "controversy" that is not "ripe" is not "actual"); *BKHN*, 3 Cal. App. 4th at 308 (same); *compare Silva v. City & County of San Francisco*, 87 Cal. App. 2d 784, 788-90 (1948) (plaintiff failed to state facts establishing "actual controversy" as to compensation due on condemnation of real property prior to the commencement of condemnation proceedings).

In any event, even if plaintiffs had stated facts establishing some "actual controversy" about enforcement of any allegedly unconscionable term in Sprint's customer service agreement, they would not have defeated Sprint's demurrer simply by doing so. Even in the presence of an actual controversy, a plaintiff does not have an absolute right to relief under the Declaratory Judgment Act. *See Citizens' Committee for Old Age Pensions v. Bd. of Supervisors*, 91 Cal. App. 2d 658, 660 (1949).

Indeed, the trial court is authorized by the Declaratory Judgment Act to "refuse to exercise the power granted" to it "in any case where its declaration . . . is not necessary or proper at the time under all of the circumstances." Cal. Civ. Proc. Code § 1061. Whether to refuse to issue a declaration is a "matter within the trial court's discretion." *Hannula v. Hacienda Homes, Inc.*, 34 Cal. 2d 442, 448 (1949); *accord, e.g., State Farm Mut. Auto. Ins. Co. v. Super. Ct.*, 47 Cal. 2d 428, 433 (1956). The court's discretion to refuse relief is "broad." *Weissman v. Lakewood Water & Power Co.*, 173 Cal. App. 2d 652, 656 (1959), *disapproved on another point by Roylance v. Doelger*, 57 Cal. 2d 255, 262 (1962).

As a result, any refusal of relief is reviewed for "abuse of discretion" [*C.J.L. Const., Inc. v. Universal Plumbing*, 18 Cal. App. 4th 376, 383 (1993); *accord, e.g., Hannula*, 34 Cal. 2d at 448], and warrants reversal only if such abuse is "clearly shown" by the plaintiff [*Hannula*, 34 Cal. 2d at 448; *accord, e.g., Auberry Union School Dist. v. Rafferty*, 226 Cal. App. 2d 599, 602 (1964)].

Plaintiffs could not show—clearly or otherwise—that the trial court abused its discretion by sustaining Sprint's demurrer to their fourth amended complaint and thereby refusing them relief. Even if plaintiffs had stated facts establishing some "actual controversy" about enforcement of any allegedly unconscionable term in Sprint's customer service agreement, they failed to state facts "with sufficient particularity" as to allow adjudication of the terms' alleged unconscionability. *Weissman*, 173 Cal. App. 2d at 658. As stated, unconscionability is complex and dependent upon the peculiar facts of each individual case, involving as it does the invocation of a sliding scale weighing procedural and substantive unconscionability against each other. Plaintiffs' allegation of "unconscionability" was vague, conclusionary, and generic [AA 21, *see* AA 31], and as such ill suited to the kind of adjudication unconscionability demands. Under these circumstances, the trial court would not have exceeded the bounds of reason by refusing relief as "not necessary or proper." Cal. Civ. Proc. Code § 1061.

(2) Plaintiffs' Contrary Arguments Are Unpersuasive

Plaintiffs' argument that the Court of Appeal "committed a serious error in failing to following [sic] the rules applicable to demurrers when an appellate court reviews a demurrer on appeal" [OBM a 11] fares no better with respect to their declaratory relief cause of action than it did for their CLRA claim.

It is immaterial whether plaintiffs *might have stated facts* establishing an actual controversy if they had referred to Sprint's attempt to enforce the arbitration clause in the Contra Costa action. That is because plaintiffs stated no such facts. *See, e.g., Feldesman*, 44 Cal. App. 2d at 570-71 ("it is to be presumed that [the plaintiff] stated his case as favorably as possible to himself . . . ; if a fact necessary to the . . . cause of action is not alleged it must be taken as having no existence"); *Richmond Redevelopment Agency*, 48 Cal. App. 3d at 349 (same).

Moreover, it is doubtful that plaintiffs could have stated facts establishing an actual controversy *in this action* based on the Contra Costa action. It would have been improper for the Orange County Superior Court, which was the trial court in this action, to determine the enforceability of the arbitration clause based on any controversy arising in the Contra Costa action. The resolution of the controversy arising in the Contra Costa action was a matter for the Contra Costa County Superior Court to decide.

In fact, the existence of an actual controversy in the Contra Costa action well illustrates the absence of any controversy in this action. The Contra Costa County Superior Court had before it a concrete billing dispute against which it could determine whether to enforce Sprint's arbitration clause. Here, by contrast, plaintiffs asked the Orange County Superior Court to decide the enforceability of a laundry list of the terms in Sprint's form customer service

agreement[9] in a vacuum and without any underlying dispute against which the court could assess the question.

Plaintiffs go on to argue that the Court of Appeal committed another "serious error" in supposedly concluding that their cause of action under the Declaratory Judgment Act was dependent on their causes of action under the UCL and the CLRA. (OBM at 42) But as shown, they failed to state facts satisfying the standing requirements of *either* the CLRA or the Declaratory Judgment Act. Thus, whether their declaratory relief cause of action was dependent on their CLRA cause of action was irrelevant.

c. Plaintiffs Did Not Attempt To Demonstrate They Could Amend Their Complaint To State Facts Establishing Standing For Their Declaratory Relief Cause Of Action

As it was with their CLRA cause of action, it was plaintiffs' burden to demonstrate, if they could, that they could state facts establishing standing for their Declaratory Judgment Act cause of action if they were granted leave to amend. *Hendy*, 54 Cal. 3d at 742; *accord Goodman*, 18 Cal. 3d at 349

Plaintiffs failed, however, even to attempt to make the requisite demonstration to the trial court in the first instance or, ultimately, to the Court of Appeal. They likewise failed to argue in

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9 *See* n.3 at 4, *ante*.

their opening brief on the merits any claim that either court should have granted leave to amend. They thereby waived any such claim.

But even in the absence of waiver, plaintiffs could not have shown any entitlement to a grant of leave of amend. As stated, having failed to state facts establishing standing on *six* tries, there was and is no basis to give plaintiffs yet another try.

IV.
CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Court of Appeal.

DATED: December 12, 2007.

REED SMITH LLP

By _____
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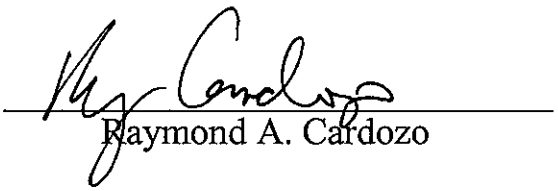
CERTIFICATE OF WORD COUNT COMPLIANCE

The foregoing Answer Brief on the Merits contains 9,856 words, including footnotes but excluding tables and this certificate. In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on December 12, 2007, at San Francisco, California.



Raymond A. Cardozo

Meyer et al. v. Sprint Spectrum LP
Cal. Sup. Ct. No. S153846 (Cal. App. 4/3 No. G037375
Orange County Superior Court No. 04CC06254 (Class Action))

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, Two Embarcadero Center, Suite 2000, San Francisco, CA 94111-3922. On December 12, 2007, I served the following document(s) by the method indicated below:

ANSWER BRIEF ON THE MERITS

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

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Orange County Superior Court
Central Justice Center
(Attn: Hon. Sheila Fell,
Dept. C34)
700 Civic Center Drive West
Santa Ana, CA 92701

Clerk of the Court of Appeal
Fourth Appellate Dist., Div. 3
925 N. Spurgeon Street
Santa Ana, California 92701-3724

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 12, 2007, at San Francisco, California.

Myra R. Taylor

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