No. S166435

IN THE

# Supreme Court of the State of California

JAMES CLAYWORTH, *et al.*,

*Petitioners,*

*v.*

PFIZER, INC., *et al.*,

*Respondents.*

**On Review of the Court of Appeal**
**First Appellate District**
**Case No. A116798**

## PETITIONERS' REPLY BRIEF ON THE MERITS

JOSEPH M. ALIOTO (STATE BAR NO. 42680)
JOSEPH M. ALIOTO, JR. (STATE BAR NO. 215544)
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## SUMMARY OF ARGUMENT

The central contention in Manufacturers' Answer Brief is that the Cartwright Act's use of "damages sustained" compels a finding that the 1907 Legislature intended to allow the pass-on defense. Yet, Manufacturers fail to square their interpretation with the Act's underlying purposes: punishment of wrongdoers, promotion of competition, deterrence of future violation, and disgorgement of illicit profits.

Prohibiting the defense is not mutually exclusive with Manufacturers' reading of "damages sustained." The United States Supreme Court has long shared Manufacturers' interpretation of "damages sustained," yet it has rejected the defense for two generations. Manufacturers' attempts to distinguish *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* (1968) 392 U.S. 481 (*Hanover Shoe*) cannot be sustained. That case provides an apt guide for construing the Cartwright Act, since the federal law shares the same "damages sustained" language – and the same overriding goals – as its California counterpart.

Manufacturers also wrongly contend that California "always" allows mitigation evidence. But in truth, California frequently precludes such evidence in order to give effect to the law, even where doing results in plaintiff's windfall. A guilty defendant cannot be permitted to profit from its wrong.

The proper reading of the Cartwright Act is one which recognizes a plaintiff's injury and damage as soon as it is forced to pay an unlawfully high price. Only then will the law's purpose be effectuated.

In 1976, "modeling" its law "directly on the federal statute," California adopted the Hart-Scott-Rodino Act's provision on multiple liability, which was written specifically to address the concern created by *Hanover Shoe*. When California incorporated the federal law, it necessarily recognized *Hanover Shoe*. The 1978 Cartwright Act amendment provides further evidence that the Legislature rejected the rule Manufacturers request. That enactment was aimed partly at preventing a wrongdoer from escaping liability – precisely what Manufacturers attempt here.

The pass-on defense has been universally rejected by the states in this nation, and none of them would allow Manufacturers' proffered defense. As these jurisdictions show, allowing the introduction of defensive pass-on evidence is a legislative, not judicial, function. Rejecting the defense, on the other hand, is squarely within the province of judicial power.

Under the Unfair Competition Law (UCL), Pharmacies suffered injury and "lost money" by paying more for drugs than they were worth, and they are entitled to restitution of the overcharges. In their attempt to keep the unlawful overcharges, Manufacturers inappropriately rely on the rights of absent third-parties. They incorrectly contend that since absent third-parties have the best right to the overcharges,

*Manufacturers* should be permitted to retain them. This implausible claim turns the concept of restitution on its head. Manufacturers argue for a return to the "status quo," and in the same breath ask this Court to sanction their illicit conduct. But, the status quo is hardly achieved by allowing these defendants to keep their unlawfully acquired overcharges.

This Court should decisively reverse the decision below and outlaw for good the pass-on defense.

## ARGUMENT

### I. THE PASS-ON DEFENSE IS NOT AVAILABLE IN CLAIMS BROUGHT UNDER THE CARTWRIGHT ACT

### A. To Effectuate The Purpose Of The Cartwright Act, An Overcharged Plaintiff Must Be Held To Suffer Injury And Damages As Soon As It Purchases A Price-Fixed Product

Manufacturers argue that damages are only awarded in compensation and that they must *always* be lessened to the degree mitigated. (Answer Brief on Merits (ABM) at pp. 12-14.) Yet, their interpretation of "damages," even if correct, does not compel the conclusion that the pass-on defense should be permitted.

Pharmacies have never suggested that the meaning of "damages" needs to be altered in order for this Court to prohibit the pass-on defense, as Manufacturers erroneously

assert. The United States Supreme Court has long interpreted the phrase "damages sustained" as meaning "actual, compensatory damages," just as California has. (*Howard v. Stillwell & Bierce Mfg. Co.* (1891) 139 U.S. 199, 209; *Local 20, Teamsters Union v. Norton* (1964) 377 U.S. 252, 260, n. 15.) And, just as California sometimes lessens damage awards to the extent mitigated, so too have the federal courts. (*Hume v. United States* (1889) 132 U.S. 406, 412; *Phelps Dodge Corp. v. NLRB* (1941) 313 U.S. 177, 198.) Nevertheless, the federal courts have rejected the pass-on defense for decades. Thus, Manufacturers' interpretation is not mutually exclusive with prohibiting the defense.

In order to effectuate the purposes of the law, this Court should construe the Cartwright Act to mean that an overcharged plaintiff suffers injury and sustains compensable damages at the moment it purchases a price-fixed product at an artificially-high rate and in the amount of the overcharge it is forced to pay. To do otherwise would allow a guilty defendant to restrain competition without reprisal, retain illegally profits, and avoid punishment, undeterred from repeating the offense.

### 1. Manufacturers' Wooden Construction Fails To Interpret The Law With Respect To Its Purpose

In construing a statute, the Court's "role is limited to ascertaining the Legislature's intent so as to effectuate the purpose of the law." (*Palmer v. GTE California, Inc.* (2003) 30

Cal.4th 1265, 1271.) All other rules of statutory construction are subject to this controlling principle. (*In re Estate of Potter* (1922) 188 Cal. 55, 76.) "Legislative purpose will not be sacrificed to a literal construction of any part of the act." (*Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

In their opening brief, Pharmacies argued that the pass-on defense cannot be permitted because its application would severely undermine the purposes of the Cartwright. (Opening Brief on Merits (OBM) at pp. 25-40.)

In rebuttal, Manufacturers first attempt to dismiss the Cartwright Act's goals as mere "public policy" argument. (ABM at pp. 28-29.) But in fact, the purposes of the Cartwright Act have been expressed in the statute and interpreted by this Court and therefore constitute "legislative intent," not mere "public policy." (OBM at pp. 25-26.)

Second, they argue that "a mandate to construe a statute liberally in light of its underlying remedial purpose does not mean that courts can impose on the statute a construction not reasonably supported by the statutory language." (ABM at p. 29, *quoting*, *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 645.) But that rule is inapplicable here. Pharmacies' interpretation is the same "reasonable" interpretation applied by four decades of Supreme Court precedent and by all eleven states that have considered and rejected the pass-on defense.

Manufacturers attempt to distinguish *Hanover Shoe* as an unreasonable guide for this Court, but their efforts are futile. First, they inexplicably claim that *Hanover Shoe* did not involve an interpretation of the statute. (*Clayworth v. Pfizer* (2008), 165 Cal.App.4th 209, 232 (*Clayworth*); ABM at p. 20.) But, *Hanover Shoe* made clear its holding was a construction of "the meaning of § 4." (*Hanover Shoe, supra*, 392 U.S. at p. 489.) And, the Supreme Court later emphasized "the issue before the Court in ... *Hanover Shoe* was *strictly* a question of statutory interpretation." (*Cal. v. ARC Am. Corp.* (1989) 490 U.S. 93, 102-103, italics added.)

Manufacturers further contend that *Hanover Shoe*'s construction of Section 4 of the Clayton Act provides no guide for reading the Cartwright Act. (ABM at p. 20.) But, the words in both Section 16750 and Section 4 are operatively identical. (Compare Bus. & Prof. Code §16750 ["damages sustained"] and 15 U.S.C. §15 ["damages by him sustained"].) And, both California and the federal courts define "damages" in the same way. (See *ante*, at p. 4; OBM at p. 38.)

Neither does the fact that *Hanover Shoe* construed Section 4 with respect to the policies of the law, rather than the statute's text, forward Manufacturers' point. (ABM at p. 20.) In fact, it rebuts it. What *Hanover Shoe* understood, and the First District did not, was that the language of the statute cannot be interpreted in a way which frustrates the legislative purpose of the law. (OBM at pp. 38-40.) The purposes of the federal and California antitrust laws are essentially identical.

Where they differ, "the Cartwright Act is broader in range and deeper in reach than the Sherman Act." (*Cianci v. Superior Court* (1985) 40 Cal.3d 903, 920 (*Cianci*).)

Manufacturers further try to distinguish *Hanover Shoe* by claiming that the Legislature rejected its policies when amending the Cartwright Act in 1978. (ABM at pp. 34-36.) That convoluted suggestion is readily refuted by the legislative history of the amendment. (See *post*, at pp. 25-26.)

Manufacturers also falsely claim that, contrary to California, *Hanover Shoe* applied a "privity rule," adopted from *S. Pac. Co. v. Darnell-Taezner Lumber Co.* (1918) 245 U.S. 531 (*Darnell-Taezner*). (ABM at pp. 20-21.) But, *Hanover Shoe* never announced such a rule. *Darnell-Taezner*'s observation that the plaintiff was in privity with the defendant was not used to limit cases as such, but to point out that – since the plaintiff was the only party who was able to recover the overcharge – denying him the ability to bring suit would allow the guilty defendant to "retain his illegal profit." (*Hanover Shoe, supra*, 392 U.S. at p. 490, n. 8, *quoting*, *Darnell-Taezner, supra*, 286 U.S. at p. 533-534.) Moreover:

> *Hanover Shoe* cannot be read ... as limiting actions to parties in privity with one another. That was made clear in *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969), decided the next Term ... in which the Court traced an illegal overcharge through several levels in the chain of distribution ....

(*Illinois Brick Co. v. Illinois* (1977) 431 U.S. 720, 751 (*Illinois Brick*) (dis. opn. of Brennan, J.).)

In sum, *Hanover Shoe* offers a sound interpretation which is readily adaptable to the Cartwright Act.

Third, Manufacturers argue that the decision below adequately serves the law's purposes. (OBM at pp. 26-35.)

They contend that the enforcement policy of the Cartwright Act would not be sacrificed, even if direct purchasers stopped bringing suit. Like the First District, they argue that private suits are unnecessary, since *parens patriae* cases more than adequately enforce the law. (AMB at p. 30) But, this Court has many times rejected that view, emphasizing the importance of private actions in supplementing a resource-strapped Attorney General. (*Cianci, supra*, 40 Cal.3d at p. 913; *Chicago Title Ins. Co. v. Great Western Financial Corp* (1968) 69 Cal.2d 305, 329 (*Chicago Title*); *Cel-Tech Commcns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 213.)

They further contend that monetary inducements provide ample incentive for damaged parties to bring suit and enforce the law. (ABM at pp. 29, 31-32.) But, Manufacturers fail to confront the chilling effect the pass-on defense will have on *meritorious* actions brought by direct purchasers. Thus, they claim that the decision below "does not prohibit any *damaged* plaintiff from suing; indeed, a direct or indirect purchaser 'who passed on only *some* of these overcharges would maintain "damages" for which it could state a

Cartwright Act claim.'" (ABM at p. 32, *quoting*, *Clayworth, supra*, 165 Cal.App.4th at p. 243, italics in original.) But, if the pass-on defense were allowed, *even damaged* direct purchaser plaintiffs would be deterred from bringing suit, knowing they would be faced with overwhelmingly expensive and lengthy discovery. Deterring direct purchaser actions, aside from undermining the purpose of the law (*Hanover Shoe, supra*, 392 U.S. at p. 493-494), is inconsistent with the Legislature's 1978 Amendment, which expressly invited direct purchaser suits. (OBM at pp. 27-29.)

If Pharmacies' suit is precluded, no plaintiff will survive to prosecute these guilty defendants. No other plaintiff has sued because no other plaintiff (including consumers) has the incentive. (OBM at pp. 6-7.) Manufacturers reply that if the claim had merit,[1] insurance companies could sue. (ABM at p. 30, n.12.) But, if the pass-on defense were allowed, Manufacturers would simply argue the insurance companies passed-on the overcharges in the form of higher premiums. Because of the peculiarities of the industry, if Pharmacies' suit is barred, Manufacturers will effectively be given carte blanche to violate the law.

Manufacturers also argue for their illicit windfall by claiming the pass-on defense would serve the law's

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[1] Manufacturers' factually liberal defense of the claims' merits is irrelevant here, as they are presumed guilty on this appeal. (AMB at p. 30, n.12.)

compensation goal. (ABM at p. 30.) But, their reading elevates compensation above any other goal, and Manufacturers' reliance on the statement in *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 132 (*Bruno*) that "compensation is the primary rationale of private antitrust lawsuits," distorts the logic of that case, which ultimately awarded damages to admittedly uninjured class members. (*Bruno, supra*, 127 Cal.Ap.3d at pp. 131-132.) Manufacturers ignore the fact that *Bruno* rejected their very reading, repudiating federal cases that elevated compensation above all other goals. (*Ibid.*) Additionally, other courts have shown that compensation is "subordinate" to "protect[ing] the public from ... restraints of trade." (*Milton v. Hudson Sales Corp.* (1957) 152 Cal.App.2d 418, 443.)

Manufacturers offer the preposterous contention that *Pharmacies*, rather than themselves, seek the greater windfall. (ABM at p. 30.) But while accusing Pharmacies of reaping a $3 profit[2] as a result of a single overcharge, Manufacturers concede the same overcharge results *in a $50*

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[2] Relying on their "simple math" (ABM at p. 9, n. 6), Manufacturers suggest Pharmacies profited from the overcharge, but their math is indeed simple. Since they cannot show what Pharmacies would have charged absent the conspiracy, they cannot show Pharmacies profited or sustained no damages. (OBM at pp. 21-25.) The difficulty of this proof justifies outlawing the defense, since its introduction would severely jeopardize antitrust enforcement. (OBM at pp. 26-27, 14-15.)

*windfall* to them. (Vol. IV Clerk's Transcript (CT) 867, line 4; ABM at p. 9, n. 6.) And while Pharmacies' profit, even if presumed, stems from their struggle to remain viable businesses, Manufacturers, already the most profitable firms in the world, seek exorbitant profit through illegality.

Even if an overcharged plaintiff does recover a windfall, such is tolerated when serving the purpose of the law. (See *post*, at pp. 13-14; OBM at pp. 33-34.)

Finally, in asserting the pass-on defense somehow serves antitrust policy, Manufacturers argue for the First District's fabricated "golden rule." (ABM at pp. 33, 36-37.) But, the Bible is not binding authority. And, there are "sound reasons" for treating offensive and defensive pass-on differently. (OBM at pp. 30-31.) Ignoring this argument, Manufacturers instead claim that defensive and offensive pass-on evidence is the same.[3] (ABM at p. 36.) Not so.

To prevail on the affirmative defense[4] of pass-on, the defendant would have to make the "nearly insuperabl[y] difficult[]" proof "that the particular plaintiff could not or

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[3] On that faulty premise, Manufactures go on to argue that because California rejected *Illinois Brick* in 1978, it must also have sanctioned the pass-on defense. The argument is unsupportable. (See *post*, at pp. 25-26.)

[4] It is undisputed the pass-on defense is an affirmative defense. Manufacturers treated it as such in their Answers to the complaint and in their trial briefs. (I CT 30 - II CT 296; IV CT 798 (opposition brief), 864 (incorporating opposition brief).)

would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued." (*Hanover Shoe, supra*, 392 U.S. at p. 493.) On the other hand, to show injury, the plaintiff need only demonstrate that it purchased the product at inflated rates. (OBM at pp. 19-20.) And to prove the amount of damages, the plaintiff is afforded considerable leeway. Thus, contrary to Manufacturers' claim that "proof of the damages ... may never be inferred" (ABM at p. 22), a jury is permitted to rely on "inferential proof" of damages. (*Bigelow v. RKO Radio Pictures, Inc.* (1946) 327 U.S. 251, 264 (*Bigelow*).) "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." (*Ibid.*) Adopting the *Bigelow* standard in *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 46, this Court correctly reasoned, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

Finally, to the extent Manufacturers claim the *Illinois Brick* dissent argues for permitting the defense (ABM at p. 36), Justice Brennan plainly rejected that contention: "*Hanover Shoe* thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action." (*Illinois Brick, supra*, 431 U.S. at p. 753 (dis. opn. of Brennan, J.).)

In sum, the expressed and court-interpreted goals of the Cartwright Act are paramount when interpreting the statute. *Hanover Shoe*, analyzing a statute with the same "damages sustained" language, offers a sound foundation for construing the Cartwright Act. Both are grounded in the same important purposes, and both reject Manufacturers' proffered defense.

### 2. Drug Manufacturers' Primary Argument Hinges On A Faulty Application Of The Theory Of Mitigation

Manufacturers do not claim Pharmacies never suffered injury or damages. They argue instead that *after* damages were sustained, Pharmacies recouped their losses from third parties. Boiled down, their argument is simply that the rule of mitigation should apply. But, "a broad mitigation rule finds no support in appellate antitrust decisions." (*Guild Wineries & Distilleries v. Sosnick* (1980) 102 Cal.App.3d 627, 637.) Further, "in antitrust cases the common law rules of damages [like mitigation] are not controlling." *Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545.)

The Manufacturers make the sweepingly overbroad statement that California law has "*always*" held that "'damages sustained' by a plaintiff exclude amounts already recouped." (ABM at p. 12, italics added.) But, California has not always so held. The law often prevents defendants from introducing mitigation evidence in order to uphold the law's

purpose. That the plaintiff may recover a windfall in such cases is irrelevant, since the primary concern is preventing the wrong-doer from reaping a profit from his wrong. "No one can take advantage of his own wrong." (Civ. Code §3517.)

The collateral source rule is one such example. (OBM at p. 33.) And, there is precedent for applying it here, as the trial court in *Hanover Shoe* did. (*Hanover Shoe, Inc. v. United Shoe Mach., Corp.* (1960) 185 F.Supp. 826, 829.)

Essentially ignoring this, Manufacturers offer the one-sentence response that the collateral source rule is exceptional. (ABM at p. 33.)

But, there are other instances in which mitigation evidence is prohibited. A wrong-doer who has breached a contract cannot offer evidence that the opposing party received tax benefits in mitigation because "[t]here is deterrent value against breaching a contract if contracting parties know they must compensate the other party in full, without being able to subtract any tax benefits the other party might receive." (*Depalma v. Westland Software House* (1990) 225 Cal.App.3d 1534, 1545.) In wrongful discharge cases, a defendant may not offer proof of plaintiff's unemployment benefits. (*Monroe v. Oakland Unified School Dist.* (1981) 114 Cal.App.3d 804, 810-811.) In federal law, a director or officer who has committed a wrong may not offer mitigation evidence against the FDIC because "the risk of errors ... should be borne by the ... wrongdoers ...." (*FDIC v. Mijalis* (5th Cir. 1994) 15 F.3d 1314, 1323-1324.) Where property is converted, damages are

not mitigated if the wrongdoer returns the property without the owner's consent. (*Kissam v. Anderson* (1892) 145 U.S. 435, 441.)

Manufacturers nevertheless contend the Cartwright Act's drafters intended to allow mitigating pass-on evidence. (ABM at pp. 15-18.) They incorrectly rely on the rule that "*after* the courts have construed the meaning of any particular word, or expression, and the legislature *subsequently* undertakes to use these exact words in the same connection," the legislature is presumed to have used the phrase in the interpreted meaning. (ABM at p. 16, italics added.) However, the rule does not apply here as a matter of timing: the enactment must be subsequent to the interpretation. Only two of Manufacturers' cases were decided before the Cartwright Act was drafted in 1907, and neither of those two cases "construed the meaning of any particular word or expression." (*Utter v. Chapman* (1869) 38 Cal. 659 (*Utter*) and *Hicks v. Drew* (1897) 117 Cal. 305 (*Hicks*).) The rule also requires the legislature's subsequent use of the words be "in the same connection" in which they were originally interpreted. But, neither *Utter* (contract) nor *Hicks* (water damage) involved antitrust.

The only cited antitrust cases – both issued after the Cartwright Act was drafted – are inapposite. (ABM at pp. 16-18.) Contrary to their assertion that *Krigbaum v. Sbarbaro* (1913) 23 Cal.App. 427 (*Krigbaum*) and *Overland Publ'g Co. v. Union Lithograph Co.* (1922) 57 Cal.App. 366 (*Overland*)

"construe[ed] the Cartwright Act," the fact is – as the First District was forced to admit – "*Krigbaum* and *Overland* did not expressly construe 'damages sustained.'" (*Clayworth, supra*, 165 Cal.App.4th at p. 231.)

*Krigbaum* held that a cognizable antitrust injury is one sustained as a result of the trust's restraint on trade, as opposed to the trust's other bad acts. (*Krigbaum, supra*, 23 Cal.App. at p. 433.) No one can dispute a buyer of price-fixed products suffers antitrust injury where he pays a supracompetitive price, since the unlawful payment directly results from the illegality of the trust. In truth, Manufacturers only cite *Krigbaum* because it uses the words "actually suffered," which they woefully misconstrue. (OBM at pp. 36-37.)

*Overland* is likewise inapplicable. There, a printer alleged injury by acts of competing printers, who conspired to fix prices. (*Overland, supra*, 57 Cal.App. at pp. 368, 372-373.) The court held plaintiff could sustain no injury because the conspiracy among his competitors meant plaintiff had "fewer competitors with whom to contend." (*Id.* at p. 375.) The key fact that distinguishes *Overland* is the plaintiff was a *competitor* of the price-fixers, not a *buyer*. The *Overland* plaintiff was not injured because if the conspiracy raised prices, plaintiff could raise his rates too (without losing sales) or cut prices and win market share. This is a far cry from a *buyer* alleging a price-fixing conspiracy among his *suppliers*, as here. Unlike *Overland*, Pharmacies were forced to pay

higher prices as a result of their suppliers' cartel – quintessential antitrust injury.

The rule of these cases hardly distinguishes California from the federal courts, which also apply it. (*Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.* (1977) 429 U.S. 477, 489.)

Manufactures' remaining cases apply laws whose underlying goals are just not the same as "the high purpose" of the antitrust laws, and they are therefore irrelevant. (*Cianci, supra*, 40 Cal.3d at p. 913.) Manufacturers cite cases involving breach of contract,[5] but the purposes underlying contract are not comparable to antitrust. "Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate 'social policy.'" (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683.) Manufacturers' other authorities involve tortious water damage (*Hicks v. Drew, supra* 117 Cal. 305), flood damage to property (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565), and legal malpractice (*Loube v. Loube* (1998) 64 Cal.App.4th 421). But, the torts in these cases are hardly comparable to antitrust; preventing water damage is simply not on par with protecting the economy from destructive price-fixing conspiracies. "The antitrust laws ... are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of

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[5] ABM at pp. 12, 13 & n. 7, 14.

our fundamental personal freedoms." (*United States v. Topco Assocs.* (1972) 405 U.S. 596, 610.)

### 3. The Proper Construction Of The Statute Is That An Overcharged Plaintiff Suffers Injury And Damages As Soon As It Purchases A Price-Fixed Product

In order to effectuate the purpose of the law, while still abiding by the meaning of "damages," an overcharged plaintiff must be held to have suffered injury and damages at the moment the overcharge is paid.

There is support for such a holding. In their Opening Brief, Pharmacies cited various cases which hold that "when a conspiracy to fix prices has been proven and plaintiffs have established they purchased the price-fixed goods or services, the jury can infer plaintiffs were damaged."[6] (OBM at pp. 19-20.) In rebuttal, Manufacturers cite dicta from *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341 (*B.W.I.*) and *J.P. Morgan, Inc. v. Superior Court* (2003) 113

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[6] Manufacturers' attempt to distinguish *Cal. Adjustment Co. v. Atchison, Topeka and Santa Fe Ry. Co.* (1918) 179 Cal. 140 is unavailing. (ABM at p. 19.) *Hanover Shoe* relied on similar transportation cases in concluding that damages in an overcharge case are the overcharges. (*Hanover Shoe, supra*, 392 U.S. at pp. 489-490.) One case *Hanover Shoe* relied on, *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.* (1907) 204 U.S. 426 (*id* at p. 490, n.7), is cited with approval in *Cal. Adjustment*. (*Cal. Adjustment, supra*, 179 Cal. at p. 145.)

Cal.App.4th 195 for the supposedly contrary proposition that a defendant can overcome this presumption of injury "by showing plaintiff and the class 'passed on' the overcharge." (ABM at p. 23.) Far from holding that a defendant can "negate injury" with pass-on evidence, these cases merely stated that "*whether*" a defendant may do so "has not been addressed by any California court, and it would be premature to resolve it at this juncture." (*B.W.I., supra*, 191 Cal.App.3d at p. 1353.)

Moreover, an overcharged plaintiff may still suffer injury and damages, apart from lost profits damages, *even if* it passes-on the overcharge. (OBM at pp. 21-25.) Thus, to prove a plaintiff has "borne no portion of an overcharge," the defendant would have to prove, among other things, "that the [plaintiff] could not have raised its rates prior to the overcharge." (*Kansas v. UtiliCorp United, Inc.* (1990) 497 U.S. 199, 209 (*UtiliCorp*); *Hanover Shoe, supra*, 392 U.S. at p. 493, n.9.)

Manufacturers attempt to distort this analysis by mischaracterizing it as a "lost profits" claim. (ABM at p. 24.) Their argument is a classic red herring, and the Supreme Court has made clear that whether a plaintiff could have raised its rates absent the conspiracy is *not* related to a claim for lost profits. As *UtiliCorp* explained, an overcharge may injure a plaintiff "*apart from the question of lost [profits]*" because "if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in

his costs, the fact he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages." (*UtiliCorp, supra*, 497 U.S. at p. 209, *quoting*, *Hanover Shoe*, 392 U.S. at p. 493, n. 9.)

Thus, defendant's proof that plaintiff "could not have raised its rates prior to the overcharge" goes to whether plaintiff "has borne [a] portion of the overcharge," which is "apart from the question of lost [profits]." (*UtiliCorp, supra*, 497 U.S. at p. 209, italics added.)

Manufacturers also argue that "proof of the damages element of a Cartwright Act claim may never be presumed or inferred." (ABM at p. 22.) But, that is not the law, and a plaintiff *may* rely on inferential proof in showing damages. (See *ante*, at p. 12.)

Finally, Manufacturers improperly cite statements from the *UtiliCorp* dissent that plaintiff's "injury is not measured by the amount of the illegal overcharge that it has passed on." (ABM at pp. 23-24, *quoting, UtiliCorp, supra*, 497 U.S. at p. 224 (dis. opn. of White, J.).) The First District relied heavily on similar citations. (*Clayworth, supra*, 165 Cal.App.4th at p. 223.) None of these statements is relevant because all of them relate to *Hanover Shoe*'s "cost-plus contract" exception, which has never been an issue in this appeal.

The "cost plus" exception (*Hanover Shoe, supra*, 392 U.S. at p. 494) is very narrow and only applies where the plaintiff's customer "is committed to buying a fixed quantity regardless

of price." (*UtiliCorp, supra*, 497 U.S. at p. 217.) None of Pharmacies' customers have such contracts. (II CT 355, line 20.)

The cited *UtiliCorp* dissent passages were limited to instances in which there was a "perfect and provable pass-through" (*UtiliCorp, supra*, 497 U.S. at p. 224), a phrase borrowed from the lower court in *UtiliCorp* (*id.* at 221, *quoting*, *In re Wyoming Tight Sands Antitrust Cases* (1989) 866 F.2d 1286, 1293 (*Wyoming Sands*)), which used the phrase to describe the "cost-plus" exception. (*Wyoming Sands, supra*, 866 F.2d at pp. 1292-1293.)

In its original ruling, the First District incorrectly applied the exception, to which Pharmacies objected in their Petition for Rehearing. (Pet. Reh. at 15-16.) Conceding its error, the First District deleted its analysis of the exception on modification. (*Clayworth v. Pfizer, Inc.* (2008) 2008 Cal.App.Lexis 1325.) Unfortunately, as Pharmacies noted in their opening brief, "various stray remarks" referencing the exception still remain in the decision. (OBM at p. 3.) Manufacturers' citations are examples of such "stray remarks," and must be disregarded.

## B. The Legislative History Of The Cartwright Act Demonstrates An Intent To Apply The Rule In *Hanover Shoe*

### 1. California's Incorporation Of The Hart-Scott-Rodino Act Proves Its Intent To Follow *Hanover Shoe*

The federal Hart-Scott-Rodino Antitrust Improvement Act (HSR) includes a provision on multiple liability which requires the court to "exclude from the amount of monetary relief ... any amount ... which duplicates amounts which have been awarded for the same injury ...." (15 U.S.C. §15(c).) The provision was enacted in response to concerns that *Hanover Shoe* specifically would lead to multiple liability. This is not conjecture; the federal legislative history clearly indicates this purpose. (OBM at pp. 44-46.)

The following year, "modeling" its own bill "directly on the federal law,"[7] California adopted the HSR in its entirety. (Stats. 1977, ch. 543, §1, p. 1747.) Since an effect cannot be addressed without recognizing the existence of its cause, it must be concluded that, in adopting the HSR provision on multiple liability, California recognized the rule of *Hanover Shoe*.

Manufacturers first respond that just because the Legislature found HSR "to be a good model for California[]"

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[7] Vol. I Stipulated Motion to Augment Record (SMAR) 73, 74, 84, 104, 119.

does not mean the Legislature "adopted every aspect of federal law referenced in the HSR Act's legislative history." (ABM at pp. 42-43.) But, this untenable suggestion presumes the Legislature enacted the provision without knowing why it was written or the purpose it served.

As the court of appeal held in *People v. Butler* (1996), 43 Cal.App.4th 1224, 1244 (*Butler*), when the Legislature adopts the federal law in its entirety, it is presumed to be aware of the federal legislative history. (OBM at p. 46.) Manufacturers argue that *Butler* expressed no "general proposition." (ABM at p. 44, n.17.) But, this Court has reiterated the *Butler* rule, holding that where the California statute is "*modeled on* the [federal law]," as here, "the legislative history of the federal act serve[s] to illuminate the interpretation of its California counterpart." (*Am. Civil Liberties Union Found. v. Deukmejian* (1982) 32 Cal.3d 440, 447, italics added.)

Manufacturers erroneously contend the "obvious purpose" of the adopted provision "is to prevent the Attorney General from seeking recovery on behalf of consumers who have already recovered ...." (ABM at p. 43.) But, this makes no sense. Why would the Attorney General bring suit on behalf of consumers if the consumer class had already recovered? The "obvious purpose" of the provision was made plain in a statement of legislative intent submitted by the congressman who authored it: "[t]he first purchaser can, under *Hanover Shoe*, recover the entire overcharge, whether or not he absorbs all or merely part of it ... However, the compromise

bill ... expressly forbids duplicative recoveries." (II SMAR 259, 266.)

Finally, Manufacturers contend that adopting Pharmacies' analysis would produce absurd results. (ABM at p. 44.) They suggest that if a direct purchaser files suit and recovers an overcharge, the Attorney General would not be able to *subsequently* sue for the same overcharge in *parens patriae*. That fantastic hypothetical was dismissed by this Court in *Union Carbide Corp. v. Superior Court* (1984) 36 Cal.3d 15, 24 (*Union Carbide*) which explained, quoting the dissent in *Illinois Brick*, "[t]he extended nature of antitrust actions, often involving years of discovery, combines with the short four-year statute of limitations to make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit." The present case offers a vivid example. The original complaint was filed in August, 2004 and the statute has already run. (II SMAR 319.)

2. The 1978 Amendment Sought To Prevent Guilty Defendants From Escaping Liability

California's 1978 amendment to the Cartwright Act was unquestionably pro-enforcement, having been passed to secure the right of indirect and direct purchasers to sue for antitrust violations. Yet, the Manufacturers contend that this amendment paradoxically enacted a loophole that allows guilty defendants to escape liability.

At various points in their brief, Manufacturers argue that in passing the 1978 amendment, California rejected the underlying rationale of *Hanover Shoe*. (ABM at pp. 20, 27-28, 34-37.) They suggest that the "evidentiary problem, considered insoluble in *Hanover Shoe*, was clearly contemplated by the 1978 Amendment's drafters as a challenge that could be met by the California courts." (ABM at p. 36.) They support a variety of arguments with this fallacious conclusion. (ABM at pp. 20, 27-28, 33-37.) But, because their premise is false, all of these arguments fail.

The legislative history of the 1978 Amendment makes it abundantly clear that the evidentiary problems outlined by the *Illinois Brick* Court were not "clearly contemplated" by the Legislature, as Manufacturers incorrectly assert. The bill's digest flatly states, "[t]his measure *does not address* the ... evidentiary difficulties foreshadowed in [*Illinois Brick*]." (III CT 552, italics added.)

Manufacturers suggest the 1978 amendment was intended to provide a defensive loophole. The opposite is true; the pro-enforcement act was written to prevent antitrust wrongdoers from escaping liability. By extension, it also disapproved Manufacturers' defense.

The amendment was described as "consistent with the policies of more antitrust enforcement and more protection for the victims of antitrust violations." (III CT 592.) The bill's

founder[8] testified before the Judiciary Committee that "California's law should be created in such a manner *as to make it as difficult as possible for anti-trust violators to profit from their wrongdoing*." (III CT 587, italics added.) He further testified, "[i]f this bill is not passed those people who have manipulated the price to the State, may be allowed to keep their illegal monies and ... do the same thing in the future." (III CT 586.) The bill's sponsor explained to the Assembly, "[t]he intent of this bill is to *prevent a manufacturer from avoiding the anti-trust law* as a result of the Illinois Brick decision." (III CT 593, 583, italics added.) The legislative history criticizes *Illinois Brick* in terms of its "tremendous loophole," which "would allow every manufacturer of products to escape any liability for restraint of trade or price-fixing ...." (III CT 581.) These citations indicate that the central tenet of the amendment was not only to protect indirect purchaser recovery, but to ensure violators would be punished and disgorged. Manufacturers' defense cannot be permitted because it would allow precisely what the Legislature sought to prevent.

The 1978 amendment was also discussed by this Court in *Union Carbide, supra*, 36 Cal.3d 15. There, the Court found the Legislature "met with approval" the portion of the dissent in *Illinois Brick* that analyzed multiple liability. (OBM at p. 43.) The dissent's reasoning on multiple liability hinged on a

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[8] Compare III CT 584 and 589.

recognition of *Hanover Shoe*. Since the Legislature "approved" this reading, it also must have approved the reasoning of *Hanover Shoe*. (OBM at pp. 42-44.) Manufacturers respond by quibbling about what portion of the dissent the Legislature approved, but their attack analyzes the wrong passage from *Union Carbide*.[9]

Manufacturers also attempt to rebut the argument, based on *Union Carbide*, that "the risk of multiple liability, even though remote, only exists in a legal scheme that rejects the pass-on defense and permits indirect purchaser standing." (ABM at p. 41.) Their counter consists solely of the assertion that the "intra-system" risk identified in *Union Carbide* – that an intermediate purchaser might sue independent of the end consumer, subjecting the defendant to multiple liability – is not unique to pass-on cases. (ABM at pp. 41-42.) But *Union Carbide was* a pass-on case, and the *mere existence* of "intra-system" risk *necessarily* means the pass-on defense is unavailable. If the defense were available, multiple liability could not – as a matter of fact – be a concern, and it would have been incorrect for this Court to conclude that "through discovery or other means, petitioners may be able later to make a showing of substantial risk of multiple liability ...." (*Union Carbide, supra*, 36 Cal.3d at p. 24.)

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[9] Pharmacies analyzed the passage from page 24 of *Union Carbide*. (OBM at p. 43.) Manufacturers distinguish the passage from page 20. (ABM at p. 40.)

Finally, Manufacturers suggest that the Legislature would not have approved *Hanover Shoe* "silently." (ABM at p. 42; OBM at pp. 48-49.) But, there was no need for the Legislature to affirmatively adopt *Hanover Shoe*, given the state of the law at that time. In 1968, the Cartwright Act was known as the "baby Sherman Act" (III CT 561) and federal interpretations were *applied* to the Cartwright Act. (*Chicago Title, supra*, 69 Cal.2d at p. 315.) That is precisely why the Legislature acted so decisively in repudiating *Illinois Brick*. (III CT 565 ["it is quite probable that a California judicial interpretation will be forthcoming that will follow ... *Illinois Brick*"].)

### C. California Must Not Become The Only State In The Nation To Allow A Guilty Defendant To Evade Liability By Asserting The Pass-on Defense

Each of the eleven state jurisdictions that have considered the pass-on defense have rejected its application where it would frustrate the only plaintiff poised the redress the violation. Manufacturers offer little in reply.

First, they claim that "[w]hat other states have done ... is irrelevant" to the issue here. (ABM at p. 45.) But, where there is no California case directly on point, "foreign decisions involving similar statutes and similar factual situations are of great value to the California courts." (*Martinez v. Enter. Rent-A-Car Co.* (2004) 119 Cal.App.4th 46, 55.)

Second, Manufacturers claim that the pass-on defense has not been universally rejected by the states. They cite two cases in which trial court judges have permitted the defense. Neither is worthy of consideration, since neither represents the law of any jurisdiction. The first is a federal district court decision interpreting Michigan state law. (*In re Vitamins Antitrust Litigation* (2003) 259 F.Supp.2d 1.) That case has never been cited by any Michigan court, is not binding in that state, and does not constitute Michigan law. Moreover, it relies on defense-oriented idiosyncrasies of Michigan law which do not exist in California, like the rejection of punitive damages in all tort actions and the denial of treble-damages in antitrust cases. The other decision is a four-page, unreported opinion from a state trial court in Wisconsin that has not been reviewed. (*J&R Ventures v. Rhone-Poulenc S.A.* (Wis. Super. Ct. Dec. 4, 2006, No. 00-1143); XI CT 2602.) Moreover, the decision is inherently suspect: the same trial judge rejected the pass-on defense four years earlier. (*K-S Pharmacies, Inc. v. Abbott Laboratories* (Wis. Super. Ct., 1996, No. 94-2384), XI CT 2601.)

Third, Manufacturers argue there is no consensus among the nine states that have considered the pass-on defense legislatively. But they attack only two statutes – New Mexico and Maryland – thereby conceding the validity of the other seven. Their attack is futile.

The New Mexico statute allows the defendant to introduce pass-on evidence only "in order to avoid duplicative

liability." (N.M.Stat.Ann. §57-1-3(b)(2)(ii).) If a defendant may only offer pass-on evidence to avoid multiple liability, it necessarily follows that at least one plaintiff has redressed the violation.

Like New Mexico, the Maryland statute allows a defendant to offer pass-on evidence only "in order to avoid duplicative liability." (Md. Comm. Law Code Ann. §11-209(b).) So, the violation is still prosecuted. Moreover, the defendant may only offer pass-on evidence if the overcharge was passed-on to the government, which is itself able to maintain the suit and redress the wrong. (*Ibid.*)

Neither of these statutes allows what Manufacturers impermissibly seek: a defense that would dispose of the only plaintiff.

In sum, none of these laws allows a defendant to evade liability. And, since Pharmacies are the only plaintiffs that have sued here, none of these statutes would permit the defense in this case. Furthermore, if the defense is to be permitted, it must be through legislation. All of the states that have allowed pass-on in *any* situation have done so through legislative enactment. On the other hand, every reviewing court to consider the defense – Minnesota, Arizona, and the United States – has acted properly within its judicial power in rejecting it. This Court should do the same.

## II. THE PASS-ON DEFENSE IS NOT AVAILABLE IN CLAIMS BROUGHT UNDER THE UNFAIR COMPETITION LAW

### A. Pharmacies Suffered Injury And "Lost Money" When They Purchased Drugs For More Than They Were Worth

Manufacturers first make the unsupported assertion that Pharmacies were "uninjured." (ABM at p. 47.) But, in passing Proposition 64, the voters expressly stated that a UCL plaintiff "who has been injured in fact under the standing requirements of the United States Constitution" has been injured in fact for purposes of the UCL. (Prop. 64, §1, subd. (e).) Manufacturers do not contest this reading. (OBM at p. 54.) Neither can they contest that Pharmacies have standing and have suffered injury under *Hanover Shoe*. In both federal and California law, a plaintiff suffers injury when it pays more for a product than it is worth. (*Chattanooga Foundry & Pipe Works v. Atlanta* (1906) 203 U.S. 390, 396; *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847, 855 (*Hall*).)

Manufacturers also cite *Peterson v. Cellco P'ship* (2008) 164 Cal.App.4th 1583, 1592 (*Peterson*) in contending that a plaintiff cannot show he has "lost money" simply by alleging the overcharge "was previously in [his] possession." (ABM at pp. 47-48.) But, their argument reveals a fundamental misunderstanding of Pharmacies' position.

Pharmacies have not argued they "lost money" *merely* because it was previously in their possession. They lost money

because, using money in their possession, they were forced to pay more for drugs than they were worth. (OBM at p. 55.) *Peterson* supports, not refutes, this conclusion. There, plaintiffs were precluded from bringing suit because they failed to show they paid more for insurance than it was worth. (*Peterson, supra*, 164 Cal.App.4th at p. 1591 [plaintiffs "obtained the bargained for insurance at the bargained for price"].) Citing *Hall*, *Peterson* thus concluded, "in *Hall*, the plaintiff 'expended money by paying the seller $29.51 – but he received a book in exchange'; therefore he did not lose money or suffer injury in fact." (*Id.* at p. 1592.) On the same reasoning, Pharmacies have undisputedly suffered injury and "lost money." Far from receiving the "benefit of their bargain," Pharmacies were forced to purchase drugs at prices 50% to 400% more than the drugs were worth.

### B. An Overcharged Plaintiff Has "Ownership Interest" In The Money Taken From It And Is Entitled To Restitution

Manufacturers claim that Pharmacies' customers, rather than Pharmacies, are the rightful owners of the claimed overcharges. (ABM at p. 49.) Thus, on the ground that the true owners are absent, Manufacturers unfathomably argue *they* should keep the overcharges. But, absent a third party's intervention or separate action, property rights are adjudicated between claimants before the court. (See *Townsend v. Perry* (1941) 43 Cal.App.2d 380, 383.)

Manufacturers' only authority for the unjust result they seek is Section 141(2) of the Restatement of Restitution, which is inapposite. [10] (ABM at pp. 49-50.).

As this Court held in *Palmtag v. Doutrick* (1881) 59 Cal. 154, 168 (*Palmtag*), the rule restated in Section 141(2) only applies where the third-party has specifically *authorized* the defendant to assert the third party's rights on its behalf: "bailee can only set up the title of a third person in an action by the bailor when he defends on such title, and by authority of such third person." (*Ibid.*; OBM at p. 60.) Absent the third-party's authorization, the defense is proscribed. (*Dodge v. Meyer* (1882) 61 Cal. 405, 423.)[11]

Manufacturers try to contain *Palmtag* on the ground it was a case about bailment, not the sale of goods. (ABM at p. 50, n.20.) But, this Court dismissed that argument in *Jeffers v. Easton, Eldridge & Co.* (1896) 113 Cal. 345, 355 where describing the *Palmtag* rule it held, "there is no difference between the relation of bailor and bailee and that of a seller

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[10] Below, Manufacturers relied heavily on *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, which the First District emphatically termed "dispositive." (*Clayworth, supra*, 165 Cal.App.4th at 245, 247.) Conceding the First District's erroneous analysis, Manufacturers have now abandoned *Madrid*.

[11] For an annotated discussion of Section 141's application in California case law, see Restatement, Restitution, California Annotations (1937), §141, pp. 126-127.

and purchaser ...." (*Id.* at p. 355.) In fact, Section 141 uses bailment in its illustrations. (Rest., Restitution, §141, cmt., illus. 2.)

Although Section 141(2) is inapplicable, the forthcoming Restatement Third of Restitution addresses the pass-on defense directly. While the current draft may unfortunately not be cited here,[12] the new Restatement does apply different rules to "conscious wrongdoers" and "innocent recipients." As to cases involving wrongdoers, "[t]he object of restitution ... is to eliminate any profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." (Rest. 3d, Restitution, §51 [Tent. Draft No. 5, Mar. 12, 2007].)

Manufacturers finally argue that "[t]he purpose of restitution" is to make the victim "whole," and *not* to "deter a violator." (ABM at p. 50.) But, this Court has very recently disagreed, confirming that Section 17203's restitution language is to be interpreted "in light of the 'concern that wrongdoers not retain the benefits of their misconduct.'" (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 320, *quoting, Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 452; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

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[12] The Restatement Third of Restitution is expected to include a section entitled "Passing on; rights of third parties," which has already been drafted and is pending approval. If approved, the section will be released in citable form in Fall, 2009.

Manufacturers support their incorrect assertion with a citation to the lower court's decision that "courts ordering restitution under the UCL are 'not concerned with restoring the violator to the status quo ante. The focus instead is on the victim.'" (*Clayworth, supra*, 165 Cal.App.4th at p. 247, *quoting, People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 134-135 (*Beaumont*).) However, tracing this "status quo ante" quotation back to its origin reveals that it does not have the meaning ascribed to it by the lower court or Manufacturers.

In the *Beaumont* case, the defendant landlords forced tenants to sign long-term leases in order to avoid the rent control ordinance. This requirement was deemed an unfair business practice, and the defendants were ordered to pay restitution. (*Beaumont, supra*, 111 Cal.App.4th at p. 132.) Not wanting to be saddled with long-term leases which no longer served their illicit purpose, defendants sought to have the contracts rescinded. (*Ibid.*) Defendants challenged the restitution order because it failed "to place the parties in the same position they would have been in before the challenged contract was entered into." (*Beaumont, supra*, 111 Cal.App.4th at p. 134.) In this context, *Beaumont* held that "courts are not concerned with restoring the violator to the status quo. The focus is instead on the victim." (*Id.* at p. 134.) But, the purpose of this holding was to prevent the defendants from *benefitting* from the restitution order and not, as

Manufacturers contortedly use it here, to allow a defendant to keep its ill-gotten gains.

By refusing to restore the violator to the status quo ante, the *Beaumont* court reasoned, "restitution is not solely 'intended to benefit the victims by the return of money, but instead is designed to ... deter future violations.'" (*Beaumont, supra*, 111 Cal.App.4th at p. 135.) In using the "status quo ante" language, *Beaumont* was quoting this Court's opinion in *Cortez v. Purolator Air Filtratino Products Co.* (2000) 23 Cal.4th 163, 177 (*Cortez*) that "[t]he status quo ante to be achieved by the restitution order was to again place the *victim* in possession of that money." (*Beaumont, supra*, 111 Cal.App.4th at p. 134, italics in original.) *Cortez* made clear that the "victim" in such a case was the person who had previously been in possession of the money. (*Cortez, supra*, 23 Cal.4th at p. 177.) In this case, since the money came directly from the plaintiffs, it is to be returned to them.

To accept Manufacturers' interpretation of the "status quo ante" language would flip the purpose of restitution on its head. It is hardly a return to the status quo to allow the wrongdoer – the only party who undisputedly has no right to the money – to keep its illicit profit. "[Removing] the possibility of profit from conscious wrongdoing ... is one of the cornerstones of ... restitution." (Rest.3d, Restitution [Tent. Draft No. 5, Mar. 12, 2007], comment (e).)

### C. Pharmacies' Right To Seek Injunctive Relief Has Never Been Challenged And Is Rightly Before This Court

Manufacturers accuse Pharmacies of not briefing the injunctive relief issue; however, they themselves never challenged the remedy in either their motion below (I SMAR 2) or in any of their briefs to the trial and appellate courts. The issue was not briefed by either party below because it formed no part of the trial court's decision. (IX CT 2634-2639.) The First District's ruling on injunctive relief was issued *sua sponte*. (*Clayworth, supra*, 165 Cal.App.4th at p. 247, n. 18.)

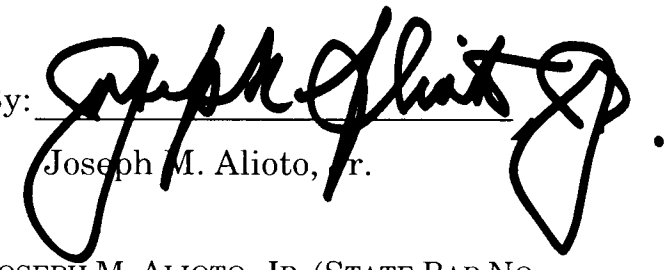
Because the First District reached the issue on the merits and it has been briefed by both parties, it is properly before the Court for resolution. (*Fawkes v. Reynolds* (1922) 190 Cal. 204, 209.) Since Pharmacies have standing, they are entitled to injunctive relief.

## CONCLUSION

For the reasons set forth above and in Petitioners' Opening Brief on the Merits, Pharmacies respectfully request the Court reverse the decision below and prohibit the pass-on defense as a matter of law.

June 22, 2009

Respectfully submitted,

By: 

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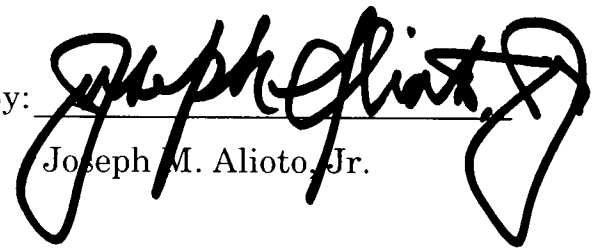
## WORD COUNT CERTIFICATION

The undersigned certifies that the foregoing PETITIONERS' REPLY BRIEF ON THE MERITS contains 8,389 words, exclusive of the tables and this certificate, pursuant to California Rules of Court, rule 8.520(c)(1), as counted by the computer program used to prepare the foregoing brief.

June 22, 2009

Respectfully submitted,

By: 

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**PROOF OF SERVICE**

*James Clayworth, et al. v. Pfizer, Inc., et al.,*
California Supreme Court No. S166435
Court of Appeal, 1st Appellate Dist., Div. 2, No. A116798
Alameda County Super. No. RG04172428

I, Tamara Slye, declare I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the City and County of San Francisco and my business address is 555 California Street, Suite 3160, San Francisco, CA 94104.

On June 22, 2009, I served the attached document described as:

**PETITIONERS' REPLY BRIEF ON THE MERITS**

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| Thomas Greene<br>Special Assistant Attorney General<br>**Attorney General of California**<br>1300 "I" Street<br>Sacramento, CA 94244-2550 | Kathleen Foote<br>Senior Assistant Attorney General<br>**Attorney General of California**<br>455 Golden Gate Avenue Suite 11000<br>San Francisco, California 94102-7004 |
| Clerk of the Court<br>**Alameda County Superior Court**<br>1225 Fallon Street<br>Oakland, CA 94612 | Hon. Thomas J. Orloff<br>**Alameda County District Attorney**<br>1225 Fallon St., Room 900<br>Oakland, CA 94612 |
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I, Tamara Slye, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 22, 2009, at San Francisco, California.

Tamara Slye

**SERVICE LIST**

*James Clayworth, et al. v. Pfizer, Inc., et al.*
California Supreme Court No. S166435
Court of Appeal, First Appellate District, Division Two, No. A116798
Alameda County Superior Court Case No. RG04172428

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| for Defendant **BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.**<br><br>**Anita F. Stork**<br>**COVINGTON & BURLING**<br>One Front Street<br>San Francisco, CA 94111-5356<br><br>Thomas J. Cosgrove<br>**COVINGTON & BURLING**<br>1201 Pennsylvania Avenue, N.W.<br>Washington, D.C. 20004-2401 | for Defendant **BRISTOL-MYERS SQUIBB COMPANY**<br><br>**Paul J. Riehle**<br>**Matthew A. Fischer**<br>**SEDGWICK, DETERT, MORAN & ARNOLD LLP**<br>One Market Plaza<br>Steuart Street Plaza, 8th Floor<br>San Francisco, CA 94105<br><br>**Evan R. Chesler**<br>**Elizabeth L. Grayer**<br>Marek P. Krzyzowski<br>**CRAVATH, SWAINE & MOORE LLP**<br>Worldwide Plaza, 825 Eighth Avenue<br>New York, NY 10019 |

**SERVICE LIST**

*James Clayworth, et al. v. Pfizer, Inc., et al.*
California Supreme Court No. S166435
Court of Appeal, First Appellate District, Division Two, No. A116798
Alameda County Superior Court Case No. RG04172428

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| for Defendant **ELI LILLY & COMPANY**<br><br>Gary Hansen<br>**OPPENHEIMER WOLFF & DONNELLY LLP**<br>Plaza VII, Suite 3300<br>45 South Seventh Street<br>Minneapolis, MN 55402-1609 | for Defendant **GLAXOSMITHKLINE**<br><br>**George S. Cary**<br>**David I. Gelfand**<br>Sara D. Schotland, Senior Counsel<br>Matthew Bachrack<br>**CLEARY GOTTLIEB STEEN & HAMILTON LLP**<br>2000 Pennsylvania Avenue, N.W.<br>Washington, D.C. 20006<br><br>**Alexander F. Wiles**<br>John C. Keith<br>**IRELL & MANELLA LLP**<br>1800 Avenue of the Stars, Suite 900<br>Los Angeles, CA 90067-4276 |
| for Defendant **HOFFMANN-LA ROCHE INC.**<br><br>H. Christian L'Orange, Of Counsel<br>**DRINKER BIDDLE**<br>50 Fremont Street, 20th Floor<br>San Francisco, CA 94105-2235<br><br>**Paul H. Saint-Antoine**<br>**Mary E. Kohart**<br>**David J. Antczak**<br>**DRINKER BIDDLE**<br>One Logan Square<br>18th and Cherry Streets<br>Philadelphia, PA 19103-6996 | for Defendants **JANSSEN PHARMACEUTICAL, INC., JOHNSON & JOHNSON HEALTH CARE SYSTEMS, INC., ORTHO BIOTECH, INC.,** and **ORTHO-McNEIL PHARMACEUTICAL, INC.**<br><br>**Beatrice B. Nguyen**<br>Cecilia C. Ogbu<br>**FOLGER LEVIN & KAHN LLP**<br>275 Battery Street, 23rd Floor<br>San Francisco, CA 94111<br><br>**William J. Cavanaugh, Jr.**<br>**PATTERSON BELKNAP WEBB & TYLER LLP**<br>1133 Avenue of the Americas<br>New York, NY 10036 |
| for Defendant **MERCK & CO., INC.**<br><br>**John M. Townsend**<br>**Robert P. Reznick**<br>**Scott H. Christensen**<br>**HUGHES HUBBARD & REED LLP**<br>1775 I Street, N.W.<br>Washington, D.C. 20006-2401<br><br>**Rita M. Haeusler**<br>**HUGHES HUBBARD & REED LLP**<br>350 South Grand Avenue, 36th Floor<br>Los Angeles, CA 90071-3442 | for Defendant **NOVARTIS PHARMACEUTICALS CORP.**<br><br>**Aton Arbisser**<br>Bryant S. Delgadillo<br>**KAYE SCHOLER LLP**<br>1999 Avenue of the Stars, Suite 1700<br>Los Angeles, CA 90067-6048<br><br>**Saul P. Morgenstern**<br>Karin E. Garvey<br>**KAYE SCHOLER LLP**<br>425 Park Avenue<br>New York, NY 10022-3598<br><br>**James A. O'Neal**<br>**FAEGRE & BENSON LLP**<br>90 South Seventh Street<br>Minneapolis, MN 55402<br><br>**Kim J. Walker**<br>**FAEGRE & BENSON LLP**<br>801 Grand Ave., Suite 3100<br>Des Moines, IA 50309-8002 |

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