CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION THREE

No. B213044

SAFECO INSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

LISA KARNAN, On Behalf of Herself and All Others Similarly Situated,

Real *Party in Interest.*

On Petition for Writ of Mandate from the Los Angeles Superior Court
The Honorable Anthony J. Mohr
Superior Court No. BC266219

OPPOSITION OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OF OTHER APPROPRIATE RELIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

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APPELLANT/PETITIONER: Safeco Ins. Co. of America, et al. RESPONDENT/REAL PARTY IN INTEREST: Lisa Karnan	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Real Party in Interest Lisa Karnan

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (Explain):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 7, 2009

Kevin K. Green
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

Petitioners Safeco Insurance Company of America and First National Insurance Company of America (collectively, Safeco) seek a writ of mandate to overturn a discovery order. Foreclosing precertification discovery in this case, however, would promote a grave injustice. Safeco would be allowed to elude legal accountability to its own insureds for an egregious violation of the Proposition 103 reforms enacted to protect them. As the trial court emphasized, the record contains "strong" evidence that Safeco illegally surcharged its policyholders for lack of prior insurance or continuous coverage before applying to Safeco. (3 Appendix in Support of Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief (Safeco App.) 632.) The court was correct that the circumstances here are analogous to *CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273 (*CashCall*), not the unusual facts that led to the denial of discovery in *First American Title Insurance Co. v. Superior Court* (2007) 146 Cal.App.4th 1564 (*First American*). As *CashCall* concluded in approving precertification discovery on a similar record, there is no "bright line" precluding contact with absent class members to protect their rights in a case of compelling merit such as this. Because Safeco fails to show an abuse of discretion, its writ petition should be denied.

The salient considerations, outlined in the discovery order, are:

- Safeco concealed its illegal surcharges, violating the Insurance Code, from its own policyholders and government regulators (so, unless affirmatively contacted, affected persons would not know to come forward).
- Any new suit by Safeco insureds challenging the same wrongdoing would face almost-certain dismissal under the statute of limitations (a fate attributable to repeated stays of this litigation at Safeco's request).
- There is no prospect for relief in a public enforcement or other action (in contrast to *First American*, where the private litigant sought to piggyback on relief obtained by public prosecutors).

(3 Safeco App. 631-632.) Indeed, the California Department of Insurance (DOI) passed on an opportunity essentially to convert this case into a public enforcement action. Declining a referral under the primary jurisdiction doctrine – a referral Safeco urged – the DOI deliberately left prosecution of this matter to private enforcement "through the discovery processes available to the Superior Court." (1 Appendix of Real Party in Interest (RPI App.) 69.)

Safeco now seeks to short-circuit those processes. According to Safeco, there is something illegitimate about this case and this Court, accordingly, should terminate it. Importantly, however, this suit was filed by a party that unquestionably had standing. The first plaintiff, The Proposition 103 Enforcement Project (Project), a non-profit organization, brought a "representative" action under the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.). (1 Safeco App. 2.) This was just as the UCL permitted in 2002. Standing to enforce the Insurance Code through the UCL was a non-issue until Proposition 64's passage in 2004, nearly three years after the original complaint. This Court has distinguished between cases where standing never existed, and those where the plaintiff "***originally*** had standing, but has since lost it by intervening law or facts." (*First American*, *supra*, 146 Cal.App.4th at p. 1574, emphasis in original.) This action's legitimacy when it was initiated makes it an even stronger candidate for precertification discovery than *CashCall*, where the plaintiffs who sued never had standing.

With seven years behind it and counting, this case certainly has a long procedural history. Certain aspects are particularly relevant to this Court's review. Notably, the trial court initially misread *First American* in a manner prejudicial to the Project. In 2006, after the California Supreme Court held Proposition 64 retroactive, the Project sought precertification discovery to identify Safeco policyholders able to continue the suit. Under *First American*, as discussed, the Project was almost certainly entitled to this discovery, but the trial court denied it. As even the court acknowledged, this was a "gotcha"

situation in which the Project "did everything right" only to see the law on standing subsequently change. (1 Safeco App. 137.) Current plaintiff Lisa Karnan, the real party in interest here, was substituted for the Project out of necessity to satisfy the trial court. She seeks precertification discovery only because her own standing has since been challenged as inadequate.

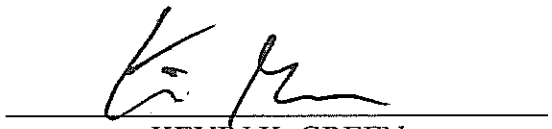
Safeco accuses Karnan of "gamesmanship" since she entered the proceedings, but the record does not support the charge. Applying the balancing test set forth in *Parris v. Superior Court* (2003) 109 Cal.App.4th 285 (*Parris*), the trial court soundly determined that neither Karnan nor her counsel did anything to tip the scales against allowing precertification discovery. Safeco equivocates on whether the rights of absent class members are pertinent. The court below properly took this factor into account as compelled by overwhelming California authority.

In Safeco's view, there is something troubling about opening the defendant's business records to continue a pending lawsuit. But the discovery Karnan seeks is narrowly tailored and, when examined for what is really at issue, presents no cause for concern. The plaintiff has a free-speech right to contact class members to discover relevant evidence from them and to gauge their interest in participating. Karnan is unable to contact Safeco policyholders here only because, as is common in class actions, she does not know who they are. Only Safeco knows. Once apprised of this litigation, the represented group should be the one to decide whether any among them wants to step forward to serve as champion for the class. When the discovery issue is viewed in this light – taking into account the rights of the represented group – it is even more apparent the trial court did not abuse its discretion.

II. VERIFICATION

I, Kevin K. Green, am a member of Coughlin Stoia Geller Rudman & Robbins LLP, counsel for Karnan in this writ proceeding and in the superior court. I am familiar with, and have personally reviewed, the relevant portions of the record that support the arguments made in this opposition. Accordingly, I, rather than Karnan, make this verification.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was executed on February 19, 2009, at San Diego, California.[1]



KEVIN K. GREEN

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[1] This Court instructed Karnan to file an "opposition" to Safeco's writ petition. The order to show cause, however, did not advise that a peremptory writ in the first instance was being considered. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171.) Instead, the Court used neutral language, directing the parties "to SHOW CAUSE why the relief requested in the petition should or should not be granted." (Order to Show Cause, Jan. 7, 2009.) Under these circumstances, the brief Karnan files here seems more akin to a "return." (Cal. Rules of Court, rule 8.487(b)(1).) To the extent necessary, Karnan hereby demurs to Safeco's petition on the ground that it fails to state a claim upon which relief may be granted. Due to her disagreement with Safeco's legal and factual characterizations, Karnan also responds by verified answer denying the petition's allegations. (*Ibid.*)

III. NATURE OF THE CASE

A. The Complaint Alleges that Safeco Follows a Systematic Surcharge Policy that Violates the Insurance Code and Is Not Reported to the DOI

In January 2002, the Project filed the original complaint. (1 Safeco App. 1.) Founded in 1993, the Project is an undertaking of the Foundation for Taxpayer and Consumer Rights, a non-profit public benefit corporation now known as Consumer Watchdog. (1 Safeco App. 6.) By taking legal action before various fora, the organization has sought to ensure the effective enforcement of Proposition 103 (Ins. Code, § 1861.01 et seq.) on behalf of California drivers. (1 Safeco App. 6.)

The factual and legal core of the case was, and remains, straightforward. At issue is Safeco's violation of two Insurance Code provisions. First, the Project challenged Safeco's illegal use of lack of prior insurance, or lack of continuous coverage, to increase auto insurance premiums. (1 Safeco App. 2-4.) This industry tactic was outlawed by Insurance Code section 1861.02, a provision of Proposition 103 that regulates the "rating factors" that auto insurers may consider. In particular, subdivision (c) bars the use of "prior insurance" as a rating factor. (1 Safeco App. 3-4.) Second, Safeco has violated Insurance Code section 1859, a reporting statute, by failing to disclose its true underwriting and rating practices to the DOI. (1 Safeco App. 4-5.)

Critically for the present purposes, Safeco's concealment ensured that affected Safeco policyholders did not know their own insurance company had illegally surcharged them. The Project was able to discern Safeco's violations through investigation and its experience examining the rating practices of automobile insurers. (1 Safeco App. 172-210.) But, as discussed in greater detail later, California drivers applying for Safeco coverage lack the knowledge and expertise needed to uncover this misconduct. As the original complaint alleged: "Because SAFECO knowingly and actively withholds

material information concerning its actual underwriting and rating practices . . . plaintiff and the general public of the State of California were likewise all unaware that SAFECO's underwriting practices were unlawful." (1 Safeco App. 5.)

Based on these facts, the initial pleading sought to enforce Proposition 103 both directly, as a private right of action, and through the UCL. The Project asserted three claims for relief: (1) violation of section 1859; (2) violation of section 1861.02; and (3) unlawful, fraudulent and unfair business practices violating the UCL. (1 Safeco App. 7-10.) As predicates for the UCL's unlawful prong, the complaint cited Safeco's Insurance Code violations. (1 Safeco App. 9.) As permitted in 2002, the Project filed a representative action on behalf of the general public instead of a class action. (1 Safeco App. 2.)

B. Evidence Unearthed in Discovery Confirms the Complaint's Allegations

The trial court found highly significant to its decision that the limited discovery to occur has already corroborated the complaint's allegations. For example, a Safeco business record described the systematic practice this way: "'Non-verifiable merit surcharge. We will be charging for those new business customers who cannot verify prior insurance at the Driving Safety Record Rate Level of 2. . . . This merit will be charged on policies where none of the drivers in the household can provide acceptable documentation that they have been accident free for the last 36 months (meaning they have not had prior insurance).'" (2 Safeco App. 528-529, emphasis deleted; see also 5 Safeco App. 907 [original document]; 2 RPI App. 262-266 [distilling the evidence showing Safeco's wrongdoing].)

Unfortunately, Safeco is not the only insurer on the wrong side of the law here. The undersigned counsel brought a similar private enforcement action on behalf of policyholders of another large insurance company,

Interinsurance Exchange of the Automobile Club. (1 RPI App. 183-190, 204-249 [DOI's administrative opinions in the case].) The dispute settled after the DOI found that Auto Club had unlawfully used the absence of prior insurance or lack of continuous coverage to determine premiums, just as the evidence shows Safeco has done. (See also 2 RPI App. 260-265 [Karnan's opposition to summary judgment discussing similarity between Auto Club and Safeco suits].) Pursuant to the Auto Club settlement, $22.5 million in cash was distributed to approximately 113,000 class members. (4 Safeco App. 665.)

Potentially much more in restitution is at stake here. Safeco's per-policyholder illegal overcharge is more than ***double*** Autoclub's surcharge. (4 Safeco App. 665.) Hence, the potential impact on Safeco policyholders of denying discovery in this case would be tangible and real. Affected class members would be unable to recover tens of millions of dollars Safeco has unlawfully collected from them in violation of the Insurance Code. Safeco fails to explain why it should not be held to the same account as other insurance companies. The court below, analyzing these facts in the context of the *Parris* balancing test, soundly concluded that the requested discovery is appropriate.

IV. RELEVANT EVENTS IN SUPERIOR COURT

As Safeco tells it, prejudice would result from amending the complaint to substitute a new plaintiff because this case has been pending for so many years and the current plaintiff somehow misused the tools of litigation. To set the record straight, Karnan has her own story to tell in the form of the procedural history below. As will appear, through all the twists and turns, the case was prosecuted patiently and in the best of faith. For much of the time, the action was stayed due to Safeco's persistent effort to avoid a hearing on the merits. After Proposition 64's passage in 2004, the litigation focused more intensively on the UCL, but the California Supreme Court did not hold Proposition 64 applicable to pending UCL suits until the summer of 2006.

The parties' skirmishes over discovery to identify absent class members to prosecute the UCL claim did not begin until 2007. As the trial court recognized, the passage of time and equities on this record actually support, not undercut, the narrow discovery Karnan sought.

A. 2002-2004: Shortly After the Legal Proceedings Begin, the Action Is Stayed at Safeco's Request

From the time of suit in January 2002 until the end of 2004, the litigation made no progress due to trial court stays obtained by Safeco.

Demurring immediately to the original complaint in February 2002, Safeco claimed that the California Insurance Commissioner had "exclusive jurisdiction" to adjudicate the complaint's allegations. As an alternative basis to slow the litigation down, Safeco contended that the case had to be referred to the DOI under the "primary jurisdiction" doctrine. (1 RPI App. 2.) This doctrine "may be invoked whenever a court concludes there is a 'paramount need for specialized agency fact-finding expertise.'" (*Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377, 401.) The Project opposed a primary jurisdiction referral because this action concerns wrongdoing – Safeco's use of illegal rating factors – that the Commissioner neither reviewed nor approved. (1 RPI App. 27.) The Project thus argued that a referral would only "unnecessarily delay the case." (1 RPI App. 57.)

This prediction proved correct. In July 2002, as Safeco urged, the trial court (at that time, the Honorable Richard Fruin) invoked primary jurisdiction and referred the case to the Commissioner. (1 RPI App. 64.) In December 2002, after assessing the Project's allegations, the DOI sent the case back. The agency made plain that it preferred private enforcement in this instance against Safeco: "The Commissioner declines to hold hearings on the matter because the factual questions presented by the litigation do not require any actuarial or rate making expertise, matters which the California Department of Insurance regularly handles, and matters in which the Commissioner is vested

with unique authority. The particular facts necessary to resolve the dispute will best be obtained through the discovery processes available to the Superior Court." (1 RPI App. 69.)

In February 2003, following the return from the DOI, the trial court held a case management conference. The stay was effectively continued because no litigation deadlines were set. In the court's words, "I'm not sure what decision we've made except not to do anything." (1 RPI App. 77.)

In November 2003, after reassignment to the current trial judge, Safeco moved to stay pending the anticipated appellate decision in *Poirer v. State Farm Mutual Automobile Insurance Company*. Safeco pointed out, correctly, that "substantial pretrial proceedings have yet to get underway" and only "[m]inimal discovery has been propounded," although without mentioning that this was due to prior stays. (1 RPI App. 86.) Safeco also moved for judgment on the pleadings. Although the DOI had just rejected the "primary jurisdiction" referral, Safeco renewed its remarkable assertion that the DOI had "exclusive jurisdiction" over the Project's allegations. (1 RPI App. 89.) Arguing that the DOI could not possibly have exclusive jurisdiction and that *Poirer* was distinguishable, the Project opposed further delay. (1 RPI App. 113-115.)

In March 2004, the trial court granted Safeco another stay. The court ordered the matter halted pending Division One's anticipated decision in *Donabedian v. Mercury Insurance Co.* (2004) 116 Cal.App.4th 968 (*Donabedian*). (1 RPI App. 131.) Over the Project's objection, the stay order presaged even further delay after *Donabedian* was decided: "At such time, the Court will consider whether the stay should be lifted or whether it should remain in effect pending the Court of Appeal decision in *Poirer v. State Farm*." (1 RPI App. 131.)

In May 2004, the trial court continued the stay "until further notice." (1 RPI App. 136.) In August 2004, although *Donabedian* had become final,

the court "granted a continuance of the stay . . . pending a decision in the *Poirer v. State Farm* case currently before the Court of Appeal." (1 RPI App. 141.) The wait for precedential guidance from *Poirer* was ultimately for naught. In October 2004, Division Eight issued a nonpublished opinion in *Poirer* following the analysis in *Donabedian*, decided seven months earlier.

In December 2004, the trial court finally lifted the stay barring the Project from prosecuting the case. (1 RPI App. 163-164.) Conveniently for Safeco, though, the focus shifted to then-recent Proposition 64.

B. 2005: Before the Project Can Substitute a New Plaintiff with Standing Under Proposition 64, Safeco Obtains Another Stay

In November 2004, just as the litigation was to get underway in earnest, California voters passed Proposition 64. The initiative heightened standing prerequisites for private UCL enforcement actions. However, Proposition 64 did not "expressly declare whether the new standing provisions it adds to the UCL apply to pending cases." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 229 (*Mervyn's*).) Despite the uncertainty, in January 2005, Safeco demurred again and argued the Project now lacked UCL standing. In March 2005, although noting the split in the Courts of Appeal, the trial court held Proposition 64 applicable to this case. (1 Safeco App. 12-14.) The court gave the Project "30 days leave to amend to substitute plaintiffs with standing under Proposition 64." (1 Safeco App. 12.)

According to Safeco, the Project should have substituted a new plaintiff during this period. Safeco overlooks that before the 30-day period for amendment could expire, Safeco obtained yet another stay of the trial proceedings to file its first writ petition nearly four years ago. (1 Safeco App. 130-131; see also 1 RPI App. 171.) In July 2005, Safeco shifted the legal battle to the appellate level by filing a petition for extraordinary relief challenging the Project's first two causes of action under Proposition 103. (*Safeco Insurance Co. of America v. Superior Court* (B184610).) The writ

petition acknowledged that the trial court had once more stayed the proceedings, "pending review by this Court." (1 RPI App. 173.)

C. 2006: After This Court Holds that Proposition 103 Provides No Private Right of Action, Safeco Unsuccessfully Seeks to Terminate the Case on Jurisdictional Grounds

In March 2006, ruling on Safeco's first writ petition, this Court held that "there is no private right of action for a violation of section 1861.02." (*Farmers Insurance Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 847 (*Farmers*).) The Project's third cause of action under the UCL, however, was not at issue. (*Id.* at pp. 847-849.) In July 2006, the California Supreme Court held Proposition 64 retroactive and thereby ended the division in the lower courts on that issue. (*Mervyn's, supra*, 39 Cal.4th at p. 227.) In a companion decision, the high court held that trial courts have discretion to allow plaintiff substitutions in pending cases, when necessary, to meet the UCL's new standing requirements. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235 (*Branick*).)

Given these developments, the litigation finally seemed ripe to consider a plaintiff substitution to meet Proposition 64. In July 2006, the Project moved for discovery to facilitate such a substitution. (1 Safeco App. 17-18.) But Safeco sought to thwart the addition of a new plaintiff on jurisdictional grounds.

Safeco contended, strenuously, that this Court's *Farmers* opinion on Proposition 103 was the "final disposition of the case," including the UCL claim. (1 Safeco App. 59, emphasis omitted.) As Safeco argued then, the Project's discovery motion "attempts to circumvent the Court of Appeal's decision" and "to do exactly the opposite of what has been ordered." (1 Safeco App. 54, 58.) Observing that the Code of Civil Procedure "imposes a fine for those who disobey a peremptory writ," Safeco even suggested the

trial court would expose itself to "enforcement remedies" if the Project was allowed to amend the UCL cause of action. (1 Safeco App. 59.)

In September 2006, the trial court issued an order adopting Safeco's sweeping reading of *Farmers* and granted judgment on the pleadings for Safeco. (1 Safeco App. 79-80.) This Court, however, promptly corrected the misapprehension.

In October 2006, the Project joined another litigant's request for writ review to clarify the *Farmers* mandate. (*Ryan v. Superior Court* (B194498).) In November 2006, this Court issued a *Palma* order agreeing that the Project's UCL claim was not foreclosed. The Court explained: "*Farmers* was limited solely to the viability of a direct statutory cause of action under Insurance Code section 1861.10, subdivision (a). The *Farmers* court did not address whether plaintiffs could amend a cause of action alleging unfair competition pursuant to Business and Professions Code section 17200." (1 RPI App. 174.) With the benefit of a more complete record, this Court emphasized that the Project could not be faulted for postponing an amendment. "In any event, we conclude it was reasonable for plaintiff to delay amending the pleadings due to the pending appeal" – meaning the *Farmers* writ proceeding from 2005 to 2006. (1 RPI App. 176.)

The *Palma* order made plain that the trial court should "consider the merits of [amendment] pursuant to *Branick*." (1 RPI App. 176.) In December 2006, with the scope of *Farmers* no longer in dispute, the trial court reset the Project's discovery motion for another hearing. (1 Safeco App. 82.)

D. 2007: Citing *First American*, the Trial Court Initially Rejects Discovery to Identify Safeco Policyholders Able to Seek Relief Under the UCL

Thus, it was not until 2007 that the litigation really confronted whether the Project could amend the UCL cause of action to meet Proposition 64. There were two battles on precertification discovery. Each has generated a writ petition to this Court.

In March 2007, the trial court heard oral argument on the Project's discovery motion. Safeco relied heavily, as it does now, on *First American*, *supra*, 146 Cal.App.4th 1564. Decided two months earlier, this Court's opinion was a focal point of the debate.

As the trial court noted, in contrast to *First American* the Project unquestionably had UCL standing when suit was filed nearly three years before Proposition 64. Calling Safeco's argument "upsetting," the court told Safeco's counsel: "The poor plaintiff in this case, Prop 103 Enforcement Project has lost their standing, through no fault of their own. . . . I will tell you something: it really – I just can't sit here and say this is a '[gotcha]' because it is. I am not going to say that in a case like this, the plaintiff loses. Because the plaintiff did everything right at the time." (1 Safeco App. 134, 137.) This consideration drove the court initially to allow the proposed discovery. "I think at this point the plaintiff should have the right to do some discovery to find a named plaintiff with standing. Because [the Project] had standing in the first place and the only reason they didn't file a class action is they didn't have to do it." (1 Safeco App. 138-139.)

As the trial court instructed, the Project submitted a proposed order, but before issuing a written ruling allowing the discovery, the court invited further briefing and held another hearing. (1 Safeco App. 142-212.) At the second oral argument in June 2007, the court was again reluctant to foreclose access to discovery. As the court told Safeco's counsel: "These people [the Project's lawyers] did everything right. They did exactly – they would have been castigated if they had filed a class action. They did what they had to do [by filing a representative action]. They did it correctly and in the best of faith, and now what you're saying is they lose. Do you consider that fair?" (1 Safeco App. 235.)

Later in the June 2007 hearing, the trial court seemed to acknowledge that *First American* involved different circumstances. "It's an open question,"

the court said, "whether it's an abuse of discretion to allow discovery in this kind of a case where the plaintiff is a representative plaintiff, never wanted to file a class action in the first place, ergo, then, he never was a member of the class." (1 Safeco App. 240.) Safeco's counsel even agreed with the judge's statement that the Project's discovery request was not "an attempt to end run Prop 64. I would agree with you there." (1 Safeco App. 246.)

In August 2007, while calling the result "harsh," the trial court ultimately concluded its hands were somehow tied by *First American* and denied the Project's motion. (1 Safeco App. 254-259.) The court nonetheless identified several factors favoring the discovery:

> No one faults the Project for failing to file a class action. The Project would not have been a proper plaintiff (i.e., not a member of the class), and proceeding as a representative action constituted an equally viable option, perhaps a better one.

(1 Safeco App. 255, footnote omitted).

> The potential for abuse of the discovery process is virtually non-existent in this case. Plaintiff had standing when it filed its complaint. It filed the complaint three years before enactment of Proposition 64, which means it had no reason to suspect that the law was going to change. Permitting discovery to find a new representative with standing here would in no way lead to the type of potential discovery abuse that could have resulted had *First American* gone the other way.

(1 Safeco App. 256-257.) The August 2007 order certified the matter for immediate review under Code of Civil Procedure section 166.1. (1 Safeco App. 259.) The court gave the Project ninety days to substitute a new plaintiff, albeit without access to Safeco's records disclosing policyholders within the relevant time frame. (1 Safeco App. 260.)

Disagreeing with the trial court's reading of *First American*, the Project petitioned this Court for a writ of mandate in October 2007. (*The Proposition 103 Enforcement Project v. Superior Court* (B202927).) Shortly thereafter, current plaintiff Lisa Karnan came forward and sought to be substituted in

superior court. Fully believing she had standing and would be an appropriate plaintiff, the Project's counsel withdrew the writ petition without prejudice, a request this Court granted: "We received petitioner's Withdrawal of Petition for Writ of Mandate Without Prejudice filed November 1, 2007, informing this court that petitioner is withdrawing the above-captioned petition for writ of mandate. The petition is dismissed." (1 RPI App. 178; see also 3 Safeco App. 556-557 [discussing withdrawal of petition with trial judge].)

In October 2007, a first amended complaint was filed naming Karnan as proposed class representative on behalf of affected Safeco policyholders. The amended pleading asserted one cause of action under the UCL. (1 Safeco App. 262, 271.) The substantive allegations were unchanged. Echoing the original complaint, Karnan averred that Safeco concealed its illegal surcharges from both the DOI and its own policyholders. (1 Safeco App. 263-269.)

E. June 2008: The Trial Court Entertains Safeco's Summary Judgment Motion Challenging Karnan's Standing but Still Has Not Ruled on the Motion

Safeco's historical descriptions are especially skewed on what happened after Karnan entered the case. According to Safeco, from the outset Karnan could not have reasonably believed she had UCL standing. The record demonstrates otherwise.

As the trial court observed, it was not until February 2008, when Safeco moved for summary judgment, that Karnan's standing was even in question. (3 Safeco App. 629.) The court, of course, did not adjudicate her standing at that time. All that occurred was a motion from Safeco on which the court had yet to rule (and still has not, as discussed below). Hence, when Safeco contended in February 2008 that Karnan's purported lack of standing was "undisputed," she rightly responded that "plaintiff has not yet had an opportunity to dispute it." (2 Safeco App. 357.)

Karnan then articulated her reasonable belief that she suffered "injury in fact" and lost "money or property" as the UCL requires. (Bus. & Prof.

Code, § 17204.) In violation of section 1861.02 – the statute sued upon since the outset – Safeco refused to reinstate Karnan's policy due to a gap in coverage. As a result, she had to pay a greater sum to obtain coverage with another insurer. Although Karnan was not ultimately surcharged by Safeco, the key point, for purposes of her good faith, is that she justifiably believed she was within the class when she stepped forward. As explained in her briefing below, the precise harm she sustained was not clarified until shortly before the summary judgment hearing in June 2008, after some discovery had finally occurred. (2 Safeco App. 351-353, 357-359, 462-464, 533-535; 3 Safeco App. 618; 2 RPI App. 266-270.) By persistently attacking Karnan's credibility, Safeco seeks to hold a layperson to an unfairly exacting understanding of certain nuances of insurance law and practice.

At the summary judgment hearing, Karnan's counsel further explained their good faith belief she had UCL standing, perhaps with an amended class definition if necessary. (2 Safeco App. 442-443, 450-452.) Notably, the trial court acknowledged that Karnan may have UCL standing: "We've got two questions. One, does she have standing? Now, it may be that she does because she lost money or property. . . . I'm willing to give you standing for Ms. Karnan." (2 Safeco App. 447.)

To be sure, the trial court mused aloud to counsel about granting summary judgment for Safeco and sought a proposed order from its counsel. (2 Safeco App. 454.) No written order ruling on the motion has been issued, however. As noted above, at least once previously, the court changed its mind after oral argument and issued a different written order. (Compare 1 Safeco App. 139 with 254.) In sum, Safeco's notion that Karnan (a graduate student in religious studies at Claremont Graduate University) has deliberately litigated this case on a false premise (no standing) is unfounded.

F. November 2008: After the New Plaintiff's Standing Is Challenged, the Trial Court Allows Discovery to Protect Absent Class Members Given the "Strong" Evidence of Safeco's Wrongdoing

In July 2008, as invited at the summary judgment hearing (2 Safeco App. 444, 454), Karnan moved for precertification discovery to identify Safeco policyholders who might serve in her stead if necessary. (2 Safeco App. 456.) By this time, the legal landscape on precertification discovery had the benefit of *CashCall, supra*, 159 Cal.App.4th 273, issued in January 2008.

Framed with *CashCall* in mind, Karnan's motion was specific on the information she sought and the process she believed should be followed:

- Plaintiff will submit a proposed letter to the Court to be sent to customers who were subjected to Safeco's DSRRL2 surcharge or required to submit to Safeco's paper application process, notifying them of this action and their right to opt-out of any discovery which would disclose their contact information to plaintiff's counsel.
- Safeco shall serve plaintiff with objections, if any, to the content which will be ruled on by the Court.
- Once the content has been approved by the Court, the letter will be mailed from a third-party administrator chosen by plaintiff.
- Safeco shall provide the administrator with the last known residential addresses for the affected Safeco policyholders and applicants.

(2 Safeco App. 465.)

Citing *CashCall*, Karnan also moved for reconsideration of the trial court's August 2007 order denying discovery to the Project. (1 Safeco App. 254.) Karnan argued that *CashCall* only underscored the Project's entitlement to precertification discovery under the circumstances of this case. (2 Safeco App. 470.) The reconsideration request noted that apart from a motion by a party, the trial court was free to revisit its August 2007 discovery order rendered before *CashCall*. (2 Safeco App. 546 [citing *LeFrancois v. Goel* (2005) 35 Cal.4th 1094, 1108].)

Although the trial court never ruled on the motion for reconsideration, it granted Karnan's motion for precertification discovery in November 2008. (3 Safeco App. 627.) Just as *First American* had significantly influenced the court's decision to deny discovery earlier to the Project, *CashCall* impelled the court, on further thought, to allow this when Karnan sought it. The order emphasized *CashCall* as supporting discovery to protect Safeco policyholders unaware of the wrongdoing and whose meritorious claims would otherwise be time-barred. The court noted that Karnan made a "***strong offer of proof***, supported by what appears to be ***direct evidence***, to the effect that the defendant had a surcharge policy based on a lack of prior insurance. . . . This justifies allowing the discovery plaintiff seeks." (3 Safeco App. 632, emphasis added; see also 5 Safeco App. 907 [incriminating document Safeco initially declined to supply to this Court].)

Also in its November 2008 order, the trial court wrote that Karnan committed "an abuse of the discovery process" by pursuing discovery after Safeco challenged her standing. (3 Safeco App. 630.) With all respect, this conclusion is inconsistent with the record summarized above. In light of the trial court's recognition that Karnan may have UCL standing (2 Safeco App. 447), the suggestion that she misused tools of discovery ***because*** she lacked standing is untenable.

Karnan admits she "wasted no time" in propounding discovery requests because, as she explained in her briefing below, "this action has been pending without discovery since 2002." (1 Safeco App. 282; see also 1 RPI App. 150-158 [December 2004 hearing at which counsel noted the long stays and lack of discovery].) But there was no abuse. To take one example, when it moved for summary judgment, Safeco relied on its underwriting file for Karnan, which was not available to her previously. Karnan reasonably sought discovery in a defensive manner to assist with "interpreting the underwriting file." (2 Safeco App. 364.) This discovery, in fact, bore on Safeco's challenge to her standing.

(2 Safeco App. 363-364.) In any event, as the court determined within its discretion, none of this outweighed the considerations favoring precertification discovery, on the current motion, to protect the rights of absent class members. (3 Safeco App. 632.)

On December 29, 2008, Safeco filed its current writ petition. On January 7, 2009, this Court issued an order to show cause. In her preliminary opposition filed the next day, Karnan argued that the petition should be summarily denied because, among other reasons, Safeco failed to furnish a complete record of documents from the superior court. (See Preliminary Opposition to Petition for Writ of Mandate (Cal. Rules of Court, Rule 8.487(a)(1)) and Suggestion to Vacate Order to Show Cause, 1/8/09, pp. 2-4.) Replying to Karnan's preliminary opposition, Safeco has asserted that nothing relevant was omitted, but this is false. Out of necessity, Karnan files her own appendix accompanying this formal opposition.[2]

V. DISCUSSION

A. Discovery Rulings Are Reviewed Deferentially

It is useful to begin with the standard of review. "In every appeal, the threshold matter to be determined is the proper standard of review – the prism through which we view the issues presented to us." (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1500.)

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[2] "It is well established that it is a petitioner's duty to supply an adequate record of the proceedings in the trial court when seeking relief by extraordinary writ." (*Francisco R. v. Superior Court* (1980) 114 Cal.App.3d 232, 238.) Thus, for example, Safeco was not allowed to submit its summary judgment memorandum (a motion Safeco must deem relevant to these proceedings), but then exclude Karnan's ***unredacted*** opposition outlining the "strong" evidence of Safeco's wrongdoing. (3 Safeco App. 632.) Too conveniently for Safeco, the redacted version in Safeco's writ exhibits is covered with sterilizing blackout. (Compare 2 Safeco App. 411-415 with 2 RPI App. 262-266.)

The applicable prism here grants the trial court significant leeway. "Appellate review of discovery rulings is governed by an abuse of discretion standard." (*First American, supra*, 146 Cal.App.4th at p. 1573.) As this Court has explained: "Thereunder, a trial court's ruling will be sustained on review unless it falls outside the bounds of reason." (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 304, internal quotation marks omitted.) Safeco bears all burdens, and "'unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) Discretion is, of course, "'subject to the limitations of legal principles governing the subject of its action.'" (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.) To borrow from a federal decision examining standards of review, discretion connotes "a range of permissible decisions." (*Zervos v. Verizon New York, Inc.* (2d Cir. 2001) 252 F.3d 163, 169.)

In this case, the trial court's order cogently explains the rationale for allowing precertification discovery and is faithful to the pertinent legal principles. This was discretion exercised within the range, not abused.

B. Applying the *Parris* Balancing Test, California Courts Allow Precertification Discovery to Locate Substitute Class Plaintiffs

According to Safeco, decisions granting precertification discovery to identify a new class plaintiff are aberrational. In reality the concept is hardly novel.

A California appellate court first endorsed this in *Budget Finance Plan v. Superior Court* (1973) 34 Cal.App.3d 794 (*Budget Finance*). The more recent decision in *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772 likewise held there was no abuse of discretion in permitting this discovery. Most recently, the panel in *CashCall, supra*, 159 Cal.App.4th 273 declined to disturb the lower court's order permitting it. To Karnan's

knowledge, *First American*, *supra*, 146 Cal.App.4th 1564 is the only published California decision going the other direction. As discussed in greater detail later, *First American* concerned the unique situation of a plaintiff trying to piggyback on government investigations that had already resulted in full refunds to all affected consumers.

The rationale for precertification discovery to identify new class plaintiffs is straightforward. The first decision reasoned: "[S]hould the trial court conclude in what is prima facie a proper class action that the named plaintiffs may not adequately represent the class, it should afford them an opportunity to redefine the class or to add new individual plaintiffs. It follows that if discovery is necessary in order to do this, it should be made available." (*Budget Finance*, *supra*, 34 Cal.App.3d at p. 799.)

As this Court has noted, the "apparent blanket authorization" announced in *Budget Finance* should be read in light of subsequent appellate authority. (*First American*, *supra*, 146 Cal.App.4th at p. 1578.) Courts now generally assess the issue under the *Parris* balancing test. "Although parties are free to communicate with potential class members before class certification, when they seek to enlist the aid of the court in doing so, it is appropriate for the court to consider 'the possibility of abuses in class-action litigation.'" (*Parris*, *supra*, 109 Cal.App.4th at p. 300.) Specifically, "in addition to applying the normal rules governing discovery motions, the trial court must also expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances." (*Id.* at pp. 300-301.) The trial court did this here and its order is sound.

C. Safeco Does Not Demonstrate Any Abuse of Discretion

Like the *Parris* court, the Court of Appeal in *CashCall* instructed trial judges to weigh potential litigation abuses against the rights, in particular, of absent class members. (See *Parris*, *supra*, 109 Cal.App.4th at pp. 300-301; *CashCall*, *supra*, 159 Cal.App.4th at pp. 292-296.) *CashCall* also built on *First American*, where this Court recognized that "members of the putative class may have an interest in pursuing the class action." (*First American*, *supra*, 146 Cal.App.4th at p. 1577.) In particular, three factors drove the result in *CashCall*: (1) the "secret nature" of the illegal conduct injuring the group; (2) a "potential statute of limitations problem"; and (3) there was "no other action or enforcement pending to provide class members with relief for the alleged violations." (*CashCall*, *supra*, 159 Cal.App.4th at p. 293.) In these circumstances, "the trial court could reasonably conclude the rights of the class members outweighed the potential for abuse of the class action procedure." (*Id.* at pp. 292-293.) Because *CashCall* is analogous, the same conclusion is compelled on the record in this case.

1. Class Members Cannot Reasonably Be Charged with Knowledge of Safeco's Unlawful Activity

The trial court accurately apprehended that Safeco policyholders could not have detected their insurer's illegal surcharges. (3 Safeco App. 631.) Safeco's notion that class members were on notice of the practice, had they only exercised "due diligence," is absurd.

Safeco says its policyholders had the means at their disposal to detect the misconduct. As Safeco explained this theory to the trial judge, its insureds are able to "self-identify them[selves] as potential plaintiffs this action" because "certainly policyholders know when they apply to Safeco whether or not they have insurance" and "whether or not in the last three years they had a lapse in coverage." (3 Safeco App. 590.) The court immediately pinpointed

the problem with this argument: "Right, but they don't necessarily [know] if Safeco is going to consider" those factors, in direct violation of the Insurance Code. (3 Safeco App. 590.) The November 2008 discovery order soundly rejected Safeco's position: "Absent a detailed breakdown of charges, there is no way a class member with a coverage gap would know that his/her premium included a surcharge based on the lapse. The only way to find out now is to allow Plaintiff the discovery she seeks." (3 Safeco App. 631.)

Challenging this finding, Safeco contends its policyholders should have been tipped off to the misconduct by the insurer's many regulatory filings with the DOI. Notably, Safeco has come full circle from its prior position on the expertise required to understand DOI paperwork. To obtain a referral to the DOI under the primary jurisdiction doctrine in 2002, Safeco argued that the Commissioner was uniquely competent to review the complaint's allegations and even had "exclusive jurisdiction" over them. (1 RPI App. 2.) As Safeco's counsel told the trial court, "generally only the Commissioner and his people understand and the insurance company actuaries understand" the DOI regulatory filings. (1 RPI App. 52.) Even putting aside this turnabout, Safeco's arcane submissions to the DOI would not put its insureds, if they took the time to locate them, on notice of anything pertinent to this lawsuit. The complaint alleges that Safeco's DOI filings do ***not*** disclose the illegal surcharges. (1 Safeco App. 266, emphasis added.)

Indeed, rather than revealing the practice to the public and government regulators, Safeco has made every effort to hide it. Safeco brought two motions to seal the document cited by the trial court as "direct evidence, to the effect that [Safeco] had a surcharge policy based on a prior lack of insurance." (3 Safeco App. 632; see 5 Safeco App. 907 [document in question].) Safeco also moved aggressively to seal any brief Karnan filed referring to this document. (See 4 Safeco App. 745 [first motion to seal], 789-793, 796-797 [second motion].) Apart from whether the document is a genuine "trade

secret," the public could not possibly be on notice of something this insurance company has worked so hard to keep under wraps.

Although it may be unsurprising that Safeco points the finger at its own policyholders, this familiar defense tactic misses the mark for other reasons. Citizens are entitled to presume that businesses comply with the law. A UCL violation does not turn on the consumer's zeal in unearthing the true state of affairs. As a leading case on "reasonable consumer" explains, the public is not required to "investigate the merits" of Safeco's business practices. (*Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 504.) "'There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. . . . [T]he rule of caveat emptor should not be relied upon to reward fraud and deception.'" (*Id.* at p. 509.)

In a recent UCL decision, this Court phrased the point similarly. Any insinuation that a consumer has "unclean hands" cannot defeat a UCL claim, for this would "sanction the insurer's unlawful and unfair conduct." (*Ticconi v. Blue Shield of Cal. Life & Health Insurance Co.* (2008) 160 Cal.App.4th 528, 544 (*Ticconi*).) Before Proposition 64 and still today, the UCL focuses on "'"preservation of fair business competition,"'" not the diligence of the unsuspecting public. (*In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1266, quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).) A court, in fact, uses the "wrong standard" in UCL suits if it "focus[es] on issues of proof regarding individual consumers." (*Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1144.) Safeco's dim view of the UCL disregards that "California's consumer protection laws are among the strongest in the country." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 242.)

Safeco's attempt to import caveat emptor here also ignores basic principles of California insurance law. The business of insurance is a "highly regulated industry" because it is "'affected with a public interest.'" (*Calfarm*

Insurance Co. v. Deukmejian (1989) 48 Cal.3d 805, 830.) Proposition 103 was, most emphatically, a consumer protection measure. In an opinion in this very case, this Court observed: "The stated purpose of the initiative was 'to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians.'" (*Farmers*, *supra*, 137 Cal.App.4th at p. 851, quoting Stats.1988, p. A-276, § 2.) To achieve these goals, the electorate specified that Proposition 103 "'shall be liberally construed and applied in order to fully promote its underlying purposes,'" not given a miserly application favoring insurance companies. (*Id.* at p. 852, quoting Stats.1988, p. A-290, § 8.)

Safeco likewise disregards the nature of the insurer-insured relationship. It is "often characterized by unequal bargaining power in which the insured must depend on the good faith and performance of the insurer." (*Vu v. Prudential Property & Casualty Insurance Co.* (2001) 26 Cal.4th 1142, 1151, citations omitted.) Insurance Code violations like those here are "a failure for which the insurer must bear responsibility." (*Allstate Insurance Co. v. Dean* (1969) 269 Cal.App.2d 1, 4.) The UCL should have its greatest force in cases like this. "[I]n general, as between a person who is enriched as the result of his or her violation of the law, and a person intended to be protected by the law who is harmed by its violation, for the violator to retain the benefit would be unjust." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 182 (conc. opn. of Werdergar, J.).)

Even more strained is Safeco's attempt to invoke press reports of insurer misconduct, and related developments, to show purported notice to California drivers. To take a few examples, the Merced Sun-Star and the Monterey County Herald are read by few if any people in the southern part of the state. To Karnan's knowledge, moreover, virtually none of the documents Safeco seeks to inject here by judicial notice were before the trial court. This

is, a thin basis for obtaining a writ of mandate. (See Opposition of Real Party in Interest to Safeco's Request for Judicial Notice, filed concurrently.)

Safeco's misconduct is especially noteworthy given one of the core purposes of Proposition 103 – full disclosure to facilitate public scrutiny and involvement in setting fair premiums. By virtue of the 1988 initiative, the Insurance Code now instructs: "All information provided to the commissioner pursuant to this article shall be available for public inspection . . . ." (Ins. Code, § 1861.07.) This statute sought to "foster[] consumer participation in the rate-setting process." (*State Farm Mutual Automobile Insurance Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1045 (*State Farm*).) The integrity of this process is jeopardized when an insurance company does not disclose to the DOI the factors actually used to determine premiums. Non-disclosure also thwarts the Legislature's aim "to promote competition in the insurance business and provide a means whereby insurance consumers can more easily comparison shop for insurance coverage." (Ins. Code, § 1855.1) This "actual or threatened impact on competition" runs afoul of the UCL. (*Cel-Tech*, *supra*, 20 Cal.4th at pp. 186-187.)

According to Safeco, class members should have discovered the surcharge because policyholders can ask their agents if Safeco has been defrauding them. Policyholders cannot reasonably be expected to ask agents whether the premium they are paying includes a surcharge that is illegal and, for this very reason, has been kept secret by the insurance company imposing it. Even if asked, agents would be unlikely to reveal the surcharge (assuming they know about it) because this could subject them to liability for selling a policy at a price that included an illegal surcharge. (See Ins. Code, § 1861.16, subd. (b).) In sum, Safeco's "due diligence" arguments are far-fetched.

2. The Statute of Limitations Would Preclude Safeco Insureds from Obtaining Relief in a New Action

Safeco makes no real effort to disprove the two other factors deemed significant in *CashCall* – the timeliness problems a new case would confront, and no prospect for relief in any other action.

Safeco began surcharging policyholders without prior coverage in early 1999 and appears to have discontinued this practice sometime in 2003. (3 Safeco App. 618.) The UCL statute of limitations is four years. (Bus. & Prof. Code, § 17208.) Hence, if a new class action challenging Safeco's surcharge were filed today, it would face almost-certain dismissal on timeliness grounds. The trial court acted within its discretion by giving weight to this consideration. (3 Safeco App. 631.) Applicable law dictated as much. "California courts have shown a liberal attitude toward allowing amendment of pleadings to avoid the harsh results imposed by statutes of limitations." (*Garrison v. Board of Directors* (1995) 36 Cal.App.4th 1670, 1677; see also *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1007 [to same effect].)

Given the time periods at issue, the denial of precertification discovery here would prevent affected Safeco policyholders from ever getting their money back. This is contrary to the UCL's core purpose. UCL actions come in many different stripes, but they share a common objective. As our Supreme Court has stated repeatedly, "the offender is not entitled to keep the fruits of its unfair, deceptive, or unlawful conduct." (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1271.) """"One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom."""" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267, quoting *Fletcher v. Security Pacific Nat. Bank* (1979) 23 Cal.3d 442, 451.)

Importantly, the filing of a class action tolls the statute of limitations for absent class members only in limited circumstances. Where it applies, class action tolling generally extends the time to file future individual cases, not another class action. (See *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1336-1340.) For a policyholder overcharged by several hundred dollars, the right to file an individual action is of no practical value. To borrow this Court's words, "fees and costs could easily dwarf" any possible recovery. (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1435 (*Earley*).) The only future litigation option benefiting from tolling is a small claims suit no policyholder would attempt against a mammoth insurance company.

A Safeco policyholder wrongly surcharged as long as a decade ago, without knowing this, is even less likely to come forward without being affirmatively contacted through discovery. Such persons may have switched to other insurers, left the state or the country or otherwise seen their circumstances change significantly. The trial court was right that on this record, the passage of time only bolstered the argument for precertification discovery. Otherwise, the defendant would have every incentive to drag things out, only to declare after several years of delay that it was simply too late to make a plaintiff substitution.[3]

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[3] On the statute of limitations, the record contains a misapprehension that warrants correction. In its August 2007 order denying precertification discovery to the Project, the trial court reasoned: "Plaintiff [the Project] has not alleged that a future action will be time-barred and has not presented any reason why purported class members might be denied relief if ***this action*** is unable to proceed on their behalf." (1 Safeco App. 257, emphasis in original.) The court's description was inaccurate. At the hearing preceding the Project's motion for precertification discovery, the Project's counsel contended: "Because of the statute of limitations, Your Honor, if a case were filed today,

3. The Policyholders Have Not Obtained Relief Elsewhere

The third factor is whether class members may obtain relief in a public enforcement or related action. (See *CashCall, supra,* 159 Cal.App.4th at p. 293.) There has been no suit by any government agency to refund monies Safeco wrongfully took from its policyholders (unsurprising in light of Safeco's concealment). The rationale given in *CashCall* is right on the mark here also: "[T]he rights of the class members in this case involve important statutory rights that allegedly have been violated and, without precertification discovery, those violations likely will go unaddressed." (*Id.* at p. 294.)

Further underscoring the trial court's sound exercise of discretion, the DOI made plain its preference for private enforcement by declining the primary jurisdiction referral early in this litigation. As the agency explained: "The particular facts necessary to resolve the dispute will best be obtained through the discovery processes available to the Superior Court." (1 RPI App. 69.) Given this history, it would be most ironic for this case to end, after great effort to hold the defendant accountable, because crucial and non-intrusive discovery was foreclosed.

4. *First American* Is Off Point

In response to *CashCall*, Safeco has consistently sought to return the focus to *First American*, issued one year earlier. Safeco proclaims *First American* is controlling, but the salient considerations could not be more different.

The plaintiff there, Jeffrey Sjobring, filed a proposed UCL class action in 2005, after Proposition 64. (*First American, supra,* 146 Cal.App.4th at p. 1567.) It was not a case, as here, initiated under the UCL's old standing rules.

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most of the people who Safeco overcharged would – would be out of luck because of the statute of limitations." (1 Safeco App. 243.)

Sjobring did not lose standing after suit was filed. He never had it in the first place. (*Id.* at p. 1574.) Moreover, Sjobring was, in a word, an opportunist. He shamelessly tried to benefit from the good enforcement work already done by public prosecutors. Government officials pursued the wrongdoers and obtained complete relief nationwide for the consumers who were hurt. (*Id.* at pp. 1567-1568, 1576.) As this Court stated, "this is not a case in which Sjobring has uncovered an apparent wrongdoing that will remain unaddressed without this class action." (*Id.* at p. 1577.) Here, of course, the DOI refused a primary jurisdiction referral and expressly endorsed this private action to hold Safeco accountable. (1 RPI App. 68-70.)

In addition, there was no statute of limitations concern in *First American*. Sjobring made "no argument that any future action [absent class members] might pursue would be time-barred, or offer any other reason why the class members might be denied relief if ***this action*** is unable to proceed on their behalf." (*First American, supra*, 146 Cal.App.4th at p. 1577, emphasis in original.) This case, again, is the polar opposite. Without it, there will be no relief for injured Safeco policyholders who are out tens of millions of dollars due to Safeco's misconduct.

Quoting isolated passages from the opinion, Safeco posits that *First American* established some type of sharp line forbidding precertification discovery whenever a class plaintiff, no matter the circumstances, is found to lack standing. Safeco's argument is misguided and erroneous.

This Court did not so hold, and with good reason. The Supreme Court before *First American* rejected a rigid rule that "plaintiffs who never had standing may not substitute plaintiffs with standing." (*Branick, supra*, 39 Cal.4th at p. 244.) California precedent has long "permitted plaintiffs who have been determined to ***lack*** standing, or who have ***lost*** standing after the complaint was filed, to substitute as plaintiffs the true real parties in interest." (*Id.* at p. 243, emphasis added [collecting cases].) As Division One expressed

in allowing the Project's parent organization to amend a UCL complaint: "In general, courts liberally allow amendments for the purpose of permitting plaintiffs who lack or have lost standing to substitute as plaintiffs the true real parties in interest." (*Foundation for Taxpayer & Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal.App.4th 131, 136.) The *CashCall* court also persuasively addressed this issue: "It follows from the general rule liberally allowing amendments of complaints by plaintiffs without standing to substitute in new plaintiffs with standing (i.e., real parties in interest) that standing of the original named plaintiffs at the beginning of an action is ***not*** necessarily a prerequisite to continuation of the action." (*CashCall, supra*, 159 Cal.App.4th at p. 288, emphasis in original.)

Indeed, a balancing test connotes not just discretion vested in the trial judge, but also that the facts of the case, not categorical rules, drive the outcome. This Court's recognition of the *Parris* balancing test further undermines Safeco's suggestion that some bright-line rule was created. (*First American, supra*, 146 Cal.App.4th at p. 1576; see also *CashCall, supra*, 159 Cal.App.4th at p. 296, fn. 13 [concluding that *First American* "applied the *Parris* balancing test"].) *First American* is no basis for finding an abuse of discretion on the very different record here.

5. Precertification Discovery Furthers, Not Undermines, the Purposes Behind Proposition 64

In a related vein, Safeco points to Proposition 64 as reason to terminate this case by denying a plaintiff substitution. The people's will actually dictates the opposite.

In applying any initiative, the "voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.) Proposition 64, of course, clamped down on "frivolous" UCL actions. (Prop. 64, § 1, subd. (b)(1), (c), (d).) Just as importantly, the electorate sought to keep the courthouse doors open for legitimate ones. The voters expressly

reaffirmed the need for a robust UCL to protect them in the marketplace: "This state's unfair competition laws set forth in Sections 17200 and 17500 of the Business and Professions Code are intended to protect California businesses and consumers from unlawful, unfair, and fraudulent business practices." (Prop. 64, § 1, subd. (a).) This case is the sort of meritorious UCL action the voters sought to preserve. Again, the record here contains "strong" evidence, found in Safeco's own business records, that this insurance company was illegally surcharging its own policyholders. (3 Safeco App. 632.)

In *Branick*, of course, a unanimous Supreme Court gave its blessing to plaintiff substitutions to comply with Proposition 64. The court explained: "[T]he policy objectives underlying Proposition 64 are fully achieved by applying the measure to pending cases . . . ." (*Branick, supra*, 39 Cal.4th at p. 241.) However, "to bar a meritorious action prosecuted by a substituted plaintiff 'who has suffered injury in fact and has lost money or property as a result of' unfair competition or false advertising [citations], serves none of the voters' articulated objectives." (*Ibid.*, emphasis deleted.)

The need for a private remedy under the UCL is especially justified in light of the procedural history. In 2002, as discussed, the DOI expressly deferred to private enforcement here. (1 RPI App. 68-70.) In 2006, this Court held that Proposition 103 accords no private right of action, thereby leaving only the UCL claim in the case. Part of the rationale was the UCL's availability, due to Proposition 103 itself, to hold insurers accountable in private litigation. (See *Farmers, supra*, 137 Cal.App.4th at pp. 852-854.)

Significantly, Proposition 103 lifted the legal immunity that insurance companies had long enjoyed. "The business of insurance shall be subject to the laws of California applicable to any other business, including . . . the antitrust and unfair business practices laws (Parts 2 (commencing with section 16600) and (commencing with Section 17500) of Division 7 of the Business and Professions Code)." (Ins. Code, § 1861.03, subd. (a).) As this Court

observed in *Farmers*, *supra*, 137 Cal.App.4th at pages 856-857, the UCL's private use to enforce the Insurance Code was already validated by prior case law. (See *Donabedian*, *supra*, 116 Cal.App.4th 968; *Farmers Insurance Exchange v. Superior Court*, *supra*, 2 Cal.4th 377; *State Farm*, *supra*, 32 Cal.4th at p. 1041; *Krumme v. Mercury Insurance Co.* (2004) 123 Cal.App.4th 924, 937.) While Proposition 103 left much to the Insurance Commissioner, "'the voters envisioned that the Commissioner's ability to enforce . . . the Insurance Code would be supplemented by the use of private attorneys general.'" (*Donabedian*, *supra*, 116 Cal.App.4th at p. 983.) Precertification discovery to locate a new class representative furthers this goal.

Safeco responds that the undersigned counsel might use discovery to "stir up" litigation (whatever this means exactly). Safeco appears to assume that if given the opportunity, counsel will cross the lines marking the boundaries of appropriate conduct. But the Supreme Court rejects this dubious outlook as any reason to foreclose discovery to protect an injured class of consumers. "We cannot join [the] assumption that, when faced with an opportunity to solicit clients in the course of legitimate discovery, plaintiff's attorney will ignore his ethical obligations." (*Colonial Life & Accident Insurance Co. v. Superior Court* (1982) 31 Cal.3d 785, 794.) Courts generally presume that "'unless proven otherwise, lawyers will behave in an ethical manner.'" (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 733 (*Koo*).) "[M]ere speculation" to the contrary, all Safeco offers, is no basis for finding an abuse of discretion. (*Best Buy*, *supra*, 137 Cal.App.4th at p. 777.)

D. The Trial Court's Order Is Supported by Additional Principles of California Law

To the extent more authority is needed, the order on review here is fortified by other venerable tenets of California law. As discussed below, the following provide a broader context and further support the trial court's

discovery ruling: (1) the rights of absent class members are carefully protected before class certification; (2) the named plaintiff has the right to use discovery to communicate with the class for various reasons, just one of which is their participation in the lawsuit; and (3) plaintiff substitutions are liberally allowed to promote adjudication on the merits.

1. In Light of the Nature of a Class Action, California Law Protects the Rights of Absent Class Members Before Class Certification

From the day of filing, this action has sought relief for policyholders adversely affected by Safeco's illegal, concealed practice of surcharging them for lack of prior insurance or continuous coverage. Initially the case was pled as a representative UCL action. (1 Safeco App. 1-2.) Before Proposition 64, this meant "a UCL action that is not certified as a class action in which a private person is the plaintiff and seeks disgorgement and/or restitution on behalf of persons other than or in addition to the plaintiff." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126, fn. 10.) Reflecting Proposition 64, the operative pleading now seeks class status. (1 Safeco App. 262.) Due to the many stays and battles over UCL standing, however, the propriety of class certification has not been briefed.

Although Safeco ignores the point, a case brought as a class action is treated as such until class certification is actually decided. The class action rules "apply to each class action brought under . . . Code of Civil Procedure section 382 until the court finds the action is not maintainable as a class action or revokes a prior certification." (Cal. Rules of Court, rule 3.760(a).) Division Four has distilled the principle: "California courts recognize and preserve the rights of absent class members, even before the issue of certification has been determined." (*Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101, 1109 (*Shapell*).) When faced with a request to terminate a proposed class action – essentially what Safeco seeks here – the court should focus on "protection of the class." (*Malibu Outrigger Board of*

Governors v. Superior Court (1980) 103 Cal.App.3d 573, 579; see also *Marcarelli v. Cabell* (1976) 58 Cal.App.3d 51.) As the seasoned trial judge below recognized, the court is "a 'fiduciary' of the absent class members." (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151.)

Contrary to Safeco's assumption, then, a classwide adjudication has not occurred even if Karnan is assumed to lack standing. "The alleged putative class members are the parties interested in prosecuting the action, such that an actual, justiciable controversy exists, pending amendment to add a named representative plaintiff." (*Shapell, supra*, 132 Cal.App.4th at p. 1111.)

All of this reflects that a class representative actually sues in two capacities. The named plaintiff seeks to proceed on behalf of himself or herself (the individual cause of action), and also on behalf of the represented group (to pursue collectively the similar claims). This Court has explained: "A class action is a representative action in which the class representatives assume a fiduciary responsibility to prosecute the action on behalf of the absent parties." (*Earley, supra*, 79 Cal.App.4th at p. 1434, citing *Southern Cal. Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 839-840 (*Southern Cal. Edison*).) The fiduciary commitment includes a duty, wholly apart from resolution of the class representative's own claims, "to continue the action for the benefit of others similarly situated." (*La Sala v. American Savings & Loan Assn.* (1971) 5 Cal.3d 864, 871 (*La Sala*).) Due to the "representative nature of the class action," the named plaintiff has "a fiduciary obligation to continue until success is obtained for ***all***." (*Southern Cal. Edison, supra*, 7 Cal.3d at p. 838, emphasis in original.)

Underscoring the binary nature of a class representative's obligations, our high court recently reaffirmed that a class action is not over merely because the case concludes as to that person. "'The most important point in connection with the settlement of class actions is that settlement with the

named plaintiffs will not preclude them from further prosecuting the action on behalf of the remaining members of the class.'" (*Meyer v. Sprint Spectrum L.P.* (Jan. 29, 2009, S153846) ___ Cal.4th ___ [2009 WL 197560, at p. *4].)

2. The Discovery Process May Be Invoked to Facilitate Contact with Absent Class Members on a Host of Issues

There are certainly cases where new plaintiffs suddenly appear midstream, having heard of the litigation and expressed interest. In other circumstances, perhaps the majority of class actions faced with a plaintiff substitution, it is necessary to call upon discovery rights. This reflects core realities in this type of lawsuit. As one court concisely put it: "Class members are usually unknown to each other. Identification of the class members by name often requires discovery of records that are available to the defendant but not the plaintiffs." (*Budden v. Board of School Comrs. of City of Indianapolis* (Ind. 1998) 698 N.E.2d 1157, 1163.)

Our Supreme Court has urged lower courts to "fashion 'pragmatic procedural devices' [citation] to handle class actions within the framework of the relevant statutes." (*Southern Cal. Edison, supra*, 7 Cal.3d at p. 843.) Here this task presents no difficulty because the Code of Civil Procedure directly supports Karnan's position in this proposed class action. Judges should restrict discovery only when the "burden, expense or intrusiveness" of the exercise "***clearly*** outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.020, subd. (a), emphasis added.) California law has long followed an "expansive scope of discovery" (*Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1108), with the statutory framework "construed liberally in favor of disclosure." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 377.) Given this widely accepted premise, "[a]ny doubt about discovery is to be resolved in favor" of it. (*Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826, 837.)

In particular, "[d]iscovery may be obtained of the identity and location of persons having knowledge of any discoverable matter." (Code Civ. Proc., § 2017.010.) Courts have interpreted this language to include the represented group in a proposed class action.

A recent leading case in this area is *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360 (*Pioneer*), issued the same day as *First American.* The Supreme Court took up the role of privacy rights when the class representative seeks to contact absent class members. The named plaintiff sought, from the defendant seller, the names and addresses of other purchasers. The objective was "to facilitate communication with potential class members." (*Id.* at p. 363.) Their privacy is a relevant consideration, the Supreme Court held, but usually will not trump the interest in discovery.

The pertinent guideline is the following: "Contact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case. [Citations.]" (*Pioneer*, *supra*, 40 Cal.4th at p. 373.) Concluding there was "no serious invasion of privacy," the Supreme Court explained: "Such disclosure involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass-marketing efforts or unsolicited sales pitches." (*Ibid.*)

The Supreme Court also took heed of practical considerations that support precertification discovery in class actions. "If anything," absent class members "might reasonably expect, and even hope, that their names and addresses would be given to any such class action plaintiff." (*Pioneer*, *supra*, 40 Cal.4th at p. 372.) Grudging restrictions on precertification discovery "could have potentially adverse effects in cases brought to redress a variety of social ills, including consumer rights litigation." (*Id.* at p. 374.) Harnessing discovery to identify similarly situated individuals promotes "the effectiveness

of class actions as a means to provide relief in consumer protection cases." (*Ibid.*) Or, as Division One has observed, the state has a "compelling interest" in ensuring that "those injured by the actionable conduct of others receive full redress of those injuries." (*Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1071.)

Indeed, persons subjected to a single wrong or course of misconduct, as here, bring something to the table that can and should be facilitated through discovery. "Although it is not necessarily the case, it is reasonable to assume that at least some of the class members who contact[] plaintiffs' counsel may have relevant information about the issues in the case (beyond the mere fact that they are class members)." (*Tien v. Superior Court* (2006) 139 Cal.App.4th 528, 535-536.) By joining forces and coordinating, the class members have greater power and may be able to litigate the case more efficiently. They are, after all, the "'persons for whose benefit their action was ostensibly filed.'" (*Koo, supra*, 109 Cal.App.4th at p. 736.) Class members may rely on the named plaintiff to prosecute the suit, but it is prudent to give them the option to be involved. A final judgment in a certified class action, whether favorable to the group or not, "will be res judicata as to all persons to whom the common questions of law and fact pertain." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706.)

Access to the represented group is actually a matter of free speech. "Precertification communication with potential class members, like pre-filing communication, is constitutionally protected speech. A blanket requirement of judicial approval for such communications would constitute an impermissible prior restraint on speech." (*Parris, supra*, 109 Cal.App.4th at p. 290.) Privacy rights are protected by using a third-party administrator or mailing house to contact the recipients, who have the option but not the obligation to participate. (See *CashCall, supra*, 159 Cal.App.4th at p. 295; *Best Buy, supra*,

137 Cal.App.4th at p. 778.) This is just what Karnan proposed here. (2 Safeco App. 465.)

Applying *Pioneer*, the Courts of Appeal have recently been protective of the named plaintiff's right to contact absent class members via discovery. *Pioneer* was unavailable when this Court issued *First American*, but it was cited in *CashCall* as supporting precertification discovery in that case. (See *CashCall*, *supra*, 159 Cal.App.4th at pp. 284-285, 290.) In addition, while not involving plaintiff substitutions as such, several recent decisions illustrate the force of the above principles when a class plaintiff seeks to identify other class members through discovery. (See *Crab Addison, Inc. v. Superior Court* (2008) 169 Cal.App.4th 958 [denying writ petition challenging order granting this discovery]; *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554 [same]; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325 [reversing trial court for failing to allow this discovery before ruling on class certification]; *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242 [granting writ petition seeking contact information of class members already identified as potential witnesses].)

In sum, "[t]here is ample precedent for precertification communication by the plaintiff with potential class members." (*Experian Information Solutions, Inc. v. Superior Court* (2006) 138 Cal.App.4th 122, 130, emphasis deleted.) "This precertification discovery is based on the well-established policy acknowledging the importance of class actions in California." (*Id.* at pp. 130-131.) Our Supreme Court has long encouraged class certification "as a means to prevent a failure of justice in our judicial system." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 434.) The precedents on this point are legion. (See also *Earley*, *supra*, 79 Cal.App.4th at p. 1434; *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 156; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808.)

3. Plaintiff Substitutions Are Liberally Allowed to Ensure Cases Are Resolved on the Merits

Finally, to protect absent class members when a standing issue arises as to the named plaintiff, it follows that a new class representative be substituted whenever possible. Since 1971, the Supreme Court has provided the following guideline: "If, however, the court concludes that the named plaintiffs can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to redefine the class, or to add new individual plaintiffs, or both, in order to establish a suitable representative." (*La Sala*, *supra*, 5 Cal.3d at p. 872.) The *La Sala* principle is deeply implanted in Supreme Court jurisprudence. (See *Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 Cal.3d 582, 596; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 550.) It is also consistently recognized in this Court's decisions. (See, e.g., *Ticconi*, *supra*, 160 Cal.App.4th at p. 548; *First American*, *supra*, 146 Cal.App.4th at p. 1574.)

The Code of Civil Procedure, once more, provides direct support. "The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party . . . ." (Code Civ. Proc., § 473, subd. (a)(1).) If necessary to enable the amendment, the court may even "postpone the trial." (*Id.*, subd. (a)(2).) "Amendments to complaints under Code of Civil Procedure section 473, subdivision (a), are liberally allowed to substitute in plaintiffs with standing for original plaintiffs without standing." (*CashCall*, *supra*, 159 Cal.App.4th at p. 287.) This reflects that the better exercise of discretion is to "'permit, rather than prevent, the adjudication of legal controversies upon their merits.'" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255-256.)

VI. CONCLUSION

Acting within its broad discretion, the trial court concluded that Safeco should not be unjustly enriched so long as a new class plaintiff can be located within a measurable time frame to prosecute the case on the merits. This ruling has certainly not "exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) Safeco's writ petition should be denied.

DATED: February 19, 2009

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed **REAL PARTY IN INTEREST'S OPPOSITION TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OF OTHER APPROPRIATE RELIEF** is produced using 13-point Roman type, including footnotes, and contains approximately 12,707 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: February 19, 2009

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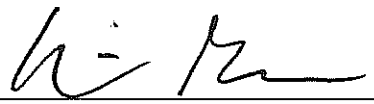

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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on February 19, 2009, declarant served the **OPPOSITION OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OF OTHER APPROPRIATE RELIEF** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this nineteenth day of February, 2009, at San Diego, California.

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