Case No. **S147345**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES, JCCP 4042

WILLARD BROWN, et al.

Plaintiffs and Appellants,

vs.

PHILIP MORRIS USA INC., et al.

Defendants and Respondents,

REVIEW OF A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIV. 1, NO. D046435,
AFFIRMING AN ORDER DECERTIFYING A CLASS ACTION,
SAN DIEGO COUNTY SUPERIOR COURT, NO. 711400,
JUDICIAL COUNCIL COORDINATION PROCEEDING 4042,
THE HON. RONALD PRAGER, JUDGE PRESIDING.

BRIEF AMICI CURIAE OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, and CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS

FRED J. HIESTAND
State Bar No. 44241
1121 L Street
Suite 404
Sacramento, CA 95814
Tel.: (916) 448-5100
Fax.: (916) 442-8644

WILLIAM L. STERN
State Bar No. 96105
Morrison & Foerster, LLP
425 Market Street
San Francisco, CA 94105
Tel.: (415) 268-7637
Fax.: (415) 268-7522

Counsel for *Amici Curiae*

Prometheus Press * Sacramento, CA

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INTRODUCTION

A. Importance of Issues Presented.

The fundamental question this case raises is whether the People, in enacting Proposition 64[1] to end "shakedown lawsuits" under the Unfair Competition Law,[2] said "what they meant and meant what they said."[3] The parsing of this query arises in the context of the court's refusal to certify this case as "class action" and centers on two sections of Proposition 64, one requiring representative claims brought by private plaintiffs to comply with procedural requirements applicable to "class action"

[1] On November 2, 2005, the electorate approved Proposition 64 by a 59% to 41% margin.

[2] Bus. & Prof. Code § 17200 *et seq.*; also referred to as the "UCL." Unless otherwise indicated, section (§) references to statutes herein apply to the B & P Code. As used herein, reference to the UCL also includes the False Advertising Law ("FAL, " § 17500 *et. seq.*) as Proposition 64 imposed the same new restrictions on private enforcement under the UCL and the FAL.

[3] *Michels v. Watson* (1964) 229 Cal.App.2d 404, 478 (Fourt, J., dissenting opinion.).

litigation,[4] and the other requiring private persons who sue under the UCL to have suffered "actual injury" *and* financial or property loss because of an unfair business practice.[5] Accordingly, two Proposition 64 issues are presented:

(1) Whether *only* the named plaintiff, or *all* putative class members, must meet the "standing" requirements to prosecute a private UCL claim; and

(2) Whether a plaintiff prosecuting a UCL claim must show that he "suffered injury in fact" *and* "lost money or property *as a result of*" the alleged violation of the UCL.

Both the trial and appellate courts agreed that plaintiffs, who sued to recover economic losses on behalf of all California residents exposed for years[6] to defendant tobacco companies' "marketing and advertising activities," and who purchased cigarettes during that time, must show that they were injured "as a result" of the advertising and marketing activities. The courts agreed that this *causation* requirement applies to *all* members of the purported "class," not just the lead or named plaintiff, and that because of this the lawsuit did not qualify for certification as a "class action." As the appellate opinion states, "even the three named plaintiffs reflect a range from being unaware that smoking is unhealthy at the commencement of smoking to being aware that smoking is harmful and addictive and yet began to smoke anyway."[7]

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[4] § 17204.

[5] § 17203.

[6] Between June 10, 1993 and April 23, 2001.

[7] *In Re Tobacco II Cases* (2006) 47 Cal.Rptr.3d 917, 924.

The same conclusions were reached around the same time with respect to these very issues by another appellate court, only this time the purported "class" that was denied certification consisted of purchasers of mouthwash rather than cigarettes. In *Pfizer, Inc. v. Superior Court* (2006) 45 Cal.Rptr.3d 840[8] plaintiffs sought, similar to plaintiffs herein, to certify a class consisting of "all persons who purchased" a product (i.e., Listerine) during a certain period of time (about a year and a half) when some "advertising and marketing" misleadingly indicated the "use of Listerine can replace the use of dental floss in reducing plaque and gingivitis." The appellate court, considering the impact of Proposition 64 after the trial court certified the class, granted a writ of mandate reversing the certification and explaining, "If [plaintiff] alone, but not class members, suffered injury in fact and lost money or property as a result of [defendant's] alleged unfair competition or false advertising, then by definition his claim would not be typical of the class. Rather, [plaintiff's] claim would be demonstrably *atypical*." Thus, as did the appellate court in this case, the court in *Pfizer* found that '[i]n view of the changes in the law brought about by Proposition 64, the class definition is plainly overbroad and must be set aside.'"[9]

These decisions are legally "correct" in that they are not only just, but based on a reasonable reading of the plain language of Proposition 64 as limned by pertinent precedents. There is nothing ambiguous about Proposition 64's plain language and expressed purpose of getting rid of lawyer-driven shakedown suits brought on behalf

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[8] Review granted November 1, 2006 and briefing deferred pending further order of the Court.

[9] 45 Cal.Rptr.3d at 849.

of persons who may have bought a product or service but who were not harmed "as a result of" the alleged infraction. Indeed, Proposition 64 had as its express purpose the elimination of the ability of private litigants to bring "representative actions" under the UCL on behalf of the general public, providing instead that named, private plaintiffs seeking monetary redress for others *besides themselves* must meet the new "standing" requirement *and* bring the lawsuit as a "class action." Plaintiffs urge a rule that would not only contravene Proposition 64 but also decades-old class action law.

Moreover, the public policy issue presented – balancing the utility of class actions against the need to prove all of the elements of each absent class members' claim – was resolved by this Court in *Mirkin v. Wasserman*.[10] There, addressing class claims of fraud and negligent misrepresentation, *Mirkin* declined to suspend the requirement of actual reliance that *each* absent class member must otherwise prove:

> Actual reliance is more than a pleading requirement; it is an element of the tort of deceit. As we have previously observed, class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going."[11]

Aggregating the demands of numerous claimants into a single class action provides no shortcut to proof. As this Court put it: "[T]here is little force in plaintiff's argument that we should reshape the law of deceit simply in order to remove an unnecessary pleading barrier to the effective utilization of class action

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[10] (1993) 5 Cal.4th 1082.

[11] *Id.*, at p. 1103.

procedures."[12] Thus, whether a claim is brought individually or on behalf of a class, it must be proven that "*each class member*…read or heard the same misrepresentations…."[13] Substitute "UCL" for the word "deceit" and this Court could have been writing about this case.

Plaintiffs' argument also defies common sense. Any other claim in California that is brought on a classwide basis requires each unnamed class member to satisfy all the elements of that claim, including all "standing" requirements. *Mirkin* establishes this rule in the case of fraud and negligent misrepresentation claims. But it is also true for other claims. No one would argue, for example, that someone with a contract cause of action could forego having to prove an element of his claim – say, the existence of a contract – just because his claim is being asserted by a named representative. Yet, that is what plaintiffs are urging this Court to adopt for the UCL.

The two issues presented are interrelated. Whatever the new requirements of Proposition 64 may be, these requirements must be met by everyone, not just the named representative. To rule otherwise, as plaintiffs urge, would mean that someone who could not sue directly under the UCL could still recover money by letting someone else sue in his stead. That is contrary to class action law and common sense. It is also the argument rejected in *Mirkin* on the ground that it would allow consumers to sue based on "misrepresentations they never heard."[14] The notion plaintiffs advance is repugnant to Proposition 64.

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[12] *Id.*

[13] *Id.*, p. 1095 [emphasis added].

[14] 5 Cal.4th at 1008.

The second issue—what does "as a result of" mean?—was also correctly decided by the appellate court herein. Proposition 64 eliminated standing as to phantom or unaffected plaintiffs, in many cases individuals who had either never bought the product or service at issue or who never saw or read the allegedly offending representations. Now, only someone who has "suffered injury in fact *and* has lost money or property *as a result of*" the actionable practices can recover.

To decide this second issue, the Court need go no further than those italicized words: the conjunctive "*and*" plus the phrase "*as a result of*." "As a result" means "to arise as a consequence, effect, or conclusion." That ought to be conclusive. Plaintiffs would dissipate this definition and replace it with one merely requiring some "factual nexus."[15] But that requires collapsing Proposition 64's two requirements into one. Yes, voters required "injury in fact;" but through the "and" and the phrase following it they also required that the claimant's injury must arise "as a result of" defendant's wrongdoing. This conclusion is supported by the purpose behind Proposition 64 – to end the practice of "shakedown" lawsuits. As the Findings and Declaration of Purpose note, the UCL was "being misused" by private attorneys who file "lawsuits for clients who have not used the defendant's product or service, [or] viewed the defendant's advertising, ..."[16]

Under plaintiffs' mistaken view, the voters approving Proposition 64 accomplished only a cosmetic change. The class plaintiffs seek to certify is no

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[15] Opening Brief on the Merits, at p. 35 ("Opening Brf.").

[16] Prop. 64, § 1(b)(1)-(4).

different than the now-discredited "general public" action – which even plaintiffs concede Proposition 64 abolished[17] – masquerading under a different name. If plaintiffs' construction of "as a result of" is adopted, it will simply spawn a new generation of "Trevor Law Groups"[18] for whom Proposition 64 will provide nothing more than an inconvenience.

Whereas before Proposition 64's passage, a claim could be privately prosecuted even though *no one* was affected by the complained of practice, plaintiffs now want to replace the "Rule of None" abolished by that initiative with the "Rule of One." It is sufficient under the UCL, plaintiffs tell us, that *one* person in the State is willing to say under oath that he read an ad, was misled, and bought "as a result" of it. So long as that one person serves as class representative, so the argument goes, courts can award unlimited monetary relief under the UCL to absent class members, even to those who were not injured by the practice. If this Court adopts that rule, the 6.5 million people who said "yes" to Proposition 64 will have wasted their votes.

B. Interest of Amici Curiae.

The two principal issues raised on this appeal – *viz.*, whether the changes to the UCL by Proposition 64 apply only to the named plaintiff or to every putative class member and whether proof of causation is now required – are of paramount interest to amici because their members are too often named as defendants in spurious UCL

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[17] Opening Brf., p. 35.

[18] For a discussion of the sort of pre-Proposition 64 abuses that have come to be associated with the "infamous" Trevor Law Group, *see People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1316-17.

class actions. We believe this brief will assist the Court in deciding whether *only* the named plaintiff, and not each putative class member, is subject to the "standing" requirements imposed by Proposition 64. Because we represent a significant portion of businesses and professional associations in California, amici are particularly well-situated to explain the adverse consequences to California's economy that would follow from a decision holding that Proposition 64 permits an absent class member to assert claims he or she could not assert individually.

The Civil Justice Association of California (CJAC) is a non-profit corporation whose hundreds of members are businesses, professional associations and local governments committed to improving the "fairness, efficiency and economy" of laws that determine who gets how much, and from whom, when injured by the wrongful acts of others. Toward these ends, CJAC has petitioned the Legislature, the courts and the people themselves for redress with respect to "unfair" and "overreaching" laws. Indeed, CJAC was an official ballot sponsor of Proposition 64, a measure made necessary by the inability of the Legislature to curb the omnivorous growth and reach of the UCL over the past several years.[19] We have an understandable interest in seeing that Proposition 64 is properly enforced to trim the excesses of the UCL.

The California Manufacturers & Technology Association (CMTA) is a 501(c)(6)

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[19] "At least eleven reform bills were introduced in 2003 to address the problems stemming from the UCL. Proposals included . . . requiring plaintiffs to have suffered harm and demonstrate typicality of claims before filing a representative action. Nonetheless, the Legislature failed to enact section 17200 reform. The legislature's inability to reach consensus on UCL reform was not new. Numerous proposals, including procedural improvements suggested by the California Law Revision Commission in 1996, have not survived committee." Mathieu Blackston, *Comment: California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater Crime* (2004) 41 *SAN DIEGO L. REV.* 1833, 1847-48.

mutual benefit trade association advocating for a strong business climate for California's 30,000 manufacturing, processing and technology based companies. Since 1918, CMTA has worked with state government to develop balanced laws, effective regulations and sound public policies to stimulate economic growth and create new jobs while safeguarding the environment. To that end, the CMTA is vitally interested in promoting a civil justice system in the state that limits frivolous lawsuits and promotes fair compensation to injured parties. The outcome of this case with regard to proper application of Proposition 64 in the class action setting will have a significant impact on California manufacturers and we appreciate this opportunity to express our views to the court.

The California Chamber of Commerce (CCC) is the largest, voluntary business association within the state of California, with more than 15,000 members, representing virtually every economic interest in the state. The Chamber was also an official ballot sponsor of Proposition 64. While we represent several of the largest corporations in California, 75 percent of our members have 100 or fewer employees. The Chamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. The Chamber only participates as *amicus curiae* on matters that have a significant impact on California businesses, of which this case is an excellent example.

The California Bankers Association (CBA) was founded in 1891 and today represents more than 300 banks in the state, including commercial banks, industrial loan companies, and savings institutions. California's banking industry provides jobs

to more than 150,000 Californians and financial security and opportunity to millions more. CBA member banks hold more than $2.7 trillion in assets and loans in excess of $1.5 trillion.

LEGAL DISCUSSION

I. EVERY ABSENT CLASS MEMBER MUST SATISFY ALL ELEMENTS OF A PRIVATELY PROSECUTED UCL CLAIM.

The requirements of the UCL as augmented by Proposition 64 must be proven by every absent class member, not just the named plaintiff. This is compelled by well-settled principles of class action law, which require that an absent class member must have a claim in his own right before he can become a member of a class. It is also compelled by common sense, by *Mirkin v. Wasserman*, and by the purposes animating Proposition 64.

A. Decades-Old Principles of Class Action Law Require That Each Absent Class Member Prove All the Elements of a UCL Claim.

As plaintiffs correctly point out, a class action is merely a procedural device for aggregating like claims and treating them together in order to avoid multiple, individual litigation.[20] But certifying a class necessarily assumes—and requires a determination—that each absent class member *has* a claim for which the named plaintiff's claim is "typical."

Plaintiffs disagree. They insist that only the "claimant" is required to "establish standing to bring an action." And once that threshold is crossed, so the argument

[20] Opening Brf., p. 5.

goes, "the class representative need only demonstrate [that] the defendant made representations that were likely to mislead and that the class members are entitled to restitution of money obtained by the defendant."[21] They are wrong.

Plaintiffs' position confuses two very different kinds of claims that are at stake in every class action case. First, a named plaintiff in a class action case may assert his own individual claims alongside the class' claims. Where he does, even plaintiffs would probably agree that he must satisfy all the elements of his *own* cause of action. That is a necessary condition to his own individual recovery, and nothing about his concurrent assertion of class claims relieves him of his burden to prove the elements of his *own* cause of action.

Second, a named plaintiff may also assert claims of others, provided all the requirements necessary to maintain a class are met. In that role, he is merely a nominee, much like a trustee, executor, or other fiduciary suing in a representative capacity on someone else's behalf. But as with any other nominee, the "real party in interest" must have a claim in his or her own right. In the class action context, this rule resides in the "typicality" requirement. To maintain a class action, the named plaintiff must prove that the absent class member has a claim for which the named plaintiff's claim is "typical."

Plaintiffs' position confuses these two roles. They would have this Court find it *sufficient*, for class certification purposes, that the named plaintiff alone is able to assert his claim. That is wrong. Proposition 64 provides that it is also now a *necessary*

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[21] *Id.*, p. 4.

condition that each absent class members can prove the elements of his or her own claim. Plaintiffs' position is contrary to decades-old class action law. Rather than repeat that discussion, we refer the Court to respondents' brief on the merits.[22]

Mere participation in a class action cannot confer on an absent class member a UCL claim he would not otherwise have. Plaintiffs ask this Court to rewrite the law by requiring that the purely *procedural* device of a class action be construed to alter UCL claims it aggregates so as to confer rights to recover in persons otherwise lacking that right if they had sued individually.

B. Common Sense Requires That Each Absent Class Member Prove All the Elements of a UCL Claim.

Plaintiffs' position also defies common sense. No other California cause of action permits a shortcut to recovery simply because the claim is asserted on behalf of a class. There is nothing in Proposition 64 to suggest that the UCL is any different.

Assume, for sake of illustration, the case of someone who *didn't* enter into a contract with a defendant. No one would seriously contend that he could recover money as an unnamed class member just because the *named plaintiff* satisfied the elements of a contract claim. Yet, that is what plaintiffs urge.

The language of Proposition 64 is exactly to the contrary. It did not make recovery on behalf of unaffected claimants *easier* through the UCL than for other claims. Rather, it expressly places UCL class action on the *same* footing as every other

[22] *See* cases cited in Respondents' Answer Brief on the Merits, pp. 11-15.

class action brought in this State.[23]

It makes no sense to suppose that an initiative designed to end the practice of "shakedown lawsuits – described to voters in the ballot pamphlet as "lawsuits where no client has been injured in fact," and "lawsuits for clients who have not used the defendant's product or service, [or] viewed the defendant's advertising – could be interpreted as authorizing that very thing so long as one person (the named plaintiff) is willing to state under oath that he can satisfy the elements of the claim.

Consider where Plaintiffs' construction leads:

•Before Proposition 64, a UCL claim could be brought without even a single affected plaintiff. Today, under plaintiffs' interpretation, Proposition 64 simply replaces the "Rule of None" with the "Rule of One." Under the "Rule of One," all it takes to bring a class action is one person willing to take up a theory of causation that, however improbable, he is willing to swear by under oath.

•Before Proposition 64, practitioners used to comb the statute books looking for hypertechnical infractions. Today, under plaintiffs' interpretation, practitioners will simply need to find a "least common denominator" plaintiff, one who can satisfy Proposition 64's elements. Never mind that the named plaintiff might comprise a class of one.

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[23] Section 17203, as amended by Proposition 64, requires that "[a]ny person may pursue representative claims for relief on behalf of others only if the claimant meets the standing requirements of Section 17204 *and* complies with Section 382 of the Code of Civil Procedure…." (Italics added.)

•Before Proposition 64, an unaffected plaintiff could threaten a defendant with potentially catastrophic exposure. Today, under plaintiffs' interpretation, the single claimant, if he can get a class certified (as happened in *Pfizer*), can pose potentially catastrophic exposure in the form of restitution to all, even if no one else in the class shared the named plaintiffs' particular (or idiosyncratic) sensibilities.

In short, plaintiffs' argue that whereas "representative" actions fueled by lawyers without real clients was commonplace before Proposition 64, today's UCL practitioner will need to change tactics ever so slightly. The voters who approved Proposition 64 engaged, if plaintiffs' view is accepted, in an idle act, full of sound and fury but signifying nothing.

C. Plaintiffs' Interpretation is Foreclosed By *Mirkin v. Wasserman*.

Plaintiffs contend that their interpretation is a permissible policy-based outcome, one that furthers the pro-consumer features of the UCL. Again, they are mistaken. *Mirkin v. Wasserman* has foreclosed that option.

In *Mirkin v. Wasserman*, shareholders brought a class action for common law deceit and negligent misrepresentation against a corporation and others alleged to have intentionally misrepresented the corporation's financial condition in prospectuses and other public communications. Plaintiffs did not plead that they had read or heard the representations, but argued that they had purchased the securities in reliance upon the integrity of the securities market. They argued that classwide reliance should be presumed under the "fraud on the market" doctrine borrowed

from the federal securities laws.[24] This Court said no, holding instead that a plaintiff suing for fraud or negligent misrepresentation under California law must prove each element of the claim as to *each* class member.[25]

Plaintiffs devote eleven pages of their opening brief to a request that this Court adopt a "presumption of reliance" in UCL cases.[26] Yet, never in their opening or reply briefs do they even mention *Mirkin*, this Court's latest exposition on the topic. That is telling.

Mirkin holds that nothing about aggregating into a class action the fraud claims at issue there suspends the need to prove reliance: "Actual reliance is more than a pleading requirement; it is an element of the tort of deceit."[27] Furthermore, "there is little force in plaintiff's argument that we should reshape the law of deceit simply in order to remove an unnecessary pleading barrier to the effective utilization of class action procedures."[28] Whether the claim in brought individually or as a class claim, it must be proven that "*each class member*…read or heard the same misrepresentations . . ..."[29] This Court could have been describing this appeal.

Mirkin is instructive in another respect. It cautions "that courts should be

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[24] 5 Cal.4th at pp. 1088-89.

[25] *Id.* at pp. 1090-98.

[26] Opening Brf., pp. 59-70; *see also* Reply Brf., p. 19.

[27] *Id.*, at p. 1103.

[28] *Id.*

[29] *Id.*, p. 1095 [emphasis added].

hesitant to impose new tort duties when to do so would involve complex policy decisions, especially when such decisions are more appropriately the subject of legislative deliberation and resolution."[30]

The voters of this State enacted Proposition 64 for the purpose of adding causation as an element of a UCL claim.[31] Ignoring that requirement in the case of class actions is not an option.

D. Plaintiffs' Interpretation Is Foreclosed by The Purposes Behind Proposition 64.

This brings us full circle back to Proposition 64. Its purpose is to abolish UCL lawsuits in which "no client has been injured in fact" and those brought on behalf of "clients who have not used the defendant's product or service, [or] viewed the defendant's advertising, …."[32]

The rule urged by plaintiffs would, if accepted by the Court, effectively disenfranchise 59% of the California electorate. If plaintiffs prevail, UCL class actions seeking recovery on behalf of uninjured consumers (and those who have not used the defendant's product or service or viewed the defendant's advertising) will continue to vex honest businesses. Shakedown claims brought on behalf of persons who lost no money or failed even to see the advertisement or read the label will continue to flourish so long as counsel can find one person willing to state under oath that he or she read an ad, was misled, and bought "as a result of" the representation. So, instead

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[30] *Id.*, pp. 1104-05.

[31] *See* discussion II *post* at pp. 17 *et. seq.*

[32] Prop. 64, § 1(b),(b)(1)-(4).

of abolishing "general public" actions and putting UCL class actions on the same footing as all other class actions, Proposition 64 will have accomplished nothing except to force class counsel to adopt a modest change in litigation tactics.

The author of a recent law review article expressed best what is wrong with plaintiffs' hypothesis:

> Increasingly, plaintiffs' lawyers are using consumer fraud statutes to pursue class actions based on manufacturers' alleged misrepresentations about their products. By themselves, these lawsuits are not troubling. But when consumers themselves have never relied on a manufacturer's misrepresentation, have never independently sought redress, and likely will never receive meaningful benefit from a suit (though their lawyers stand to make millions of dollars), these class actions become more akin to corporate blackmail than to consumer protection.[33]

This Court should rule that the UCL is no different than any other claim that in California is brought on a classwide basis. Every class member, not just the named class representative, must meet all the elements of the claim, including those for "standing."

II. PROPOSITION 64 REQUIRES PROOF OF CAUSATION.

A. The Plain Language of Proposition 64 and its Purpose Requires Proof of Causation.

The Courts of Appeal in this case and in *Pfizer* also got right the second issue raised on appeal: Proposition 64 requires proof of causation in UCL actions. This is

[33] 43 Harv. J. on Legis. 1, 2 (Winter 2006).

clear from the initiative's plain language.

The court's "first task in construing a statute is to ascertain the intent of the [measure] so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the [statutory] purpose.[34]

Applying this standard to Proposition 64 reveals that every private UCL claim now requires proof of causation: In order to obtain "any relief," a claimant must prove two things, that he (i) "suffered injury in fact" *and* (ii) "lost money or property *as a result of*" the alleged violation of the UCL. The plain meaning of "as a result of" means as a consequence or effect.[35] Furthermore, the phrase has had a clear and settled legal meaning as well: Whenever that language appears, "proximate or legal cause" must be shown.[36]

Thus, the California voters intended to limit the private remedies available under the UCL to only those persons who can prove causation. A UCL claimant must prove that he "suffered injury in fact" *and* "lost money or property" *as a consequence of* the alleged UCL violation.

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[34] *Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1386-87.

[35] *Aseli v. Board of Retirement* (2000) 84 Cal.App.4th 597, 603; *see also* Webster's, New World Dictionary (Unabridged) (2d ed. 1978), p. 1545 ("result" means "consequence; outcome; issue, effect; that which proceeds naturally or logically from facts.").

[36] *See e.g. DuPay v. Bd. of Retirement* (1978) 87 Cal.App.3d 392, 399 ("as a result of" language requires a showing of a "causal connection"); *Brown v. Gardner* (1994) 513 U.S. 115, 199 ("'as a result of' language … is naturally read simply to impose the requirement of a causal connection"); 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 537, p. 624; *see also* cases cited in Respondents' Brf., p. 24.

Plaintiffs bristle over this interpretation. They contend that the words "as a result of" impart no such causation requirement, rather, these words "can only be construed . . . as a requirement for showing factual nexus."[37] They insist that to establish standing, it is sufficient that "the representative plaintiff be one of the people from whom the defendant obtained money or property while engaging in its unfair business practice."[38] Or, as plaintiffs say in their reply, it is enough that someone "bought cigarettes."[39] That is flawed for three reasons.

In the first place, plaintiffs' textual argument compels them to butcher the statutory language. They omit the critical language of Proposition 64 and replace it with ellipses.[40] It is true that Proposition 64 now requires "injury in fact," and that this was intended to "mirror" Article III's "injury in fact" rule.[41] But the voters didn't stop with "injury in fact." They went on to demand that a claimant must have "lost money or property *as a result of*" the alleged violation of the UCL.[42] The two requirements are separated with the conjunction "and."

In the second place, plaintiffs' argument unravels on the thread of *Fletcher v.*

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[37] Opening Brf., p. 35.

[38] *Id.*

[39] Reply Brf., p. 14.

[40] *Id.*, p. 44.

[41] *Id.*, p. 36.

[42] This answers plaintiffs' argument in reply that "[t]he proponents of Proposition 64 expressly invoked the injury in fact concept under the United States Constitution and defendant cannot now claim that they really meant something more stringent." (*Cf.*, Reply Brf., p. 10.) This is precisely the point: the voters *did* add something more "stringent," the "as a result of" requirement.

Security Pacific National Bank,[43] the principal case on which they rely. Plaintiffs contend that *Fletcher* stands for the proposition that the UCL carries no "stringent causation requirement."[44] Therein lies the problem. *Fletcher* pre-dated Proposition 64. More than that, it was construing a different section of the UCL. At issue in *Fletcher* was the meaning of the "may have been acquired" language of Section 17203, the provision of the UCL that provides remedies.[45] This lawsuit, on the other hand, concerns the meaning of the "as a result of" language of Section 17204, the UCL's standing provision.

More importantly, *Fletcher* reviewed (and ultimately approved) the sort of untethered recovery that would later become the defining feature of UCL "shakedown" suits. Even plaintiffs agree that this practice, which *Fletcher* condones, was abolished by Proposition 64.[46] Yet, in their view, those same features of the *ancien regime* for some inexplicable reason remain largely intact.

In the third place, plaintiffs' meaning is undermined by the purpose behind Proposition 64. "If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."[47] Here, the purpose of Proposition 64 was to eliminate "lawsuits where

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[43] (1979) 23 Cal.3d 442.

[44] Opening Brf., pp. 32-34.

[45] Technically, *Fletcher* was construing Bus. & Prof. Code § 17535, which is part of the False Advertising Law, but it is identical to the UCL's Section 17203. Consequently, the court was effectively also construing Section 17203.

[46] *Cf.*, Opening Brf., p. 32.

[47] Karl Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How* (continued...)

no client has been injured in fact [or where] clients who [had] not used the defendant's product or service, [or] viewed the defendant's advertising, or had any other business dealing with the defendant …."[48]

Plaintiffs disagree, and justify their truncation of the statutory wording with a policy-based argument: "By requiring the representative plaintiff to have suffered an injury in fact"—i.e., without an additional causation requirement—"Proposition 64 stopped the inappropriate use of the UCL."[49] Not so.

Consider how plaintiffs' proposed rule, if adopted, would operate in *Pfizer, Inc. v. Superior Court*,[50] the companion case on appeal. *Pfizer* was a UCL class action arising from defendant Pfizer's advertisements for Listerine® mouthwash. The plaintiff, Mr. Galfano, contends he was hoodwinked by Pfizer's marketing campaign, which touted the product "as being as effective as floss" in reducing plaque and gingivitis. Somehow, he understood this to mean that he could use Listerine® *instead* of floss, so he stopped flossing. Mr. Galfano sued and sought certification of a class not limited just to those who (like Mr. Galfano) saw the advertisement and stopped flossing. Instead, he sought a class of *all* California residents who bought Listerine®, and wants Pfizer to refund every class member's purchase price. If Mr. Galfano has his way, buyers would be entitled to recover even if they (i) never read the product

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[47](...continued)
Statutes Are to be Construed (1950) 3 Vand. L. Rev. 395, 400, reprinted in Singer, *Statutes and Statutory Construction* § 48A:08, p. 639 (2000 ed.).

[48] Prop. 64, § 1(b), (b)(1)-(4).

[49] Reply Brf., p. 8.

[50] Case No. S145775.

label, (ii) never saw the allegedly offending advertisement, (iii) never were misled, and (iv) never stopped flossing. That most consumers were happy with the product doesn't warrant even a bead in Mr. Galfano's abacus.

The *Pfizer* illustration shows, contrary to plaintiffs' assertion, that Proposition 64 "stopped the inappropriate use of the UCL."[51] Plaintiffs, however, ask this Court to ignore this sea change in the law by holding that the same inequities that arose pre-Proposition 64 from allowing "unaffected plaintiffs" to sue would continue unabated today.

The Courts of Appeal here and in *Pfizer* were correct. Both the plain meaning and the purpose behind Proposition 64 require proof of causation.

B. Proposition 64's "As a Result of" Language Should Be Construed Consistently with the Interpretation California Courts Have Given the CLRA.

The Consumer Legal Remedies Act ("CLRA") contains the identical "as a result" language as Proposition 64. Only a consumer "who suffers any damage *as a result of* the use of a prohibited method, act, or practice" may sue.[52] This language has been consistently interpreted to impose a causation requirement. "Relief under the CLRA is specifically limited to those who suffer damage, making *causation* a necessary element of proof."[53]

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[51] Reply Brf., p. 8.

[52] Civ. Code § 1780(a); italics added.

[53] *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754; *see Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 688; accord, *Chamberlan v. Ford Motor Co.* (N.D. Cal. 2005) 369 F. Supp.2d 1138, 1145.

"A statute that is modeled on another, and that shares the same legislative purpose is *in pari materia* with the other, and should be interpreted consistently to effectuate [legislative] intent."[54] The CLRA and the UCL both serve pro-consumer interests. It would make little sense to construe the statutes' identical words differently. "When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, . . .the use of them in a subsequent statute in a similar setting carries with it a like construction."[55]

The voters of California are "deemed to [have been] aware" of this "judicial construction" when they enacted Proposition 64 containing the identical language.[56] Furthermore, "[i]t is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use those exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts."[57]

Plaintiffs never mention the CLRA and its analogous "as a result of" language. Yet, this Court is being asked to create one meaning for "as a result of" when it comes to the UCL and an altogether different meaning for the CLRA's identical words. To permit that would violate this Court's maxim that "legislation framed in the language of an earlier enactment on the same or an analogous subject that has

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[54] *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1129.

[55] *Perry v. Jordan* (1949) 134 Cal.2d 87, 93.

[56] *Hobbs v. Municipal Ct.* (1991) 233 Cal.App.3d 670, 682.

[57] *In re Jeanice D.* (1980) 28 Cal.3d 210, 215.

been judicially construed is presumptively subject to a similar construction."[58]

Here, plaintiffs pled both a UCL claim and a CLRA claim and sought certification of both classes. Yet, the trial court declined to certify a CLRA class, finding that individual issues "predominated" as to class members' reliance on defendants' advertising and causation. For this Court to permit the identical words in companion laws to have different meanings within the same lawsuit would be anomalous. That anomaly would not be isolated either. Lawsuits pleading both UCL and CLRA claims in the same complaint are commonplace, as this case illustrates.

C. The Majority of Federal District Courts To Have Confronted the Issue Agree That the UCL Now Requires Proof of Causation.

The district court in *Laster v. T-Mobile USA, Inc.*[59] understood the plain meaning of Proposition 64's statutory language when read in context with Proposition 64's express purpose. Citing the text of Proposition 64, *Laster* holds that "[t]he language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is required."[60] Most other district courts who have confronted the issue agree.[61]

Proposition 64 not only ended "representative" actions but it also eliminated "associational" standing when the association is "uninjured." It "removed the section

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[58] *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 766.

[59] (S.D. Cal. 2005) 407 F. Supp.2d 1181.

[60] *Id.* at 1194.

[61] *See Brown v. Bank of America* (D. Mass. 2006) 457 F.Supp.2d 82, 89 (summary judgment granted in UCL class action challenging bank's ATM disclosures due to plaintiffs' inability to prove "loss causation"); *Doe v. Texaco, Inc.*, No. C-06-02820 WHA, 2006 U.S. Dist. LEXIS 53930, at *3 (N.D. Cal. July 21, 2006) (plaintiffs lacked UCL standing because they could not demonstrate that their increased risk of cancer had caused them to "lose property or money" under the UCL); *see also Walker v. USAA Casualty Ins. Co.* (E.D. Cal., Feb. 12, 2007) ___ F.Supp.2d ___, 2007 WL 460944.

(of former Section 17203) giving standing to 'any person acting for the interests of … its members' and replaced it with language requiring a plaintiff *personally* to have suffered 'injury in fact' and 'lost money or property.' "[62]

In the face of all these federal authorities arrayed against them, plaintiffs prefer the district court's ruling in *Anunziato v. eMachines, Inc.*[63] which stands conspicuously alone. Notwithstanding Proposition 64's plain meaning, the *Anunziato* court believed that reading reliance into the UCL "would subvert the public protection aspects of these statutes."[64] But the *Anunziato* court engaged in no statutory or "plain meaning" analysis. Indeed, it failed even to analyze the facts before it. Instead, the court based its decision on the perceived ill effects a "causation" requirement might have on a *hypothetical* situation involving a manufacturer's intentional "short-weighting" of cookies.[65] Straying even further afield, the court took an excursion into 2000 census data and concluded that because 39% of Californians speak a second language at home, "the goal of consumer protection is not advanced" by a causation requirement.[66]

The Second District Court of Appeal in *Pfizer* aptly summed it up: "[I]t would appear the [*Anunziato*] court substituted its judgment for that of the voters and based its decision on the perceived ill effects a "reliance" requirement would have in

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[62] *Coalition for ICANN Transparency, Inc. v. Verisign, Inc.* (N.D. Cal. 2006) 452 F.Supp.2d 924, 939 (dismissing UCL claim brought on behalf of association without leave to amend).

[63] (C.D. Cal. 2005) 402 F.Supp.2d 1133.

[64] *Id.* at 1137.

[65] *Id.*

[66] *Id.* at 1138.

hypothetical fact situations."[67]

The Court of Appeal below also correctly distinguished *Anunziato*: "*Anunziato* did not address a situation where the complaint alleged numerous misrepresentations occurring over a lengthy period of time and where not all of the misrepresentations were made to all class members."

The Fourth District found that the tobacco company defendants' alleged misrepresentations and failures to disclose the health hazards of "light" cigarettes varied too greatly, such that "proof as to the representative plaintiffs will not supply proof as to all class members." That finding may not be disturbed in the absence of abuse of discretion.[68]

D. Proposition 64's "As a Result of" Language Should Be Construed Consistently With The Interpretation The Courts Of Other States Have Given to Their Analogous "Little FTC Acts."

Every state has enacted a form of "Little FTC Act" or unfair and deceptive practices act that, like California's UCL, is patterned on the federal FTC Act.[69] Many state "Little FTC Acts" permit private rights of action. Of those that do, most condition private recovery on a showing that plaintiff suffered a loss "as a result of" the violation. Significantly, every state whose "Little FTC Act" contains "as a result of" language has interpreted its law to require either causation, or reliance, or both.[70]

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[67] *Pfizer, Inc. v. Superior Court (Galfano)* 141 Cal.App.4th at 306, *rev. granted* Aug. 11, 2006 (S145775).

[68] *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1287.

[69] 15 U.S.C. § 45(a)(1).

[70] Courts in other states have overwhelmingly interpreted their analogous consumer (continued...)

The decisions of the courts of other states interpreting their similarly-worded statutes are persuasive and serve as guides in the interpretation of California statutes of like import.[71]

A recent decision by the district court in New York is illustrative. In construing South Dakota's Deceptive Trade Practices Act,[72] the court held that the phrase "as a result of" means that "each plaintiff will need to prove that Citibank *caused* his injury" and, further, that "proving causation requires that the alleged injury resulted from reliance on Citibank's omission or representation."[73] In that case, the court declined to certify a class of credit card users because "different class members used their Citibank credit cards with different understandings of their card member agreements," yet, "to prove causation, each plaintiff must show that Citibank's disclosure of the conversion fees was inadequate, causing the cardholder to be deceived into using the Citibank card for foreign purchases when other more

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[70](...continued)
protection statutes containing the identical "as a result of" language to require reliance or causation. *See e.g., Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.* (Mass. 2006) 445 Mass. 790, 798-99; *Collins v. Anthem Health Plans, Inc.* (Conn. 2005) 880 A.2d 106, 120; *Oliveira v. Amoco Oil Co.* (Ill. 2002) 201 Ill.2d 134, 776 N.E.2d 151; *Weinberg v. Sun Co., Inc.* (2001) 565 Pa. 612, 617-18, 777 A.2d 442, 446; *Feitler v. Animation Celection, Inc.* (Or. Ct. App. 2000) 13 P.3d 1044; *Fields v. Yarborough Ford, Inc.* (S.C. 1992) 414 S.E.2d 164, 166; *Hageman v. Twin City Chrysler-Plymouth, Inc.* (M.D.N.C. 1988) 681 F.Supp. 303, 308. For an exhaustive compendium of cases, *see* 43 Harv. J. on Legis. 1 (Winter 2006).

[71] *Erlich v. Municipal Court* (1961) 55 Cal.2d 553, 558; *see also Estate of Salisbury* (1978) 76 Cal.App.3d 635, 642.

[72] The South Dakota statute provides: "Any person who claims to have been adversely affected by any act or a practice declared to be unlawful by [this chapter] shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." S.D. Codified Law § 37-24-31; emphasis added.

[73] See *In re Currency Conversion Fee Antitrust Litig.* (S.D.N.Y. 2004) 224 F.R.D. 555, 568.

economical options were available."[74]

To read the UCL's "as a result of" language differently than the numerous states that have interpreted their similar statutes to impart a causation requirement would have adverse public policy consequences. It would be the legal equivalent of putting a "Welcome" mat outside the doors of the California courthouses, signaling that consumer class actions that could not be certified anywhere else will find a home here.[75]

E. Proposition 64's "As a Result of" Language Should Be Construed Consistently With The Interpretation Federal Courts Have Given Misrepresentation Claims Under the Federal Truth in Lending Act.

The prevalence of consumer protection laws with "as a result of" language is not limited to state statutes. The federal Truth in Lending Act (TILA) permits both individual and class actions for damages, but is conditioned by the same "as a result of" language as Proposition 64: "any actual damage sustained by such person *as a result of* the [defendant's] failure [to comply with TILA]."[76] The federal courts have had little difficulty reading "as a result of" to require proof by plaintiff of a direct causal link between the TILA violation and plaintiff's economic loss. Five federal Circuit Courts (including the Ninth) have considered the issue and all hold as a matter of statutory construction that the phrase "as a result of" in the TILA requires that

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[74] *Id.* at 568.

[75] *Cf.*, *Osborne v. Subaru of America, Inc* (1988) 198 Cal.App.3d 646, 664 ("Nor will we adopt a remedy – the gratuitous adjudication of this dispute in the courts of this state – the practical effect of which would be to bestow upon California the dubious distinction of becoming the class action capital of the country.").

[76] 15 U.S.C. § 1640(a); emphasis added.

plaintiffs prove reliance.[77]

In sum, Proposition 64 now requires that a plaintiff suing for monetary relief under California's UCL must prove causation. This is clear from the plain language of the voter initiative, Proposition 64's "findings" as to its purpose; the *Pfizer, Inc.* and *Tobacco II Cases* decisions; the interpretation the California courts have given the identical language found in the CLRA; the interpretation courts from other states have given the identical language found in their analogous "Little FTC Acts;" and the interpretation federal circuit courts have given identical language found in the federal Truth in Lending Act.

F. The Court of Appeal's Ruling is Not Inconsistent with *Mervyn's*.

Plaintiffs contend that the trial court's ruling is inconsistent with this Court's decision in *Californians for Disability Rights v. Mervyn's, LLC*.[78] Again, they are wrong.

The only issue in *Mervyn's* was whether Proposition 64 applied to actions filed but not finally determined before its enactment. This Court had no occasion to, and did not, construe the phrase "as a result of." Cases are not authority for propositions not presented or considered.[79]

Plaintiffs nevertheless insist that a single passage in the *Mervyn's* decision is

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[77] *In re Geraldine Kay Smith* (9th Cir. 2002) 289 F.3d 1155, 1156-67; accord, *Turner v. Beneficial Corp.* (11th Cir.) 242 F.3d 1023, 1028 (*en banc*) ("plaintiff must present evidence to establish a causal link between the financing institution's noncompliance and his damages"), *cert den.* (2001) 534U.S. 820; *Perrone v. General Motors Acceptance Corp.* (5th Cir. 2000) 232 F.3d 433, 436; *Stout v. J.D. Byrider* (6th Cir. 2000) 228 F.3d 709, 718; *Peters v. Jim Lupient Oldsmobile Co.* (8th Cir. 2000) 220 F.3d 915, 917; *Bizier v. Globe Financial Servs., Inc.* (1st Cir. 1981) 654 F.2d 1, 4.

[78] (2006) 39 Cal.4th 223.

[79] *McKeon v. Mercy Healthcare Sacramento* (1998) 19 Cal.4th 321, 328.

inconsistent with the trial court's ruling. There, this Court noted that Proposition 64 "does not change the legal consequences of past conduct by imposing new or different liabilities [on a defendant]," and that "[t]he measure left entirely unchanged the substantive rules governing business and competitive conduct."[80]

Plaintiffs confuse the standard for *liability* with the requirement for *standing*. After Proposition 64, distributing advertisements likely to mislead consumers is prohibited, just as it was before, and just as it was (and is) prohibited under the CLRA with its identical "as a result of" requirement. The difference is that now, a plaintiff must have "suffered injury in fact and lost money or property as a result of" the violation of the UCL. If that test is met, such a consumer can file a class action lawsuit on behalf of all persons who have also been actually injured based on the same exact conduct that violated the UCL, both now and before Proposition 64. But a consumer who was not *in fact* deceived is not someone who has been "injured in fact" or "lost money or property as a result of" the defendant's actions. Nothing in *Mervyn's* is to the contrary.

Plaintiffs' argument is illogical. A class representative who claims to have been injured "as a result of" the tobacco defendants' unfair competition should not complain about his inability to represent persons who suffered no injury at all or who never saw or relied on the alleged misrepresentation. That this requirement may make it harder to get a class certified—which appears to be plaintiffs' real quarrel—only underscores that Proposition 64 (as interpreted by the Court of Appeal) may yet

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[80] *Mervyn's*, *supra,* 39 Cal.4th at 232.

accomplish the voters' objective.

G. Giving Meaning To Proposition 64's "Causation" Element Is Not Inconsistent With The Initiative's Express Provision Authorizing UCL Class Actions.

Plaintiffs suggest that to interpret Proposition 64 as imposing a causation requirement would place insurmountable obstacles in the way of a UCL class action remedy.[81] To the contrary, UCL class actions still can be brought—so long as they comply with Proposition 64's new requirements.

If plaintiffs' "doomsday scenario" was correct, we would have seen the demise of CLRA class actions long ago. After all, the CLRA contains the same "as a result of" language, which has been interpreted to require proof of causation. (*See* Section II.B.2., above.) Yet, CLRA class actions continue to prosper.[82] One would also predict that class actions brought under other states' "Little FTC Act" or unfair and deceptive trade practices acts would have become extinct, given that states with similar "as a result of" language in their state laws have interpreted those words to require causation. That hasn't happened either.

This Court in *Mirkin* explained why. A "reliance" requirement is not inconsistent with class certification of a fraud or negligent misrepresentation claim: "[A]ctual reliance can be proved on a class-wide basis *when each class member has read or*

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[81] *See* Opening Brf., p. 57; Reply Brf., p. 2.

[82] *Cf. Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282 (affirming order certifying CLRA class action).

heard the same misrepresentations…."[83] This Court, however, drew a line between claims that would be suitable to class action treatment and those that would not. It distinguished the *Mirkin* facts by contrasting that case with the facts of two earlier Supreme Court decisions that approved class certification, remarking that in those cases, *identical* representations had been made "to *each* class member."[84]

That same dichotomy ought to apply to UCL claims, post-Proposition 64. If it did, this Court would have to affirm. Here, the allegedly actionable representations were not identical but, rather, varied greatly over time during a period of 50 years, and also varied by audience, by media, by subject, and by product.[85] As noted above, that finding may not be disturbed absent a showing that the court abused its discretion.

Finally, far from being disfavored, a causation requirement should be favored. It serves an important filtering function, much as the function served by the reliance element in *Mirkin*. Such a requirement would ensure that consumers will not be allowed to sue based on "misrepresentations they never heard."[86] That meaning will guarantee that the will of the overwhelming majority of California voters can be fulfilled.

CONCLUSION

This Court might rightly ask: What possible policy interest is advanced by

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[83] 5 Cal.4th at p. 1095 [emphasis added].

[84] 5 Cal.4th at pp. 1094-95 [citing *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811-12 and *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 358].

[85] 1 A.A. 227-230; *see* Ct. App. Opn., p. 12.

[86] *Mirkin*, *supra*, 5 Cal.4th at p. 1008.

approving a scheme that even its proponents say has as its principal virtue the ability to maximize recoveries to people who may not have been injured "as a result of" the practice? Given the plain language and the animating purpose behind Proposition 64, such a construction should be rejected.

This Court should hold that the new requirements of Proposition 64 apply not only to the claims asserted by the named plaintiff but equally to the claims asserted on behalf of each absent class member. The Court should also hold that the "as a result of" language of Proposition 64 requires all private UCL claimants to prove causation.

For all the aforementioned reasons, this Court should affirm.

Dated: March 26, 2007.

Law Offices of Fred J. Hiestand
A Professional Corporation
- and -
Morrison& Foerster, LLP

By_____
Fred J. Hiestand
William L. Stern
Attorneys for Amici Curiae
Civil Justice Association of California, California Chamber of Commerce, California Manufacturers and Technology Association, and California Bankers Association

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Fred J. Hiestand
Counsel for Amici Curiae