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9

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF SAN DIEGO

12
13 THE PEOPLE OF THE STATE OF
CALIFORNIA,

14 Plaintiff,

15 v.
16

17 ALYON TECHNOLOGIES, INC.,
a foreign corporation,
18 STEPHANE TOUBOUL and
DOES 1 through 100, inclusive,
19

20 Defendants.
21

Case No.:

**COMPLAINT FOR INJUNCTION,
CIVIL PENALTIES AND OTHER
EQUITABLE RELIEF**

22 Plaintiff, People of the State of California (“Plaintiff” or “People), by and through Bill Lockyer,
23 Attorney General of the State of California, alleges the following on information and belief:

24 **DEFENDANTS**

25 1. Defendants at all relevant times have transacted business in the City and County
26 of San Diego and elsewhere in the State of California. The violations of law alleged herein have
27 been and are being carried out within the City and County of San Diego and elsewhere in
28 California.

1 2. Defendant ALYON TECHNOLOGIES, INC. (“ALYON”), is a Delaware
2 corporation with its office and principal place of business at One Harmon Plaza, Second Floor,
3 Secausus, New Jersey 07094.

4 3. Defendant STEPHANE TOUBOUL (“TOUBOUL”), is the chief executive
5 officer of ALYON and is sued both in his individual capacity and in his capacity as chief
6 executive officer and an owner of ALYON. At all times material to this complaint, acting alone
7 or in concert with others, he has formulated, directed, controlled, or participated in the acts and
8 practices of Defendant ALYON.

9 4. Whenever reference is made in this complaint to any act or transaction of a
10 Defendant such allegation shall be deemed to mean that said Defendant and its owners, officers,
11 directors, agents, employees, or representatives did or authorized such acts while engaged in the
12 management, direction, or control of the affairs of the Defendant and while acting within the
13 scope and course of their duties.

14 5. Whenever in this complaint reference is made to any act of any Defendant, such
15 allegation shall be deemed to mean that said Defendant was acting (a) as a principal, (b) under
16 express or implied agency, and/or (c) with actual or ostensible authority to perform the acts so
17 alleged.

18 6. Whenever in this complaint reference is made to any act of Defendants, such
19 allegation shall be deemed to mean the act of each Defendant acting individually and jointly with
20 the other Defendants named in that cause of action.

21 7. At all times mentioned herein, each Defendant knew or realized that the other
22 Defendants were engaging in or planned to engage in the violations of law alleged in this
23 Complaint. Knowing or realizing that other Defendants were engaging in such unlawful
24 conduct, each Defendant nevertheless facilitated the commission of those unlawful acts. Each
25 Defendant intended to and did encourage, facilitate, or assist in the commission of the unlawful
26 acts, and thereby aided and abetted the other Defendants in the unlawful conduct.

27 8. The true names and capacities, whether individual, corporate, or otherwise, of
28 Defendants sued herein under the fictitious names of DOES 1 through 100, inclusive, are

1 unknown to plaintiff who therefore sues said Defendants by such fictitious names. Plaintiff will
2 amend this complaint to show the true names of each when the same has been ascertained.

3 **DEFINITIONS**

4 9. For the purposes of this Complaint, the following definitions shall apply:

5 A. "Line subscriber" means an individual or entity who has arranged to
6 obtain local telephone service provided through an assigned telephone number, and to be billed
7 for such service on a monthly (or other periodic) basis.

8 B. "Videotext services" means visual (and in some instances audio)
9 information and entertainment services offered over the Internet through individual World Wide
10 Web sites ("websites").

11 C. "Service vendor" or "vendor" means an entity that offers videotext or
12 other services that are billed to line subscribers either on the telephone bills received by line
13 subscribers or on other bills sent directly to the line subscribers.

14 D. "ALYON Defendants" means Defendant ALYON and Defendant
15 TOUBOUL.

16 **DEFENDANTS' BUSINESS PRACTICES**

17 10. ALYON, and TOUBOUL alone or in concert with some of the Defendants herein
18 sued as DOES 1-100, provide or have provided a billing system to service vendors (hereinafter
19 referred to as "the ALYON billing system") that permits the vendors to charge consumers whose
20 telephone lines were allegedly used to access the vendors' videotext services on a per-minute
21 basis. The ALYON billing system is touted as an alternative method of payment for consumers
22 who do not wish to place such charges on their credit cards.

23 11. To use the ALYON billing system, consumers must download on their computer
24 a modem-dialing software program ("dialing program") offered through the service vendors'
25 websites. First, consumers allegedly select the option to access vendor's videotext services
26 without a credit card. Then, consumers allegedly select "modem/ISDN" as the type of Internet
27 connection method used by their computer. After selecting this connection method, a new web
28 page loads, allegedly containing a "disclosure statement" of the "terms of services" that requires

1 consumers to click "I accept" before they are able to access vendors' videotext services by
2 clicking "I Accept." Some consumers first get to ALYON's network by responding to pop-up
3 boxes which appear on their computer screen when they or their children are on other web sites
4 on the Internet. Once there, they are prompted to download certain dialer programs onto the
5 computer they are using. Other consumers report that when they open unsolicited electronic
6 mail messages, they receive prompts to download certain dialer programs onto the computer they
7 are using.

8 12. The material terms of service, including the cost and the method by which
9 consumers will be billed, are often not clearly and conspicuously disclosed. In numerous
10 instances, the disclosure statement is presented in the form of a text box that contains only a few
11 lines of text at any one time; sometimes the scroll down function of the box is disabled so that
12 even consumers who want to cannot read the purported disclosure. To print out the full text of
13 the disclosure statement requires up to four or more pages. Consumers can become part of
14 Defendants' billing system without actually reading or scrolling through the text, because
15 Defendants' system can be entered merely by clicking the "I Accept" button.

16 13. Defendants claim that after consumers click "I Accept," they must click
17 "Connect." If the person using the computer does this, the dialing program disconnects the
18 consumer's modem from the consumer's normal Internet Service Provider ("ISP") and
19 reconnects the consumer's modem to the Internet through a telephone connection to ALYON's
20 network via a telephone connection to a "201" area code telephone number which is in New
21 Jersey. The consumer may then access the service vendor's videotext services. The consumer is
22 charged \$4.99 for each minute he or she is connected to the Internet via ALYON's network.

23 14. The ALYON Internet reconnect dialing program disconnects the consumer line
24 subscriber's modem from the line subscriber's normal ISP when the consumer tries to connect to
25 the Internet and reconnects to the Internet through ALYON's network via a telephone
26 connection to a "201" area code telephone number which is in New Jersey. In numerous
27 instances, the ALYON Internet reconnect dialing program is downloaded to a consumer's
28 computer without the knowledge or consent of the consumer line subscriber whose telephone

1 line is connected to the computer. Some consumers who claim that they did not click “I accept”
2 still report having the ALYON Internet reconnect program downloaded onto their computers.
3 Some of these programs and/or files appear to be self-executing, meaning that the program can
4 cause a computer to reconnect to the 201 area code telephone number without the consumer
5 using the computer taking any affirmative steps. The Defendants charge the consumer line
6 subscriber, or the person the Defendants believe is the line subscriber, \$4.99 for each minute the
7 line subscriber’s computer is connected to the Internet via ALYON’s network.

8 15. The programs and/or files which the Defendants place or cause to be placed on
9 consumers’ computers do not work as the Defendants claim. Instead, consumers report that
10 these programs and/or files function or have in some instances functioned in the following ways:

11 A. Upon visiting a website for which the Defendants provide their billing
12 services, consumers’ computers are bombarded with numerous pop-up boxes, and while
13 the consumers were trying unsuccessfully to close all of the pop-up boxes, the dialer
14 program was downloaded onto their computers without their authorization;

15 B. Consumers’ computers have been connected to the 201 area code
16 telephone numbers, even if consumers have not first clicked on both “I Agree” and
17 “Connect.”

18 16. When a consumer uses the dialing program to access a vendor’s videotext
19 services, a system known as Automatic Number Identification (“ANI”) is used to capture the
20 telephone number from which the call is being placed. Using ANI information, Defendants
21 identify the consumer who they believe is the line subscriber responsible for the captured
22 telephone number, and send that consumer a bill. Defendants make no attempt to determine
23 whether the person they are billing downloaded the dialing program, or viewed the vendor’s
24 videotext services, or authorized anyone else to do so from the consumer’s computer.

25 17. Since a date unknown to plaintiff but at least since June 2002, the ALYON
26 Defendants, themselves or using the services of some of the Doe Defendants or other agents,
27 have mailed bills directly to the consumer line subscribers whose telephone lines purportedly
28 were used to access vendors’ videotext services through the ALYON billing system. The

1 Defendants initially send bills that list ALYON's name at the top to consumers, and include a
2 Post Office Box number to which consumers are instructed to return their payments. These bills
3 also list a toll-free number for consumers to call if they have any questions about the bill, and
4 direct consumers to access ALYON's website at www.Alyon.net for customer service.

5 18. The bills include a statement that charges are for "Pay Per Use Internet Access to
6 Proprietary Content as an Entertainment Fee." The second page of each bill lists any calls
7 purportedly made using the ALYON Internet reconnect dialing program. Each call is billed at a
8 rate of \$4.99 per minute with an offsetting credit of \$0.10 per minute for "LD charges." The
9 bills are sent to consumers with a "due date" less than two weeks from the date of the invoice.
10 In numerous instances, consumers receive their first bill three or four days before payment is
11 due.

12 19. The bills also provide a notice of customers' billing rights, which states that the
13 "rights and obligations of the customer and the billing entity are provided under the Telephone
14 Disclosure and Dispute Resolution Act." This notice also states that consumers must provide
15 notification of any billing error in writing to ALYON's P.O. Box in Georgia within 30 days after
16 the mailing date of the first bill. In numerous instances, after receiving written notices of billing
17 errors from consumers, Defendants do not forgive the charges, nor do they conduct a reasonable
18 investigation into the validity of the charges and notify the customers of why they are sustaining
19 the charges. Instead, Defendants simply subject complainants to additional billing and collection
20 efforts, and in some instances directly or indirectly threaten to adversely affect a complainant's
21 credit history.

22 20. In the vast majority of instances, consumers who do not pay after receiving their
23 first bill receive a second bill. Defendants mail the second bill less than thirty days from the
24 invoice date of the first bill. The second bill states that payment is necessary to prevent
25 collection activity.

26 21. Many consumers who have received the Defendants' bills do not know what they
27 are being billed for. In many instances, neither the consumer nor anyone in the consumer's
28 household has ever accessed ALYON's vendors' videotext services on the Internet, used their

1 computer modem to make such a call, or has ever authorized any person to do so. In other
2 instances, a line subscriber has discovered that a minor in the line subscriber's household, or
3 another who does not have the line subscriber's authorization, has accessed videotext services
4 using the ALYON billing system.

5 22. In numerous instances, consumers who have called ALYON's toll-free number to
6 inquire about the charges that appear on the bills find it virtually impossible to reach an ALYON
7 representative. Consumers report calling numerous times throughout a number of days, without
8 ever receiving an answer. In numerous instances, consumers who have e-mailed Defendant
9 ALYON via its website have received only a form response which indicates that the consumer
10 must pay the bill. In the vast majority of instances, ALYON representatives represent that
11 consumers, as line subscribers, are responsible for the charges made over their telephone lines,
12 regardless of the explanation.

13 23. In some instances, ALYON representatives offer to reduce the amount owed
14 when a minor has accessed a vendor's website without the line subscriber's permission, but only
15 if a line subscriber provides an affidavit and copy of the minor's birth certificate. In some other
16 instances, ALYON, through its representatives and its website, represents to line subscribers that
17 they must provide an affidavit and proof from their telephone exchange carrier that no call was
18 made to ALYON's servers before ALYON will remove the charges.

19 24. Consumers have indicated they have had difficulty removing Defendant
20 ALYON's dialer program from their computers once it has been downloaded. In numerous
21 instances, consumers who have followed Defendant ALYON's dialer program removal
22 instructions on its website, complain that the dialer program comes back even when they follow
23 the instructions. Since the program is downloaded into the computer's registry, it often becomes
24 part of the computer's booting process and thus can come back when the computer is rebooted
25 even if consumers delete the shortcut icon from the desktop.

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2 **FIRST CAUSE OF ACTION**
3 **AGAINST ALL DEFENDANTS FOR**
4 **UNTRUE OR MISLEADING STATEMENTS**
5 (Violations of Business and Professions Code section 17500)

6 25. Paragraphs 1 through 24 of this complaint are incorporated herein as though set
7 forth in full.

8 26. Beginning at a date unknown to plaintiff and continuing to the present, ALYON,
9 TOUBOUL and DOES 1-100, with the intent to induce California consumers to use the ALYON
10 billing system that ALYON provides or has provided, have made or caused to be made, and
11 continue to make, in violation of Business and Professions Code section 17500, numerous untrue
12 or misleading statements before the public in the City and County of San Diego and elsewhere in
13 the State of California. Such statements include, but are not limited to, the following:

14 A. Defendants bill consumers for videotext services that they represent were
15 provided at the consumers request through the consumers' telephone lines using
16 Defendants' dialing program. Such representations are untrue or misleading in that in
17 numerous instances, the videotext services were not provided at the consumers request to
18 the consumer being billed through the consumers' telephone lines.

19 B. Defendants represent that because a line subscriber's telephone was used
20 to access videotext services through Defendants' dialing program, the line subscriber is
21 legally obligated to pay Defendants for those videotext services. Such representations
22 are untrue or misleading in that they do not adequately disclose, if they disclose at all,
23 that there are numerous instances in which line subscribers are not legally obligated to
24 pay Defendants for videotext services accessed via Defendants' dialing program using
25 the line subscribers' telephone lines.

26 C. Defendants represent to consumers that they owe money to the Defendants
27 when, in fact, such representations are untrue or misleading in that in numerous
28 instances:

i. the telephone number from which the connection to videotext
services was made was not assigned to the billed consumers at the time the call

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was made;

ii. the person who was operating the computer at the time the connection to the videotext services was established from the billed telephone number does not have the legal ability to establish a contract between the line subscribers for the billed telephone number and the Defendants;

iii. the consumers did not request and/or did not agree to purchase access to the videotext services which is the basis for the Defendants' claim that the consumers owe money to the Defendants.

27. Defendants knew, or should have known, that the statements or omissions set forth in paragraph 26, were untrue or misleading at the time such statements were made.

**SECOND CAUSE OF ACTION
AGAINST ALL DEFENDANTS FOR
UNLAWFUL, UNFAIR OR DECEPTIVE BUSINESS PRACTICES
(Violations of California Business and Professions Code 17200)**

28. Paragraphs 1 through 27 of this complaint are incorporated herein as though set forth in full.

29. Beginning at an exact date unknown to plaintiff and continuing to the present, ALYON, TOUBOUL and DOES 1 through 100, have engaged in unfair competition as defined in Business and Professions Code section 17200, in the City and County of San Diego and elsewhere in the State of California. Such unfair competition includes, but is not limited to, the following acts or practices:

A. Defendants have violated Business and Professions Code section 17500 as alleged in paragraphs 26 and 27 of the above First Cause of Action.

B. In numerous instances, based on the use of a line subscriber's telephone line to call a domestic telephone number in order to access paid videotext services using Defendants' dialing program, Defendants, directly or through one or more of the DOE Defendants, bill, attempt to collect, and collect charges from line subscribers who did not themselves access videotext services, or authorize anyone else to do so. For example,

1 Defendants directly or through one or more of the DOE Defendants, bill, attempt to
2 collect, and collect charges from consumers:

- 3 i. who do not own a computer;
- 4 ii. who were not assigned the billed telephone number at the time the
5 Defendants claim the connection to the videotext services were made;
- 6 iii. who were not at home or who were not using their computers at
7 the time the Defendants claim the connection to the videotext services were made;
8 and
- 9 iv. whose minor children accessed the videotext services.

10 C. A line subscriber cannot reasonably avoid Defendants' billing and
11 collection efforts for videotext services accessed through the line subscriber's telephone
12 line because a line subscriber cannot reasonably anticipate or prevent charges incurred
13 through use of his or her telephone line to domestic telephone numbers (such as a "201"
14 area code telephone number) using Defendants' dialing program.

15 D. Defendants' engage in the practice of billing, attempting to collect, and
16 collecting charges from line subscribers who neither themselves access videotext services
17 provided over domestic telephone lines using the Defendants' dialing program, nor who
18 authorize anyone else to do so. In numerous instances, the ALYON Defendants' dialing
19 programs are downloaded onto line subscribers' computers without their authorization.
20 The dialing programs then cause the line subscribers' telephone lines to dial a 201 area
21 code telephone number in New Jersey to access videotext services for which Defendants
22 cause consumers to be billed to and for which Defendants collect, attempt to collect or
23 arrange for the collection of payment from the line subscriber. Because line subscribers
24 can neither reasonably block Defendants' dialing programs from their computers nor
25 block the use of their telephone lines to make long distance calls to telephone numbers
26 which are not traditional pay-per-call prefixed numbers (i.e., 900, 976, etc.), consumers
27 cannot reasonably avoid the use of their telephone line to sign onto Defendants' dialing
28 programs to access videotext services. Therefore, line subscribers cannot reasonably

1 avoid the billing and collection efforts for supposed videotext services accessed through
2 Defendants' dialing programs and the line subscribers' telephone lines.

3 E. Defendants' commit the practice of downloading dialing programs to line
4 subscribers' computers that access videotext services through long distance telephone
5 calls without the line subscribers' authorization.

6 F. Defendants have violated the federal "Pay-Per-Call" Rule, 16 C.F.R.
7 Section 308.7, which regulates billing and collection practices for pay-per-call services
8 including telephone-billed purchases, by failing to comply with the procedures required
9 therein, as follows:

10 i. Section 308.7(a)(6) of the Pay-Per-Call Rule defines a telephone
11 billed purchase as "any purchase that is completed solely as a consequence of the
12 completion of the call or a subsequent dialing, touch tone entry, or comparable
13 action of the caller." In numerous instances, Defendants bill line subscribers for
14 videotext services purchased as the result of the completion of a call from the line
15 subscriber's telephone lines. Therefore, Defendants' bills contain charges for
16 telephone-billed purchases.

17 Under Section 308.7(a)(1) of the Pay-Per-Call Rule a "billing entity" is
18 defined as "any person who transmits a billing statement to a customer for a
19 telephone-billed purchase, or any person who assumes responsibility for receiving
20 and responding to billing error complaints." As described above, ALYON,
21 directly or through one or more of the DOE Defendants, transmits billing
22 statements to customers for telephone-billed purchases and assumes responsibility
23 for receiving and responding to billing error complaints, and therefore is a billing
24 entity.

25 Section 308.7(d) of the Pay-Per-Call Rule provides that once a customer
26 has submitted notice of billing error, the billing entity must, either forgive the
27 charge or send a written acknowledgment to the customer including a statement
28 that any disputed amount need not be paid pending investigation of the billing

1 error, no later than 40 days after receiving the notice; conduct a reasonable
2 investigation; and, where a billing error has occurred, correct the customer's
3 account for any disputed amount and any related charges, and notify the customer
4 setting forth the reasons why it has determined that no billing error occurred.
5 Defendants have violated Section 308.7(d) of the Pay-Per-Call Rule by engaging
6 in the following acts or practices including, but not limited to:

7 a. After receiving notices of billing errors from customers,
8 Defendants have failed and continue to fail to either correct billing errors
9 and credit the accounts or transmit explanations of why Defendants have
10 determined, after conducting a reasonable investigation, that no billing
11 errors have occurred;

12 b. Defendants have attempted and continue to attempt to
13 collect disputed amounts from customers after such customers have
14 submitted notices of billing errors to Defendants but before the
15 Defendants have complied with Section 308.7(d) of the Pay-Per-Call
16 Rule;

17 ii. Section 308.7(g) of the Pay-Per-Call Rule provides that once a
18 customer has submitted notice of a billing error to a billing entity, the customer
19 need not pay, and the billing entity may not try to collect, any portion of any
20 required payment that the customer reasonably believes is related to the disputed
21 amount until the billing entity receiving the notice has conducted a reasonable
22 investigation and either corrected the charge or determined that the charge is not
23 in error, or set forth the reasons why it has determined that no billing error
24 occurred. Defendants have violated Section 308.7(g) of the Pay-Per-Call Rule in
25 that even after consumers submit notice of a billing error to Defendants, they
26 have tried to collect payments from the consumer that the consumer reasonably
27 believes are related to the disputed amount, without first notifying the consumer
28 that Defendants have conducted a reasonable investigation and either corrected

1 the charge or determined that the charge is not in error, or set forth the reasons
2 why they have determined that no billing error occurred.

3 iii. Section 308.7(i) of the Pay-Per-Call Rule provides that once a
4 billing entity has received notice of a billing error, the billing entity may not
5 threaten directly or indirectly to report adverse information to any person because
6 of the customer's withholding payment of the disputed amount or related charges,
7 until the billing entity has met the requirements of 308.7(d) and allowed the
8 customer as many days thereafter to make payments as prescribed by
9 308.7(d)(3)(ii). Defendants have violated Section 308.7(i) of the Pay-Per-Call
10 Rule in that Defendants have threatened and continue to threaten directly or
11 indirectly to report adverse information because of customers' withholding of
12 payment of disputed amounts, after such customers have submitted notices of
13 billing errors to Defendants but before the Defendants have complied with
14 Section 308.7(d) of the Pay-Per-Call Rule;

15 iv. Section 308.7(n) of the Pay-Per-Call Rule requires billing entities
16 to notify their customers of their dispute resolution rights. Defendants have
17 violated Section 308.7(n) of the Pay-Per-Call Rule in that Defendants have failed
18 and continue to fail to provide customers with accurate notices of their dispute
19 resolution rights under the Pay-Per-Call Rule as required.

20 G. Defendants provide an "information-access service" as defined by
21 Business and Professions Code section 17539.5 subdivision (a)(6) in that they permit
22 consumers to access a telephone number, for which the consumer is assessed, by virtue of
23 placing or completing the call, a charge that is greater than, or in addition to, the charge
24 for the transmission of the call. Defendants are an "information provider" as defined by
25 Business and Professions Code section 17539.5 subdivision (a)(5) in that they advertise
26 or sell an information-access service on whose behalf charges are billed. Business and
27 Professions Code section 17539.5 subdivision (c) prohibits any person to solicit or sell an
28 information access service unless the person clearly and conspicuously discloses in all

1 solicitations an accurate description of the information-access service; the name, address,
2 and non-900 telephone number of the information provider; the cost of the call if the call
3 is based on a usage sensitive basis, the cost per minute or other unit of time. Defendants
4 have violated Business and Professions Code section 17539.5 subdivision (c) by placing
5 or causing to be placed on California consumers' computers, the dialing program offered
6 through the service vendors' websites through which the consumer will be billed by the
7 ALYON billing system, without clearly and conspicuously disclosing the material terms
8 of service, in that:

9 i. The disclosure statement if presented at all, is presented, in the
10 form of a text box that contains only a few lines of text at any one time. In some
11 instances, the disclosure statement, including, but not limited to, the cost of the
12 videotext services to which Defendants provide access and billing services, are
13 not actually available to be viewed in its entirety, in that the scroll capability
14 within the text box has been disabled;

15 ii. To print out the full text requires four or more pages;

16 iii. To accept the terms of service, consumers need not scroll through
17 the text, they only need to click "I Accept."

18 iv. Defendants do not clearly and conspicuously provide an accurate
19 description of how the ALYON Internet reconnect dialing program works.

20 H. Defendants send bills to consumers without providing sufficient time for
21 the consumers to pay the bill in that in numerous instances consumers receive their first
22 bill three or four days before payment is due.

23 I. Defendants do not provide adequate means for consumers to inquire about
24 the charges that appear on the bills in that, in numerous instances:

25 i. consumers report being unable to reach a representative by calling
26 ALYON's toll-free number;

27 ii. consumers who have e-mailed Defendant ALYON with inquiries
28 receive only a form response; and

1 be assessed a civil penalty of \$2,500.00 for each violation of Business and Professions Code
2 section 17500, as proven at trial, but in an amount of not less than \$1,000,000.00.

3 5. That plaintiff have such other and further relief as the nature of the case may
4 require and as the court deems appropriate and necessary.

5 6. That plaintiff recover its costs.

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7 Dated: May 15, 2003

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Respectfully submitted,

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BILL LOCKYER
Attorney General of the State of California

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