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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

CHAPALA/ALL AMERICAN INSURANCE SERVICES, INC., a dissolved California corporation, formerly known as MFC & V INSURANCE SERVICES, INC. and the erroneously sued Montgomery, Fansler Carlson & Valois,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA,
Respondent,

PHILLIP LETZO, HANS LINGENS, BONITA BRAATEN (as executor to the Estate of Glenn Braaten), individually, on their own behalf, and as a class action representative on behalf of all those similarly situated, and in the interest of the general public, DAVID J. ABRAHAM, BROWN & BROWN INSURANCE SERVICES OF CALIFORNIA, INC.,
Real Parties in Interest.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA BARBARA • CASE NO. 1342321-LEAD CASE
[RELATED AND CONSOLIDATED TO CASE NO. 1372147]
DONNA D. GECK, JUDGE • DEPARTMENT 4 • TELEPHONE NO. (805) 882-4590

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES [SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER]

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ATTORNEYS FOR PETITIONER
CHAPALA/ALL AMERICAN INSURANCE SERVICES, INC., A DISSOLVED CALIFORNIA CORPORATION, FORMERLY KNOWN AS MFC & V INSURANCE SERVICES, INC. AND THE ERRONEOUSLY SUED MONTGOMERY, FANSLER CARLSON & VALOIS

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Second **APPELLATE DISTRICT, DIVISION** Six	Court of Appeal Case Number: B
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	FOR COURT USE ONLY
APPELLANT/PETITIONER: Chapala/All American Insurance Services, Inc. RESPONDENT/REAL PARTY IN INTEREST: Phillip Letzo, Hans Lingens et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Chapala/All American Insurance Services, Inc. etc.

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: October 31, 2013

David S. Ettinger
(TYPE OR PRINT NAME)

▶ David S. Ettinger
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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IN THE COURT OF APPEAL
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CHAPALA/ALL AMERICAN INSURANCE SERVICES, INC., a dissolved California corporation, formerly known as MFC & V INSURANCE SERVICES, INC. and the erroneously sued Montgomery, Fansler Carlson & Valois
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Respondent,

PHILLIP LETZO, HANS LINGENS, BONITA BRAATEN (as executor to the Estate of Glenn Braaten), individually, on their own behalf, as a class action representative on behalf of all those similarly situated, and in the interest of the general public, DAVID J. ABRAHAM, BROWN & BROWN INSURANCE SERVICES OF CALIFORNIA, INC.,
Real Parties in Interest.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

INTRODUCTION

This petition seeks writ relief from a trial court order certifying a class action. The order is not appealable, but, as the Supreme Court has explained, when there has been an improper class certification, "appeal from a final judgment is not a practical

remedy" because "[d]elaying review until final judgment — while the trial court attempts to manage the unmanageable — would mean that the parties could not obtain appellate review until after they had paid the great costs which render the damage action inappropriate." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 387, fn. 4 (*Blue Chip Stamps*).) Here, a class action is inappropriate and a writ should issue.

The class action that has been certified seeks damages from an insurance agent and his former employers, including petitioner Chapala/All American Insurance Services, Inc. Plaintiffs are three former clients of the agent, David Abraham. They allege that, for more than 12 years, Abraham engaged in churning, encouraging his clients through misrepresentations to surrender annuities or life insurance policies and to buy replacement annuities or policies. The churning allegedly earned Abraham commissions while causing a financial loss to his clients from surrender costs.

The class certification order raises an issue about which the Courts of Appeal are divided — the proper analysis for determining whether putative class plaintiffs have fulfilled their required burden of demonstrating the existence of an ascertainable class. This court favors one analysis. (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1460 (*Marler*); *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1100-1101 (*Akkerman*).) The trial court, however, opted for the analysis this court has rejected. Importantly, although class certification rulings are generally afforded deference on appeal, " ' "[I]f the trial court failed to follow the correct legal analysis . . . , 'an appellate court is

required to reverse . . . "even though there may be substantial evidence to support the court's order." ' " ' " (*Marler*, at p. 1459.)

The trial court certified classes consisting of as many as 740 people who were Abraham's clients over a 12-year, 7-month period. It defined the classes to include "All persons who purchased one or more annuities [or life insurance policies] from Defendants and transferred, liquidated or terminated that annuity [or policy] and acquired a replacement annuity [or policy] at any time from April 1, 1995 through October 31, 2007." (Vol. 13, exh. 38, p. 3528.)

Under this court's analysis, class ascertainability is not tested, as other courts allow, "by simply determining if class members may be identified from the most inclusive facial class definition." (*Marler*, *supra*, 199 Cal.App.4th at p. 1460.) Instead, the plaintiffs must "prove that there is an identifiable group *that was harmed by the defendant*." (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1100, emphasis added.) Thus, the trial court should consider "whether the class 'definition is overbroad,' and if the plaintiffs have shown that 'class members who have claims can be identified from those who should not be included in the class.' " (*Marler*, at p. 1460.)

The trial court applied the limited ascertainability analysis, quoting at length a leading case specifying that method — *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908. (Vol. 13, exh. 38, pp. 3522-3523.) The court's order even expressly acknowledged that "[s]ome class members may not have been damaged at all." (Vol. 13, exh. 38, p. 3525.) Writ relief is necessary because the court used an incorrect analysis.

Moreover, an appropriate analysis establishes that the classes are not ascertainable. The classes include everyone who bought from defendants an annuity or life insurance policy and then a replacement annuity or policy. But selling a replacement annuity or policy is not inherently wrongful or actionable. The Legislature has specified that a decision to buy a replacement "could be a good one — or a mistake." (Ins. Code, § 10509.4, subd. (d).) Further, one of plaintiffs' own witnesses — a Department of Insurance investigator — testified at deposition that he had identified some of Abraham's clients who had not lost money from the surrender penalties they had incurred. (Vol. 8, exh. 18, pp. 2084-2088, 2090-2093, 2102-2103.) The classes are overbroad and should not have been certified.

As this court has recognized, the existence of an ascertainable class is a prerequisite to class certification. (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1100.) The trial court's application of the wrong test on this fundamental issue will create the type of unmanageable class that the Supreme Court has found to support a writ. (*Blue Chip Stamps*, *supra*, 18 Cal.3d at p. 387, fn. 4.)

The class certification order is erroneous for an independent reason: the trial court improperly analyzed whether, and plaintiffs failed to show that, issues of fact or law common to the class members predominate over issues that must be decided individually.

Individual adjudications will be required to determine whether each class member's claim is barred by the statute of limitations. Despite certifying the classes, the trial court stated

that "[t]he class period is extraordinarily long . . . rais[ing] statute of limitation issues, which plaintiffs gloss over" and that "[t]here may well be issues of whether a tort is continuing or when a particular class member discovered or should have discovered all facts essential to his cause of action." (Vol. 13, exh. 38, p. 3525.) The court did not explain how these necessarily individual determinations do not defeat class certification.

Further, among other things, plaintiffs themselves claim Abraham's alleged fraud was "accomplished" in five different ways. (Vol. 1, exh. 5, pp. 254-255.) Separate trials will be necessary to determine not only which class members were harmed but which, if any, of the five alleged fraudulent ways — or combination of ways — were used against each class member.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " (*Comcast Corp. v. Behrend* (2013) 569 U.S. __, __ [133 S.Ct. 1426, 1432, 185 L.Ed.2d 515].) It also "has the potential to create injustice." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The trial court here incorrectly concluded that this case fits within the exception.

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

Petitioner Chapala/All American Insurance Services, Inc., a dissolved California corporation, formerly known as MFC & V Insurance Services, Inc., and the erroneously sued Montgomery, Fansler Carlson & Valois, petitions this court for a writ of mandate and/or prohibition or other appropriate relief directed to respondent Superior Court for the County of Santa Barbara and by this verified petition alleges:

Beneficial interest of petitioner; capacities of respondent and real parties in interest

1. Chapala/All American Insurance Services, Inc., a dissolved California corporation, formerly known as MFC & V Insurance Services, Inc., and the erroneously sued Montgomery, Fansler Carlson & Valois (Chapala), is a defendant in an action pending in respondent Superior Court for the County of Santa Barbara, titled *Letzo et al. v. Abraham et al.*, Superior Court case number 1342321. Phillip Letzo, Hans Lingens, and Bonita Braaten (as executor to the Estate of Glenn Braaten) are the plaintiffs in the action and are named as real parties in interest in this writ proceeding. David J. Abraham and Brown & Brown Insurance Services of California, Inc., are co-defendants of Chapala in the action and are also named as real parties in interest.

Authenticity of exhibits

2. Each of the exhibits accompanying this writ petition is a true and correct copy of the original document or exhibit filed or lodged in respondent court, except for the reporter's transcripts of the August 9 and August 30, 2013, hearings in respondent court. The exhibits are incorporated by reference as if fully set forth in this petition. The exhibits are paginated consecutively, and page citations in this petition are to the consecutive pagination.

Chronology of pertinent events

3. In March 2010, plaintiffs filed a class action lawsuit against David Abraham and Brown & Brown of California, Inc. (now Brown & Brown Insurance Services of California, Inc.). (Vol. 1, exh. 1, p. 2; vol. 3, exh. 14, pp. 778-779.) By April 2011 when plaintiffs filed their third amended complaint (vol. 1, exh. 4, p. 245), Chapala had been added as a named defendant. (Vol. 1, exh. 5, p. 246.) Abraham allegedly had been an insurance agent employee of Chapala and became a Brown employee when Brown acquired Chapala. (Vol. 1, exh. 5, pp. 253, 254.)

4. Plaintiffs alleged that over a 14-year period — from 1993 to 2007 — Abraham improperly earned commissions by churning plaintiffs' annuities and life insurance policies. (Vol. 1, exh. 5, pp. 253, 255.) They claimed the churning involved Abraham inducing clients, first, to purchase insurance annuities or life insurance policies and, second, to surrender the annuities or policies

and buy replacement annuities or policies. (Vol. 1, exh. 5, pp. 253-254.) This conduct allegedly generated commissions for defendants but also reduced plaintiffs' retirement funds or devalued their policies. (Vol. 1, exh. 5, p. 254.)

5. Plaintiffs alleged that Abraham "accomplished [his] scheme" in five different ways: (1) fraudulently advising that a replacement annuity would have an increased interest rate that would more than cover the surrender charge of the original annuity, (2) fraudulently advising that the replacement annuity issuer would reimburse plaintiffs for the surrender charge of the original annuity, (3) concealing the loss of annuity appreciation or insurance policy devaluation, (4) fraudulently advising that a replacement policy would be "a better deal" because it would provide a greater cash value, and (5) forging plaintiffs' signatures to surrender and/or buy annuities and/or policies. (Vol. 1, exh. 5, pp. 254-255.)

6. Plaintiffs alleged that, although Abraham's misconduct started in 1993, they did not become aware of the fraudulent transactions and forgeries until November 2007 or later. (Vol. 1, exh. 5, p. 255.)

7. Plaintiffs alleged 10 causes of action: (1) negligence-negligence per se, (2) negligent misrepresentation, (3) intentional misrepresentation, (4) breach of fiduciary duty, (5) violation of Insurance Code section 10509.4, (6) aiding and abetting a breach of fiduciary duty, (7) negligent hiring and retention, (8) violation of Business and Professions Code section 17200 et seq., (9) conversion, and (10) elder abuse. (Vol. 1, exh. 5, p. 246.)

8. Plaintiffs alleged that their class action included four subclasses: (1) "All persons who purchased annuities from Defendants during the applicable limitations period and who were, at the time of purchase, senior citizens as defined by California Civil Code § 1761," (2) "All persons who purchased annuities from Defendants during the applicable limitations period and who were *not* senior citizens at the time of purchase," (3) "All persons who purchased life insurance from Defendants during the applicable limitations period and who were, at the time of purchase, senior citizens as defined by California Civil Code § 1761," and (4) "All persons who purchased life insurance from Defendants during the applicable limitations period and who were not senior citizens." (Vol. 1, exh. 5, pp. 249-250.)

9. Plaintiffs here also sued — with over two dozen others — 13 insurance companies and others. Plaintiffs sought damages for the same alleged churning of annuities and life insurance policies. The lawsuit — the *Andrade* action (Celina Andrade was the first named plaintiff) — was *not* a class action. (Vol. 4, exh. 17, p. 1079.)

10. In June 2011, the *Andrade* lawsuit and the present one were consolidated for trial purposes. (Vol. 2, exh. 6, p. 270.)

11. Beginning in July 2011, and continuing for more than a year, the plaintiffs settled their individual claims with the *Andrade* defendants. The settlements totaled approximately $1,000,000. (Vol. 7, exh. 17, pp. 1887-1888; vol. 9, exh. 19, pp. 2587-2588; vol. 10, exh. 19, p. 2712.) The *Andrade* plaintiffs dismissed their action in April 2013. (Vol. 11, exh. 20, p. 3077.)

12. In May 2012, more than two years after filing their complaint in this action, plaintiffs moved to certify their lawsuit as a class action. (Vol. 2, exh. 7, p. 271.) No longer alleging separate subclasses for senior citizens, plaintiffs now proposed two subclasses: (1) "All persons who purchased annuities from Defendants during the applicable limitations period" and (2) "All persons who purchased life insurance from Defendants during the applicable limitations period." (Vol. 2, exh. 7, p. 273.) Plaintiffs also narrowed somewhat the claims period to a 12-year span, starting it in April 1995 instead of in 1993 as they had alleged in their Third Amended Complaint. (Vol. 2, exh. 7, pp. 293-294.)

13. Plaintiffs' motion included evidence of the following:

a. Chapala hired Abraham as an insurance agent in 1995. (Vol. 2, exh. 8, p. 302.)

b. When Brown bought Chapala in 2003, Abraham became a Brown employee. (Vol. 2, exh. 9, p. 513.)

c. Brown fired Abraham in 2007. (Vol. 2, exh. 9, p. 510.)

d. In 2009, Abraham pleaded guilty to felony grand theft. (Vol. 2, exh. 9, pp. 501-502, 522.) He admitted that, between February 16, 2000, and November 27, 2007, he stole $2,109,492.65 from 60 named clients through the unauthorized sale and transferring of annuities. (Vol. 2, exh. 9, pp. 503-505.) The named plaintiffs in the present case are among those 60 clients. (Vol. 2, exh. 9, pp. 504, 529-530.)

e. Abraham's supervisor was aware of a 1999 lawsuit against Abraham by two clients and of a 2005 demand letter

against Abraham on behalf of another client, both alleging churning of life insurance policies or annuities. (Vol. 2, exh. 8, pp. 435, 439, 444-445, 450-451, 459-460, 469-470, 477-480; vol. 2, exh. 9, p. 532.)

14. Plaintiffs' motion included the declarations of 12 of Abraham's former clients, who briefly explained the history of their dealings with Abraham. (Vol. 3, exh. 10, p. 542.) Philip Letzo, for example, stated in his declaration that Abraham advised him to transfer his annuities to a new company "[o]n several occasions during the period of time from 1995 to 2007" and that Abraham told him "the transfer would result in a greater profit because the new annuity would pay a higher interest and/or a bonus that would more than offset any penalty charges." (Vol. 3, exh. 10, p. 574.) He further said Abraham also advised him "regarding the purchase and transfer of life insurance," telling him that his "life insurance would build up a cash value and that eventually [he] could use that cash value to pay the premiums." (*Ibid.*) Letzo also identified documents that were "related to the transactions that Abraham conducted on my behalf" and that contained his forged signature. (Vol. 3, exh. 10, p. 575.) Letzo reported that he had "received partial compensation" for his losses from settlements with insurance companies and from Abraham through criminal restitution, but that he "did not believe it was financially beneficial . . . to pay an attorney to file a separate lawsuit on [his] behalf" for recovery of any remaining compensation. (*Ibid.*)

15. Plaintiffs also submitted an index of all policies Abraham had written while working for Chapala and Brown. (Vol. 1, exh. 3, pp. 72-244.) Plaintiffs claimed that, from that index,

which listed "approximately 740 persons," they could identify all putative class members. (Vol. 2, exh. 7, p. 277.) They said that these 740 people made up "the size of the putative class." (Vol. 2, exh. 7, p. 278.)

16. The certification motion also included the declaration of an investigator for the California Department of Insurance (CDI), who had investigated annuity transactions by Abraham and Brown between 2000 and 2007. (Vol. 3, exh. 11, p. 655.) The investigator concluded that, during that time, "at least 60 persons incurred penalties for the premature surrender of annuities by Abraham between 2000 and 2007." (Vol. 3, exh. 11, p. 656.)

17. Chapala and Brown opposed the certification motion. (Vol. 3, exh. 15, p. 782; vol. 9, exh. 18, p. 2559.) Abraham joined the oppositions. (Vol. 11, exh. 21, p. 3078.)

18. The Brown opposition included deposition testimony of the CDI investigator, in which he agreed that churning is not established solely by the fact that a person switched a policy from one company to another. (Vol. 8, exh. 18, pp. 2078-2079.) He also testified that he had identified some of Abraham's clients who had not lost money from the surrender penalties they had incurred. (Vol. 8, exh. 18, pp. 2084-2088, 2090-2093, 2102-2103.)

19. The trial court issued a tentative ruling in advance of a scheduled August 9, 2013, hearing on the class certification motion. (Vol. 12, exh. 25, p. 3318.) The tentative ruling was to grant the motion, but redefine the certified classes to be: "1. All persons who purchased one or more annuities from Defendants and transferred, liquidated or terminated that annuity/and acquired a replacement

annuity during the applicable limitations period" and "2. All persons who purchased one or more life insurance policies from Defendants and transferred, liquidated or terminated that life insurance policy and acquired a replacement life insurance policy during the applicable limitations period." (Vol. 12, exh. 25, p. 3333.)

20. At the August 9 hearing, the court continued the class certification motion for three weeks so that the parties could brief the court's proposed changes to the class definitions. (Vol. 12, exh. 27, p. 3347.)

21. After the supplemental briefing (vol. 12, exh. 28, p. 3348; vol. 12, exh. 29, p. 3356; vol. 12, exh. 31, p. 3389; vol. 12, exh. 37, p. 3393) and a hearing (vol. 13, exh. 36, p. exh. 3458), the court on September 5 issued an order granting class certification (vol. 13, exh. 38, p. 3512).

22. In its September 5 order, the court once again revised the class definitions, this time, among other things, to specify that the time period during which the class members' transactions took place covered 12 years and 7 months. The court certified these classes: "1. All persons who purchased one or more annuities from Defendants and transferred, liquidated or terminated that annuity/ and acquired a replacement annuity at any time from April 1, 1995 through October 31, 2007" and "2. All persons who purchased one or more life insurance policies, excluding term life insurance policies, from Defendants and transferred, liquidated or terminated that life insurance policy and acquired a replacement life insurance policy at any time from April 1, 1995 through October 31, 2007." (Vol. 13, exh. 38, p. 3528.)

23. After certifying the class, the trial court granted plaintiffs' motion to begin notifying class members (vol. 13, exh. 39, p. 3540) and denied defendants' motion to stay proceedings until this court rules on this writ petition (*ibid.*).

Basis for relief

24. Respondent superior court's class certification order is an abuse of discretion because the court used a legal analysis in conflict with the one prescribed by this court, and because it is not supported by substantial evidence.

25. Chapala has no adequate remedy other than this writ petition. The order certifying a class action is not appealable, but is reviewable by writ. (See Code Civ. Proc., § 904.1; *In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 409 ["An order certifying a class is not appealable except on appeal from the final judgment. [Citations.] However, such an interlocutory order is reviewable by way of a petition for writ of mandate"]; see also *Estrada v. RPS, Inc.* (2005) 125 Cal.App.4th 976, 986 ["an order certifying a class is subject to modification at any time, and is appealable after final judgment"].) Moreover, as the Supreme Court has recognized, when the trial court has improperly certified a class action, "appeal from a final judgment is not a practical remedy." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 387, fn. 4 ["Delaying review until final judgment — while the trial court attempts to manage the unmanageable — would mean that the parties could not obtain appellate review until after they had paid the great costs which

render the damage action inappropriate"]; see *American Honda Motor Co., Inc. v. Superior Court* (2011) 199 Cal.App.4th 1367, 1370-1371.)

PRAYER

Petitioner Chapala therefore asks that this court:

1. Either:

a. Issue a peremptory writ of mandate and/or prohibition in the first instance or such other appropriate writ as the facts warrant, commanding respondent superior court to vacate and set aside its September 5, 2013, order granting plaintiffs' motion for class certification and either to enter a new and different order denying the motion or to reconsider the motion; or

b. Issue an alternative writ commanding respondent superior court to grant the relief specified in paragraph 1(a), or to show cause why it should not be ordered to do so, and upon return to the alternative writ, if any, issue a peremptory writ as set forth in paragraph 1(a);

2. Award petitioner its costs under California Rules of Court, rule 8.493; and

3. Grant such other relief as may be just and proper.

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DONALD S. ZALEWSKI

By: _____
David S. Ettinger

Attorneys for Petitioner
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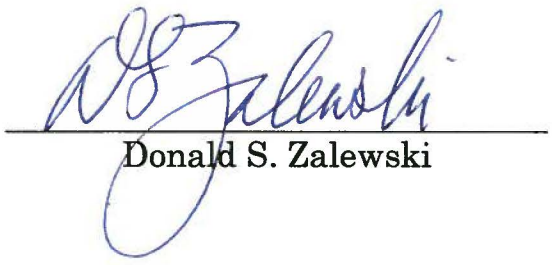
VERIFICATION

I, Donald S. Zalewski, declare as follows:

I am one of the attorneys representing petitioner Chapala/All American Insurance Services, Inc., a dissolved California corporation, formerly known as MFC & V Insurance Services, Inc., and the erroneously sued Montgomery, Fansler Carlson & Valois (Chapala) in the case in the Superior Court of the State of California for Santa Barbara County captioned *Phillip Letzo et al. v. David J. Abraham et al.*, case number 1342321, out of which this Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief, arises.

I have read the foregoing petition and know its contents. The facts alleged in the petition are within my own knowledge, information, or belief, and I believe those facts to be true. Because of my familiarity with the records, files, and proceedings described here, I, rather than my client, verify this petition.

I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct and that this verification was executed on October 29, 2013, at West Covina, California.



Donald S. Zalewski

MEMORANDUM OF POINTS AND AUTHORITIES

WRIT RELIEF IS NEEDED TO REVERSE THE INAPPROPRIATE CERTIFICATION OF A CLASS ACTION.

A. The trial court used an improper legal analysis to determine whether the classes it certified are ascertainable.

1. Appellate courts use a de novo standard of review, and are required to reverse, when the trial court does not follow the correct legal analysis.

Class actions are permitted "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc., § 382; see *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) Before a trial court can certify a class action, however, "[t]he party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker*, at p. 1021; see *Miller v. Bank of America, N.A.* (2013) 213 Cal.App.4th 1, 7 [" '[S]atisfaction of that burden requires that

the plaintiff establish more than "a reasonable possibility" that class action treatment is appropriate' "].)

A trial court's determination whether a class-action plaintiff has satisfied his or her burden is generally accorded deference. However, as this court has noted, "where the trial court's ruling is based on ' "improper criteria or incorrect legal assumptions" ' in deciding class certification, [the] review is 'de novo.' " (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1459 (*Marler*).) Further, " ' "[I]f the trial court failed to follow the correct legal analysis . . . , 'an appellate court is required to reverse . . . "even though there may be substantial evidence to support the court's order." ' " ' " (*Ibid.*; see *Brinker*, *supra*, 53 Cal.4th at p. 1050 ["A grant or denial of class certification that rests in part on an erroneous legal assumption is error; without regard to whether such a certification might on other grounds be proper, it cannot stand"]; *American Honda Motor Co., Inc. v. Superior Court* (2011) 199 Cal.App.4th 1367, 1372, 1376.)

The trial court here used a legal analysis conflicting with the analysis specifically prescribed by this court for determining whether a class is ascertainable, as is now explained.

2. In determining class ascertainability, the trial court used an analysis in conflict with the one prescribed by this court.

The Courts of Appeal disagree about the proper analysis for determining whether there is an ascertainable class, a determination which is one of the prerequisites for certifying a class action. "Some courts conclude that class ascertainability is tested by simply determining if class members may be identified from the most inclusive facial class definition." (*Marler*, *supra*, 199 Cal.App.4th at p. 1460.) This court, however, follows a different approach, examining whether the class definition is overbroad because it includes within the class certain members who would not have valid claims.

Under this court's analysis, the mere ability to identify class members from the class definition is not enough to establish ascertainability. Instead, as this court explained in *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094 (*Akkerman*), the trial court should also consider community-of-interest factors, including the requirement that a putative class action plaintiff "prove that there is an identifiable group *that was harmed by the defendant*." (*Id*. at p. 1100, emphasis added.)

For example, in *Akkerman*, this court held that a putative class action plaintiff had not adequately defined the class he sought to represent. The plaintiff there defined the class as anyone who had received electro-convulsive therapy (ECT) in California after a certain date from a particular device, and he alleged that the

device's manufacturer had made misrepresentations minimizing the risks of the therapy. (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1100.) This court concluded that the trial court could find "the class was more narrow than [plaintiff's] definition because it would involve only ECT patients *deceived* by [the manufacturer]" (*ibid.*) and that restitution for all members of the class as defined "would require a windfall award of restitution to all who received ECT even if the procedures were successful and beneficial" (*id.* at p. 1101).

Other courts have declined to follow this court's *Akkerman* decision — e.g., *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 977 (*Cohen*) ["*Akkerman* should not be followed"]. Instead of *Akkerman*, the *Cohen* court found itself "the most comfortable following the 'ascertainability' discussion laid out . . . in *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 107 Cal.Rptr.2d 761 (*Hicks*)," which does not consider whether a defined class includes persons not harmed by the defendant. (*Cohen*, at p. 975.)

In *Hicks*, a home construction defect case, the trial court had concluded that " 'class membership under any of plaintiffs' causes of action [cannot] be ascertained without an individualized analysis of each putative class member's concrete slabs [because] manifest damage to a slab must exist as a precondition for class membership.' " (*Hicks*, *supra*, 89 Cal.App.4th at p. 914.) The Court of Appeal concluded, however, that "[t]he trial court applied an improper criterion in determining ascertainability of the class. Manifest damage to a slab is not a 'precondition' for class membership. It is, if anything, an element in the proof of

[defendant's] liability and relates to the existence of common questions of law and fact, not ascertainability of the class." (*Ibid*., quoted by the trial court here, vol. 13, exh. 38, p. 3523.)

But this court has defended *Akkerman*, stating that, unlike *Cohen* and *Hicks*, "[w]e do not exclude an analysis of community of interest factors in testing ascertainability. We may consider whether the class 'definition is overbroad,' and if the plaintiffs have shown that 'class members who have claims can be identified from those who should not be included in the class.' " (*Marler*, *supra*, 199 Cal.App.4th at p. 1460.) Other Courts of Appeal use the same comprehensive analysis that this court does. (See *Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, 728 ["Ascertainability also addresses the breadth of the class. 'Courts have recognized that "class certification can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be identified from those who should not be included in the class" ' "].)

Like *Cohen*, but in contrast to this court's *Akkerman* and *Marler* decisions, the trial court here felt "most comfortable" (*Cohen*, *supra*, 178 Cal.App.4th at p. 975) following the overly inclusive *Hicks* ascertainability analysis.

The trial court quoted *Hicks* at length, including the part where the *Hicks* court held it improper to consider whether the defined class could include members without valid claims. (Vol. 13, exh. 38, pp. 3522-3523.) Similarly, at another part of its ruling, the trial court stated that " '[c]lass members are "ascertainable" where

they may be readily identified without unreasonable expense or time by reference to official records' " and noted that defendants' and insurance companies' records show who bought annuities and replacement policies. (Vol. 13, exh. 38, p. 3514, quoting *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932 and *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 133.) Immediately after that, it quoted a case — which in turn quotes *Hicks* — that said, " 'Rather than focusing the ascertainability question on the ultimate fact class members would have to prove to establish liability, this element is "better achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary." ' " (Vol. 13, exh. 38, p. 3514, quoting *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1334, which quoted *Hicks*, *supra*, 89 Cal.App.4th at p. 915.)

The *Hicks* analysis employed by the trial court here conflicts with that required by *Akkerman* and *Marler*. Instead of examining whether plaintiffs "prove[d] that there is an identifiable group *that was harmed by the defendant*" (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1100, emphasis added), the *Hicks* approach simply looks to see if there is an identifiable group, period.

The trial court may have concluded it is feasible to determine from defendants' or insurance companies' records whether someone is a member of the group made up of those who "purchased one or more annuities [or life insurance policies] from Defendants and transferred, liquidated or terminated that annuity [or life insurance policy] and acquired a replacement annuity [or life insurance policy]

at any time from April 1, 1995 through October 31, 2007" (vol. 13, exh. 38, p. 3528). However, more than that is required. The proper test determines whether the classes were overbroad, i.e., whether the group definition could include people who were not harmed by the defendants.

The trial court did additionally make passing reference to an over-breadth analysis. It cited *Akkerman* once, briefly, but without applying the opinion to this case (vol. 13, exh. 38, p. 3521) and, in a separate part of its order, it said that "the consistent representations by Abraham and the consistent losses occasioned upon churning accounts, indicate that the definition identifies classes of persons whose annuity and life insurance policies were inappropriately churned" (vol. 13, exh. 38, p. 3513). However, if that comment does refer to over-breadth, it still does not negate the trial court's undeniable and dominant use of the *Hicks* test, which this court has held is incorrect.

Independent of the trial court's heavy reliance on *Hicks*, the absence of any effective over-breadth analysis is shown by its acknowledgment that "[s]ome class members may not have been damaged at all" (vol. 13, exh. 38, p. 3525). In any event, any over-breadth analysis was tainted by the trial court's legally erroneous reversal of the burden of proof in that analysis. It was *plaintiffs*, as the parties seeking certification, who had "the burden to establish the existence of . . . an ascertainable class" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326), yet the trial court relied on the fact that "*Defendants* do not present evidence" of any Abraham customer who bought replacement annuities or life

insurance policies and who were not told that the replacements would be financially advantageous (vol. 13, exh. 38, p. 3513, emphasis added.)

Because the trial court "failed to follow the correct legal analysis . . . ," reversal — in this case, by issuance of a writ — "is required." (*Marler*, *supra*, 199 Cal.App.4th at p. 1459, internal quotation marks omitted.)

B. The certified classes are not ascertainable because they include persons not harmed by the defendants and the classes are thus fatally overbroad as a matter of law under this court's decisions.

Writ relief is necessary because the trial court did not properly analyze whether the classes it was certifying were ascertainable. At the least, the trial court should be directed to conduct a proper ascertainability evaluation. But that direction is unnecessary because it is clear that the classes are fatally overbroad as a matter of law.

The classes certified by the trial court consist of any people who, over a more than 12-year period, bought from defendants at least one annuity or life insurance policy and who "transferred, liquidated or terminated" the annuity or insurance policy "and acquired a replacement" annuity or insurance policy. (Vol. 13, exh. 38, p. 3528.) But these are not, as they must be, "identifiable group[s] *that* [*were*] *harmed by the defendant*" (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1100, emphasis added). The class definitions

are overbroad because they do not distinguish " 'class members who have claims . . . from those who should not be included in the class.' " (*Marler*, *supra*, 199 Cal.App.4th at p. 1460.) Indeed, the trial court itself acknowledged that "[s]ome class members may not have been damaged at all." (Vol. 13, exh. 38, p. 3525.)

Because the class as defined includes anyone to whom defendants sold a replacement annuity or life insurance policy during the applicable period,[1] for the class to be one that was "harmed by the defendant[s]" (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1100), the mere selling of those replacements had to have been harmful and wrongful. Otherwise, the class can include members who do not have claims and the class is not ascertainable. But the selling of replacements was not harmful per se, either in the abstract or in this case specifically.

To begin with, although the Legislature has regulated the selling of replacement annuities and policies (see Ins. Code, § 10509 et seq.), it has not declared the practice to be inherently bad. To the contrary, the Legislature has prescribed that a notice to be given to a prospective purchaser of a replacement annuity or policy must

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[1] The class definitions are ambiguous regarding whether they are limited to persons who bought *replacement* annuities or policies *from defendants*. Class members are those who, first, "purchased one or more annuities [or life insurance policies] from Defendants" and, second, "transferred, liquidated or terminated that annuity [or policy] and acquired a replacement annuity [or policy]." The definitions do not specify from whom the class members acquired the replacement annuities or policies. The court probably intended defendants to have been the source of the replacement annuities or policies, but that should be clarified. Even with this clarification, however, the classes are still not adequately ascertainable.

state, "Are you thinking about buying a new life insurance policy or annuity and discontinuing or changing an existing one? If you are, *your decision could be a good one — or a mistake*." (Ins. Code, § 10509.4, subd. (d) (hereafter § 10509.4(d)), emphasis added.)[2]

Evidence from one of plaintiffs' own witnesses in this case is to the same effect. The witness — a California Department of Insurance (CDI) investigator who was involved in Abraham's criminal prosecution (vol. 8, exh. 18, p. 2084) — testified in deposition that churning is *not* established solely by a person switching a policy from one company to another and that, specifically pertinent to this case, he had identified clients of Abraham's who had *not* lost money from the surrender penalties they had incurred. (Vol. 8, exh. 18, pp. 2078-2079, 2084-2088, 2090-2093, 2102-2103.)

So, were the class members harmed by defendants' selling them replacement annuities or policies? It depends. As the Legislature has said, the choice to buy a replacement could have been "a good one — or a mistake" (§ 10509.4(d)). And, because harm *vel non* to class members depends on factors not included in the class definitions, those definitions are unacceptably overbroad.

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[2] Plaintiffs alleged that defendants did not provide them with the required notice under section 10509.4(d). (Vol. 1, exh. 5, p. 260.) But the trial court recognized early on that such a failure could not be the basis for a damages claim; it sustained without leave to amend a demurrer to plaintiffs' damages allegations in their section 10509.4 cause of action. (Vol. 1, exh. 2, p. 28.) More to the point for class certification purposes is that the Legislature has determined that simply selling a replacement annuity or life insurance policy is not wrongful conduct.

This problem is no different than the ascertainability failings in *Akkerman*, discussed above, where relief for all class members would have required "a windfall award" for some. (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1101).

The trial court found, "the consistent representations by Abraham and the consistent losses occasioned upon churning accounts, indicate that the definition identifies classes of persons whose annuity and life insurance policies were inappropriately churned." (Vol. 13, exh. 38, p. 3513.) But the consistency of Abraham's representations begs the essential question of harm to the class as defined. Even if Abraham made consistent representations about replacement annuities and insurance policies, the class is still not limited to those who were *harmed* by the representations.

The representations that the replacements were financially advantageous were accurate in some cases. Buying replacements is sometimes a "good" decision (§ 10509.4(d)) and, under plaintiffs' theory of the case, Abraham didn't care whether his representations were accurate or not, as long as they generated replacement sales. Plaintiffs allege that Abraham's motivation was to increase his commissions, not to decrease plaintiffs' investments. Also, the class is not restricted to those clients who detrimentally relied on the representations, just as the *Akkerman* class was improperly not limited to "ECT patients *deceived by*" the defendant's representations regarding the risks of the therapy (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1100, emphasis added). Finally, the trial court's finding of "consistent losses" is belied by the testimony

of one of plaintiffs' own witnesses, the CDI investigator, who identified Abraham clients who had not lost money from surrender penalties, not to mention the court's conclusion that "[s]ome class members may not have been damaged at all" (vol. 13, exh. 38, p. 3525).

The trial court certified a class that does not distinguish " 'class members who have claims . . . from those who should not be included in the class.' " (*Marler*, *supra*, 199 Cal.App.4th at p. 1460.) Certification was thus erroneous.

C. The class certification order was improper also because the trial court used an incorrect analysis to determine whether common questions of law or fact predominate and because common questions do *not* predominate.

As explained, besides showing the existence of an ascertainable class, plaintiffs also were required to demonstrate "a well-defined community of interest." (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) " '[T]he "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." ' " (*Ibid*.) In this case, the trial court used an improper legal analysis and erroneously concluded that common questions of law or fact predominate.

"The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Brinker*, *supra*, 53 Cal.4th at p. 1021.) " '[W]hat really matters to class certification' is 'not similarity at some unspecified level of generality but, rather, dissimilarity that has the capacity to undercut the prospects for joint resolution of class members' claims through a unified proceeding.' " (*Id.* at p. 1022, fn. 5.)

Thus, in concluding writ relief was proper to reverse a class certification order, the Supreme Court stated that "[p]laintiffs' burden on moving for class certification . . . is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate* . . . . '[T]his means "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment." ' " (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108 (*Lockheed*), citation omitted; see *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844 (*Kaldenbach*) ["Class certification has routinely been denied primarily because individualized issues predominated over common ones"].)

This court has recognized that "class actions for tort liability 'present a multitude of problems.' " (*Akkerman*, *supra*, 152 Cal.App.4th at p. 1102.) That is true here, yet the trial court used an incorrect legal analysis and overlooked the insuperable

obstacles to jointly adjudicating the class members' disparate claims. Under the class certification order, numerous substantial issues will need to be decided on a case-by-case basis.

The trial court's analysis was legally wrong — thus requiring reversal (*Marler*, *supra*, 199 Cal.App.4th at p. 1459) — regarding statute of limitations defenses in particular.

In general, the fact that a defense must be individually adjudicated is part of the calculus in denying class certification. (*Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450 ["The affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues"]; see *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913; *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 990; *Soderstedt v. CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 144, 151-152; *Knapp v. AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.) And this is true of statute of limitations defenses specifically. (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 811 [reasons that class action for injuries from latex gloves was inappropriate included that plaintiffs "may have been using latex gloves for a period of time exceeding the statute of limitations, thus requiring an examination of the viability of each plaintiff's claim"]; see *Thorn v. Jefferson-Pilot Life Ins. Co.* (4th Cir. 2006) 445 F.3d 311, 318-329 [class certification properly denied because statute of limitations

defense did not present common issues that could be resolved on a class-wide basis].)[3]

Here, the trial court brushed aside the significance of statute of limitations defenses with a faulty analysis. The court recognized that the defenses could cause substantial commonality problems and that plaintiffs apparently had not satisfied their burden regarding those defenses — it said that "[t]he class period is extraordinarily long . . . rais[ing] statute of limitation issues, which plaintiffs gloss over" and that "[t]here may well be issues of whether a tort is continuing or when a particular class member discovered or should have discovered all facts essential to his cause of action." (Vol. 13, exh. 38, p. 3525.)

Instead of then explaining why individual statute of limitations determinations nevertheless do not defeat class certification in this case, the court simply quoted a Supreme Court footnote comment that "[n]o California court has declined to certify a class action specifically because of a statute of limitations defense." (*Lockheed*, *supra*, 29 Cal.4th at p. 1105, fn. 4, quoted at vol. 13, exh. 38, p. 3525.)[4] The court's order — like the plaintiffs — "gloss[ed] over" these significant barriers.

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[3] California courts regularly look to federal class action decisions for guidance. (See *Brinker*, *supra*, 53 Cal.4th at p. 1021 ["Drawing on the language of Code of Civil Procedure section 382 and *federal precedent*, we have articulated clear requirements for the certification of a class" (emphasis added)]; *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1090; *Kaldenbach*, *supra*, 178 Cal.App.4th at p. 844.)

[4] The court also quoted conclusory holdings from two Ninth Circuit opinions — *Cameron v. E. M. Adams & Co.* (9th Cir. 1976) 547 F.2d

(continued...)

The court also failed to quote the sentence in *Lockheed* that followed the comment it did quote. There, the court reported that the defendants had conceded that "a limitations defense does not categorically preclude class certification." (*Lockheed*, *supra*, 29 Cal.4th at p. 1105, fn. 4.) But the fact that a statute of limitations defense does not "categorically" preclude class certification does not mean, as the trial court apparently concluded, that the need for case-by-case determinations of the defense is irrelevant to an evaluation whether common issues of law or fact predominate.

In addition to the statute of limitations defenses, it is clear that liability will need to be separately tried.[5] Abraham's alleged misrepresentations were made orally, which alone raises a red flag regarding whether common issues predominate. "Generally stated,

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(...continued)
473, 478 ["the presence of individual issues of compliance with the statute of limitations here does not defeat the predominance of the common questions"] and *Williams v. Sinclair* (9th Cir. 1975) 529 F.2d 1383, 1388 ["The existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones. Given a sufficient nucleus of common questions, the presence of the individual issue of compliance with the statute of limitations has not prevented certification of class actions in securities cases"]. (Quoted at vol. 13, exh. 38, p. 3525.) The holdings align with the trial court's ruling that individual issues do not predominate, but they give no insight into how the trial court reached that conclusion.

[5] Plaintiffs cannot rely on Abraham's criminal conviction to establish liability for Chapala because Chapala was not a party to the criminal proceeding. (See *Beets v. County of Los Angeles* (2011) 200 Cal.App.4th 916.)

an action based substantially on oral, rather than written, misrepresentations cannot be maintained as a class action." (*Rowe v. Morgan Stanley Dean Witter* (D.N.J. 1999) 191 F.R.D. 398, 412 (*Rowe*); see *Kaldenbach*, *supra*, 178 Cal.App.4th at pp. 844-845; *Kavruck v. Blue Cross of California* (2003) 108 Cal.App.4th 773, 786; cf. *Sotelo v. Medianews Group, Inc.* (2012) 207 Cal.App.4th 639, 656 [even when same misrepresentation is made in *written contracts*, "whether a particular class member has read that misrepresentation presents an individual question and not a common question"].)

But more specifically, plaintiffs' own complaint alleges that Abraham's fraud was "accomplished . . . in several ways," and the complaint then lists five different methods.[6] Without ignoring defendants' due process rights, it is impossible to determine liability

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[6] Plaintiffs alleged: "Defendant Abraham, in managing Plaintiffs' retirement annuities and life insurance policies, accomplished this scheme in several ways, to wit: (1) fraudulently telling Plaintiffs that the increased interest rate from the proposed replacement annuity would more than cover the surrender charge incurred on the annuity surrendered; (2) fraudulently telling Plaintiffs that the issuer of the replacement annuity would reimburse them for the surrender charge for the old annuity, (3) failing to reveal the loss of annuity appreciation or devaluation of the life insurance policy, (4) fraudulently telling Plaintiffs that the replacement life insurance policy would be 'a better deal' in that it would provide a greater cash value, and (5) independently, and without Plaintiffs' knowledge, forging their signatures and initials to effectuate transactions whereby annuities were surrendered without Plaintiffs' authorization, and/or purchased without Plaintiffs' authorization with funds from wrongfully surrendered annuities, and/or life insurance policies were surrendered and replacement policies were purchased." (Vol. 1, exh. 5, pp. 254-255.)

for misrepresentation by any common means. What Abraham might have said to each class member and in what context, and which, if any, of the "several ways" of accomplishing fraud — or of various combinations of the "ways" — he used with each of his clients, necessitates inherently individualistic determinations. (See *Akkerman*, *supra*, 152 Cal.App.4th at p. 1103 ["each class member would have to prove his individual claim for restitution by establishing reliance and causation"].)

Further, as explained above, whether buying replacement annuities or policies caused harm is a crucial issue that is not subject to joint adjudication. The United States Supreme Court stated, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' " (*Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __, __ [131 S.Ct. 2541, 2551, 180 L.Ed.2d 374]; see *In re Rail Freight Fuel Surcharge Antitrust Litigation* (D.C. Cir. 2013) 725 F.3d 244, 252 ["The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy"]; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 463 ["Only in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability"]; *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1350 [" ' "[T]here can be no class certification unless it is determined by the trial court that similarly situated persons have sustained damage. There can be no cognizable class unless it is first determined that members who make up the class have sustained

the same or similar damage." ' [Citation.] When variations in proof of harm require individualized evidence, the requisite community of interest is missing and class certification is improper."].)

Finally, a churning case raises further specific impediments to class treatment. In one such case, the court granted a motion to dismiss class action allegations, concluding among other things that "the investment objectives, financial acumen, account character, investor involvement or monitoring and investor acquiescence or approval (all vital factors in any churning claim) are similarly specific to Plaintiffs and each member of the Proposed Class." (*Rowe*, *supra*, 191 F.R.D. at p. 410.)

The trial court relied on *Lockheed* to (erroneously) dismiss concerns about statute of limitations defenses defeating class certification. However, the Supreme Court in *Lockheed* held the trial court there abused its discretion in granting a class certification motion. The high court's conclusion is apt here: "The questions respecting each individual class member's right to recover that would remain following any class judgment appear so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified on such a basis advantageous to the judicial process and the litigants." (*Lockheed*, *supra*, 29 Cal.4th at p. 1110.)

CONCLUSION

For the foregoing reasons, the court should issue a writ of mandate or prohibition as requested in this petition.

October 31, 2013

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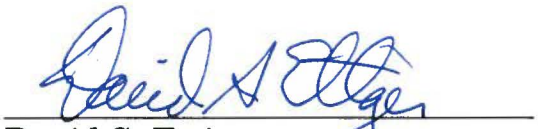
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 8,291 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: October 31, 2013



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On November 1, 2013, I served true copies of the following document(s) described as follows on the interested parties in this action:

1. **PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES [SUPPORTING EXHIBITS FILED UNDER SEPARATE COVER]**

2. **EXHIBITS SUPPORTING PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF [13 Volumes]**

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on November 1, 2013, at Encino, California.

Victoria Beebe

Victoria Beebe

SERVICE LIST
***Letzo v. Abraham* —Case No. 1342321**

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(without exhibits)

For Respondent Court

Hon. Donna D. Geck
Santa Barbara County Superior Court
1100 Anacapa Street, Dept. 4
P.O. Box 21107
Santa Barbara, CA 93121-1107
(without exhibits)

Trial Judge