ASCDC
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December 18, 2014

The Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-7303

Re: *Lunada Biomedical v. Laura Nunez et al.*,
Supreme Court Case No. S222666
Second Appellate Dist., Div. 5, Case No. B243205

Letter Brief of *amicus curiae* Association of Southern California Defense Counsel in support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

The Association of Southern California Defense Counsel ("ASCDC") respectfully urges the Court to grant review in *Lunada Biomedical v. Laura Nunez et al.* (Case No. S222666, 2d. Civ. No. B246606). The Court of Appeal's published opinion holds, as a matter of first impression, that California businesses faced with a notice issued pursuant to the California Legal Remedies Act ("CLRA") cannot maintain a declaratory relief action to establish the propriety of the challenged conduct. In practical terms, the Court of Appeal took away a vital procedural remedy that is otherwise widely available under California law. This Court should grant review to address this issue of widespread impact, and it ultimately it should decide the issue in favor of the availability of declaratory relief pursuant to Code of Civil Procedure section 1060.

Interest Of *Amicus Curiae*

ASCDC is the nation's largest and preeminent regional organization of lawyers devoted to defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts and the bar in addressing legal issues of importance to its members and the public. As *amicus curiae,* ASCDC has

been active in this Court, filing briefs in cases presenting issues of interest to ASCDC members and their clients. (See, e.g., *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148; *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541; *Cassel v. Superior Court* (2011) 51 Cal.4th 113.)

A wide segment of ASCDC's membership defends and counsels businesses threatened with CLRA litigation. As such, ASCDC and its constituent members have a substantial interest in decisional law regarding the CLRA, and particularly in cases like *Lunada Biomedical,* where there is a potential for large and detrimental impact upon California businesses, should review not be granted.

Reasons Why Review Should Be Granted

The Issue Presented – Whether A California Business Threatened With Liability Under The CLRA Is Permitted To File A Declaratory Relief Action To Determine The Propriety Of The Challenged Conduct Or Whether It Must Wait, Possibly For Years, To Be Sued – Affects Virtually Every California Business And Will Be Damaging To Both Businesses And Consumers Alike

In a 2007 article in Plaintiff Magazine, the CLRA was described as "the most far-reaching consumer protection statute in the United States ... ." (Sturdevant & Markwalder, The Consumer Legal Remedies Act: Restoring The Traditional Pleading And Proof Requirements For Claims Of Deception Under Civil Code Section 1750 (2007).) The statute applies to any transaction involving the sale or lease of goods or services to a "consumer." (Civ. Code, § 1770, subd. (a).) It reaches a vast expanse of conduct coming within the statute's 24 proscribed methods, acts, and practices. (Civ. Code, § 1770, subds. (a)(1)-(a)(24).)

Given the breadth of the statute, the threat of legal action pursuant to the CLRA is a risk that virtually every California business faces.

Prospective plaintiffs initiate damages actions under the CLRA by sending target businesses a statutorily-mandated notice pursuant to Civil Code section 1782, subdivision (a). In our member's experience, prospective plaintiffs always request a monetary settlement in connection with this notice.

Prospective plaintiff's have a lengthy period of time to initiate CLRA litigation. After waiting a 30-day statutory period, they have up to three years. (See Civ. Code, §§ 1782, subd. (b), 1783.) Thus, the threat of liability can exist for years without the prospective plaintiff having to take any action.

This situation gives rise to what the Court of Appeal called a "Hobson's choice" (typed opn., p. 25), whereby the defendant's options are to either capitulate to the plaintiff's settlement demands, or stomach the continually increasing potential exposure and the chance that it can later be determined that the challenged conduct violates the CLRA.

ASCDC members are acutely aware of how the threat of prospective liability, particularly one with increasing exposure, can paralyze a client's business. Pending legal threats cause tremendous worry to boards and executive-level staff at businesses of all sizes. They stifle growth and development. This is detrimental to California's workforce. It is also detrimental to the consumers whose interest the CLRA purports to foster.

Businesses frequently choose to settle civil claims, including claims with questionable validity, just to avoid delay and the uncertainties of litigation. In deciding that declaratory relief was not an available remedy for Lunada Biomedical, the opinion below raises the specter that all businesses will face the prospect of capitulation to even questionable claims. As our members well-know, there are innumerable reasons why capitulation may be the better alternative than to wait to see if the prospective plaintiff makes good on the threat of a CLRA notice.

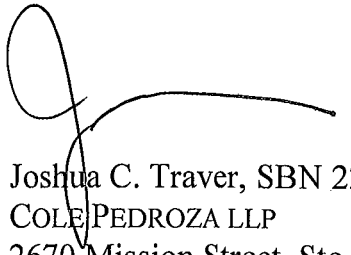
ASCDC fears that the opinion below will incentivize the service of unmeritorious CLRA notices. In purporting to keep with this Court's decision in *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, the Court of Appeal identified as its goal the preservation of CLRA's procedural mechanisms and substantive provisions favoring consumers. Conspicuously, however, the Court of Appeal recognized that the CLRA claimant faced with a declaratory relief action can still present a CLRA claim by way of a cross-complaint. (Typed Opn., p. 26.) It thus appears, at least at first blush, that the effect of permitting the target defendant to file a declaratory relief action is only to advance the initiation of the legal proceedings that are threatened by the CLRA notice. Presumably, a CLRA notice is sent because the plaintiff believes it has merit. And if it really will have merit, the consumer will prevail on the CLRA cross-complaint and receive all the damages and relief specified in the CLRA by way of the cross-complaint. On the other hand, if the defendant prevails, the only thing the plaintiff will have lost is the opportunity to decide *against* filing litigation based on the CLRA notice *after* that notice has already been sent.

Declaratory relief is a powerful and essential remedy. As even the Court of Appeal acknowledged, the question whether declaratory relief should be foreclosed following service of a CLRA notice is a close one based on existing law. (Typed Opn., p. 24.)

ASCDC joins in petitioner's arguments that the Court of Appeal misinterpreted this court's opinion in *Filarsky* and incorrectly distinguished two intermediate Court of Appeal cases permitting declaratory relief actions in the related context of threatened Proposition 65 enforcement actions. Suffice it to say, this Court should grant review in order to give full and complete consideration to this issue, particularly given the broad and detrimental impact that results from the denial of court access to California businesses faced with CLRA notices.

Respectfully submitted,

ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL



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PROOF OF SERVICE
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I am employed by Cole Pedroza LLP, in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2670 Mission Street, Suite 200, San Marino, California 91108.

On the date stated below, I served in the manner indicated below, the foregoing document described as: LETTER BRIEF OF AMICUS CURIAE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF PETITION FOR REVIEW on the parties indicated below by placing a true copy thereof, enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

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

Executed this 18th day of December 2014 at San Marino, California.

MiChelle McGrath

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