CASE NO. S157001

N THE SUPREME COURT OF THE STATE OF CALIFORNIA

PAULINE FAIRBANKS, *et al.*,
Plaintiffs/Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
Respondent.

FARMERS NEW WORLD LIFE INSURANCE CO., *et al.*,
Defendants/Real Parties in Interest.

On Review of the Decision of the Court of Appeal,
Second Appellate District, Case No. B198538,
Denying a Petition for Writ of Mandate Challenging a Decision of the
Los Angeles Superior Court, Case No. BC305603.

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PETITIONERS FAIRBANKS, *ET AL.*; AND APPLICATION TO FILE AMICUS CURIAE BRIEF

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APPLICATION OF UNITED POLICYHOLDERS TO FILE AMICUS CURIAE BRIEF; STATEMENT OF INTEREST

Pursuant to Rule of Court 8.520(f), United Policyholders ("UP") requests permission to file the Amicus Curiae Brief set forth in the pages following on behalf of Plaintiffs and Petitioners Pauline Fairbanks, *et al.*

United Policyholders ("UP") is a not-for-profit corporation founded in 1991 to educate the public, the judiciary and elected officials on insurance issues and the rights of policyholders.[1] The organization is tax-exempt under Internal Revenue Code §501(c) (3), and is funded by donations and grants from individuals, businesses, and foundations. UP is governed by an eight-member Board of Directors. UP is based in Northern California, but operates across the United States. In particular, much of the organization's work takes place in communities that have been hit by natural disasters such as hurricanes, wildfires, earthquakes, and floods, giving rise to large numbers of insurance claims and resulting consumer confusion and frustration.

Among other activities, UP monitors legal and marketplace developments that impact insurance policyholders, operates an Amicus Project, participates in forums and conferences where public policy on insurance is formulated, compiles survey and other data, provides

[1] For a more complete description of UP and its work over the years, *see* the "About" page of the UP website, located at: http://www.unitedpolicyholders.org/about.html

information to the media, and provides post-disaster on-the-ground services, training, self-help materials, and advice for victims of natural disasters who are making insurance claims. UP also receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues. UP responds to marketplace developments such as sudden price increases, unavailability or large-scale non-renewals by educating the public on consumer options. UP also publishes various materials that give practical guidance to consumers, advocates, disaster relief personnel and other, on insurance issues, including both "front end" issues related to the selection and purchase of insurance, and "back end" issues related to coverage and claims. Many of these materials may be viewed on the organization's website at http://www.unitedpolicyholders.org.

UP was formed as an organization out of a belief that greater advocacy – in the judicial, administrative, media, and legislative arenas – was needed for insureds and insurance policyholders. Businesses and individuals rely on insurance to protect their property and livelihoods against risk. While insurance companies provide a valuable "quasi public" service by allowing policyholders to ensure against such risk, they are also in the business to earn profits. While the financial interests of the policyholder and insurance company sectors are distinct, and other in conflict, both sectors need the overall insurance system to function fairly

and efficiently. Insurers' interests are very well represented in the judicial, legislative, administrative, and media arenas through powerful and extremely well funded trade associations, lobbyists, attorneys and other spokespeople. Policyholders' interests are far less so, and United Policyholders is working to increase the representation of both large and small insureds in forums throughout the country.

United Policyholders previously has appeared as amicus curiae in over two hundred and twenty cases throughout the United States, including numerous cases in the California courts.[2] United Policyholders has also appeared as *amicus curiae* in cases before the United States Supreme Court. *See Humana, Inc. v. Forsyth*, No. 97-303 (U.S. Sept. 18, 1998); *FL Aerospace v. Aetna Casualty and Surety Co.*, No. 90-289 (U.S. Sept. 13,

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[2] Cases in which UP has previously filed *amicus curiae* briefs include, without limitation, the following: *County of San Diego v. Ace Property & Cas. Ins. Co.* (2005) 37 Cal.4th 406; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747; *Garamendi v. Golden Eagle Ins. Co.* (2005) 127 Cal.App.4th 480; *American Ins. Ass'n v. Garamendi* (2005) 127 Cal.App.4th 228; *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004) 121 Cal.App.4th 1029; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780; *Marselis v. Allstate Ins. Co.* (2004) 121 Cal.App.4th 122; *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16; *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070; *County of San Diego v. Ace Property & Casualty Ins. Co.* (2002) 103 Cal.App.4th 1335; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059; *Bialo v. Western Mut. Ins. Co.* (2002) 95 Cal.App.4th 68; *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142; *20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247; and *AICCO, Inc. v. Insurance Co. of North America* (2001) 90 Cal.App.4th 579.

1990), and the United States Supreme Court cited United Policyholders' brief in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). United Policyholders was the only national consumer organization to submit an amicus brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003).

United Policyholders has an interest in this case because unfair and deceptive practices in the marketing and sale of insurance directly impact UP's constituency of policyholders. Deceptive practices not only result in excessive and unnecessary costs for policyholders at the time of the initial transaction, but also cause significant damage when claims are denied because the terms of coverage or other aspects of the insurance have been misrepresented at the time of sale. As an organization, UP is firmly of the belief that insurance is a "service" within the meaning of the Consumers Legal Remedies Act, Civil Code §1761(b), particularly when it is sold in conjunction with other consumer goods and services, that the CLRA *does and should* apply to the sale of insurance and insurance-type services, and that application of the CLRA is *necessary* to protect consumers from unfair and deceptive practices in the insurance marketplace.

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Accordingly, United Policyholders, requests permission to file the following Amicus Curiae Brief.

Dated: July 9, 2008

UNITED POLICYHOLDERS

LAW OFFICES OF KIM E. CARD

By: _____
KIM E. CARD
Attorneys for Amicus Curiae
UNITED POLICYHOLDERS

AMICUS CURIAE BRIEF

INTRODUCTION

This case presents one of the most important questions concerning California's consumer protection laws to reach this Court in recent years. That question is whether the provisions of the Consumers Legal Remedies Act, Civil Code §1750, *et seq.* ("CLRA"), which prohibit "unfair methods of competition and unfair or deceptive acts or practices" in the sale or lease of "goods or services" to consumers apply to the sale of insurance. The CLRA is a broad and potent consumer protection statute, which "contains an express statement of legislative intent: 'This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive practices and to provide efficient and economical procedures to secure such protection.'" *Broughton v. Cigna Healthplans of California*, 21 Cal.4th 1066, 1077 (1999), *quoting* Civil Code §1760.

In a number of cases in the past, the CLRA has been effectively applied in cases challenging unfair and deceptive practices in the sale of insurance. *See e.g., Broughton, supra,* 21 Cal.4th at 1066, in which the plaintiff challenged the deceptive marketing of health insurance coverage; and *Massachusetts Mutual Life Insurance Company v. Superior Court*, 97 Cal.App.4th 1282 (2002), in which the plaintiff alleged fraud in the sale of "vanishing premium" life insurance policies. As a result of this Court's

dicta more than 25 years ago in *Civil Service Employees Ins. Co. v. Superior Court*, 22 Cal.3d 362, 376 (1978), however, in which the Court opined in passing, and without analysis, that "insurance is technically neither a "good" nor a "service" within the meaning of the [CLRA]," there has long been uncertainty as to whether the statute applied to insurance. This has led to inconsistent rulings among the trial courts and Courts of Appeal, and has discouraged victims of unfair and deceptive practices in the sale of insurance from seeking relief under the CLRA. This case now presents the issue squarely for the Court.

United Policyholders submits that the decision of the Court of Appeal below, finding that insurance is a not a "service" within the meaning of the CLRA was in error, and should be reversed. In fact, as discussed below, insurance has long been included in the definition of "services" in other similar consumer protection statutes. *See e.g.,* Civil Code §1802.2. Moreover, the Court of Appeal's perfunctory conclusion that insurance cannot be a "service" was based on assumptions about the nature of insurance (including that is nothing more than a contract of indemnity) that were not only unsupported by the record, but that are simply not true of many types of insurance that are sold to consumers in the current marketplace. *See* Slip Op., at 6. Thirty years ago when *Civil Service* was decided, it may have been true that most insurance was sold in the rarefied confines of an agent's office and in the form of basic indemnity

contracts. That is not true today. Consumers are now bombarded with insurance offers and solicitations in many different forms and contexts, most notably through the Internet, direct mail, and in many different types of retail stores. And perhaps more importantly, the sale of insurance *in connection with* the sale of other consumer goods and services is now pervasive and ubiquitous.

Furthermore, many types of insurance sold today cannot fairly be characterized as a simple "agreement to pay if and when an identifiable event occurs." (*See* Slip Op., at 6.) Instead, the insurance contract offers and constitutes a complex bundle of services for which the consumer most certainly pays as part of the premium. And the insurance companies market, advertise, solicit and *compete* on the basis of these insurance services, which necessarily means that when companies use unfair and deceptive practices, consumers suffer real harm. They may be induced to purchase insurance that they either do not need, or that is ill-suited or insufficient for their circumstances, and they may be diverted from purchasing insurance that they *do* need. And when they suffer a loss, they may find that the insurance they purchased does not provide the coverage and services that were promised. When unfair and deceptive acts and practices have been undertaken in transaction that results in the sale of insurance, (*see* Civil Code §1770), particularly when that insurance is sold "in connection with" the sale or lease of other goods and services, (*see*

Civil Code §1761(b)), the provisions of the CLRA do, and *should*, apply for the protection of consumers and the public.

ARGUMENT

I. INSURANCE HAS LONG BEEN CONSIDERED A "SERVICE" IN CALIFORNIA STATUTORY AND CASE LAW.

As the parties have recognized in their briefing, the issue presented in this case essentially boils down to the question of whether insurance, and in particular the type of insurance that was at issue in the underlying claim, is a "service" within the meaning of the CLRA.

Civil Code 1761(b) defines "services" for purposes of the CLRA as follows: "'Services' means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Obviously, insurance is neither specifically included nor specifically excluded in this definition of "services." That is also true, however, of essentially every other type of consumer service, in that the definition is phrased broadly and inclusively, and does not list *any* specific type of service. The question, therefore, is primarily one of statutory interpretation and legislative intent.

The basic rules of statutory interpretation, as summarized by this Court, are as follows:

> We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the

> words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

Nolan v. City of Anaheim, 33 Cal.4th 335, 340 (2004) (emphasis added).

In considering the intent of the Legislature, it is highly relevant that there are a number of statutory provisions in California law that clearly *include insurance* under the broad rubric of the term "services." Most notably, the Unruh Act, Civil Code §1801, *et seq.*, which regulates retail installment sales contracts, and which was enacted *before* the CLRA, defines "Services" as follows:

> "Services" means work, labor and services, for other than a commercial or business use, including services furnished in connection with the sale or repair of goods as defined in Section 1802.1 or furnished in connection with the repair of motor vehicles (except for service contracts as defined by subdivision (p) of Section 2981 which are sold in conjunction with the sale or lease of a vehicle required to be registered under the Vehicle Code) or in connection with the improvement of real property ***or the providing of insurance***, but does not include the services of physicians or dentists, nor services for which the tariffs, rates, charges, costs or expenses, including in each instance the deferred payment price, are required by law to be filed with and approved by the federal government or any official, department, division, commission or agency of the United States.

Civil Code §1802.2 (emphasis added). This definition explicitly includes "the providing of insurance" *within* the broad term "services." The definition does not *distinguish* insurance as something *other than* a service;

rather, it simply specifies insurance as one type of service that is covered. And indeed, the Unruh Act has long been interpreted in the case law as applying to insurance (when insurance is financed under a retail installment contract). *See e.g., King v. Central Bank,* 18 Cal.3d 840, 844-45 (1977); *Crawford v. Farmers Group, Inc.,* 160 Cal.App.3d 1164, 1168-69 (1984).

What is particularly significant about the definition of "services" in Section 1802.2 of the Unruh Act is that the initial part of the definition (including the first three phrases, up to "including services furnished in connection with the sale or repair of goods"), is *identical,* word for word, to the definition of "services" in the CLRA. Given that the Unruh Act preceded the adoption of the CLRA, and given the parallel consumer protection purposes of the two statutes, it can reasonably be presumed that the definition of "services" for the CLRA was borrowed from the Unruh Act. Rather than include the entire, lengthy definition of "services" that was in the Unruh Act, however, including all of the expressly stated inclusions and exclusions, what the Legislature did in the CLRA was to simply opt for the shortest and *broadest* possible definition, with any applicable exemptions stated in separate sections. *See* Civil Code §1754 (exempting certain real property transactions); 1755 (exempting advertising media). Thus, because insurance was plainly included in the Unruh Act definition of a "service," and because the CLRA adopted that same definition (in its broadest possible form) without specifically stating an

exemption for insurance as it did for other activities, *see* §§1754-1755, there is strong evidence that the Legislature intended insurance to be covered.[3]

There are several other California statutes that also either expressly include insurance within the definition of "services," or that demonstrate a legislative understanding that insurance *is* a service unless expressly excepted from such a definition. Civil Code §1689.5, for example, which defines terms for purposes of the right to rescind a "home solicitation contract" *(see* Civil Code §§1689.6-1689.11), defines the term "services" as follows:

> (d) "Services" means work, labor and services, including, but not limited to, services furnished in connection with the repair, restoration, alteration, or improvement of residential premises, or services furnished in connection with the sale or repair of goods as defined in Section 1802.1, and courses of instruction, regardless of the purpose for which they are taken, *but does not include* the services of attorneys, real estate brokers and salesmen, securities dealers or investment counselors, physicians, optometrists, or dentists, nor financial services offered by banks, savings institutions, credit unions, industrial loan companies, personal property brokers, consumer finance lenders, or commercial finance lenders, organized pursuant to state or federal law, that are not connected with the sale of goods or services, as defined herein, *nor the sale of insurance that is not connected with the sale of goods or*

[3] As further evidence on this issue, note that the Unruh Act definition also specifically referenced services provided "in connection with the improvement of real property." Civil Code §1802.2 The CLRA definition omitted that specification in the same manner that it omitted the reference to insurance, but no credible argument could be made that such omission evidenced an intent by the Legislature to exclude home improvement contracts from the CLRA.

> *services as defined herein*, nor services in connection with the sale or installation of mobile homes or of goods sold with a mobile home if either are sold or installed under a contract subject to Section 18036.5 of the Health and Safety Code, nor services for which the tariffs, rates, charges, costs, or expenses, including in each instance the time sale price, is required by law to be filed with and approved by the federal government or any official, department, division, commission, or agency of the United States or of the state.

Civil Code §1689.5 (emphasis added).

Again, the first part of this definition is remarkably similar to the definition of "services" in the CLRA. And what is significant for purposes of the issue presented in this case is that the Legislature, in this definition: (1) *included* insurance connected with the sale of goods or services, and (2) felt the need to specifically *exclude* insurance that was *not* connected with the sale of goods or services. In other words, the definition necessarily implies that all insurance is a service, and to the extent the statute was not intended to apply to insurance, that exception had to be stated expressly. *See also* Civil Code §1689.24 (containing the same definition for purposes of "seminar sales solicitation contracts").

Yet another statute evidencing the Legislature's understanding of insurance as a service is found in the Consumer Finance Lenders Law, Financial Code §§22000, *et seq.*, which regulates small consumer loans. Financial Code §22341of that statute provides that when refinancing a consumer loan, "t]he licensee shall not sell, attempt to sell, or agree to sell any *goods or services* to the borrower, *other than credit insurance as*

defined in Section 22314 and insurance required by the licensee to protect its security interest, until the loan has been in effect for at least 30 days." (Emphasis added). This provision, prohibiting the sale of any goods or services "*other than* credit insurance . . . and insurance required by the licensee to protect its security interest," clearly contemplates that insurance is a "service." If the Legislature had not considered insurance a service, there would have been no need to expressly allow the sale of credit insurance and insurance to protect the security interest, notwithstanding the prohibition against the sale of any "services."

Another example of the Legislature including insurance within "services" is found in Civil Procedure §425.17(c), which was enacted relatively recently in 2003 as part of California's Anti-SLAPP and SLAPPback provisions. That section provides that "Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, *insurance*, securities, or financial instruments, ..." Code Civ. Proc. §425.17(c) (emphasis added). Not only did the Legislature include insurance in this list of "goods or services," it included insurance as the *first* category on the list.

The case law has also referred to and treated insurance as a "service." In *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 684-85

(1988), for example, this Court described the nature of insurance as follows:

> Thus, "As one commentary has noted, 'The insurers' obligations are ... rooted in their status as purveyors of a *vital service* labeled quasi-public in nature. *Suppliers of services* affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements.... [A]s a supplier of a public *service* rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary.' ...

(Emphasis added) (citations omitted). *See also Cates Construction, Inc. v. Talbot Partners,* 21 Cal.4th 28, 54 (1999) (*citing Foley*, and referring to insurance as a "quasi-public *service*") (emphasis added).

What the statutory provisions discussed above demonstrate is that insurance has been long been considered a "service" by the Legislature when that term has been used in consumer protection legislation. Thus, the fact that "insurance" was not expressly included in the CLRA definition of "services" does not mean that the Legislature intended to exclude it (any more than it intended to exclude all of the other types of services not specifically mentioned). Rather, the Legislature intended the term "service" *to have the broadest possible meaning*, without exclusions, consistent with the broad consumer protection purpose and intent of the statute. *See* Civil Code §1760 ("This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers

against unfair and deceptive business practices and to promote efficient and economical procedures to secure such protection.")

II. THE MARKETING AND SALE OF INSURANCE HAS CHANGED AND GROWN SIGNIFICANTLY IN RECENT YEARS.

The Insurance Information Institute ("III"), a nationwide industry-funded organization, self-identified as "a primary source of information, analysis and referral concerning insurance," reports that in 2005 (the most recent year reported on the III website), insurance products and services contributed almost $300 billion (2.4 percent) of the Gross Domestic Product nationwide.[4] That was a $50 billion increase over the industry's contribution to GDP in 2001, just four years earlier. *See* Insurance

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[4] The official data source for the GDP in the United States is the United States Department of Commerce Bureau of Economic Analysis. That agency defines GDP as: "The market value of goods and services produced by labor and property in the United States, regardless of nationality; GDP replaced gross national product (GNP) as the primary measure of U.S. production in 1991." *See* US Dept of Commerce, Bureau of Economic Analysis, "Glossary of Terms," http://www.bea.gov/glossary/glossary.cfm. Significantly, insurance is included within total "goods and services" for purposes of the GDP.

Similarly, motor vehicle insurance, is included in the federal Consumer Price Index, which measures changes in the price of consumer goods and services. The CPI is described on the United States Department of Labor Bureau of Labor Statistics as follows: "The Consumer Price Indexes (CPI) program produces monthly data on changes in the prices paid by urban consumers for a representative basket of goods and services." Motor vehicle insurance is part of that "representative basket" of services. http://www.bls.gov/CPI/

Information Institute, *Insurance Sector's Share of Gross Domestic Product 2001-2005* http://www.iii.org/economics/national/gdp/?printerfriendly=yes.

Two related trends in the rapidly-expanding insurance market are relevant here. First, in recent years, there has been a significant increase in the sale of insurance through "nontraditional" avenues, i.e., through sources other than trained, licensed, and local insurance agents. This is in part the result of the provisions of the Gramm-Leach-Bliley Act (PL 106-102) (1999) that repealed prohibitions against banks and other financial institutions selling insurance (and vice versa). *See e.g.,* 12 U.S.C. §1843, *et seq.* The Insurance Information Institute recently published an article on its website on this very issue, describing the trend in the following manner:

> In the early days of insurance, insurance policies were sold at banks. But the 1916 National Bank Act limited banks' sale of insurance, except in small towns. In the 1990s various court decisions allowed banks to get back into the business of selling insurance, culminating in the 1999 Gramm-Leach-Bliley Act, which said that banks, insurance companies and securities firms could affiliate and sell each others' products. Since that time banks have bought hundreds of insurance agencies and brokerages, and bank sales of all kinds of insurance have grown significantly.
>
> Life insurers began to market life insurance and annuities through banks (mostly fixed annuities, which are similar to other bank products) and financial planners or advisers in the 1990s. A large portion of variable annuities, which are based on securities, and a smaller portion of fixed annuities are now sold by stockbrokers. In three states, Connecticut, Massachusetts and New York, consumers can purchase small life insurance policies directly from savings banks, without going through commissioned salespeople. This practice, which other states refused to follow, began in the early 1900s.

> *It is not uncommon for insurance companies to make arrangements with various entities, in addition to banks, to make their products available; they include workplaces, associations, car dealers, real estate brokers, pet shops and travel agents, among others.*

See Insurance Information Institute, *Buying Insurance: Evolving Distribution Channels*, April 2008, (emphasis added).[5]

The United States Department of Labor, Bureau of Labor Statistics, has noted the same trend:

> Congressional legislation now allows insurance carriers and other financial institutions, such as banks and securities firms, to sell one another's products. More insurance carriers now sell financial products such as securities, mutual funds, and various retirement plans. This approach is most common in life insurance companies that already sold annuities, but property and casualty companies also are increasingly selling a wider range of financial products. In order to expand into one another's markets, insurance carriers, banks, and securities firms have engaged in numerous mergers, allowing the merging companies access to each other's client base and geographical markets.

http://www.bls.gov/oco/cg/cgs028.htm *See also* California Financial Code §4051.5(a)(2) ("Federal banking legislation, known as the Gramm-Leach-Bliley Act, which breaks down restrictions on affiliation among different types of financial institutions, increases the likelihood that the personal financial information of California residents will be widely shared among, between, and within companies.").

The reference to the sale of insurance at "pet shops and travel agents" in the Insurance Information Institute article quoted above

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[5] *See* http://www.iii.org/media/hottopics/insurance/distribution/

highlights the second trend that need be noted. Increasingly, insurance is sold at retail locations, over the telephone, or through the Internet, often by untrained and unlicensed personnel, and as an ancillary service *in connection with the sale of other consumer goods and services*. There are several examples of this trend in recent published case law, and these examples likely represent just tiny sample of what is occurring in the marketplace. *See e.g., Wayne v. Staples, Inc.,* 135 Cal.App.4th 466 (2006) (challenging the unlicensed sale of shipping insurance action by office supply retail chain); *Medina v. Safe-Guard Products, International, Inc.,* __ Cal.App.4th __ (Fourth District Court of Appeal, June 19, 2008) (challenging the sale of vehicle service contracts by a nonadmitted insurer)[6]; *Stevens v. Superior Court*, 75 Cal.App.4th 594 (1999) (challenging the unlicensed sale of insurance by a car dealer); *Grand Rent A Car Corp. v. 20th Century Ins. Co.,* 25 Cal.App.4th 1242, 1251-1252 (1994) (insurance sold in connection with a car rental agreement); *Hertz Corp. v. Home Ins. Co.* (1993) 14 Cal.App.4th 1071, 1077 & fn. 5 (1993) (same). *See also* Insurance Code §1758.7 *et seq.* (relating to the sale of insurance at self-service storage facilities); Insurance Code §1758.6 *et seq.*

[6] This very recent opinion is particularly disturbing in that the court found that the unlicensed sale of insurance could not be challenged in an action for restitution under the Unfair Competition Law, Business and Professions Code §17200, *et seq.*, because insureds did not suffer any "injury in fact" or loss of money or property as a result of the practice. The notion that the sale of nontraditional insurance products by a unlicensed businesses, in violation of California law, is "no harm; no foul" practice is troubling, to say the least, and points to the need for *more*, not fewer, remedies for consumers.

(relating to the sale of insurance by retail communications vendors); §1758.8 (relating to the sale of insurance by rental car agencies).

In the circumstances referenced above, insurance is marketed, sold, and provided as a "service" "furnished in connection with" the sale or lease or other goods and/or services. *See* Civ. Code §1761(b). If pet shops and travel agents are selling insurance, at the same time they sell puppies and cruises, it makes no sense whatsoever – either legislatively or as a matter of sound public policy – to exempt the sale of such ancillary insurance services from regulation under the CLRA. If one portion of a transaction involving the sale of goods or services to a consumer falls within the regulation of the CLRA, surely the Legislature would have intended for another portion of the same transaction, involving the sale of insurance "in connection with" such goods and services, to also be covered under the terms of the statute.

III. INSURANCE COMPANIES MARKET AND SELL INSURANCE TO CONSUMERS IN THE CURRENT MARKETPLACE AS A BUNDLE OF SERVICES.

As noted above, UP submits that the Court of Appeal was simply inaccurate in its characterization of insurance contracts. The Slip Opinion describes insurance as "simply an agreement to pay if and when an identifiable event occurs." (Slip Op., at 6.) While such a description may be accurate as to some very simple insurance contracts, it is demonstrably wrong as a broad characterization of *all* insurance. Even the insurance plan

that was at issue in this case was not a simple we-will-pay-if-you-die contract. It was a complex financial planning service that created the possibility of accumulation of value, the lowering or increasing of premiums over time, and the maintenance of insurance without payment of premiums.

Indeed, the typical consumer insurance policy in California, at least in certain sectors of the market including homeowners and automobile insurance, is no longer a bare contract of indemnity. Such policies are marketed, sold and delivered as a bundle of services for the protection and convenience of the consumer. This is evident from even a cursory review of the elaborate websites and the variety of web-based services offered by the major automobile and homeowners' insurance companies in California.

The website for the Defendant insurer in this action, Farmers Insurance, offers a smorgasbord of services, including "Financial Tools and Calculators;" numerous "Checklists;" instructions on "Childproofing the Home" and other "Safety and Prevention Tips."[7]

One page offers a whole range of services related to purchasing and insuring a car:

> **Buying A Car - The Total Auto Solution**
> Let Farmers help you solve the worries about buying your next auto with these helpful car buying tips:
>
> • Are you ready to buy? We have easy to use online tools to help you answer

[7](http://www.farmers.com/FarmComm/WebSite/html/common/tools_and_calculators.html)

these and other buying questions: How much car can I afford? Should I lease?

- Choosing the right car. Before you buy, take a look at our list of vehicles with better insurance values.
- Getting an Auto insurance quote. At Farmers, we can help you get the right coverage at the price that fits your budget.
- Protecting you on the road. Ask your local Farmers agent about these optional services to help provide protection over and above your basic auto insurance coverage. Emergency Roadside Assistance and Towing Service, Car Rental Reimbursement, Auto Glass Repair Service.

Also, check out what discounts may apply to you.[8]

Although this same page also states that "[t]he above services are not insurance products, are supplied by third parties, and are totally elective as a service from these vendors to existing Farmers policyholders," there is no denying that Farmers is offering these services in conjunction with and for the specific purpose of marketing and selling its insurance plans.

Another page of the Farmers' website offers retirement planning services:

> **Saving For Retirement**
> No matter what your age, it's a good idea to put aside money on a regular basis. And if you're wondering when to start preparing for retirement, the answer is today!
>
> At Farmers we offer many services to help you prepare for your retirement - from IRAs to Mutual Funds* and Variable Annuities*+ to Life insurance+.
>
> Helpful Tools:
>
> - Do you know what your Social Security benefits will be?
> - Traditional IRAs or Roth IRAs

[8] *See* http://www.farmers.com/FarmComm/WebSite/html/common/plan_for_life_events/LiveEvents_BuyingACar.html

- Are there any advantages to transferring to a Roth IRA?
- How much will your money grow in a Roth IRA?
- How much will your money grow in a Traditional IRA?
- How much Life Insurance will you need at retirement?

* Securities offered through Farmers Financial Solutions, LLC, 30801 Agoura Rd. Bldg 1 Agoura Hills, CA 91301, (818) 584-0200
[+] Life insurance and annuity products are issued by Farmers New World Life Insurance Company: 3003 77th Ave., S.E., Mercer Island, WA 98040-2890.[9]

The website for State Farm Insurance is equally helpful. It contains a page specifically titled "Service Center," where policyholders and prospective insureds can find out:

How to...

* Pay your bill
* Register your policies to manage online
* Change a Health insurance policy
* Change a Life insurance policy or Annuity
* Report a claim
* Find a registered State Farm representative
* Get a list of all NAIC numbers for State Farm's companies
* Organize your family information
* Organize your property information[10]

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[9] *See* http://www.farmers.com/FarmComm/WebSite/html/common/plan_for_life_events/LiveEvents_SavingForRetirement.html

[10] *See* http://www.statefarm.com/insurance/service_center/service_center.asp

State Farm also tells prospective insureds: "We offer broad protection that you can trust, plus affordable rates, *and outstanding service.*"[11]

Similar promises of service are made on the website of the California State Automobile Association, another significant provider of auto and homeowners insurance in California.

> **Homeowners Insurance**
>
> For more than 30 years AAA Home Insurance has provided security and peace of mind. Since welcoming our first policyholders in 1974 we've learned a lot about the importance of trust and protection.
>
> Today we invite you to join over 500,000 homeowners and renters in 15 states who count on AAA to safeguard their homes and their financial futures. Get a quote now on insurance rated A+ by A.M. Best Company.
>
> *You'll discover policies that can be tailored to your specific needs, highly responsive claims handling, and a new ally in keeping your home and family out of harm's way.*[12]

Another page of the CSAA website, specifically addressed to California consumers, emphasizes the personalization of coverage.

> **Homeowners Insurance in California**
> AAA Home Insurance provides protection for your home and all attached and detached structures from most direct physical losses. With flexible payment plans and affordable, broad-range coverage

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[11] *See* http://www.statefarm.com/insurance/homeowners/homeowners.asp

[12] *See* http://www.csaa.com/portal/site/CSAA/menuitem.673ba8385c605d5ed6df7df092278a0c/?vgnextoid=4cc52ce6cda97010VgnVCM1000002872a8c0RCRD

for your house and personal belongings, we'll be able to design a policy that will best suit your individual needs.[13]

And with respect to auto insurance, CSAA specifically emphasizes the level of service promised and provided:

> **Auto Insurance**
> For almost as long as the automobile has been around, AAA has been providing our Members with the most reliable auto insurance available. *Our reputation for quality and service is unmatched.* (Emphasis added.)[14]

http://www.csaa.com/portal/site/CSAA/menuitem.673ba8385c605d5ed6df7df092278a0c/?vgnextoid=ccb52ce6cda97010VgnVCM1000002872a8c0RCRD

Through its extensive experience working with insurance policyholders, United Policyholders has seen first hand the manner in which insurance companies primarily compete with one another on the basis of the *services* they offer to insureds, rather than on the basis of rates, which are often far too complex to explain in advertising and marketing materials. Thus, when consumers choose an insurance company and/or an insurance plan, they are often choosing on the basis of representations that have been made to them about the characteristics or benefits of a plan (Civil

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[13] *See* *http://www.csaa.com/portal/site/CSAA/menuitem.c13d2427e527f6a08e7ea35492278a0c/?vgnextoid=41e5de4896b1d010VgnVCM100000c512daceRCRD&vgnextchannel=4cc52ce6cda97010VgnVCM1000002872a8c0RCRD*

[14] *See* http://www.csaa.com/portal/site/CSAA/menuitem.673ba8385c605d5ed6df7df092278a0c/?vgnextoid=ccb52ce6cda97010VgnVCM1000002872a8c0RCRD

Code §1770(5)), about the "source, sponsorship or approval" of the insurance services offered (Civil Code §1770(2), or about the "rights, remedies or obligations" of the transaction (Civil Code §1770(14). Just as this Court held in *Broughton*, if the insurance company is alleged to have "deceptively and misleadingly advertised the quality" of its services, such conduct ought to be subject to a claim for injunctive and other relief under the CLRA. See *Broughton, supra*, 21 Cal.4th at 1072.

IV. THERE ARE "UNFAIR AND DECEPTIVE PRACTICES" IN THE INSURANCE MARKETPLACE FOR WHICH CONSUMERS SHOULD BE ABLE TO SEEK PROTECTION UNDER THE CLRA.

United Policyholders submits that not only *should* the CLRA apply to insurance sales practices, based on the language of the statute, principles of statutory interpretation, and the case law, but that there is also a *need* for greater protection of consumers in this area. Summarized below are just four areas in which there has a problem of unfair and deceptive practices in the sale of insurance to consumers. Although the California Department of Insurance is empowered to address many of these practices, in the form of enforcement and penalty actions, its resources are simply inadequate to police the marketplace and address the needs of all consumers. The 2006 Annual Report of the Insurance Commissioner, for example, reported that

the Consumer Services Division fielded 276,419 calls that year.[15] That is an average of more than 757 calls for every day of the year. It states the obvious to say that the Department simply cannot fully address every inquiry or complaint by an injured consumer. Moreover, even when a cease and desist order or other enforcement action is taken by the Department, restitution is frequently *not* provided to policyholders, who may be left without remedy or redress.

► ***Underinsurance for Homeowners.*** Just recently, on June 6, 2008, UPH issued a Press Release reporting data from a 2007 survey of the wildfire victims in San Diego and San Bernardino Counties. *See* *http://www.unitedpolicyholders.org/pdfs/Survey_0608.pdf*

Among the significant findings of that survey were the following:

- 75 percent of respondents were underinsured in their dwelling
- The *average* amount by which respondents were underinsured was $240,000.
- Only 18 percent of respondents had complained to the California Department of Insurance.

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[15] *See* 2006 Annual Report of the Commissioner, at 56 (http://www.insurance.ca.gov/0400-news/0200-studies-reports/0700-commissioner-report/upload/DOIAnnualReport_2006.pdf).

- Only 22 percent of respondents had been provided the information insurers were required to provide (the list of reimbursable expenses).

The problem of underinsurance, as was explained by Amy Bach, Executive Director of UPH, in the Press Release, results from unfair and deceptive practices in the sale of insurance which lead consumers to believe that they have purchased full coverage, when in fact, they have not.

> "Who's to blame? Not homeowners." said Bach. "People's homes are their biggest asset and they don't knowingly leave themselves exposed. The fact is there are financial incentives for insurance companies to underinsure clients so as to limit their exposure when catastrophes hit. Agents set policy limits based on the formulas they get from insurance companies and often rush to close a sale without checking to make sure the limits are adequate. California law is allowing insurance companies to hide behind legalese to avoid responsibility. So, disaster after disaster, underinsurance consistently remains a huge problem."

UPH, Press Release: "United Policyholders Survey Shows 2007 Wildfire Victims Grossly Underinsured, Majority of Claims Not Resolved," June 6, 2008, at 2.

Furthermore, as was also reported in the Press Release, most affected consumers do *not* complain to the Department of Insurance about the problem of underinsurance. Only 18 percent of the survey respondents had submitted a complaint. "The most common reason given for not complaining to the CDI was that the homeowner is still negotiating with their insurance company. However, almost 25% of people who hadn't filed

a complaint hadn't done so because they believed it would do no good, would make matters worse, or were afraid of angering their insurance company." *Id.,* at 2.

► ***Fraudulent Sales Practices for Annuities and Other Life Insurance Products Targeting the Elderly.*** The second area in which there have been well-documented abuses is the sale of annuities, "vanishing premium" and other life insurance plans marketed to seniors. This case is one such example. Another example, from the published case law, is *Massachusetts Mutual Life Insurance Company, supra,* 97 Cal.App.4th at 2002, in which the plaintiffs filed suit under the CLRA challenging sales practices with respect to "vanishing premium" life insurance policies.

An article currently posted on the Department of Insurance website discusses the problem of sales practices related to STOLI or SPINLIFE schemes in the sale of life insurance policies for "life settlements." A "life settlement," as described by the Department is "a transfer of an ownership interest in a life insurance policy to a third party for compensation less than the expected death benefit under the policy. The third party then makes any required premium payments and holds the policy until the death of the insured, at which time the third party is paid the death benefit under the policy." While life settlements "can be a favorable option for a senior to access the death benefit of a policy for which he or she no longer has a good economic need to keep in force," schemes have arisen that involve

"investors soliciting the original purchase of the insurance for the sole purpose of an eventual sale to them which usually occurs two years after the policy is first taken out." The Department describes these schemes as follows:

> Seniors may find themselves being approached by investors or life agents who encourage them to purchase life insurance that will be transferred a couple of years later to an investor. Often these sales pitches occur in a pleasant setting such as nice restaurant, or even on a yacht. The sales pitches can paint a tempting picture: the life insurance purchase itself is characterized as being "free," "risk-free" or "no-cost," and the senior is often promised an up-front cash bonus. These types of schemes are becoming increasingly common and are known as "Stranger Originated Life Insurance (STOLI)" or "Speculator Initiated Life Insurance (SPINLIFE)." The California Insurance Commissioner is also aware of unscrupulous operators pitching "longevity survey" schemes. This is where seniors are paid a sum to fill out a "longevity survey" where their private medical information is divulged to unknown third parties. The Department of Insurance suspects that the latter are also used to purchase life insurance for investors who wish to wager on the senior's death.

See California Department of Insurance, *CONSUMERS: SENIOR ADVISORY ON STOLI OR SPINLIFE LIFE INSURANCE SCHEMES*; at http://www.insurance.ca.gov/0100-consumers/0250-seniors-issues/senior-stranger-owned-life-insurance.cfm

Significantly, the article goes to note that "life settlements" are *not* currently regulated by the Department of Insurance. Thus, while the described schemes relate to the sale of insurance, they may be outside the regulatory power of the Department. There is no reason, statutory or otherwise, why the described schemes do not fall within the definition of

"services" for purposes of the CLRA, and clearly there is a need for the private remedies available under the statute.

As reported in United Policyholder's May 2008 Newsletter, UP has also been active on this issue, and in February of this year, was invited by Insurance Commissioner Steve Poizner to join him in announcing a large settlement with Allianz Life Insurance Company for allegedly targeting thousands of seniors in deceptive annuity sales. *See* UP, "Protecting Seniors from Annuity and Insurance Scams," *What's UP Newsletter*, May 2008.[16] Although this settlement was an important enforcement success, it is the view of UP that the Department simply does not have the resources to police all of the bad actors in the industry. This means that that without private remedies, many consumers would be left without redress. Moreover, even the Allianz settlement was primarily in the form of penalties and fees and costs for the Department, and did not provide damages to the affected policyholders.

► ***Deceptive and Unfair Practices in the Marketing and Sale of Health Insurance.*** There have also been documented abuses in the area of sales of health insurance and health service plans. One obvious example is *Broughton v. Cigna Healthplans of California, supra*, 21 Cal.4th at 1066, in which this Court addressed the question of whether a claim brought under

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[16]*See* http://www.unitedpolicyholders.org/e_news/May08/article_Seniors.html

the CLRA was subject to arbitration. *Id.,* 21 Cal.4th at 1072. The underlying claim in that case, however, alleged deception in the marketing of health insurance.

A more recent case, *Ticconi v. Blue Shield of California Life & Health Ins. Co.,* 160 Cal.App.4th 528 (2008), highlights another aspect of the problem. Although the particular issue before the court in *Ticconi* related to class certification, the underlying allegation in the case was that the defendant insurer was engaging in a practice known as post-claims underwriting. *Id.,* 534-536. In this practice, the insurer markets and sells an insurance policy based on certain representations about the coverage offered, the insured's obligations, and the underwriting process. The insurer then represents that the policy has gone through underwriting and is approved, issues the policy and begins collecting premiums. *After* the insured incurs significant medical expenses, the insurer refuses to pay benefits, and rescinds the policy, accusing the insured of misrepresentations on the application (hence the "post-claims underwriting").

United Policyholders has been tracking this problem, and reported on the issue in its Fall 2007 Newsletter:

> Earlier this year, United Policyholders, (via volunteer Sharon Arkin) the CA. Department of Managed Care, Bill Shernoff and others filed amicus briefs supporting a policyholder in a case called *Hailey v. CA. Physicians Service dba Blue Shield of CA.* (See Amicus Update in this issue) Blue Shield "rescinded" Hailey's policy after he submitted claims for medical care expenses on the grounds that he had allegedly misrepresented his health history on his application for

> coverage. Rescission is a legal term that means to nullify and void a contract and refund monies paid as if the contract was never in effect.
>
> The pro-policyholder amicus briefs present the view that Blue Shield invented this allegation as an excuse to avoid paying his claims, and that it is doing this same thing to many other policyholders. We believe that Blue Shield is engaging in illegal post-claim underwriting. Insurers must evaluate (underwrite) risks before they issue a policy. It cannot process applications, accept premiums, bind coverage, issue policies, and then use information it had access to but ignored prior to issuing a policy, as a basis to later deny claims.

United Policyholders, "Health Plan Rx," What's UP Newsletter, Fall 2007 (http://www.unitedpolicyholders.org/newsletters/fall07.html#3) *See also* Lisa Grion, "Blue Cross Makes Policy About-Face, *Los Angeles Times,* May 11, 2007 (http://www.latimes.com/business/la-fi-insure11may11,0,2524867.story?coll=la-home-center)

► ***Unfair Practices in the Sale of Insurance by Unlicensed Sources.*** And finally, as has been discussed above, there is an on-going issue in the marketplace of unfair and deceptive practices in the sale of "nontraditional" insurance sold "in connection with" other consumer goods and services. *See e.g., Wayne v. Staples, supra,* 135 Cal.App.4th at 466 (unlicensed sale of insurance and failure to disclose a significant mark-up); *Stevens v. Superior Court, supra,* 75 Cal.App.4th at 594 (the unlicensed sale of insurance by auto dealers).

One particular example of a deceptive practice is known as "payment packing," which is used in connection with the sale or lease of

automobiles. The practice was described in *Casella v. Southwest Dealer Services, Inc.*, 157 Cal.App.4th 1127 (2007) as follows:

> When a dealer's sales representative and customer struck a deal for the purchase of a car, the sales representative or sales manager would calculate the monthly payment. If and when the sales representative or sales manager quoted the customer an *inaccurately high monthly payment*, the difference between the true monthly payment and that quoted by the sales manager constituted "leg." *Leg was built into such transactions, a practice Casella referred to as "payment packing" for "the purpose of selling aftermarket products. It assist[ed] the finance manager in selling those extra products that they offer you in the finance department."* The finance and insurance managers then used that leg in order to entice customers to agree to purchase additional products offered at inaccurately low costs. The customer was not made aware that leg has been built into the deal.

Casella, 157 Cal.App.4th at 1132-33 (emphasis added). In other words, in order to sell "after market" products and services, which could include service contracts, credit insurance, and other contracts that would constitute insurance, the dealer deliberately inflates the monthly payment quoted to the purchaser for the cost of the vehicle in order to deceive him or her into purchasing additional products or services. If and when such a practice is used in the sale of insurance to a consumer "in connection with" the purchase of a vehicle or other goods and services, the provisions of the CLRA should certainly apply.

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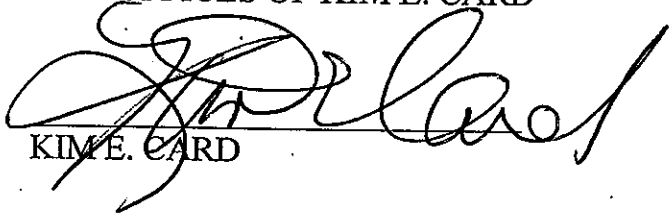
CONCLUSION

For the foregoing reasons, United Policyholders respectfully submits that the decision of the Court of Appeal below should be reversed, and that this Court should hold that unfair and deceptive practices in the sale of insurance to consumers may be challenged under the provisions of the CLRA.

Dated: July 9, 2008

UNITED POLICYHOLDERS

LAW OFFICES OF KIM E. CARD

By: 

KIM E. CARD

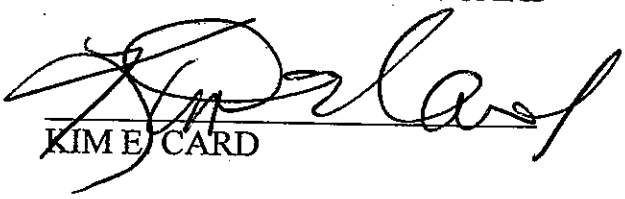
CERTIFICATE OF WORD COUNT (Rule 8.204(c))

Pursuant to Rule of Court 8.204(c), the undersigned counsel hereby certifies that the foregoing Amicus Brief of United Policyholders, is double spaced, printed in Times New Roman 13 point text, and contains 8,068 words, including the Application. The above word count was determined using the Word Count function of the Microsoft Word program, and does not include words in the Table of Contents and Table of Authorities.

Dated: July 9, 2008

UNITED POLICYHOLDERS

LAW OFFICES OF KIM E. CARD

By: 

KIM E. CARD

CERTIFICATE OF SERVICE
(C.C.P. §1013a(2))

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I, Kim E. Card, am an active member of the California Bar (Bar number 147779), and am not a party to this action. My business address is: Law Offices of Kim E. Card, 1690 Sacramento Street, Berkeley, California, 94702.

On July 9, 2008, I served the foregoing:

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS/PETITIONERS FAIRBANKS, ET AL. (AND APPLICATION TO FILE)

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed to each as follows:

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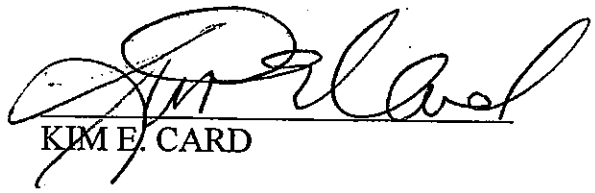
The Honorable Anthony Mohr Los Angeles Superior Court Dept. 309 Central Civil West Courthouse 600 S. Commonwealth Avenue Los Angeles, CA 90005	Office of the Clerk Court of Appeal Second Appellate District Division Three 300 S. Spring Street, Second Floor North Tower Los Angeles, CA 90013-1213

[X] **BY FIRST CLASS MAIL:** The foregoing documents were placed in sealed envelopes, with postage fully paid, and deposited in the mail of the United States Postal Service on this date in Berkeley, California.

Executed on July 9, 2008, at Berkeley, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



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