No. C051841

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

TIMOTHY McADAMS,

Plaintiff and Appellant,

vs.

MONIER, INC.,

Defendant and Respondent.

Appeal from an Order Denying Class Certification
Superior Court for the County of Placer, Case No. SCV16410
Honorable Larry D. Gaddis, Judge

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF APPELLANT

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APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to rule 8.200(c) of the California Rules of Court, Consumer Attorneys of California ("CAOC") respectfully requests leave to file the accompanying brief as amicus curiae in this proceeding in support of appellant Timothy McAdams.

CAOC, founded in 1962, is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. This has often occurred through class and other representative actions under this state's Unfair Competition Law (Bus. & Prof. Code §§17200 *et seq.*) (UCL).[1] Most recently, CAOC participated as amicus in *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 ("*Mervyn's*") (2006) and *In re Tobacco II Cases*, 46 Cal. 4th 298 ("*Tobacco II*") (2009), the two leading cases in which the Supreme Court construed Proposition 64, which amended the UCL. CAOC has also participated as an amicus in cases pending at the intermediate appellate level.

CAOC has a substantive and abiding interest in ensuring that the amendments made to the UCL by means of Proposition 64 are correctly interpreted according to their plain terms, and in a manner consistent both with the Supreme Court's precedents and with the strong public

[1] Statutory references are to the Business & Professions Code unless otherwise specified.

policies underlying the UCL, which that Court has consistently affirmed.

In this case, the Supreme Court directed this Court to vacate its original opinion, *McAdams v. Monier, Inc.*, 151 Cal. App. 4th 667, 60 Cal. Rptr. 3d 111 (2007) ("*McAdams I*") (review granted), and reconsider the cause in light of *Tobacco II*. The parties have filed supplemental briefs pursuant to Rule of Court 8.200(b) to address the impact of *Tobacco II*. This Court has vacated *McAdams I* (*see* Order filed 09/04/09) and is expected to issue a new opinion. CAOC has a strong interest in participating as an amicus in cases, like this one, raising critical questions of interpretation of Proposition 64 and *Tobacco II*.

Additionally, after the parties filed their supplemental briefs, the Court of Appeal handed down a new opinion, *Morgan v. AT&T Wireless Services, Inc.*, ___ Cal. App. 4th ___, 2009 WL 3019780 (Sept. 23, 2009), which construes *Tobacco II* and which the parties' briefs do not address. CAOC's amicus brief addresses this decision, among other points.

No party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation or submission. *See* Cal. Rules of Court, rule 8.200(c)(3).

For these reasons, CAOC respectfully requests permission to file the accompanying brief as amicus curiae in this matter.

Dated: October 1, 2009

Respectfully submitted,

SCHUBERT JONCKHEER KOLBE
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By_____
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AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF APPELLANT

I. INTRODUCTION

Tobacco II is wholly consistent with, and fully supports, this Court's reversal of the trial court's order denying class certification in this case. Indeed, *Tobacco II* makes the trial court's error in denying class certification of the UCL claim even more plain.[2]

While the outcome of this Court's original opinion, *McAdams I*, remains correct post-*Tobacco II*, several modifications are appropriate to ensure that all language in the opinion comports with *Tobacco II*.

II. THIS COURT'S DISCUSSION OF CLASS CERTIFICATION OF THE UCL CLAIM EASILY MAY BE MODIFIED TO COMPORT WITH *TOBACCO II*

A. The Opinion's Statement that Class Members Must Individually Prove Standing Should be Omitted in Light of *Tobacco II*

First, *McAdams I* should be modified to reflect *Tobacco II*'s holding that only the named class representative must meet the new standing requirement imposed by Prop. 64. *See Tobacco II*, 46 Cal. 4th at 306 ("We conclude that standing requirements are applicable only to the class representatives, and not all absent class members.").

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[2] *Tobacco II* did not address the Consumers Legal Remedies Act (Civ. Code §§1750 *et seq.*) ("CLRA"), and CAOC agrees with both parties that this Court's discussion of the CLRA claim, and its reversal of the order denying class certification of that claim, is unaffected by *Tobacco II* and need not be modified in any respect. *See McAdams I*, 60 Cal. Rptr. 3d at 114-19 (part 2 of section labeled "DISCUSSION"); Respondent's Supplemental Responding Brief, filed 09/17/09, at 4-5; Appellant's Supplemental Opening Brief, filed 09/09/09, at 2.

As the Supreme Court explained, this holding was text-based, and derives directly from the UCL's wording as amended by Proposition 64:

> [T]he references in [Business & Professions Code] section 17203 to one who wishes to pursue UCL claims on behalf of others are in the singular; that is, the "person" and the "claimant" who pursues such claims must meet the standing requirements of section 17204 and comply with Code of Civil Procedure section 382. The conclusion that must be drawn from these words is that only this individual—the representative plaintiff—is required to meet the standing requirements.

Tobacco II, 46 Cal. 4th at 315-16.

Accordingly, the following language should be omitted from *McAdams I* to bring it into conformity with *Tobacco II*:

> Furthermore, it is a basic principle of standing that " '[t]he definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. *Each class member must have standing to bring the suit in his own right*.'" (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal. App. 3d 62, 73, 231 Cal. Rptr. 638, quoting *McElhaney v. Eli Lilly & Co.* (D. S.D.1982) 93 F.R.D. 875, 878; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal. App. 4th 997, 1018, 36 Cal. Rptr. 3d 592.)

McAdams I, 60 Cal. Rptr. 3d at 121 (emphasis added). The Supreme Court expressly disagreed with that reading of *Collins*, noting that "*Collins* does not address the question before us of whether absent class members in a UCL action are required to establish standing, and is therefore inapposite." *Tobacco II*, 46 Cal. 4th at 323.[3] The language is inconsistent with *Tobacco II* and should be deleted from the opinion,

[3] The Supreme Court distinguished *McElhaney* on a similar basis. *See id.* at 323 n.15.

along with any other suggestion that unnamed class members must meet the standing requirements in a UCL case.

B. The Opinion's Discussion of an "Inference of Common Reliance" for the UCL Claim Should be Omitted in Light of *Tobacco II*

Second, the opinion's discussion of an "inference of common reliance" for the UCL claim is no longer needed after *Tobacco II*. *McAdams I*, 60 Cal. Rptr. 3d at 121-23.[4] That is because, as *Tobacco II* makes clear, "reliance" is not an element of a UCL "fraudulent" prong claim that will have to be proven for liability purposes at trial.

McAdams I's discussion of an "inference of common reliance" is correct and would be appropriately included if addressing a cause of action, such as common-law fraud, of which reliance was an element. However, under *Tobacco II*, reliance is merely something that the class representative must establish in order to have *standing* to bring a UCL "fraudulent" prong claim. It is *not* something the unnamed class members must prove—either at the outset for standing purposes, or at trial for liability purposes. Nor, for that matter, must the class representative prove reliance at trial for liability purposes. In other words, reliance is irrelevant to whether common questions predominate on liability in a UCL "fraudulent" prong case like this one.

As the Supreme Court explained, "[Proposition 64] was not intended to have *any effect* on absent class members." *Tobacco II*, 46 Cal. 4th at 319 (emphasis added). Hence, now, as before Proposition 64, all that must be proven at trial to establish a violation of the UCL's "fraudulent" prong is that "members of the public are likely to be deceived" by the defendant's conduct. *Id.* at 312 (citing *Kasky v. Nike*,

[4] This discussion begins at the bottom of page 121 with "As we shall explain …" and concludes with footnote 7 on page 123.

Inc. (2002) 27 Cal. 4th 939, 951). *Accord*: *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992); *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 211 (1983); *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442, 451 (1976). Recovery is "available without individualized proof of deception, reliance, and injury." *Tobacco II*, 46 Cal. 4th at 320 (citing *Bank of the West*, 2 Cal. 4th at 1267; *Committee on Children's Television*, 35 Cal. 3d at 211).

The Supreme Court was very careful preserve the "likely to deceive" liability standard for "fraudulent" prong cases, observing that imposing the new standing requirement on unnamed class members would "implicitly overrule [this] fundamental holding in our previous decisions, including *Fletcher*, *Bank of the West*, and *Committee on Children's Television*." *Id.*

The Court was also very careful to qualify its discussion of reliance as applicable *only* to the named class representatives and *only* for standing purposes—not to the unnamed class members and not for purposes of liability at trial. *See, e.g.*, *id.* at 306 ("for purposes of establishing *standing* under the UCL … *a class representative* proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance"); 328 ("we conclude that a plaintiff must plead and prove actual reliance to satisfy the *standing* requirement of section 17204 …"); 329 ("we … remand for further proceedings to determine whether *these* [*named*] *plaintiffs* can establish *standing* …") (emphasis added).

Finally, the Court was careful to preserve the pre-Proposition 64 distinction between a UCL "fraudulent" prong claim and common-law fraud:

> The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. "A [common law] fraudulent deception must be actually false, known to be false by the perpetrator *and reasonably relied upon* by a victim who incurs damages. *None of these elements are required to state a claim* for … relief" *under the UCL*.

Id. at 312 (quoting *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332 (1998)) (emphasis added).

In a very recent case, a sister Court of Appeal confirmed *Tobacco*'s holding that Proposition 64 did not alter the UCL's substantive liability standards, and that *pre*-Proposition 64 precedents (including those establishing the "likely to deceive" standard for "fraudulent" prong claims) continue to govern:

> Thus, *pre-Proposition 64 caselaw* that describes the kinds of conduct outlawed under the UCL *is applicable to post-Proposition 64 cases* such as the present case. The *only* difference is that, after Proposition 64, plaintiffs (but not absent class members in a class action) must establish that they meet the Proposition 64 standing requirements.
>
> …. As noted above, a fraudulent business practice is one that is *likely to deceive* consumers.

Morgan v. AT&T Wireless Services, Inc., ___ Cal. 4th ___, 2009 WL 3019780, *11-*12 (Sept. 23, 2009) (citing *Tobacco II*, 46 Cal. 4th at 312, 320). The Court of Appeal then discussed the facts necessary to establish a UCL "fraudulent" prong *violation* in a section entirely separate from its discussion of the facts necessary to prove the class representative's *standing*. *See id.* at *11-*14 (Part B.1 (discussing liability); Part B.2 (discussing standing)).

Accordingly, in place of the discussion of "inference of common reliance," the *McAdams I* opinion, to comport with *Tobacco II*, need only repeat what it already said respecting the CLRA claim:

> The class action is based on a single, specific, alleged material misrepresentation: Monier knew but failed to disclose that its color roof tiles would erode to bare concrete long before the lifespan of the tiles was up. ….
>
> [This is] a single, material misrepresentation to class members that consisted of a failure to disclose a particular fact regarding its roof tiles. Plaintiff has tendered evidence that Monier knew but failed to disclose to class members that the color composition of its roof tiles would erode to bare concrete well before the end of the tiles' represented 50-year life; and that this failure to disclose would have been material to any reasonable person who purchased tiles in light of the 50-year/lifetime representation, or the permanent color representation, or the maintenance-free representation.

McAdams I, 60 Cal. Rptr. 3d at 115, 117.

In the CLRA discussion, *McAdams I* went on to hold that "the purchases common to each class member … would be sufficient to permit an inference of common reliance among the class on the material misrepresentation comprising the alleged failure to disclose." *Id*. at 117. That discussion is unnecessary for the UCL claim, and therefore need not be included, because reliance is not an element of a UCL claim and the class members will not have to prove it. *Tobacco II*, 46 Cal. 4th at 312, 319, *passim*.

In another recent case, the court construed *Tobacco II* and granted class certification of a UCL "fraudulent" prong claim without finding common reliance—inferred or otherwise: "Plaintiffs may prove with generalized evidence that Defendants' conduct was 'likely to deceive' members of the public. The individual circumstances of each class member's loan need not be examined because the class members are not required to prove reliance and damage. Common issues will thus predominate on the UCL claim." *Plascencia v. Lending 1st Mortgage*, ___ F.R.D. ___, 2009 WL 2569732, *10 (N.D. Cal. Aug. 21,

2009). Notably, the court certified the common-law fraud claim based on inferred classwide reliance, but found it unnecessary to discuss inferred reliance in certifying the UCL claim. *See id.* at *10-*11.[5] The same reasoning applies here. *See also Morgan*, 2009 WL 3019780 at *12 (noting "the distinction between common law fraud, which requires allegations of actual falsity and reasonable reliance pleaded with specificity, and the fraudulent prong of the UCL, which does not" (citing *Tobacco II*, 46 Cal. 4th at 312, 320; *Committee on Children's Television*, 35 Cal. 3d at 212 n.11)).

Under *Tobacco II*, all that the class members (and the class representatives) will have to prove for liability purposes at trial is conduct "likely to deceive" consumers. *Tobacco II*, 46 Cal. 4th at 312; *Morgan*, 2009 WL 3019780 at *11, *12. As the *McAdams I* opinion already holds, common questions predominate on that question:

> Contrary to the trial court's view, the alleged misrepresentation underlying this class action comprises a single, specific misrepresentation of a particular fact, and the claims of all class members " 'stem from this same source.'"

McAdams I, 60 Cal. Rptr. 3d at 121 (quoting *Chamberlan v. Ford Motor Co.*, 223 F.R.D. 524, 526 (N.D. Cal. 2004)).

C. The Opinion's Statement that Class Members "Will Have to Show the Representation Made to Him or Her" Should be Omitted to Comport with *Tobacco II*

The final change needed to bring *McAdams I* into full conformity with *Tobacco II* is to omit any suggestion that, to recover restitution

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[5] In certifying the UCL claim, the court discussed "a presumption of reliance" *only* "for the purposes of Proposition 64 *standing*." *Plascencia*, 2009 WL 2569732 at *11 (emphasis added).

under the UCL, class members must prove more now than before Proposition 64. Specifically, *McAdams I* states:

> *Each class member who seeks individual restitution*, however, *will have to show the representation made to him or her* (e.g., the 50-year/lifetime, permanent color, or maintenance-free representation, or the like) *that accompanied this failure to disclose.* (See *Mervyn's*, *supra*, 39 Cal.4th at p. 232, 46 Cal.Rptr.3d 57, 138 P.3d 207 [under the UCL, "a private person may recover restitution only of [that money or property] that the defendant has unfairly obtained from such person or in which such person has an ownership interest"].)

McAdams I, 60 Cal. Rptr. 3d at 124 (emphasis added). This language is inconsistent with *Tobacco II*, and the *McAdams I* opinion stands without it.

As *Tobacco II* holds, nothing in the UCL's text suggests that Proposition 64 changed the rules governing entitlement to restitution. On the contrary, those rules were unchanged and "patently less stringent" than the new rules governing standing:

> [T]he language of section 17203 with respect to those entitled to restitution—"to restore to any person in interest any money or property, real or personal, which *may have been acquired*" (italics added) by means of the unfair practice—is **patently less stringent** than the standing requirement for the class representative—"any person who has suffered injury in fact and has lost money or property *as a result of* the unfair competition." (§ 17204, italics added.)

Tobacco II, 46 Cal. 4th at 320 (italics original; bold added). As a result, and out of "'concern that wrongdoers not retain the benefits of their misconduct,'" "courts repeatedly and consistently … hold that *relief* under the UCL is available without individualized proof of deception, reliance and *injury*." *Id.* (quoting *Fletcher*, 23 Cal. 3d at 452) (emphasis added).

To reiterate, "relief" is available *without* proof of "injury." *Id.*

Accordingly, *Tobacco II* held that to require absent class members to show that "they have 'lost money or property as a result of'" the defendant's conduct "would conflict with the language in section 17203 authorizing broader relief—the 'may have been acquired' language …." *Tobacco II*, 46 Cal. 4th at 320.

Section 17203 ("may have been acquired") authorizes "broader" restitutionary relief than section 17204's language ("as a result of") might suggest. As *Tobacco II* points out, if the electorate had intended to change the remedies, it would have amended section 17203 as well as section 17204. *Id.* at 320 & n.14.

"[T]he UCL's focus [is] on the defendant's conduct, rather than the plaintiff's damages," *id.* at 312, and its purpose is to restore the status quo ante, *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 121 (2000) (citing *People v. Superior Court (Jayhill)*, 9 Cal. 3d 283, 286 (1973)). The UCL does not require plaintiffs to prove what they lost; rather, it requires plaintiffs to prove what the defendant "acquired," which must then be "restored" to the persons from whom it came. Bus. & Prof. Code §17203; *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144-45 (2003).

In *Tobacco II*, the Supreme Court confirmed all this. It reaffirmed that, notwithstanding Proposition 64, "*restitution may be ordered* 'without individualized proof of *deception, reliance, and injury* if necessary to prevent the use or employment of an unfair practice.'" *Tobacco II*, 46 Cal. 4th at 320 n. 14 (citing *Fletcher*, 23 Cal. 3d 442; *Bank of the West*, 2 Cal. 4th at 1267) (emphasis added).

The paragraph from *McAdams I* quoted above suggests that class members must prove actual deception and injury as a prerequisite to an

order requiring the defendant to "restore" what it "acquired." The suggestion diverges from *Tobacco II* and should be omitted from the opinion.

III. CONCLUSION

For all of these reasons, the Court is respectfully asked to modify its original opinion in the three ways discussed above. With those three changes, the opinion's language will comport with *Tobacco II* as fully as its outcome already does.

Dated: October 1, 2009

Respectfully submitted,

SCHUBERT JONCKHEER KOLBE
& KRALOWEC LLP

By_____
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CERTIFICATE OF COMPLIANCE
WITH WORD COUNT REQUIREMENT

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it does not exceed 2,723 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3)).

Dated: October 1, 2009

_____
Kimberly A. Kralowec

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McAdams v. Monier Lifetile, LLC, et al.
C051841

I, Jason Dang, state:

I am a citizen of the United States. My business address is Three Embarcadero Center, Suite 1650, San Francisco, California 94111. I am employed in the City and County of San Francisco where this mailing occurs. I am over the age of eighteen years and not a party to this action. On the date set forth below, I served the foregoing documents described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF APPELLANT

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Jason Dang