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✓	**Insider Trading**: Insider Trading Behavior **Accounting**: Quality of Earnings Issues **Governance:** Corporate Governance Issues

Avon Loses Appeal in "Channel Stuffing" Lawsuit
Avon Products, Inc. (NYSE:AVP) Update

May 9, 2005

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Avon Products, Inc. is a global manufacturer and marketer of beauty and related products. The Company's business is comprised of direct selling, which is conducted in North America, Latin America, Europe and the Pacific. Avon's products fall into four product categories: Beauty, which consists of cosmetics, fragrances and toiletries (CFTs); Beauty Plus, which consists of jewelry, watches and apparel and accessories; Beyond Beauty, which consists of home products, gifts, decorative items and candles, and Health and Wellness, which consists of vitamins, an aromatherapy line, exercise equipment and stress relief and weight management products. The Company has operations in 58 countries, including the United States, and its products are distributed in 85 more countries, for a total coverage of 143 markets.

Summary of 3DAdvisors Findings for AVP

- **Accounting:** Avon loses appeal in "channel stuffing" lawsuit
- **Accounting:** History of the lawsuit and why it is significant for investors

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Discussion of 3DAdvisors Findings

On Friday, May 6th, after the market close, the attorneys for the plaintiffs in what has become known as the "Channel Stuffing" lawsuit against Avon Products informed us that they had won a major victory in their efforts with the Court of Appeal of the State of California. They have forwarded the Court of Appeal decision, which is attached as Appendix A. Not only is the decision eloquently written, it also provides a thorough history of the case.

From a longer term perspective, what this means is that the plaintiff's case will move ahead, and real discovery will begin with several key operating executives likely to be deposed on the relevant issues. It is unclear exactly how broad and how deep the allegations really go within Avon, but interesting details could emerge as the case progresses. We expect to continue following this case and other executive behavior at Avon very closely, and we would advise our clients to do the same.

Accounting: Avon loses appeal in "channel stuffing" lawsuit

The plaintiffs, who are former independent Avon sales representatives, alleged in the original and amended class action complaints, that the Company routinely shipped them unordered goods, and then refused to either give the reps credit or refunds (if the representative had paid for the unordered goods), in direct contradiction to the Company's own return policy. Further, in some cases, the Company threatened to terminate the rep if the rep continued to return goods it had not ordered, and in other cases, the Company sent accounts to collection, trying to extract payment for goods the rep never ordered and had returned for credit or refund.

The plaintiff's suit was based on four "causes of action":

1. Fraudulent Concealment

2. Breach of Contract

3. Unjust Enrichment

4. Violation of Business and Professions Code Section 17200 (California)

Avon successfully got the trial judge to throw out 1, 2, and 4 above and successfully moved to strike the class action allegations of the complaint (they got the judge to rule that 3 of the 4 plaintiffs were not proper class representatives).

At the time, this was a major setback for the plaintiffs, but they responded with two Writ of Mandate[1] filings and an appeal with the California Court of Appeal, seeking to reverse the rulings of the trial judge.

The attached ruling, in no uncertain terms, systematically reviews Avon's arguments on each point and orders the lower court to reverse its earlier decisions to throw out three of the four original causes for action initiated by the plaintiffs. The Court of Appeal also directed the lower court to reinstate the plaintiffs as "proper class representatives" that it had ordered removed from the case.

Accounting: History of the lawsuit and why it is significant for investors

We have kept track of this lawsuit and its ups and downs, for over a year and a half, for a variety of reasons. It was first mentioned in our initial report on Avon back on 09/21/03 because the allegations in the complaint suggested that the Company, by shipping unordered goods to its reps and because revenue is recognized when the goods are shipped, constituted what in effect is channel stuffing. In addition, we had observed certain accounting behavior having to do with gross and persistent under accruals for doubtful accounts, and then later sales returns[2], which we felt were also

[1] Petition for Writ of Mandate under California law is a legal device to request the court to review its decision, in this case, to dismiss two of the original causes of action. Filing the writ is an expeditious alternative to the appeal process, which normally would not start until the still active portions of the suit are heard.

[2] See report dated 03/09/04 where we discuss the first time disclosure of the *allowance for sales returns* in the Company's 2003 SEC Form 10-K. We believe the "channel stuffing" lawsuit may have caused this disclosure as the Company's shipping and return policies were receiving increasing scrutiny.

consistent with the allegations in the complaint(s). Even though the Company ultimately writes off significantly larger amounts than it accrues for doubtful accounts and returns, at the very least the practice gives the Company the opportunity to manage its reported quarterly revenue and earnings because it can decide when the write offs take place. When we called the Company and asked about the timing of the write offs, they declined to offer any information.

Even though the plaintiffs suffered a significant setback last year when the trial judge ruled against them on several key issues (which have now been reversed by the attached Court of Appeal decision), we continued to monitor progress of the case especially since it became increasingly apparent with each passing quarter that Avon's U.S. business was struggling. In our most recent Avon report (02/15/05), we noted that similar "channel stuffing" allegations have been made by independent representatives in Poland, an important market in Eastern Europe. As we said in our last report, the prospect of slowing international growth is as important, perhaps more important, than faltering sales in the U.S. because the Avon growth story is predicated on successfully taking the brand and distribution model overseas, a story which the Company has successfully hyped and used to drive the stock up over the past 18 months. Indeed, the Company has put up big growth numbers in a number of foreign markets, but if the channel stuffing behavior is in fact significant and not limited to the U.S., it becomes very difficult to know what true sales and revenue are each quarter in any market.

Just last week, the Company reported that in the first quarter of this year U.S. revenue and operating profits continued to decline, falling by 6 and 15%, respectively. More importantly, there was also evidence that growth has remained sluggish in such key overseas markets as Mexico and the U.K., and questions about inventories, unit sales and rep morale dominated the ensuing conference call. Despite the fact that the Company reported overall revenue and operating profit increases of 7 and 16%, respectively, for the quarter (and in fact they beat earnings expectations by a penny per share and raised guidance), the shares dropped 3.2% the day of the release on heavy volume.

With all of this as the backdrop, the California Court of Appeal decision comes. It is unclear how the stock will react in the short run, but we anticipate the plaintiff's attorneys will make a significant effort to ensure the decision receives media coverage. To most investors and analysts the lawsuit is old news, and given the early decisions by the trial judge in the Company's favor and its insistence that the suit has no merit, it was all but forgotten. But now, given the continued deceleration in the U.S. and growing concerns regarding overseas markets, the flicker of growing skepticism among analysts may be fanned by the news that this suit has not gone away and in fact may be an issue in terms of the reliability of the Company's reported revenue numbers. If nothing else, the reemergence of the suit isn't likely to improve the credibility of management, nor help the morale of independent reps.

Appendix A

Ruling by the Court of Appeal
For the State of California

Filed 5/6/05

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RAVEN BLAKEMORE et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; AVON PRODUCTS, INC., Real Party in Interest.	B174825 B175973 (Lo Angeles County Super. Ct. No. BC292702)
RAVEN BLAKEMORE et al., Plaintiffs and Appellants, v. AVON PRODUCTS, INC., Defendant and Respondent.	B176780 (Los Angeles County Super. Ct. No. BC292702)

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, II and III.

ORIGINAL PROCEEDINGS in mandate (B174825 and B175973), and

APPEAL from an order of the Superior Court for the County of Los Angeles (B176780). Wendell Mortimer, Jr., Judge.

Petitions granted and order reversed.

Huron Maki & Johnson, Jeffrey Huron, Ann S. Lee and Brenda Barton-LeMay for Petitioners, Plaintiffs and Appellants.

Paul, Hastings, Janofsky & Walker, Alan K. Steinbrecher, Dennis S. Ellis and Joshua G. Hamilton for Real Party in Interest, Defendant and Respondent.

SUMMARY

This is a class action lawsuit filed against Avon Products, Inc. by women who sell or sold beauty products for Avon as independent sales representatives. The sales representatives allege that Avon shipped them products they did not order and, when they returned and paid for the unordered products, Avon refused to credit their accounts and engaged in various other practices to dissuade them from returning unordered products. They allege causes of action for fraudulent concealment, breach of contract and unfair business practices, among others. Avon successfully demurred to several causes of action and successfully moved to strike the class action allegations of the complaint, resulting in two writ petitions and an appeal by the sales representatives.

We conclude that both the writ petitions and the appeal have merit. In the unpublished portion of this opinion, we find:

(1) The plaintiffs stated facts sufficient to support an action for fraudulent concealment;

(2) The plaintiffs stated facts sufficient to support an action for breach of contract; and

(3) The trial court erred in eliminating plaintiffs Blakemore, Smith and Lane from the case on the ground their second amended complaint was inconsistent with averments in earlier versions of the complaint.

In the published portion, we conclude:

(4) The third amended complaint properly stated a claim for violation of the unfair and fraudulent prongs, but not the unlawful prong, of the unfair competition law, Business and Professions Code section 17200;

(5) The trial court erred in striking the plaintiffs' class action allegations; and

(6) No basis exists for plaintiffs' request to remand the case to a different trial judge.

FACTUAL AND PROCEDURAL BACKGROUND

Raven Blakemore and several other women (collectively, Blakemore plaintiffs) who sell or sold beauty products as independent sales representatives for Avon Products, Inc. brought a class action lawsuit against Avon. The crux of their complaint is that Avon engages in a practice they characterize as "channel stuffing," in which Avon forces or "stuffs" products onto its sales representatives – Avon's "channels of distribution" – by deliberately shipping them products they did not order, or products far in excess of the quantities they ordered. When the sales representatives return the unordered products for credit, Avon refuses to grant the credit, in violation of its own return policy. Blakemore's complaint alleges Avon falsely denies receiving the returned products; coerces the representatives to accept and pay for unordered products rather than return them for credit; unfairly requires the representatives to pay the return shipping costs; revokes its policy of "instant credit" and requires the representatives to pay for unordered products until Avon completes its lengthy return process; refuses to ship any further products until the representatives pay for their entire orders in advance, which most cannot afford to do; threatens to terminate the representatives' businesses if they persist in returning unordered products for credit; and, when representatives quit or are terminated, submits claims to collection agencies based on unordered products that were

returned to Avon in order to harass the representatives into paying monies they do not owe. Blakemore's complaint describes a nationwide class, and a California subclass, consisting of all Avon sales representatives "who, since March 24, 1999, received products from Avon they did not order, thereafter returned the unordered products to Avon, and did not receive credit for those returned products . . . ."

Blakemore alleges several causes of action in several iterations of the complaint, and Avon filed demurrers and motions to strike in each case. We first describe the pleadings and the trial court's rulings which precipitated the writ petitions and appeal now under review.

1. Blakemore's first amended complaint.

In the first amended complaint – the ruling on which is not at issue – Blakemore was the only named plaintiff. She specifically alleged that Avon shipped her products she never ordered and, when she tried to return them under Avon's policies and her contract, Avon either failed to acknowledge the return or failed to credit her for the returns, and thereafter demanded payment for products she never ordered. When Blakemore refused to pay money to Avon for products she did not order, her alleged past due account was sent to collections by Avon, and Avon continued to claim that Blakemore owed Avon money for the unordered and returned products. Blakemore asserted causes of action for violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), breach of contract, unjust enrichment, and money had and received.

The trial court sustained Avon's demurrer to the first amended complaint on the ground Blakemore had failed to plead any cognizable pecuniary damages, and gave Blakemore thirty days leave to amend to bring in one or more plaintiffs who suffered actual pecuniary damages.

2. Blakemore's second amended complaint.

The second amended complaint added three named plaintiffs – Robin Smith, Lupe Lane and Elda Garcia – and added a cause of action for fraudulent concealment.[1] Blakemore added allegations that, in August 2002, she returned unordered products to Avon and paid the return shipping costs, and also paid for the returned products in the sum of $83.79, with the expectation that she would receive credit for that amount in future account statements she received. Avon failed to give any credit to Blakemore for those products. Thereafter, Blakemore received other unordered products for which she was charged, and promptly returned them and paid the shipping costs. Avon denied receiving the returned products and refused to grant any credit. When Blakemore refused to pay any further amounts for unordered products that she returned to Avon, Avon sent a false claim to a collection agency, which threatened to sue her and take other adverse actions to collect monies she does not owe. Smith, Lane and Garcia likewise allege the details concerning their return of unordered products, payment of shipping costs, and payment for unordered products "with the expectation that [they] would receive credit for that amount in [their] future account statements pursuant to Avon's Return Policy."[2]

Incorporating the allegations described, the Blakemore plaintiffs assert causes of action for fraudulent concealment, breach of contract, unjust enrichment, and violation of the unfair competition law (UCL). The second amended complaint includes the following allegations:

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[1] The cause of action for money had and received was deleted from the second amended complaint.

[2] According to the complaint, the alleged "channel stuffing" practices benefit Avon because the company records unordered product shipments as final sales which boost the company's sales revenues, and the compensation of Avon's top executives is directly tied to the company's sales revenues and financial performance.

- Fraudulent concealment. Avon's conduct constituted the fraudulent concealment of material facts regarding its ordering, shipping, and return policies and practices. Avon represented to its sales representatives that (a) the company would ship and charge only for products that were ordered by the representatives; (b) representatives could return products they did not order for full credit; (c) the company would immediately grant credit to the representatives' accounts for unordered products that they return to Avon; and (d) the representatives would not receive certain "preferred preview" products if they contacted Avon to decline receipt.[3] Avon failed to disclose, however, (a) that it deliberately ships and charges for unordered products; (b) that the sales representatives must pay the return shipping costs; (c) that Avon does not honor its return policy and refuses to grant credit for unordered products that are returned; (d) that Avon deliberately ships "preferred preview" products whether or not the sales representative contacts Avon to decline receipt; (e) that Avon denies credit for unordered

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[3] The complaint alleges Avon provides a detailed purchase order with the assurance that it will ship and charge only for those products specifically ordered in the purchase order. The practice of shipping unordered products is known as "forced delivery." Other methods of "channel stuffing" include "preferred preview," which occurs when Avon introduces a new product and automatically ships the new product to all of its sales representatives. Prior to the shipment, Avon represents in writing that the sales representatives may decline to receive the product by notifying Avon, but Avon engages in a company-wide practice of deliberately shipping the products to all representatives, even to those who decline receipt. The complaint also alleges Avon has a "return policy" under which it represents, both in writing and orally, that sales representatives may return unordered products to Avon for full credit. The Blakemore plaintiffs allege that representation is false, "in that Avon has a policy and practice of denying credit to Sales Representatives who return unordered products by falsely claiming Avon never received the returned products when in fact the company did receive such products." In some instances, Avon "deceptively 'grants' immediate credit to a Sales Representative in one month's account statement and then later reverses such credit in subsequent account statements." If the representative discovers the credit reversal and seeks adjustment, Avon falsely claims it never received the returned products or the initial credit was in error.

products by falsely claiming the returns were not received; (f) Avon seeks payment for unordered products that are returned by submitting false claims to collection agencies; (g) that Avon initially grants credit and later reverses the credit in future account statements; and so on. These undisclosed policies were material facts which Avon had a duty to disclose to the representatives, because (1) they materially qualified the representations Avon made, or rendered those representations "likely to mislead" the representatives, and (2) because the facts were known or accessible only to Avon. Avon concealed these material facts with the intent to defraud the representatives into enlisting or remaining active sales representatives, accepting unordered products, returning them, and paying Avon for unordered products they returned. The Blakemore plaintiffs were unaware of the material facts concealed, "and would not have enlisted or remained active Sales Representatives, ordered products from Avon, accepted unordered products from Avon, returned unordered products to Avon, or paid Avon for unordered products."

- Breach of contract. Plaintiffs entered into substantially identical written contracts with Avon, "which Avon from time to time has amended and modified both orally and in writing, including but not limited to in its training guides, sales brochures, marketing pamphlets, and promotional materials . . . ." Implied in the contract "is a covenant of good faith and fair dealing that Avon will do nothing to deprive Plaintiffs of the benefits of" the contract. Material benefits plaintiffs were to receive under the contracts were that: Avon would ship only the products plaintiffs ordered; would charge for only those products; would grant credit for unordered products plaintiffs returned; would not refuse to grant credit for unordered products plaintiffs returned by denying receipt when in fact it received those products; would not penalize plaintiffs for returning unordered products by requiring them to pay the return shipping costs, or revoking their "instant credit," requiring advance payment for future orders, or threatening to terminate

plaintiffs; and would not falsely claim plaintiffs owed monies for unordered products that they returned and submit those false claims to collection agencies. Avon breached the contract by shipping unordered products, charging for them, refusing to grant credit, falsely denying receipt of returned products, requiring payment of return shipping costs, revoking credit, and so on.

- Violation of the UCL. Avon's conduct was "fraudulent, unfair, and/or unlawful" in violation of the UCL. Specifically:
    - The practices were "fraudulent in that they are likely to deceive members of the general public about Avon's ordering, shipping, and return policies and practices" by falsely representing that Avon would ship and charge only for those products that were ordered, without disclosing it deliberately ships unordered products, "which deceives new and existing Sales Representatives into selling and ordering Avon products . . . ."[4]
    - Avon's practices were "unfair in that they are immoral, unethical, oppressive, unscrupulous and/or substantially injurious to consumers . . . ." Specifically, the deliberate shipment of unordered products "unfairly requires the Sales Representatives to pay the shipping costs of returning the unordered products even though they were not at fault for receiving such products and thus should not bear the cost of doing so . . . ." Avon unfairly revokes the "instant credit"

[4] Similarly, Avon falsely represents that sales representatives may return products for full credit, which deceives representatives into accepting unordered products from Avon; falsely represents that Avon will grant credit for unordered products, which deceives representatives into paying for unordered products that they return "with the expectation that they will receive due credit at a later time in future account statements;" and submits false claims to collection agencies, "which deceives Sales Representatives, who are harassed and threatened by the collection agencies, into paying monies they do not owe."

of, and unfairly requires prepayment from, representatives who return unordered products, under the guise that they are making excessive returns. Since many sales representatives cannot afford to sell Avon products without instant credit, the unfair revocation of their credit "economically coerces Sales Representatives into accepting and paying for unordered products so that they can continue servicing their clients and operating their businesses . . . ." Similarly, Avon unfairly threatens to terminate sales representatives who persist in returning unordered products for credit, and unfairly submits false claims that representatives owe Avon money to collection agencies in order to harass them into paying monies they do not owe.

- Avon's practice of shipping unordered products to sales representatives is an unlawful practice under the UCL because it violates a federal statute prohibiting the mailing of unordered merchandise. (39 U.S.C. § 3009.)

Avon again demurred and moved to strike the second amended complaint, arguing that none of the four causes of action were supported by applicable law and, in particular, that Blakemore's allegations of pecuniary harm were "directly contradicted by the prior complaints filed by her . . . ." Avon argued the same was true of Smith and Lane because, while the first amended complaint was pending, Blakemore sought permission to file a proposed second amended complaint, in which Smith and Lane did not allege they paid for products they returned, but only alleged, like Blakemore in the first amended complaint, that Avon failed to credit them for returned products and continued to claim they owed Avon money for returned products. The fourth plaintiff, Garcia, was not named in the proposed second amended complaint. As to Garcia, Avon argued her allegations of harm were "spurious" and "too absurd to be believed."

On March 16, 2004, the trial court:

- Sustained Avon's demurrer to the cause of action for fraudulent concealment without leave to amend, "because all plaintiffs knew that they had not ordered the product and were not deceived."
- Sustained Avon's demurrer to the breach of contract claim without leave to amend, "because there is still no allegation of any contract term that was breached."
- Overruled Avon's demurrer to the unjust enrichment claim.
- Sustained, with leave to amend, the UCL claim, observing that the "complaint fails to plead shipments were made by U.S. Mail, therefore violat[ing] 39 United States Code Section 3009." At the hearing, counsel for Avon asked the court for clarification of its tentative ruling granting leave to amend to allege use of the U.S. mail, stating that he (counsel) "read that to mean we're working with the unlawful prong of 17200 and the unfair and fraudulent prongs are out of the case." The court responded, "That was my thinking, yes."
- Sustained, without leave to amend, Avon's demurrer as to Blakemore, Smith and Lane. The court concluded they were "not proper class representatives because they had alleged that they did not pay, and now allege that they did pay."
- Overruled the demurrer as to Garcia.[5]

Six weeks later, Blakemore filed a petition for writ of mandate, challenging the trial court's rulings on the fraudulent concealment and contract claims and on the elimination of Blakemore, Smith and Lane as class representatives. On June 9, 2004, this court deferred ruling on the petition, in anticipation of a further petition for writ relief with respect to subsequent rulings made by the trial court in its order dated June 1, 2004.

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[5] The court ruled that Avon's motion to strike was moot in light of its other rulings.

3. Blakemore's third amended complaint.

Meanwhile, on April 5, 2004, the remaining plaintiff, Elda Garcia, filed a third amended class action complaint, alleging causes of action for unjust enrichment and violation of the UCL. Avon again filed both a demurrer and a motion to strike. On June 1, 2004, the trial court:

- Again overruled Avon's demurrer to the unjust enrichment claim, giving Avon 15 days to answer.
- Sustained Avon's demurrer to the UCL claim, without leave to amend. This time, the court observed that the statute prohibiting the mailing of unordered merchandise (39 U.S.C. § 3009) "allow[ed] consumers to keep the product for free. Here we are dealing with Avon representatives, not consumers, and there is not a contention that they should have been able to keep the product without payment."
- Granted Avon's motion to strike the class allegations. The court observed that "Garcia, who paid $79 for product that she did not order and did return, is not typical. Common questions do not exist. The reasons stated as to why a representative paid for an unordered product have been varied and are inconsistent with the alleged return policy which allowed for instant credit."

In response to the trial court's order, Garcia took two actions. First, on June 4, 2004, she sought reconsideration of the trial court's ruling striking the class allegations, based on the then-recently issued opinion in *Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320 (*Prince*). *Prince* observed that "it is only in mass tort actions (or other actions equally unsuited to class action treatment) that class suitability can and should be determined at the pleading stage," and that "[i]n other cases, . . . class suitability should not be determined by demurrer." (*Id.* at p. 1325, fn. omitted.) Second, on June 17, 2004, Garcia filed a writ petition challenging the court's ruling on her UCL claims, arguing that her complaint properly stated claims under all three

prongs of the unfair competition law – that is, that Avon's practices were unlawful, unfair and fraudulent.

On June 24, 2004, this court ordered the consolidation of the two writ petitions, and issued an alternative writ of mandate, suggesting that the trial court vacate both its orders and issue a new ruling (a) overruling the demurrers as to the fraudulent concealment claim, the UCL claim, and the inclusion of Blakemore, Smith and Lane as plaintiffs, and (b) sustaining the demurrer to the contract claim with further leave to amend. The trial court did not vacate its orders, and on July 20, 2004, it denied Garcia's motion for reconsideration. The trial court observed that *Prince, supra,* 118 Cal.App.4th 1320, did not make new law, but rather "acknowledged that the facts of each case need to be considered as to a community of interest, which is what this Court has done."

Garcia filed a timely appeal from the portion of the trial court's June 1, 2004 order striking Garcia's class action allegations and from the July 20, 2004 order denying her motion for reconsideration of that order. We heard oral argument on the appeal and the writ petitions at the same time and, on our own motion, consolidate the matters for decision.[6]

DISCUSSION

We discuss the several issues raised in the writ petitions and the appeal in the general order in which they arose. For purposes of review, we necessarily accept as true the facts alleged in the complaints.

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[6] In an order dated August 12, 2004, this court denied Garcia's request to consolidate the appeal with the writ proceedings for purposes of briefing, oral argument and decision but, mindful that the issues were closely related, advised the parties that oral argument would be heard at the same time.

I. The Blakemore plaintiffs stated facts sufficient to support an action for fraudulent concealment.

The elements of an action for fraud based on concealment are:

> "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613.)

In transactions not involving fiduciary or confidential relations, the duty to disclose element of the claim may be met if "the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead," or if "the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff . . . ." (*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294, fns. omitted (*Warner*).)

The facts alleged by the Blakemore plaintiffs present a somewhat unusual instance of an actionable non-disclosure within the principles stated in *Warner*. That is, the Blakemore plaintiffs allege in substance that Avon represented its policy was that it shipped and charged only for products ordered by its representatives, and that they could return unordered products for full credit. In fact, Avon's practice was just the opposite. It shipped and charged for unordered products, denied credit for returned products, and refused to refund monies paid for returned products. Thus, the undisclosed actual practice does more than "materially qualify" the policy as represented; it is the precise opposite of that policy. While perhaps not typical of a fraudulent concealment claim, the allegations fall within the standard for actionable non-disclosure stated in *Warner*.

Indeed, the complaint alleges the functional equivalent of a promise made with no intention to perform it – or an implied misrepresentation of fact – which is likewise actionable fraud. (See Civ. Code, § 1710, subd. 4 [defining deceit as "[a] promise, made without any intention of performing it"]; 5 Witkin, Summary of Cal. Law (9th ed. 1988 Torts, § 685, p. 786.)

In short, we discern no reason why the allegations in the second amended complaint should be found insufficient to state a claim for fraudulent concealment. The Blakemore plaintiffs allege facts supporting all the elements of such a claim. Avon did not disclose facts which materially qualified – indeed contradicted – its affirmative representations. It did so with the intent to defraud the sales representatives "into enlisting or remaining active Sales Representatives, ordering products from Avon, accepting unordered products from Avon, returning unordered products to Avon, and paying Avon for unordered products that they returned." The Blakemore plaintiffs were unaware of the material facts concealed, "and would not have enlisted or remained active Sales Representatives, ordered products from Avon, accepted unordered products from Avon, returned unordered products to Avon, or paid Avon for unordered products." And, as a result of the concealment of Avon's actual policies, the Blakemore plaintiffs were damaged, since they paid Avon for products they returned, expecting to be credited for those returns in accordance with Avon's policies as represented. Every element of a fraudulent concealment claim is stated.

The trial court concluded that no claim was stated "because all plaintiffs knew that they had not ordered the product and were not deceived." This conclusion reflects a misconception about the nature of the deception alleged. Of course, a representative who receives an unordered product knows that she did not order it. She does not know, however, that Avon will not give her a credit when she returns it, and indeed will give neither a credit nor a refund when she both returns it and pays for it. The practices of refusing to provide credit and refusing to make refunds for returned products were not disclosed to the representatives when they enlisted with Avon, and are contrary to – and

therefore necessarily "materially qualify" – the policies Avon represented would apply. Moreover, the representatives had no way of knowing that, contrary to those representations, Avon intended to deny credits and refunds.

Avon asserts the Blakemore plaintiffs fail to state a claim for several reasons. First, Avon contends Garcia's allegations establish an awareness she had no obligation to pay for the unordered goods she received and returned.[7] Avon points to this allegation:

> "Instant Credit, which is automatically available to all Sales Representatives, grants immediate credit for products that will be or have been returned under Avon's Return Policy. Thus, under Instant Credit, Sales Representatives may deduct charges for products that they return (because those products were not ordered, damaged, disliked or the like) from their statements and pay the balance."

Avon says this is a "critical admission" that, although Garcia paid for unordered products, she knew she had no obligation to do so and instead "she could have simply deducted the charges for those products and paid the balance." However, Avon ignores the related allegations that Avon revokes instant credit when representatives return unordered products, under the pretense that they made "excessive" returns. Moreover, Garcia returned the unordered products, paid for them, and received neither a refund nor a credit. We fail to see how Garcia's allegations establish that she was "not deceived" by Avon's failure to disclose its intention to deny refunds and credits for returned products.

Second, Avon contends Garcia has not and cannot plead facts establishing that Avon's failure to disclose its policy of denying credits and refunds caused Garcia's damage. In another version of its first argument, Avon claims the allegations show that Garcia "did not pay money to Avon based on any non-disclosure on the part of Avon,"

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[7] Avon refers only to Garcia, rather than to all four Blakemore plaintiffs, taking the position she is the only proper plaintiff. See part III, *post*.

but rather did so due to her own "expectation that she would receive credit for that amount in her future account statements . . ." In other words, Garcia caused her own damage, because she paid expecting to receive credit. This argument is without merit, and virtually answers itself. Garcia expected to receive credit in a future statement because "Avon represented that Plaintiffs may return products that they did not order to the company for full credit," and "failed to disclose . . . that Avon will not honor its Return Policy by refusing to grant credit for the unordered products that Plaintiffs return." In short, the complaint clearly alleges that Garcia paid money to Avon based on Avon's failure to disclose that it would not – contrary to its representation – provide credit to Garcia for that amount.

Third, Avon argues Garcia cannot establish "that Avon had a duty to disclose facts of which she was already aware." In an Orwellian argument, Avon points out that the sample contract attached to the second amended complaint expressly advises the sales representatives that "the contract was subject to Avon's 'Policies, Procedures and Guidelines, as well as any amendments thereto.'" Avon then points to the complaint's allegations summarizing Avon's "channel stuffing" practices (paragraphs 1 – 7 of the second amended complaint). Because those practices allegedly existed for the past four years, well before Garcia became a representative, Avon suggests Garcia should have been aware of them. According to Avon, Garcia "cannot contend that a fraud claim lies for speaking 'half-truths,' where the plaintiff is aware (or should be aware) of the information that was purportedly not disclosed." In other words, despite Avon's representations as to its shipping, credit and return policies, Garcia should have known about its actual channel stuffing policies (to which she agreed), which therefore cannot form the basis for a fraudulent concealment claim. Whether Garcia should have been aware that Avon's policies were different from those represented to her is a matter of fact Avon may raise as a defense; certainly, a conclusion on the state of Garcia's knowledge cannot be drawn from the allegations in the complaint.

In sum, and for the reasons outlined above, Avon's demurrer to the cause of action for fraudulent concealment in the second amended complaint should have been overruled.

II. The trial court erred when it sustained Avon's demurrer to the cause of action for breach of contract.

The Blakemore plaintiffs allege they entered into substantially identical written contracts with Avon, "which Avon from time to time has amended and modified both orally and in writing, including but not limited to in its training guides, sales brochures, marketing pamphlets, and promotional materials . . . ." The Blakemore plaintiffs attach "copies of some of the terms" of the "Sales Representative Contract," allege that there were "additional materials in the possession, custody or control of Avon that are part of" the contract, and state they would supplement the attachment when they obtained the additional materials. They allege a covenant of good faith and fair dealing was implied in the contract, and proceed to identify the "material benefits that Plaintiffs were to receive under the Sales Representative Contract . . . ," such as that Avon would ship and charge for only products plaintiffs ordered and would grant credit for unordered products plaintiffs returned, as more fully described in part 2 of the factual background, *ante*. The Blakemore plaintiffs allege Avon breached the contract by shipping unordered products, charging for unordered products, refusing to grant credit for returned products, and so on. The Blakemore plaintiffs further allege their performance of the terms and conditions required of them, and monetary damages suffered as a direct result of Avon's breaches of the contract.

The trial court sustained the demurrer without leave to amend "because there is still no allegation of any contract term that was breached." Certainly, the complaint is not a model of clarity, and does not straightforwardly allege that, in the contract between the parties, Avon undertook to ship and charge for only products plaintiffs ordered, and to grant credit for unordered products that were returned. Instead, as the Blakemore

plaintiffs acknowledge in their writ petition, the complaint alleges "a claim for breach of the implied covenant of good faith and fair dealing, which does not depend on breach of any express term." We conclude the Blakemore plaintiffs, in substance, are correct, and the trial court erred in sustaining the demurrer to the breach of contract claim. We describe the pertinent legal principles and then turn to their application in this case.

A. The covenant of good faith and fair dealing.

"'Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.'" (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683 (*Foley*), quoting Rest.2d Contracts, § 205.) While "the difficulty in devising a rule of all-encompassing generality" has been recognized, "a few principles have emerged in the decisions." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 373 (*Carma Developers*).) "To begin with, breach of a specific provision of the contract is not a necessary prerequisite. [Citation.] Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract." (*Ibid*., fn. omitted.)

Accordingly, it is clear that the Blakemore plaintiffs do not necessarily need to identify a specific provision of the contract that was breached in order to state a claim for breach of the implied covenant of good faith and fair dealing. On the other hand, "[i]t is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract." (*Carma Developers, supra,* 2 Cal.4th at p. 373.) Thus, the implied covenant of good faith is read into contracts "'in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose[s].'" (*Ibid.*, quoting *Foley, supra,* 47 Cal.3d at p. 690.) The covenant "'is aimed at making effective the agreement's promises.'" (*Carma Developers, supra,* 2 Cal.4th at p. 373, fn. 13, quoting *Foley, supra,* 47 Cal.3d at p. 683.) As *Carma Developers* points out, it is easy to determine whether given conduct is within the

bounds of a contract's express terms. The difficulty arises "in deciding whether such conduct, though not prohibited, is nevertheless contrary to the contract's purposes and the parties' legitimate expectations." (*Carma Developers, supra,* 2 Cal.4th at p. 373.)

B. Application of the implied covenant of good faith and fair dealing to the contract alleged in this case.

The Blakemore plaintiffs do not identify a provision of the contract expressly stating that Avon will credit the representative for unordered products that are returned, or that Avon will refund monies a representative has paid for unordered products she has returned. However, the Blakemore plaintiffs allege that the contract consists of various materials, including training guides, sales brochures and the like, and attach copies of some of the documents alleged to be part of the contract. These include the "Avon Appointment Card" and a purchase order form,[8] with the following terms:

- The "Avon Appointment Card" specifically states the representative's agreement – and, by implication, Avon's agreement – to "comply with all of the policies and procedures, provision, or any future amendment thereto in The Avon Training and/or Avon Advertising and Promotion Guide," and "[t]o abide by the collective Avon Policies, Procedures and Guidelines, as well as any amendments thereto."
- The purchase order form includes instructions for replacing a product and for returns and credits to the representative's account. The instructions advise the representative to look in her next order for the replacement product, if she has ordered a replacement, "or look on your next invoice for the credit." The representative is also instructed to choose a "reason code," among which is "Avon error."

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[8] Avon's return to the writ petitions expressly states that "the Representative Contract includes the Purchase Order identified in Exhibit 1 . . . ."

- The representative agrees, in the "Avon Appointment Card," to "provide product orders and to pay Avon for such orders on time . . . ."
- The "Avon Appointment Card" also states that, within six months of termination of the relationship between Avon and the representative, "Avon will repurchase on reasonable commercial terms, current marketable inventory that the Representative has purchased for resale within the twelve (12) months prior to the termination of the Representative relationship with Avon."

These provisions may not expressly prohibit Avon from sending its representatives unordered products or, more importantly, from refusing to credit their accounts when the products are returned and refusing to issue refunds when payment is made for the returned products. However, we have no difficulty concluding that "such conduct, though not prohibited, is nevertheless contrary to the contract's purposes and the parties' legitimate expectations." (*Carma Developers, supra*, 2 Cal.4th at p. 373.)

The purpose of the contract is necessarily to promote and facilitate the sale of Avon products. The contract is not, however, a one-way street. By accepting the contract, Avon necessarily agrees to comply with its own "collective Avon Policies, Procedures and Guidelines" to achieve the contract's purposes. In view of the express provisions of the purchase order form (1) including "Avon error" among the possible reasons for return or replacement of a product, and (2) advising the representative "to look on your next invoice for the credit," and the representative's undertaking to "provide product orders and to pay Avon for such orders . . . ," it is reasonable to expect a credit or a refund when unordered products are returned. Avon's failure to provide credits or refunds was, at least for purposes of stating a breach of contract claim, contrary to the parties' legitimate expectations, and therefore a breach of the covenant of good faith and fair dealing implied in the contract. (See *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032, quoting *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153 ["'the covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from

engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract'"].)

Avon offers two other arguments in support of the propriety of the trial court's ruling. First, Avon contends the ruling was proper because the contract claim "was not drafted in conformity with California law," in that the Blakemore plaintiffs did not attach the contracts actually signed by them. While a written contract is usually pleaded by setting it out verbatim, or incorporating an attached copy by reference, California law does not require adherence to those methods. "In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." (*Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 198-199.) While this method "involves the danger of variance where the instrument proved differs" from the one alleged, "it is an established method." (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 480, p. 573.) The absence of a signed contract alone provides no basis for sustaining a demurrer.

Second, Avon claims Garcia "failed to properly plead facts establishing her own performance of the terms of the undefined Representative Contract," and that the trial court was therefore "free to infer that there was no compliance with those terms." Specifically, Avon cites the language in the purchase order form's section on returns which advises the representative to "look on your next invoice for the credit." These instructions continue by stating: "Wait for your next invoice . . . we will tell you which products to return on the Product Return Statement." Avon claims the second amended complaint shows that Garcia "simply sent back her return without being told on her next Product Return Statement to do so by Avon," and her failure to do so "precludes a breach of contract cause of action." The argument is specious. Garcia, and the other Blakemore plaintiffs, allege they "performed all the terms and conditions required of them under the Sales Representative Contract, except as such performance has been excused or rendered impossible by the acts and omissions of [Avon] as alleged herein." Garcia's specific allegations concerning her return of the unordered products she

received do not – contrary to Avon's statement which omits any quotation of those allegations – demonstrate noncompliance with Avon's procedures. And, any such non-compliance may well have been excused by the fact that "in her next account statement, Avon – without any explanation – increased the charge for those unordered [products] . . . ." These questions are not ones that may be resolved on demurrer.

Returning to the principal point, "[t]he covenant of good faith and fair dealing . . . exists . . . to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349, italics omitted.) In this case, the express terms of the Avon contract with its representatives could lead a reasonable person to understand that credits or refunds would be provided for returned products.[9] Under these circumstances, it was error to sustain Avon's demurrer because the Blakemore plaintiffs properly stated a claim for breach of the covenant of good faith and fair dealing implied in the contract.

III. The trial court erred in concluding Blakemore, Smith and Lane were not proper class representatives.

The trial court sustained, without leave to amend, Avon's demurrer as to Blakemore, Smith and Lane. The court concluded they were "not proper class representatives because they had alleged that they did not pay, and now allege that they did pay." We conclude the trial court improperly applied the rule of pleading that prohibits inconsistent factual averments in an amended complaint. We first explain the rule, and then turn to its application in this case.

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[9] Moreover, the complaint alleges that there were "additional materials in the possession, custody or control of Avon that are part of" the contract, which could shed further light on the parties' agreement.

A plaintiff "may not 'discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading.'" (*Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 404, fn. 6 (*Leasequip*), quoting *California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 53, fn. 1.) Stated differently, the rule is that "all allegations of fact in a verified complaint, which are subsequently omitted or contradicted, are still binding on the complainant." (*Lim v. The.TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 690-691 (*Lim*).) The rule is intended to prevent sham pleadings that omit an incurable defect in the case. (*Id*. at p. 690.) However, the rule "was not intended to preclude plaintiffs from providing additional and noncontradictory allegations." (*Leasequip, supra*, 103 Cal.App.4th at p. 404, fn. 6.)

In the second amended complaint, the Blakemore plaintiffs neither omit nor contradict any of the allegations in their earlier complaints. They merely make additional allegations, including allegations that they paid shipping costs for returning unordered products and that, in some instances, they paid for products they did not order. These allegations do not contradict the earlier allegations that, "[w]hen [they] refused to pay money to Avon for product [they had] never ordered," their allegedly past due accounts were sent to collections by Avon.[10] Indeed, those earlier allegations of refusal

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[10] By way of comparison:

- In the first amended complaint, Blakemore alleged generally that Avon shipped products she did not order; she attempted to return the unordered products and Avon either failed to acknowledge the return or failed to credit Blakemore for the returns; thereafter, Avon demanded payment for products that were unordered; and "[w]hen Plaintiff refused to pay money to Avon for product she never ordered . . . , Plaintiff's alleged past due account was sent to collections by Avon." Smith and Lane made similar general allegations in the proposed second amended complaint.

- In the second amended complaint, Blakemore was more specific. She identified unordered products that were sent to her and the amount she was charged. She alleges, as to unordered products received in August 2002, that she returned the

to pay remain in the second amended complaint, and present no inconsistency with the additional allegations. We discern no contradiction in alleging instances of both payment for, and refusal to pay for, unordered products. Indeed, the sequence of events alleged – initially paying for unordered products, and subsequently refusing to pay for further unordered products in the face of Avon's failure to provide credit – would be entirely rational.[11] The rule is that a plaintiff cannot, in an amended complaint, omit relevant facts that made the original complaint defective, not that she cannot add relevant facts to cure a defect in the original complaint. (See *Lim, supra*, 99 Cal.App.4th at p. 691, italics omitted ["[t]he rule is aimed at averments of fact the pleading party attempts to avoid in a later pleading"].) The bottom line is that the Blakemore plaintiffs' allegations that they paid for some products does not contradict their allegations that they refused to pay for others. As in *Leasequip*, "the allegations in the second amended complaint amplified, but did not contradict, those in the first amended complaint."

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unordered products and paid the return shipping costs, and that on September 5, 2002 she paid for those unordered products, with the expectation she would receive credit. Blakemore further alleged that in September 2002, Avon again shipped unordered products, which she returned and paid the return shipping costs, but Avon denied receiving the returned products and refused to grant any credit. "When Ms. Blakemore refused to pay any further amounts for unordered products that she duly returned to Avon, Avon sent a false claim to a collection agency . . . ." Smith and Lane made similar allegations, identifying certain amounts they paid for unordered products, and, in Smith's case, her subsequent refusal to pay for further unordered products.

[11] Avon contends the allegations in the second amended complaint that the Blakemore plaintiffs "paid money to Avon cannot be reconciled with prior allegations that they 'refused to pay' any money to Avon," and that "[b]oth allegations simply cannot exist together . . . ." This argument might have some merit if the first amended complaint categorically stated, as Avon's selective quotation suggests, that plaintiffs refused to pay "any money" to Avon. As previously noted (see fn. 10, *ante*), the complaint states that "[w]hen Plaintiff refused to pay money to Avon for product she never ordered," Avon sent her account to collections. This allegation is entirely consistent with a claim that plaintiffs initially paid for some of the unordered products.

(*Leasequip, supra,* 103 Cal.App.4th at p. 404, fn. 6.) Absent a contradiction, no basis exists for concluding the amended pleading was a sham, and the trial court erred in sustaining Avon's demurrer as to Blakemore, Smith and Lane on that basis.[12]

IV. The trial court erred in sustaining Avon's demurrer to Garcia's cause of action for violation of the unfair competition law.

In the third amended complaint, Garcia alleges that Avon's practices – shipping and charging for unordered products, denying credit to sales representatives who return unordered products, and so on – violate the unfair competition law, Business and Professions Code sections 17200 et seq. Conduct violating the UCL includes "any unlawful, unfair or fraudulent business act or practice . . . ." By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Garcia sufficiently alleges a violation of the UCL under the unfair and fraudulent prongs of the statute, but not under the unlawful prong.

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[12] Our conclusion on this point makes it unnecessary to discuss the Blakemore plaintiffs' contention that the trial court erred in taking judicial notice of the proposed second amended complaint, for purposes of finding a contradiction between its allegations (as to Smith and Lane) and those of the second amended complaint.

A. Garcia alleges facts constituting an unfair or fraudulent business practice under the UCL.

Having determined that the Blakemore plaintiffs alleged a sufficient claim for fraudulent concealment (see part I, *ante*), we necessarily conclude that the practices alleged are sufficient to constitute an unfair or fraudulent business practice under the UCL.

The term "fraudulent" as used in Business and Professions Code section 17200 requires only a showing that members of the public are likely to be deceived. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211.) Unlike common law fraud, a section 17200 violation can be shown even without allegations of actual deception, reasonable reliance and damage. (*Ibid.*) In this case, Garcia alleges that Avon represented it would ship and charge only for ordered products, and representatives could return unordered products for full credit, while in actuality Avon's practice was to ship unordered products and refuse to grant credit for returned products, thus deceiving its sales representatives into accepting and paying for unordered products with the expectation their accounts would be credited in the future. These allegations are sufficient to state a section 17200 claim based upon deception. (See, e.g., *Pastoria v. Nationwide Ins.* (2003) 112 Cal.App.4th 1490, 1499 [allegations that insurer did not notify purchasers of insurance policies of impending material changes in policy benefits and premiums until after they purchased the insurance were sufficient to state a section 17200 claim based on deception].) Because the allegations are sufficient to state an unfair competition law claim based upon deception, the same allegations necessarily suffice to state a claim under the unfairness prong of the UCL. A practice which is deceptive is necessarily unfair.[13]

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[13] In its return to Garcia's writ petition, Avon contends that the "universal test to determine what conduct will constitute a violation of the unfair or fraudulent prongs of Section 17200" is whether the public is likely to be deceived.

B. Garcia cannot state a UCL claim predicated on conduct that is unlawful under 39 U.S.C. section 3009.

The third amended complaint also alleges that Avon's practices were unlawful business practices under the UCL because the shipment to its representatives of unordered products violated federal law prohibiting the mailing of unsolicited merchandise (39 U.S.C. § 3009), and section 5 of the Federal Trade Commission (FTC) Act. (15 U.S.C. § 45(a)(1).) Section 3009, a part of the Postal Reorganization Act, provides, with irrelevant exceptions, that:

> "the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section [prohibiting bills or dunning communications relating to such merchandise] constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15."[14] (39 U.S.C. § 3009, subd. (a).)

"Unordered merchandise" is defined as "merchandise mailed without the prior expressed request or consent of the recipient." (39 U.S.C. § 3009, subd. (d).) The statute also provides that a recipient of such merchandise may treat it as a gift. (*Id.*, subd. (b).)

We conclude that section 3009 does not prohibit the mailing of unordered merchandise as between parties to an ongoing contractual relationship involving the sale of the same merchandise. The language of the statute does not expressly limit its application to consumers, instead using the word "recipient." However, the legislative history of the statute as reported in case precedents, similar state statutes, and the FTC's own orders enforcing section 3009 show that it is addressed to the mailing of unordered

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[14] Section 45(a)(1) of title 15 of the United States Code – the Federal Trade Commission Act – provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

merchandise by the seller to the consumer of that merchandise, not to parties who have contracted with each other to promote the sale of the same merchandise to third persons.

First, the legislative history of section 3009 was reviewed by the Ninth Circuit in *Kipperman v. Academy Life Ins. Co.* (9th Cir. 1977) 554 F.2d 377 (*Kipperman*):

> "Section 3009's main purpose is to combat an old and pernicious practice of mailing unsolicited merchandise by enabling the Federal Trade Commission to attack the practice as a *per se* violation of unfair trade laws and by allowing the consumer to keep the item received. . . . [W]hat is now section 3009 was introduced as an amendment to the Senate version of the Act on the same evening the Act was passed. The purpose of the amendment was to 'control the unconscionable practice of persons who ship unordered merchandise to consumers and then trick or bully them into paying for it.' 116 Cong.Rec. at 22314 (June 30, 1970) (remarks of Sen. Magnuson). The Senate amendment was accepted by the conference committee without comment. 1970 U.S. Code Cong. & Admin. News, p. 3721." (*Kipperman, supra*, 554 F.2d at p. 379.)

Thus, the legislative intention was to prevent the practice of shipping unordered merchandise "to consumers" and then tricking them into paying for it. (*Ibid*.) Other cases have made similar references. (E.g., *Crosley v. Lens Express, Inc.* (W.D.Tex. Feb. 9, 2001, Civ. A. No. SA-00-CA-385-EP) 2001 U.S.Dist. Lexis 25222, pp. 4-5, 15 (*Crosley*) ["[i]t is clear that section 3009, like the Federal Unfair Trade Practices Act that it references, is designed to protect consumers from the unfair trade practices"; "the statute's reason for being is not the postal service; rather, it is the need to protect consumers from dishonest business persons"]; *Kashelkar v. Rubin & Rothman* (S.D.N.Y. 2000) 97 F.Supp.2d 383, 395 [section 3009 "concerns the mailing of unsolicited merchandise to customers"].)

Second, as *Kipperman* points out, "the practice with which section 3009 is concerned traditionally has been governed by state law." (*Kipperman, supra*, 554 F.2d at p. 380.) The State of California has such a statute, governing the unsolicited sending of goods or services (Civ. Code, § 1584.5), and it is similarly directed at sellers

marketing products or services to consumers. California's statute, like federal law, applies to goods "not actually ordered or requested by the recipient" (Civ. Code, § 1584.5), and the statute repeatedly refers to "the seller" and "the consumer."[15] While the existence of a state statute on the same subject does not control the interpretation of a federal law, it serves to demonstrate the similarity of purpose in the statutes – the protection of consumers from sellers of unsolicited goods or services.

Third, the Federal Trade Commission, the agency responsible for enforcing section 3009, indicated in a consent order that a "recipient" does not include a person or business establishment which does not purchase the merchandise for consumption. (*In re Commercial Lighting Products, Inc.* (1980) 95 F.T.C. 750, 1980 FTC Lexis 83, p. 11.) In *Commercial Lighting Products*, the FTC initiated an investigation of alleged violations of section 3009 by a company in the business of selling light bulbs, and the parties entered into a consent order. The order requires the company to cease and desist from certain practices, including "[s]hipping Products or causing Products to be shipped, without the expressed request or consent of a Person." (*Id.* at p. 12.) The order defines "Person" as a recipient of products from the company, with the express proviso that "Person shall not mean a natural person, business establishment or institution which does not purchase said Products for consumption (i.e., independent jobbers or wholesalers)." (*Id.* at p. 11.)

In sum, section 3009 forbids the mailing of unordered merchandise by sellers to consumers, and was not intended to apply to independent jobbers or wholesalers or, as in this case, where a contractual relationship exists between the parties relating to the sale

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[15] For example, the statute defines the unsolicited sending of merchandise through the mails to include "any merchandise … selected by the company and offered to the consumer . . . ." and requires merchandise or services "selected by the seller and offered for sale on a periodic basis" to be "affirmatively ordered by a statement or card signed by the consumer . . . ." (Civ. Code, § 1584.5.)

of the merchandise.[16] Consequently, Garcia cannot state a violation of the UCL under its unlawful prong predicated on a violation of section 3009. This does not mean that the practice alleged may not be an unfair or deceptive practice under federal law, just as it may be unfair or deceptive under the UCL (part IV.A, *ante*). We hold only that the conduct alleged in the complaint is not an unlawful practice under the UCL by virtue of section 3009.[17]

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[16] Garcia asks us to take judicial notice of a notice and request for comment issued by the FTC and a statement of the FTC on office supply fraud prepared for the United State Senate Committee on Small Business. We grant the request; however, the content of the documents does not aid Garcia's argument. The documents reflect, as Garcia suggests, that the FTC interprets section 3009 as protecting small businesses from the unlawful practice of mailing unordered merchandise. It is clear, however, that small businesses are protected because they are the consumers of the unordered merchandise. The FTC notice observes that "small businesses are frequently consumers themselves . . ." and refers to "office supply scams that ship and bill for unordered merchandise . . . ." (FTC, Notice and Request for Comment Regarding Compliance Assistance and Civil Penalty Leniency Policies for Small Entities, Apr. 8, 1997, fn. 6; see also Prepared Statement of the Federal Trade Commission on Office Supply Fraud Before the Committee on Small Business, United States Senate (Mar. 28, 2000) [discussing office supply scams involving products that are used in the course of business and purchased on a regular basis].) The small businesses are plainly the consumers of the products in question.

[17] Avon argues that section 3009 cannot be used as the predicate violation for an unlawful business practice because no private right of action exists to enforce section 3009. Avon's contention is without merit. First, the cases are in conflict over whether a private right of action exists to enforce section 3009. (See *Kipperman, supra*, 554 F.2d at p. 380 [a limited private right of action exists under section 3009 to secure restitutionary, but not injunctive, relief]; *Crosley, supra*, 2001 U.S.Dist. Lexis 25222, p. 9 [section 3009 creates a limited private right of action encompassing claims for damages]; contra *Randolph v. Oxmoor House, Inc.* (W.D. Tex. Sept. 30, 2002, Civ. A. No. SA-01-CA-0699-FB) 2002 U.S.Dist. Lexis 26289 [no private right of action under section 3009].) Second, and more importantly, a private right of action under the predicate statute is not necessary in order to state a UCL violation based on that statute. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565 [rejecting contention that plaintiff cannot sue under the UCL when the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there

V. The trial court erred in striking the class allegations at the pleading stage of the case.

"[T]wo requirements must be met to sustain a class action. The first is existence of an ascertainable class, and the second is a well-defined community of interest in the questions of law and fact involved." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 809 (*Vasquez*).) The second requirement – a community of interest – 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." (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

A demurrer to class allegations may be sustained without leave to amend only "where it is clear that there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact." (*Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1234.) "Whenever there is a 'reasonable possibility' plaintiffs can plead a prima facie community of interest among class members, 'the preferred course is to defer decision on the propriety of the class action until an evidentiary hearing has been held on the appropriateness of class litigation.'" (*Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 988, quoting *Rose v. Medtronics, Inc.* (1980) 107 Cal.App.3d 150, 154.)

In this case, the trial court struck the class allegations in Garcia's third amended complaint, giving the following explanation:

> "Plaintiff Garcia, who paid $79 for product that she did not order and did return, is not typical. Common questions do not exist.

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is no private right of action; UCL claim is barred when it is based on conduct which is absolutely privileged or immunized by another statute].)

> The reasons stated as to why a representative paid for an unordered product have been varied and are inconsistent with the alleged return policy which allowed for instant credit."

We conclude the trial court erred.

1. The standard of review.

Avon contends we must apply an abuse of discretion standard in evaluating the trial court's order striking the class allegations, because the ruling was tantamount to an order denying class certification, which is reviewed under a standard affording "great discretion" to the trial court. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).) Avon is mistaken. A motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true. (See *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255 [an order striking punitive damages allegations is reviewed de novo].) Unlike a motion to strike, a motion for class certification occurs at a later stage of the case, "after notice and hearing" (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 876 (*La Sala*)), a procedure which allows the judge "as much insight into the case as possible in making his determination." (*Beckstead v. Superior Court* (1971) 21 Cal.App.3d 780, 783 (*Beckstead*).) As *Linder* observed: "[I]n the absence of other error, a trial court ruling [denying class certification] supported by substantial evidence generally will not be disturbed" unless improper criteria were used or erroneous legal assumptions were made. (*Linder, supra*, 23 Cal.4th at p. 435.) In this case, by contrast, there is no "substantial evidence" to review. Avon's motion to strike the class allegations "raises only the narrow issue whether this suit as a matter of law lacks sufficient community of interest to sustain a class action." (*La Sala, supra*, 5 Cal.3d at p. 876.) Matters of law are questions we review de novo.

2. Typicality.

First, we cannot discern any basis for the conclusion that Garcia "is not typical." We can only speculate the reason for this conclusion is the one asserted by Avon: that the description of the class – sales representatives who "received products from Avon they did not order, thereafter returned the unordered products to Avon, and did not receive credit for those returned products" – does not explicitly state that the class members paid for the returned products, while Garcia alleges she paid for the returned products. As Avon states it, "While Garcia claimed that she was entitled to a ***refund*** of money she allegedly paid . . . , the purported class members only sought ***credits*** for products they returned but never paid for."

Avon's argument draws a distinction without a difference. A class member who continues to sell for Avon would likely be satisfied by a credit to her account. One who no longer sells for Avon would require a refund. Moreover, even if there is a difference between seeking credit and seeking a refund, the point would be easily remedied by a simple modification of the class description. The significant point is that, in response to the trial court's initial ruling that plaintiffs had failed to plead any cognizable pecuniary damages, the Blakemore plaintiffs amended the complaint to do just that, alleging throughout the complaint that they paid for returned products. In short, it is impossible to read the complaint without understanding that the class alleged consists of Avon representatives who received unordered products, returned them, paid for them, and now want a credit or a refund. Garcia and the other Blakemore plaintiffs who so allege are clearly typical of the class.

3. Community of interest.

The broader question of a "community of interest in the questions of law and fact involved" (*Vasquez*, *supra*, 4 Cal.3d at p. 809) ultimately requires a determination of "whether, given an ascertainable class, 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." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238.) In this case, the third amended complaint alleges that common questions included whether Avon:

- Was unjustly enriched by refusing to grant credit after sales representatives paid for products they did not order and returned to Avon;
- Shipped and charged for products it knew or should have known were not ordered;
- Refused to grant credit for unordered products that were returned;
- Penalized representatives returning unordered products for credit by:
    - A. Requiring them to pay return shipping costs;
    - B. Revoking their instant credit;
    - C. Requiring prepayment of future or pending orders;
    - D. Threatening to terminate their businesses; and
    - E. Submitting false claims to collection agencies.

The trial court found that common questions "do not exist." Again, we do not understand why the above listed issues should not be considered questions common to all members of the putative class. If each class member brought a separate suit, each one would have to prove Avon applied the very same practices to her: it shipped unordered products, refused to grant credit when they were returned, required payment of return shipping costs, and utilized one or more of the alleged means of penalizing her for returning unordered products for credit. We are unable to discern why those issues cannot be "jointly tried" (*Collins v. Rocha, supra,* 7 Cal.3d at p. 238) with a view to establishing whether Avon engaged in the practices alleged.

The trial court apparently reasoned that the plaintiffs had "varied" reasons for paying for unordered products, and that those reasons were "inconsistent with the alleged return policy which allowed for instant credit." We fail to understand the relevance of the court's rationale, which appears to question why the plaintiffs would pay for unordered and returned products when Avon allowed instant credit. The point, however, is that Avon's announced policies were allegedly not its actual policies.

Moreover, the relevance of the plaintiffs' reasons, "varied" or not, for paying for unordered products is not apparent. If in fact they paid for unordered products which they returned – whether because they believed their accounts would be credited in due course, because they did not want Avon to terminate their businesses, because their instant credit was revoked, or for any other reason – Avon's refusal to provide credits or refunds contrary to its stated policies would arguably constitute unjust enrichment and an unfair business practice.

Avon offers several reasons for concluding the trial court correctly found that common questions of law or fact do not exist. First, Avon asserts that the complaint, which alleges the common questions of law and fact described above, demonstrates "on its face" that there is "a lack of commonality." This is because Garcia – the only named plaintiff in the third amended complaint – does not allege that Avon required her to prepay for pending or future orders, that Avon threatened to terminate her business, or that Avon submitted a false claim on her account to a collection agency (items C through E above). Other plaintiffs in earlier iterations of the complaint, however, did allege Avon submitted false claims to collection agencies, and those plaintiffs were erroneously eliminated from the case. (See part III, *ante*.) Moreover, the complaint alleges Avon imposes increasingly onerous penalties to deter representatives from returning unordered products for credit, beginning with the imposition of shipping costs and continuing in severity up to referring the representatives' accounts to collection agencies. The fact that not all class members experienced the more severe penalties does not detract from the obvious community of interest in the substance of the practice alleged: shipping unordered products and refusing to grant credits or refunds when those products were paid for and returned.

Second, Avon insists that the third amended complaint shows that "diverse factual issues preclude this case proceeding as a class action," and that "obvious individual issues . . . predominate . . . ." Specifically, "each member must show that Avon actually shipped her a good she did not order, she paid for a particular good, returned it to Avon,

and that Avon actually received it and refused to provide her a refund." This essentially argues that each class member had a separate transaction with Avon. Obviously that is so, but it is well-established that the fact separate transactions are involved does not prevent a finding of the necessary community of interest:

> "The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover subsequent to the rendering of any class judgment which determined in plaintiffs' favor whatever questions were common to the class." (*Vasquez, supra*, 4 Cal.3d at p. 809.)[18]

Taking the plaintiffs' unfair business practices claim as an example, if the class representatives prove Avon engaged in the practices alleged, each class member need not separately establish Avon's liability for engaging in that practice. The class members need only show they are members of the class – representatives who paid for unordered products they returned – and the amount of their damages. "The law unequivocally provides that each class member may establish damages independently without threatening the integrity of the class action." (*Rose v. City of Hayward* (1981)

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[18] Courts have found a sufficient community of interest in many cases involving separate transactions. In *Vasquez*, a group of consumers who bought merchandise under installment contracts were able to maintain a class action seeking rescission of the contracts for the sale of frozen food and freezers, alleging they were induced to execute the contracts by the fraudulent misrepresentations of the seller. The court rejected defendants' assertion that a class action was inappropriate because each plaintiff entered into a separate transaction at a different time and proof of the fact of representation, its falsity, and reliance as to the named plaintiffs would not supply proof of those elements as to the absent members of the class. (*Vasquez, supra*, 4 Cal.3d at p. 811.) The Supreme Court concluded: "The complaint alleges there is an ascertainable class and plaintiffs may be able to demonstrate a community of interest as to the elements of their claim of fraud, aside from the amount of damages suffered by each class member. They should, in any event, be afforded the opportunity to demonstrate that proof of most of the important issues as to the named plaintiffs will supply the proof as to all." (*Id.* at p. 815.)

126 Cal.App.3d 926, 934; see also *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1278 ["the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate"].)

In *Prince, supra*, 118 Cal.App.4th 1320, the court analyzed the differences between cases in which the suitability of a class action can and should be decided at the pleading stage, and those in which that question should not be determined by demurrer. The court pointed out that it is "only in mass tort actions (or other actions equally unsuited to class action treatment) that class suitability can and should be determined at the pleading stage." (*Id.* at p. 1325.) Avon asserts this lawsuit falls in that category, but Avon is mistaken. In the "mass tort" cases and in others found not suitable for class treatment, it is apparent from the complaint that each class member must adjudicate separately numerous issues affecting the defendant's liability, as well as damages. (See, e.g., *Silva v. Block* (1996) 49 Cal.App.4th 345, 352 [proposed class of persons wrongly and unjustifiably attacked by police dogs used by sheriff's department; question of liability to individual class members "would depend upon the particular conduct in which the suspect was engaged and the facts apparent to the handler before the police dog was employed"]; *Clausing v. San Francisco Unified School Dist., supra*, 221 Cal.App.3d at pp. 1233-1234 [proposed class of handicapped students who had allegedly been abused, beaten, and publicly humiliated by school district employees; each individual would have to prove "overwhelmingly numerous" separate issues, including the fact that he or she was a victim of abuse, the identity of the abuser, the capacity in which the abuser acted, and others; even if it could be determined that the District's policies and practices encouraged abuse of students, "this determination could not resolve the lawsuit, which would still require a full trial on each and every alleged incident of abuse with respect to fault, causation, damages, and affirmative defenses"].)[19]

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[19] Other cases finding at the pleading stage that individual issues would predominate include *Newell v. State Farm General Ins. Co.* (2004) 118 Cal.App.4th 1094, 1099, 1103 [proposed class of persons wrongfully denied policy benefits for damage caused to their

By contrast, the pleadings in this case do not show that individual issues affecting Avon's liability will predominate. We discern little difference between this case and numerous others, such as consumer fraud and wage and hour lawsuits, that have been allowed to proceed as class actions beyond the demurrer stage. (See *Vasquez, supra*, 4 Cal.3d 800 [consumer fraud (see fn. 19, *ante*]; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713-714 [class of taxicab users seeking recovery of alleged overcharges by taxi company; allegations establishing a well defined community of interest in questions of law and fact affecting the class included that each class member was known to defendant and exact amount of overcharge could be ascertained from defendant's books and records and from information within defendant's knowledge]; *Prince, supra*, 118 Cal.App.4th at p. 1329 [trial court's finding that individual issues predominated in wage and hour action alleging employer paid its drivers only for the time they were on driving assignments, rather than for the full duration of their shifts, was "simply wrong"; the plaintiff alleged "institutional practices by [the employer] that affected all of the members of the potential class in the same manner"]; see also *City of San Jose v. Superior Court, supra*, 12 Cal.3d at p. 460, fn. omitted [commenting that in *Daar* and

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homes by the Northridge earthquake; even if insurers adopted improper claims practices to adjust earthquake claims, each class member "still could recover for breach of contract and bad faith *only* by proving his or her individual claim was wrongfully denied, in whole or in part, and the insurer's action in doing so was unreasonable"; trial court made its finding after having previously heard six class certification motions, for which full class discovery was afforded, in other Northridge earthquake cases]; *Brown v. Regents of University of California, supra*, 151 Cal.App.3d at pp. 986, 989-990 [proposed class of persons allegedly injured by hospital's failure to provide adequate coronary care; case presented "a veritable quagmire of tough factual questions" that could only be resolved by individual proof, as opposed to a "relatively simple consumer fraud action"]; see also *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460-461 [class certification improper where proposed class of property owners situated in the flight pattern of San Jose airport sought recovery for diminution in market value of their property on theories of nuisance and inverse condemnation; actionable nuisance or inverse condemnation would depend on a myriad of individualized evidentiary factors, with no one factor determinative as to all parcels of property].

Vasquez, the issue of the defendant's liability to the class as a whole could be determined by facts common to all; "[l]iability to the class could be established by evidence defendant engaged in an illegal scheme to cheat or overcharge patrons, coupled with a showing from defendant's own books that defendant was successful in his scheme"].)

In sum, *Daar* and *Vasquez* "represent California's judicial policy of allowing potential class action plaintiffs to have their action measured on its merits . . . . In order to effect this judicial policy, the California Supreme Court has mandated that a candidate complaint for class action consideration, if at all possible, be allowed to survive the pleading stages of litigation." (*Beckstead, supra*, 21 Cal.App.3d at p. 783.) Absent "strong factual showings" in the complaint that negate the possibility of a community of interest, determination of the propriety of a class action should be deferred "until a time when [the court] may better make the decision." (*Id.* at pp. 783-784, fn. omitted.) So it is here. We do not hold that a class action is appropriate in this case. That issue is for the trial court to determine at a later stage of the case. As in *Beckstead*, "we hold only that no argument has been made which would allow the judge to rule at the pleading stage that the suit was without the realm of probability of being properly tried as class litigation."[20] (*Beckstead, supra*, 21 Cal.App.3d at p. 784.)

VI. Remand to a different trial judge is not appropriate.

Finally, Garcia requests this court to remand this case to a different trial judge under section 170.1 of the Code of Civil Procedure, which provides that:

> "(c) At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." (Code Civ. Proc., § 170.1, subd. (c).)

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[20] This conclusion is particularly apt in the posture of this case, in which the causes of action for fraudulent concealment and breach of contract, which this decision restores to the case, were not a part of the court's analysis as to the propriety of the class action allegations.

Garcia contends that the court's erroneous rulings favoring only Avon "reflect an animus to plaintiffs' pleadings that is inconsistent with judicial objectivity" and "have compromised 'the appearance of impartiality,'" citing *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 576 (*Rose*), and *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 247 (*Catchpole*). We disagree.

We reject the notion that erroneous rulings, without more, may justify the removal of a trial judge from further proceedings in a case. While we conclude the court erred in several respects, the leap from erroneous rulings to the appearance of bias is one we decline to make. This is not a case like *Rose* or *Catchpole*. In *Rose*, the court concluded that "the appearance of impartiality may have been compromised" where the trial judge disregarded an appellate order to conduct a hearing on a habeas corpus petition, denied the petition without a statement of reasons, and filed its own return to the appellate court's subsequent order to show cause, thereby assuming the appearance of an adversary rather than a neutral. (*Rose, supra*, 81 Cal.App.4th at pp. 569, 575-576.) In *Catchpole*, the record was rife with evidence of the trial court's gender bias during a sexual harassment case, drawing the appellate court "ineluctably" to the conclusion that the trial judge's conduct did not accord with recognized principles of judicial decorum and that "[t]he average person on the street might therefore justifiably doubt whether the trial in this case was impartial." (*Catchpole, supra*, 36 Cal.App.4th at p. 262.) In this case, the trial court did nothing more than make three erroneous rulings. Garcia can point to nothing in the transcript of the hearings or elsewhere reflecting comments or conduct by the trial judge that suggests any bias in favor of Avon or against the Blakemore plaintiffs.

"The Courts of Appeal have held that the power to disqualify a judge under Code of Civil Procedure section 170.1, subdivision (c), should '"be used sparingly and only where the interests of justice require it."'" (*Livingston v. Marie Callenders, Inc.* (1999) 72 Cal.App.4th 830, 840, citations omitted.) We see no basis for concluding that this is such a case.

DISPOSITION

The writ petition in No. B174825 is granted. Let a peremptory writ of mandate issue directing the trial court to vacate its order of March 16, 2004, sustaining the demurrers of the real party in interest to the petitioners' causes of action for fraudulent concealment and breach of contract and sustaining the demurrers of the real party in interest as to plaintiffs Blakemore, Smith and Lane, and to enter a new and different order overruling the demurrers to the causes of action for fraudulent concealment and breach of contract and overruling the demurrer as to plaintiffs Blakemore, Smith and Lane. Costs are awarded to the petitioners.

The writ petition in No. B175973 also is granted. Let a peremptory writ of mandate issue directing the trial court to vacate its order of June 1, 2004, sustaining the demurrers of the real party in interest to petitioner's cause of action for violation of Business and Professions Code section 17200 and to enter a new and different order overruling the demurrer to the extent consistent with this opinion. Costs are awarded to the petitioner.

The trial court's order of June 1, 2004, granting the respondent's motion to strike the class allegations of the third amended complaint (No. B176780) is reversed, and the court is directed to enter a new and different order denying the motion. The appellant is to recover her costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

BOLAND, J.

We concur:

COOPER, P. J.

RUBIN, J.