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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 REPLY BRIEF

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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A. APPELLANTS ACKNOWLEDGE THAT SOME FORM OF DAMAGE MUST HAVE BEEN SUFFERED BY A CONSUMER AS A RESULT OF ONE OR MORE OF THE UNLAWFUL PRACTICES SET FORTH IN CIVIL CODE SECTION 1770(a) TO ESTABLISH STANDING TO BRING A LAWSUIT

The Respondents states that it is the position of the Appellants that no showing of any damage is required in order for a Plaintiff to have standing to sue under CLRA. Appellants did not take that position in their opening brief. In fact, Appellants acknowledged that some form of damage is required in order for a Plaintiff to have standing to sue under the CLRA.

Appellants contend that the language in Section 1780(a) of the Civil Code does not establish "standing requirements" for a consumer who wishes to bring a CLRA action, but rather, simply defines the types of remedies a consumer who suffers "any damage" may obtain in a CLRA action. Appellants contend that it is Section 1770(a) of the Civil Code which establishes the standing requirements for a consumer who wishes to bring a CLRA action. (See AOB, pp. 15-18). Appellants realize that in *Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 Cal.3d 582, 200 Cal.Rptr. 38, 676 P.2d 1060, this court stated at p. 593: "We thus reject Gibraltar's effort to equate pecuniary loss with the standing requirement that a consumer "suffer any damage". This statement would suggest that this Court was of the belief in 1984 that Section 1780(a) of the Civil Code was a "standing statute". If that in fact be the case, Appellants request that this Court reexamine its position in light of the Appellants' argument that it is Section 1770(a), rather than Section 1780(a), that is the statute providing "standing" to bring a CLRA claim.

Assuming *arguendo* that Section 1780(a) is the "standing statute" for the

purpose of bringing a CLRA claim, the question then arises as to the proper statutory interpretation of the phrase "consumer who suffers any damage" contained in Section 1780(a). In *Kagan*, this Court rejected the Defendant's efforts "to equate pecuniary loss with the standing requirement that a consumer 'suffer any damage'". 35 Cal.3d at p. 593. This Court also stated in *Kagan* that it was "unlawful to engage in any of the deceptive practices enumerated in Section 1770," and as a consequence, "consumers have a corresponding legal right not to be subjected thereto." 35 Cal.3d at p. 593. This Court then stated: "Accordingly, we interpret broadly the requirement of Section 1780 that a consumer "suffer any damage" to include the infringement of any legal right as defined by Section 1770. 35 Cal.3d at p. 593.

In *Chamberlain v. Ford Motor Co.* (N.D. Cal. 2005) 369 F.Supp.2d 1138, 1147, the court stated: "The plain language of the CLRA does not require that consumers suffer particular pecuniary losses in order to bring a CLRA claim, and recover at least the statutory minimum, nor does Defendant cite any case to the contrary. Even in *Meyer v. Sprint Spectrum, LP* (2007) 150 Cal.App.4th 1136, 1139, the Court acknowledged that: "While Plaintiff did not have to allege a monetary loss to have standing under the CLRA, they must suffer some damage as a result of Sprint's conduct. In *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 118 Cal.Rptr.2d 770, the court quoted *Kagan* at p. 869:

> 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. Accordingly, we interpret broadly the requirement of Section 1780 that a consumer "suffer any damage" to include infringement of any legal right as defined by Section 1770. (*Kagan, supra,* 35 Cal.3d at p. 593).

Thus, this Court must engage in statutory interpretation in order to determine

the legislative intent when the Legislature used the phrase "any consumer who suffers any damage" in Section 1780(a).

B. IF THE LEGISLATIVE PURPOSE OF THE CLRA IS TO BE EFFECTUATED, THEN THE CLRA MUST BE INTERPRETED SO AS TO PROTECT CONSUMERS AGAINST THE UNLAWFUL PRACTICES ENUMERATED IN SECTION 1770 OF THE CIVIL CODE BY PROVIDING JUDICIAL REMEDIES THAT SECURE SUCH PROTECTION

The Legislature set forth its purpose in enacting the CLRA in Section 1760 of the Civil Code. The avowed purpose is "to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." The Legislature also instructs the Courts in Section 1760 that the CLRA is to be "liberally construed and applied to promote its underlying purposes." Thus, Section 1760 provides a mandate that the CLRA is to be construed in a manner that effectively protects consumers from being victimized by any of the unlawful practices enumerated in Section 1770, including the unlawful practice of inserting an unconscionable provision into a contract.

The fundamental principle of statutory interpretation is the ascertainment of Legislative intent so that the purpose of the law may be effectuated. *Troppman v. Val Verde* (2007) 40 Cal.4th 1121, 1135. This Court in *Troppman* further stated at p. 1135, fn. 10:

> Literal construction should not prevail if it is contrary to the Legislative intent apparent in the statute .... Each sentence must be read not in isolation but in light of the statutory scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.

In *Troppman*, this Court adopted an interpretation of the implied consent law that would serve the public safety policy that was underlying the Legislative intent reflected

in the statute.

In *Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 30 Cal.Rptr.3d 823, 115 P.3d 98, this Court acknowledged that in construing a statute, its task was to ascertain the intent of the Legislature so as to effectuate the purpose of the enactment. 36 Cal.4th at 487. The Court stated at p. 487: "We look first to the words of the statute, which are the most reliable indications of the Legislature's intent. We construe the words of a statute in context and harmonize the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." In *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, the Court stated at p. 14: "CLRA is a legislative embodiment of a desire to protect California consumers, and further a strong public policy of this state. The court in *America Online*, further stated at p. 16: "Injunctive relief afforded by the CLRA is unique as its purpose is not simply to correct future private injury, but to remedy a public wrong. *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1080, 90 Cal.Rptr.2d 334, 988 P.2d 67. The court in *Broughton* stated at p. 1080: "Whatever the individual motive of the party requesting injunctive relief, the benefits of granting injunctive relief by and large do not accrue to that party, but to the general public in danger of being victimized by the same deceptive practices as the Plaintiff suffered." This language indicates a Legislative intent of preventing consumers from being victimized by any of the unlawful acts described in Section 1770.

It is unthinkable that the Legislature would make unlawful the 23 different acts and practices set forth in Section 1770, and not provide the consumer with a remedy when the consumer is victimized by one or more of those unlawful acts. It cannot have

been the intent of the Legislature in enacting Section 1780(a) to allow any person or entity to engage in any of the unlawful acts described in Section 1770 with impunity. In *Wang v. Massey Chevrolet, supra*, the court refused to allow the defense of the "parol evidence rule in a CLRA action" because the Court reasoned that the Legislature would not have made a practice unlawful under the CLRA, and then preclude a Plaintiff from establishing the existence of the unlawful conduct by application of the parol evidence rule.

In *America Online, Inc., supra*, the court paraphrased Justice Mosk at p. 17: "Justice Mosk ... first noted that protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." In *Robinson Helicopter, Inc. v. Dana Corporation* (2004) 34 Cal.4th 979, 992, this Court stated: "California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices, citing *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1064, 80 Cal.Rptr.2d 828, 968 P.2d 539. It is obvious that the California Legislature in enacting the CLRA was seeking to preserve a business climate in favor of consumers that was free of fraud and deceptive practices. As stated in *Kagan*, consumers have a legal right not to be subjected to any of the unlawful deceptive business practices enumerated in Section 1770. 35 Cal.3d at 593. The Legislature must have found that the 23 unlawful acts set forth in Section 1770 were harmful to consumers. The Legislature obviously made the acts and/or practices unlawful because the Legislature deemed them harmful to consumers. Thus, if a consumer has been victimized by one or more unlawful acts or practices described in Section 1770, that consumer has suffered harm/damage within

the meaning of Section 1780 of the Civil Code. Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted. *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385, 271 Cal.Rptr. 99. Therefore, this Court must determine the standing requirements based upon the Legislative purpose for which the CLRA was enacted. That purpose is not only to protect consumers from unlawful business practices, but also to provide means to secure such protection. Civil Code Section 1760.

The Respondents argue that the words "suffer any damage" in Section 1780(a) must be interpreted to mean "economic loss". Respondents cite *Broughton*, claiming that this Court in *Broughton* stated that "economic problems" were the evils that the CLRA was meant to alleviate. 21 Cal.4th at 1077. Unfortunately, the Respondents, inaccurately report what this Court actually stated in *Broughton*. The court stated at p. 1077: "The CLRA was enacted in an attempt to alleviate social and economic problems stemming from deceptive business practices ...". Thus, the reference was to social problems as well as economic problems. The Respondents then argue that since the CLRA targets "economic problems", that the word "damage" in Section 1780(a) must be reasonably read to mean "economic loss", citing *Aron v. U-Haul Company of California* (2006) 143 Cal.App.4th 796, 803. (ROB, p. 15). The concern in *Aron* was whether or not Aron had standing to file a complaint under both the UCL and the CLRA. The Court found that Aron had suffered "injury in fact" because he had suffered an economic loss. At no time, however, did the Court in *Aron* interpret the phrase "suffer any damage" in Section 1780(a) to mean an economic loss.

The Respondents argue that in enacting Section1770 of the Civil Code, 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." The Respondents go on to say that if any given business conduct turned out not to result in economic harm, that it would "hardly merit suit by anyone". (ROB, p. 22). The error in this argument can be easily exposed by simply reviewing each of the 23 unlawful acts and practices set forth in Section 1770. Clearly, many of the 23 unlawful acts or practices are not necessarily likely to cause economic harm to consumers.

In making the foregoing argument, the Respondents recognized that they were faced with a problem. Their analysis would allow persons or entities who violated the CLRA could to do so with impunity if their CLRA violations caused no economic loss or harm. Recognizing that this would not be a good thing to have happen, the Respondents came up with a solution. The Respondents stated: "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." (ROB, pp 16, 22-23). This Court has twice rejected the proposition that enforcement of consumer protection statutes by government prosecution is an adequate substitute for the class action or class arbitration mechanism. *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 162 [nor do we agree ... that small claims litigation, government prosecution, or informal resolution are adequate substitutes]; *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 464 [government prosecution is not an adequate substitute for the class action or class arbitration mechanism]. The Respondents' argument only has merit in its inherent

admission that it is inappropriate to allow repeated violations of the CLRA with impunity.

The Respondents ask this Court to construe the CLRA "standing requirements" in light of the purpose of the enactment of Proposition 64 relating to the UCL. The CLRA has no relationship whatsoever to the UCL, and was completely unaffected by Proposition 64. Proposition 64 related specifically and solely to standing under the UCL. Proposition 64 has no relationship whatsoever to the statutory interpretation process required to ascertain legislative intent and/or purpose in enacting the CLRA many years before the passage of Proposition 64.

C. APPELLANTS HAVE SUFFERED HARM/DAMAGE WITHIN THE MEANING OF SECTION 1780(a) AS A RESULT OF THE RESPONDENTS' INSERTON OF UNCONSCIONABLE CONTRACT PROVISIONS INTO RESPONDENTS' CONTRACT WITH APPELLANTS WHICH VIOLATED SECTION 1770(a)(19) OF THE CIVIL CODE

The Appellants and all of Sprint's subscribers have suffered harm as a result of the unconscionable provision in the contract which precludes class actions and class arbitrations. In *Discover Bank v. Superior Court, supra,*, the Court acknowledged that a class action bar is clearly meant to prevent consumers from seeking redress for relatively small amounts of money which created for Discover Bank virtual immunity from class or representative actions despite their potential merit. 36 Cal.4th at 159. The Court stated at p. 159-160:

> By imposing this clause on its customers, Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be

overcharged small amounts without an effective method of redress cannot be ignored.

This Court further stated that class action and arbitration waivers are exculpatory clauses in the sense that because damages in the consumer cases are often small, and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation. 36 Cal.4th at 161. In a setting in which disputes between the contracting parties predictably involve small amounts of damages, the party imposing the class action bar/waiver is carrying out a scheme to deliberately cheat large numbers of customers out of individually small sums of money. 36 Cal.4th at 162-163. The class action bar/waiver is in practice the exemption of a defendant from responsibility because a class action would be the only effective way to halt and redress the alleged violations. *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 148. A class action waiver can make it very difficult for those injured by unlawful conduct to pursue a legal remedy. *Murphy, supra* at p. 148.

In the arbitration provisions contained in the contract between the parties, there is an unconscionable provision that requires the parties to split arbitration fees and costs equally. In *Armendariz v. Foundation Health PsychCare Services, Inc.* (2000) 24 Cal.4th 83, the Court found that the payment of large, fixed forum costs, especially in the face of expected meager awards, served as a significant deterrent to the pursuit of FEHA claims. 24 Cal.4th at 111. Thus, if the amount of damages incurred by a Plaintiff is relatively small, Plaintiff would be deterred from seeking an arbitration award, because the amount of his recovery would be exceeded by the amount of costs he would be required to pay to participate in the arbitration. To the same effect is

Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, where one of the issues was a fee-splitting agreement in arbitration requiring that fees and costs be split equally. The Court acknowledged that such a fee-splitting clause could discourage litigants from arbitrating their claim. 114 Cal.App.4th at 93. To the same effect is *Martinez v. Master Protection Corporation* (2004) 118 Cal.App.4th 107, 12 Cal.Rptr.3d 663, where the Court acknowledged that an agreement which contained a requirement that the employee split arbitration costs and post fees in advance of the arbitration hearing created an unacceptable chilling effect on an employee's right to arbitration. 118 Cal.App.4th at 117.

A Court has discretion under Section 1670.5 of the California Civil Code to refuse to enforce an entire agreement if the agreement is permeated by unconscionability. *Armendariz, supra,* 24 Cal.4th at p. 122. An employment arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision *Murphy v. Check 'N Go of California, Inc., supra* 156 Cal.App.4th at p. 149. Such multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. *Armendariz, supra*, 24 Cal.4th at 124; *Murphy, supra,* 156 Cal.App.4th at 149. Similarly, here, the multiple unconscionable provisions in the Respondents' arbitration agreement indicates a systematic effort by Respondents to impose arbitration on Appellants and other class members, not simply as an alternative to litigation, but as an inferior forum that works to Respondents' advantage. Under such circumstance, the Appellants and other class members have been harmed with respect to their ability to obtain fairness in the arbitral forum.

Each of the nine alleged unconscionable provisions in the standard form contract between Sprint and the Appellants and Sprint's other customers eliminate rights they otherwise would have had in their contractual relationship with Sprint. For example, the Appellants and other class members should have a right to pursue class action lawsuits and class arbitration. Appellants and other class members should have the right to pursue a jury trial if their claim is not being arbitrated. The Appellants and other class members should have the right to pursue the amount of damages that they are entitled to under the law, unrestricted by the contractual limitation on damages. The Appellants and other class members should have the right not to be bound by a 60-day statute of limitations. That has only unilateral application. Appellants and other class members should have the right not to pay an early termination fee of $150.00 for each line of service terminated because it is an unlawful liquidated damage provision. With respect to arbitration fees and costs, the Appellants and other class members should not be required to bear any type of expense that they would not be required to bear if they were free to bring an action in court. The Appellants and other class members should have the right to obtain limited discovery in pursuing a claim in arbitration. Thus, Appellants' legal rights have been severely infringed as a result of the Respondents' violation of Section 1770(a)(19). Appellants should be entitled to injunctive relief to remove these infringements on their legal rights.

D. UPON A DEMURRER, THE APPELLATE COURT MUST LOOK AT ALL OF THE ALLEGATIONS IN THE COMPLAINT IN DETERMINING WHETHER A CLAIM FOR DECLARATORY RELIEF UNDER CCP SECTION 1060 IS ADEQUATELY PLEADED

The standard of review on appeal upon the sustaining of a demurrer to a declaratory relief action is "de novo" and as a matter of law. *Ludgate Insurance Co. v.*

Lockheed Martin Corp. (2000) 82 Cal.App.4th 592, 603, 98 Cal.Rptr.2d 277. In order for an appellate court to determine whether a plaintiff had adequately pleaded a claim for declaratory relief under CCP Section 1060, the Court must look at all of the allegations of the complaint. That is particularly true here, since the Plaintiffs, in paragraph 33 of the Fourth Amended Complaint, incorporated into the declaratory relief action paragraphs 1 through 32. (AA 033). Because there are no forms of action, a declaration of rights will be upheld if the complaint states sufficient facts, even though the pleader did not think he was proceeding under CCP Section 1060, and did not appropriately label his complaint. *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 807, 135 Cal.Rptr.2d 1, 69 P.3d 927; *Marlow v. Campbell* (1992) 7 Cal.App.4th 921, 927, 9 Cal.Rptr.2d 516.

A demurrer in a declaratory relief action admits all material allegations, including the allegation that an actual controversy exists as to the rights and duties of the parties under a contract. *Ludgate Insurance Co., supra,* 82 Cal.App.4th at p. 605; *Californians for Native Salmon, etc. Association v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1426, 221 Cal.Rptr. 270; *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1565, 55 Cal.Rptr.2d 465; *Aicco, Inc. v. Insurance Company of North America* (2001) 90 Cal.App.4th 579, 591, 109 Cal.Rptr.2d 359; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722, 45 Cal.Rptr.2d 752. A declaratory relief action is a broad remedy, and the rule that a complaint is to be liberally construed is particularly applicable to one for declaratory relief. *City of Tiburon v. Northwestern Pacific Railroad Co.* (1970) 4 Cal.App.3d 160, 170, 84 Cal.Rptr. 469; *Burke v. City, etc. of San Francisco* (1968) 258 Cal.App.2d 32,

33-34, 65 Cal.Rptr. 539.

E. APPELLANTS HAVE STANDING TO BRING A DECLARATORY RELIEF ACTION IN THE CASE AT BAR

In *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 892-893, 72 Cal.Rptr.2d 73, the Court stated: "Code of Civil Procedure Section 1060 confers standing upon any person interested under a contract to bring an action for declaratory relief in cases of actual controversy relating to the legal rights and duties of the respective parties." Thus, in order to establish standing, appellants need only show that they have pleaded the existence of an actual controversy relating to the legal rights and duties of the respective parties in their contract. It is the general rule that in an action for declaratory relief, the complaint is sufficient if its sets forth facts showing the existence of an actual controversy relating to the rights and duties of the respective parties under a contract and request 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]; *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]; *Maguire 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. v. Oilwell Service Co.* (1963) 219 Cal.App.2d 235, 33 Cal.Rptr. 20 [determination of the rights and duties of the respective parties under an indemnity clause].

The Respondents suggest, with respect to the declaratory relief cause of action, that it is not yet "ripe". A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made. *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 171, 188 Cal.Rptr. 104, 55 P.2d 306. The Court in *Pacific Legal Foundation* points out that the "ripeness requirement ... prevents courts from issuing purely advisory opinions." 33 Cal.3d at p. 170. In *Pacific Legal Foundation,* it is obvious in discussing "ripeness" in the context of a declaratory relief action, that the court was referring to the existence of an "actual controversy". In *Sherwyn v. Department of Social Services* (1985) 173 Cal.App.3d 52, 218 Cal.Rptr. 778, the court stated at pp 57-58

> The ripeness doctrine is primarily bottomed on the recognition that judicial decision making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. On the other hand, the requirement should not prevent courts from resolving concrete disputes if the consequences of a deferred decision will be lingering uncertainty in the law ...".

The court further stated in *Sherwyn* at p. 58: "... The essence of an action for

declaratory relief is an allegation showing that either an actual (present), or probable (future), controversy exists relating to the legal rights and duties of the parties, coupled with a request that those rights and duties be adjudged by the court." Citing *Charles L. Harney, Inc. v. Contractors' Board* (1952) 39 Cal.2d 561, 564, 247 P.2d 913.

The Respondents argue that the Appellants cannot establish a cause of action for unconscionability, since unconscionability is only a defense to a contract, and therefore, Appellants cannot establish a cause of action for declaratory relief. This argument demonstrates a lack of understanding of CCP Section 1060. Section 1060 authorizes an "original action". This means that the Appellants do not need to establish a cause of action for "unconscionability" in order to maintain an action for declaratory relief. Appellants need only show that under their contract with Sprint, that there is an "actual controversy" involving Appellants' rights and/or duties under the contract.

The Respondents argue that the Appellants' allegations of unconscionability and "actual controversy" are vague, conclusionary and generic, and as such, are ill-suited to the kind of adjudication unconscionability demands. First of all, the Appellants have more than adequately pleaded the existence of an actual controversy as between the Appellants and the Respondents, setting forth allegations that the Respondents included in their standard form contract of adhesion at least nine separate contractual provisions that Appellants claim to be unconscionable and unenforceable. In *Western Gulf Oil Co., supra,* it was contended that the trial court erred in sustaining a demurrer to the declaratory relief complaint for want of facts. The court stated at p. 239-240: "A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the

respective parties under a written agreement and request that these rights and duties be adjudged by the Court."

In the Respondents' standard form agreement, it is stated: "If either of us waives or fails to enforce any requirement under this Agreement in any one instance, that does not waive our right to later enforce that requirement." (AA 043). In paragraph 12 of the Fourth Amended Complaint, it is alleged that the Respondents have never waived enforcement of any of the provisions in their standard form agreement. The allegations contained in the Fourth Amended Complaint which establish the existence of an "actual controversy", are paragraphs 1, 10, 12, 23, 24, 25, 31, 33 and 34. In paragraph 24, the Appellants have set forth with great specificity each of the contractual provisions in the Respondents' standard form agreement which the Appellants claim to be unconscionable and unenforceable.

It is well established that in a declaratory relief action, the court may determine disputed questions of fact. *Howard v. Howard* (1955) 131 Cal.App.2d 308, 313, 280 P.2d 802. Thus, as in any other action, there is no requirement for the Appellants to allege "evidentiary facts" in the Fourth Amended Complaint. The Respondents argue that the Appellants' declaratory relief allegations are insufficient to state a cause of action because there are no allegations establishing procedural unconscionability and substantive unconscionability within the meaning of Section 1670.5 of the California Code of Civil Procedure. First of all, such facts would be evidentiary facts and not the ultimate facts essential to establish a cause of action for declaratory relief. However, although not required, Appellants have alleged substantial facts in paragraphs 10 through 14 of the Fourth Amended Complaint to establish the existence, if true, of

procedural unconscionability. In paragraph 24 of the Fourth Amended Complaint, the Appellants set forth with specificity the nine contractual provisions which Appellants allege are substantively unconscionable and which were incorporated into the declaratory relief claim.

The Respondents argue that there is no "actual controversy" concerning unconscionability because unconscionability can only be determined when a particular contractual term is sought to be enforced in a particular contextual situation. Therefore, the Respondents argue that the Appellants have failed to state facts establishing any "actual controversy" regarding any allegedly unconscionable terms in Sprint's standard form customer agreement. Respondents argue that unconscionability is 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.

Respondents' argument must be rejected because it is contrary to law. Under subdivision (a) of Section 1670.5 of the California Civil Code, the test of whether the contract clauses involved are so one-sided as to be unconscionable is determined under the circumstances existing <u>at the time of the making of the contract</u>. *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 281, 132 Cal.Rptr.2d 116 [the critical juncture for determining whether a contract is unconscionable is the moment when it is entered into by both parties]. Subdivision (a) of Section 1670.5 of the Civil Code provides:

> (a) If the Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the Court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.

Thus, if unconscionability of the terms of a contract is to be determined as of the time that the contract was made, the facts surrounding any dispute that occurred after the contract was entered into would simply have no relevance in determining the unconscionability of contract terms. The principles of unconscionability are set forth in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, at pp. 468-469:

> To briefly recapitulate the principles of unconscionability, the doctrine 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. The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.

Thus, procedural unconscionability is based upon facts that existed at the time that the contract was entered into.

With respect to substantive unconscionability, Courts will scrutinize the substantive terms of the contract to ensure that they are not manifestly unfair or one-sided. *Gentry v. Superior Court, supra,* 42 Cal.4th at 469. For example, in the case at bar, there is a jury trial waiver which provides: "If for any reason this arbitration provision does not apply to a claim, we agree to waive trial by jury." (AA 043). This provision, requiring a pre-dispute waiver of trial by jury with respect to claims not subject to arbitration, has been held by this Court to be unlawful and/or unconscionable. *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944. Thus, substantive unconscionability is based upon the language of the contract provision itself, and is not dependent upon any other facts.

Another example here is the contract provision which provides a limitation of

monetary damages payable by Sprint: "In the event we are found to be responsible to you for monetary damages relating to the Services (including wireless devices), you agree that any such damages will not exceed the pro-rated monthly recurring charge for your Services during the affected period." (AA 042).

Thus, substantive unconscionability is determined by the language of the contract provisions itself. No other facts are necessary or proper in making a determination of substantive unconscionability. A similar limitation on damages was found to be substantively unconscionable by the Court in *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126.

To be entitled to declaratory relief, a party need not establish that it is entitled to a favorable declaratory judgment. *Ludgate Insurance Co. v. Lockheed Martin Corp., supra,* 82 Cal.App.4th at p. 606; *Wellenkamp v. Bank of America, supra,* 21 Cal.3d at p. 947; *McGuire v. Hibernia Savings & Loan Society, supra,* 23 Cal.2d at pp. 729-730. The fact that a plaintiff is not entitled to a favorable declaration is no ground for the court to exercise its discretion under CCP Section 1061. *McGuire v. Hibermia Savings & Loan Society, supra,* 23 Cal.2d at p. 730.

F. THERE IS NO REQUIREMENT THAT ANY OTHER CAUSE OF ACTION EXIST BEFORE DECLARATORY JUDGMENT MAY BE IMPOSED IN THIS CASE

Respondents argue that in order to establish an actual controversy in this case, the Appellants are required to show that the alleged unconscionable contract provisions were enforced by Sprint. In other words, Respondents assert that Appellants must show that Sprint either filed a legal action or threatened to file a legal action with respect to the enforcement of the alleged unconscionable contract provisions. However 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.

Thus, Appellants are entitled to declaratory relief without having to show that Respondents filed a legal action or threatened a legal action against them with respect to the enforcement of the contract between the parties.

G. <u>DECLARATORY RELIEF IS APPROPRIATE NOT ONLY WHEN AN ACTUAL PRESENT CONTROVERSY EXISTS, BUT ALSO WHEN A PROBABLE FUTURE CONTROVERSY EXISTS RELATING TO THE LEGAL RIGHTS AND DUTIES OF THE PARTIES TO A CONTRACT</u>

If the requirement of a present controversy were strictly applied, the benefits of

the statute would be denied in some situations that seem appropriate for declaratory relief. It seems desirable to allow the action even in the absence of a showing of a present controversy, where the likelihood of future controversy clearly appears in the complaint. 5 Witkin, *California Procedure, Pleading*, Sec. 818, pp. 274-275, 4th Ed. See *Charles L. Harney v. Contractors State License Board* (1952) 39 Cal.2d 561, 247 P.2d 973. A declaratory relief action may be brought if a probable future controversy exists relating to the legal rights and duties of the parties. *Reiner v. Danial, supra,* 211 Cal.App.3d at 688. In *Roberts v. Reynolds, supra,* the court found that a declaratory relief action was proper where there was a possible future controversy, instead of a present or immediately threatened one. 212 Cal.App.2d at p. 826. In *Sherwyn v. Dept. of Social Services, supra,* the court found that "The essence of an action for declaratory relief is an allegation showing that either an actual (present), or probable (future), controversy exists relating to the legal rights and duties of the parties, coupled with a request that those rights and duties be adjudged by the Court. 173 Cal.App.3d at p. 58.

H. WHETHER OR NOT CCP SECTION 1061 HAS APPLICATION IN THE CASE AT BAR IS NOT AN ISSUE IN THIS APPEAL BECAUSE THE TRIAL JUDGE'S DECISION DISCLOSES THAT SHE DID NOT EXERCISE ANY DISCRETION IN THIS CASE UNDER SECTION 1061

The Respondents argue that even in the presence of an actual controversy, the Appellants do not have an absolute right to relief under the declaratory relief act, since the trial court is authorized under CCP Section 1061 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 circumstances. This argument ignores the fact that the trial court's decision with respect to the declaratory relief action discloses that the trial judge did not exercise any discretion that she had under CCP Section 1061. When the trial court sustained the

Respondent's demurrer to the Third Amended Complaint as to the declaratory relief cause of action, the court stated: "The Defendant has not enforced any of the challenged provisions against the Plaintiffs making the dispute hypothetical. The challenged provisions are not procedurally or substantively unconscionable." (AA 258). When the trial court sustained Respondents' demurrer to Appellants' Fourth Amended Complaint without leave to amend, the Court stated in its minute order: "Amended complaint is essentially the same as the prior complaint. Minor changes do not change the prior analysis. Plaintiffs have not shown they were personally damaged or that the allegedly unconscionable or illegal provisions have been enforced against them." (AA 295).

Upon the sustaining of a demurrer, a trial court's exercise of discretion under CCP Section 1061 cannot be inferred where the trial judge by opinion discloses that he did not exercise any discretion, but decided the case on its merits. *Western Gulf Oil Co. v. Oilwell Service Co., supra,* 219 Cal.App.2d at 239. In *Howard v. Howard* (1955) 131 Cal.App.2d 318, 280 P.2d 802, the Court stated at p. 313:

> We do not consider that the provisions of Section 1061 CCP are here involved. The "Memorandum Ruling" of the trial court clearly indicates that the ruling was not predicated upon the exercise of judicial discretion that declaratory relief should be denied because the determination sought was not necessary or proper at the time and under all the circumstances present (CCP Section 1061) but was based on the conclusion that declaratory relief is not available when an oral contract is pleaded and its execution denied by the other party thereto.

In the case at bar, the trial court sustained the demurrer to the declaratory relief cause of action without leave to amend because the court found that the Appellants failed to allege facts setting forth an "actual controversy". Thus, the trial court decided the issue on its merits, and clearly did not exercise any discretion that was authorized

under CCP Section 1061.

Where, upon the facts stated in a declaratory relief cause of action, the plaintiff is entitled to some relief, CCP Section 1061 does not apply. *Lord v. Garland* (1946) 27 Cal.2d 840, 852, 168 P.2d 5; *BKHN, Inc. v. Department of Health Services* (1992) 3 Cal.App.4th 301, 308, 4 Cal.Rptr.2d 188; *Coruccini v. Lambert, supra*, 113 Cal.App.2d at p. 490 [a declaratory complaint will not be dismissed because the court disagrees with the construction of the contract involved contended for by plaintiff]; *Zimmer v. Gorelink* (1941) 42 Cal.App.2d 440, 448; *Weissman v. Lakewood Water & Power Co., supra*, 173 Cal.App.2d at 656.

DATED: December 31, 2007

FRANKLIN & FRANKLIN

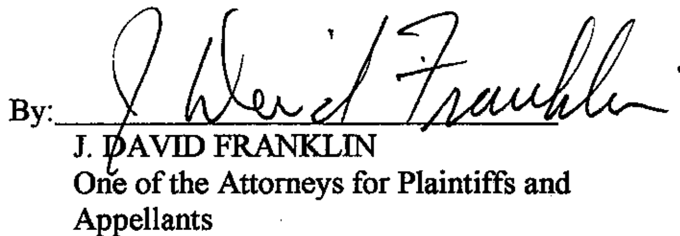
By: ______________________
J. DAVID FRANKLIN
One of the Attorneys for Plaintiffs/
Appellants

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' Reply Brief is 7,222 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: December 31, 2008

FRANKLIN & FRANKLIN

By: 

J. DAVID FRANKLIN
One of the Attorneys for Plaintiffs and 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 January 2, 2008, I served the following documents:

APPELLANTS' REPLY BRIEF

on the following parties to this action:

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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.

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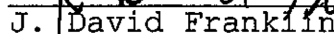
☐ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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 January 2, 2008, at San Diego, California.



J. David Franklin