S147345

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES

WILLARD BROWN, ET AL.
Plaintiffs and Appellants,

vs.

PHILLIP MORRIS USA, INC., ET AL.
Defendants and Respondents.

Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One Affirming an Order Decertifying a Class Action, San Diego County Superior Court, Case No. 711400 Judicial Council Coordination Proceeding 4042, The Hon. Ronald Prager, Judge Presiding

APPLICATION OF CURT SCHLESSINGER, PETER LORE, AND CALIFORNIA LAW INSTITUTE FOR PERMISSION TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/APPELLANTS WILLARD BROWN, ET AL; [PROPOSED] AMICI CURIAE BRIEF

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA:

Pursuant to California Rule of Court 8.520(f), Curt Schlessinger, Peter LoRe, and California Law Institute ("CLI") hereby respectfully apply to this Court for permission to file an amici curiae brief in support of Plaintiffs and Appellants, Willard Brown, et al.

Amici curiae Curt Schlessinger and Peter LoRe are plaintiffs and putative class representatives in *Schlessinger, et al. v. Ticketmaster*, pending in Los Angeles County Superior Court, Case No. BC 304565 before Judge Kenneth R. Freeman.[1] On October 21, 2003 (before enactment of Proposition 64), Messrs. Schlessinger and LoRe ("Plaintiffs") instituted this action albeit as a section 17200 representative action, against Ticketmaster to seek recovery of undisclosed UPS surcharges for expedited delivery of tickets to Internet ticket purchasers. Plaintiffs have withstood numerous motions, including motions to stay, for summary judgment/ adjudication, for judgment on the pleadings (two times) and for removal to federal court. After passage of Proposition 64, and before *Mervyn's* was decided, Plaintiffs amended and converted its case to a class action, with Plaintiffs becoming putative class representatives seeking substantial restitutionary recovery of surcharges on behalf of a nationwide class.

After almost three years of motion practice, discovery, and Proposition 64-induced delays, Plaintiffs moved for class certification. Ticketmaster principally opposed based on the contention that actual reliance was a Business and Professions Code section 17200

[1] Scott Silver is also a named plaintiff, but is not a class representative in the case.

requirement under the *Pfizer/Tobacco II* cases. After full briefing and before the class certification hearing, Ticketmaster moved for a stay until *Tobacco II* is decided. Judge Freeman granted the stay pending issuance of a decision by this Court in the pending cause.

Plaintiffs' interest in this appeal is self-evident: should this Court determine that Proposition 64 resulted in the need of class representatives or unnamed class members to prove actual reliance in order to obtain restitutionary recovery, the lawsuit which Plaintiffs have been prosecuting for almost 3 ½ years may be for naught. Moreover, because many, if not most, consumer unfair competition lawsuits involve widespread practices where actual reliance is missing, the possibility for relief under section 17200 is forestalled. Put another way, the *Pfizer/Tobacco II* approach will be the death knell of most California consumer class actions under section 17200, a result that undermines the very reason for the existence of this consumer protectionist statute.

Amicus curiae California Law Institute ("CLI") is a non-profit organization domiciled in Oceanside, California dedicated to advancing justice. CLI filed an amicus curiae brief in *Branick v. Downey Savings and Loan Association* (2006) 34 Cal.4th 235 based on its involvement in a section 17200 representative against MasterCard and VISA U.S.A. in San Francisco Superior Court. After *Branick*,[2] CLI has continuing interest in how Proposition 64 impacts consumer class actions and desires to weigh in on the *Tobacco II* issues so that aggrieved consumers can meaningfully initiate class actions without

[2] Because it could locate no impacted plaintiff willing to serve as a class representative, CLI dismissed its prior representative action with prejudice.

having to satisfy fraud-type elements never before considered to be part of section 17200's substantive requirements.

Proposed Amici believe that they can summarize the most salient points faced by this Court on review. Amici's attorneys have extensive experience in class actions, with Amici providing both California, federal, and commentary support for the arguments they make in alignment with Plaintiffs/Appellants' position in this particular cause.[3]

Although the proposed Amici Brief is submitted about a month past the initial deadline for filing, these specific facts explain the bases for the short delay:

A. Mr. Hensley has been engaged in pretrial or trial work for a substantial contract case in Orange County, employment case in Orange County, and federal trademark infringement case in Central District of California federal court, with the federal case settling so he could complete the brief with Mr. Stein;

B. Mr. Stein's lender in Illinois refused to fund further financing such that he had to wind-down his Illinois practice and relocate to California, which left some of the principal briefing and editing to Mr. Hensley;

C. Judge Freeman in the *Ticketmaster* case indicated prior to an April 12, 2007 status conference that he might proceed with the class certification, which led counsel to

[3] Specifically, Mr. Hensley has fifteen years of prosecuting and defending both consumer and federal/state securities class actions. Mr. Stein, licensed in both California and Illinois, has focused his practice on prosecuting consumer class actions for the last twelve years.

get CLI's permission to assist the court as Amicus. At the April 12 conference, Judge Freeman continued the stay based on *Pfizer/Tobacco II* such that Messrs. Schlessinger and LoRe have a keen continuing interest in the issues presented for review; and

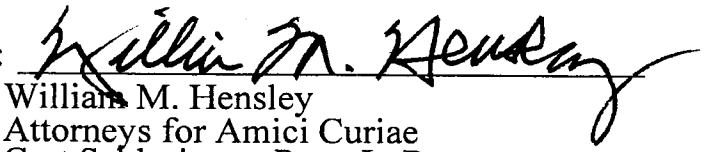
D. Proposed Amici here have filed their Proposed Brief on April 23, 2007, which is the extended deadline given to Farmers Insurance Exchange by order dated March 22, 2007, so as to not result in any time prejudice to the Court or other parties.

Accordingly, Amici Curiae Curt Schlessinger, Peter LoRe, and California Law Institute requests the Court to accept the accompanying Amici Curiae brief for filing.

DATED: April 23, 2007

JACKSON DEMARCO TIDUS & PECKENPAUGH

William M. Hensley
Robert J. Stein III

By: 

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I. INTRODUCTION.

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After almost three years of motion practice, discovery, and Proposition 64-induced delays, Plaintiffs moved for class certification. Ticketmaster principally opposed based on the contention that actual reliance was a Business and Professions Code section 17200 requirement under the *Pfizer/Tobacco II* case duology. After full briefing and before the class certification hearing, Ticketmaster moved for a stay until *Tobacco II* is decided. Judge Freeman granted the stay pending issuance of a decision by this Court in the pending cause.

Plaintiffs' interest in this appeal is self-evident: should this

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Court determine that Proposition 64 resulted in the need of class representatives or unnamed class members to prove actual reliance in order to obtain restitutionary recovery, the lawsuit which Plaintiffs have been prosecuting for almost 3 ½ years may be for naught. Moreover, because many, if not most, consumer unfair competition lawsuits involve widespread practices where actual reliance is missing, the possibility for relief under section 17200 is forestalled. Put another way, the *Pfizer/Tobacco II* approach will be the death knell of most California consumer class actions under section 17200, a result that undermines both the very reason for the existence of this consumer protectionist statute and the purported objective of Proposition 64, which was to have these claims prosecuted as class actions with impacted consumers serving as the class representatives.

Amicus curiae California Law Institute ("CLI") is a non-profit organization domiciled in Oceanside, California dedicated to advancing justice. CLI filed an amicus curiae brief in *Branick v. Downey Savings and Loan Association* (2006) 34 Cal.4th 235 based on its involvement in a section 17200 representative against MasterCard and VISA U.S.A. in San Francisco Superior Court. After *Branick*,[2] CLI has continuing interest in how Proposition 64 impacts consumer class actions and desires to weigh in on the *Tobacco II* issues so that aggrieved consumers can meaningfully initiate class actions without having to satisfy fraud-type elements never before considered to be part of section 17200's substantive requirements.

[2] Because it could locate no impacted plaintiff willing to serve as a class representative, CLI dismissed its prior representative action with prejudice.

II. *TOBACCO II*'S INJECTION OF COMMON LAW FRAUD ELEMENTS INTO SECTION 17200 OVERTHROWS YEARS OF CONTRARY DECISIONS AND FINDS NO SUPPORT IN PROPOSITION 64'S VOTER ENACTMENT.

A. Before Enactment Of Proposition 64, Section 17200 Decisional Law Rejected Infusion Of Fraud Elements Into The Pro-Consumer Statutory Framework.

At common law, consumers claiming deception had no redress for unfair competition. However, the 1933 amendment to former Civil Code section 3369, the predecessor to section 17200, dramatically broadened the provision to protect consumers as well as business competitors. (*People ex rel. Mosk v. National Research Co.* (1962) 201 Cal.App.2d 765, 770.) Subsequent amendments, up to Proposition 64, broadened the reach of former section and current section 17200. (See, e.g., Stats. 1963, ch. 1606, § 1 (adding "unlawful" to the list of unfairly competitive business practices); Stats. 1972, ch. 1084, § 2 (adding "deceptive" advertising to unfairly competitive advertising practices); Stats. 1976, ch. 1006, § 1 (adding restitutionary and equitable relief other than mere injunctive relief to redress § 17200 violations); Stats. 1977, ch. 299, § 2 (recodified former Civil Code sections 3369 and 3370 as Business and Professions Code section 17200 et. seq.); Stats. 1992, ch. 430 (extending reach to one-time, past and completed acts and deleting "in state" only ambit as far as reaching uncompetitive conduct); Stats. 1998, ch. 599 (expanding reach to Internet transactions).)

In line with these statutory amendments broadening the parameters and reach of section 17200, the courts equally were solicitous of interpreting the provisions broadly and unhampered by common law fraud substantive restrictions. Specifically, an unfair practice under the "fraudulent" prong of section 17200 has for 20-plus years held cognizable claims, dispensing with proof of common law fraud elements such as intent, scienter, actual reliance, or damage. Rather, an aggrieved consumer seeking relief under section 17200's "fraudulent" prong only needed to demonstrate that "members of the public are likely to be deceived." (*Committee on Children's Television v. General Foods Corp.* (1983) 35 Cal.3d 197, 211.)

Since *Committee on Children's Television*, California decisions consistently rejected infusing fraud elements such as actual reliance into section 17200 until the *Tobacco II/Pfizer* dual decisions aberrantly held otherwise. (See, e.g., *People v. Dollar Rent-A-Car Systems, Inc.* (1989) 211 Cal.App.3d 119, 129;[3] *State Farm Fire & Cas. Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1095; *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647-648; *Klein v. Earth Elements, Inc.* (1997) 59 Cal.App.4th 965, 970; *People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1076; *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1167.)

We now examine Proposition 64 to see if these years of

[3] *Dollar Rent-A-Car Systems*, supra, 211 Cal.App.3d at page 131 tersely rebuffed the very argument that the *Tobacco II* trial and appellate jurists used to deny class certifications, citing to *Children's Television* as support: "Defendants argue that there is no statutory violation if the customer does not even read the contract. Such an interpretation would defeat the purpose behind the statutes. These statutes protect against the *likelihood* of deception to the public, not just *actual* harm." (Emphasis in original.)

precedents were clearly eradicated by the 2004 voter enactment.

B. Proposition 64 Has No Clear Expression Of Intent To Override Inject Fraud-Like Elements Into Section 17200

As this Court expressed well in an earlier Proposition 64 case, it will not attempt to infer sweeping substantive changes from ambiguous general language in Proposition 64. (Cf. *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 229-230 (prospective/retroactivity issue would not turn on ambiguous language in Proposition).) Instead, "[A]bsent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language" with "the words . . . read in context, considering the nature and purpose of the statutory enactment." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 301.)

Unfortunately for everyone, *Tobacco II* had no principled discussion of Proposition 64's impact on the substantive elements of section 17200. It simply recited certain amended sections of section 17200 and then distinguished *Anunziato v. eMachines* (C.D. Cal. 2005) 402 F.Supp. 2d 1113. However, *Tobacco II* did rule that class certification was inappropriate because, among other factors, not even the class representatives relied on the germane representations. (Slip. Op. at pp. 13-15.)

Nothing in Proposition 64 indicates voters intended to abolish the *Committee on Children's Television* test or reinject fraud-like elements as part of a new substantive proof for consumers suing under

section 17200.

Because legislative analysis and ballot arguments are properly reviewed in determining voter's intent (*Legislature v. Eu* (1991) 54 Cal.3d 492, 504-505, cert. denied (1992) 503 U.S. 919, 112 S. Ct. 1292-1293), the salient portions in each demonstrate no intent to overrule years of outstanding jurisprudence on section 17200's key substantive claim requirements:

- Proposition 64 only requires that persons other than government prosecutors, when suing on behalf of others, "meet the additional requirements of class action lawsuits" (Legislative Analyst's Analysis of Proposition 64)[4] – saying nothing about additional substantive restrictions being put on class action members.

- In analyzing the fiscal impacts of Proposition 64, the Legislative Analyst concluded that its requirements of having representative actions brought as class actions "could increase court workload, and therefore state costs, to the extent there is an increase in class action lawsuits and their related requirements" – hardly evincing an intent to eviscerate section 17200 class actions.

- In rebuttal to opposition arguments to Proposition 64, proponents indicated it did not change any consumer protection laws, but was only meant to "stop abusive shakedown lawsuits" and "protect [citizen's] rights to file suit if you've been harmed." Nothing in the rebuttal mentioned

[4] See http://www.ss.ca.gov/elections/6p-nov04/pub_display/07_pub_dsply_prop_64b.pdf for Legislative Analyst's Analysis and ballot arguments relating to Proposition 64.

adding substantive restrictions to section 17200.

- Arguments for Proposition 64 repeatedly cited Trevor Group type of abuses, mentioning nothing about consumer class actions brought by impacted class representatives.

Rather than a wholesale revamp of section 17200, the Proposition 64 ballot arguments demonstrate voters only intended to eliminate abuses such as the frivolous filing of lawsuits by such private attorneys as The Trevor Group having no client injured in fact (except for the venture capitalists backing the lawyers filing waves of 17200 lawsuits). (*American Products Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP* (2005) 134 Cal.App.4th 1332, 1347.)[5] In stark contrast to such shakedown situations, the vast majority of consumer protection class actions – such as *Tobacco II*, *Pfizer*, and the pending Ticketmaster case in Los Angeles County Superior Court – involve cases where thousands to millions of aggrieved consumers are seeking restitution for real-life economic losses. Requiring the representative plaintiffs to prove fraud-like elements (and certainly dispositively impacted if everyone in the putative class had to satisfy

[5] In determining that the Civil Code section 47 litigation privilege did not apply to commencement of multiple lawsuits under peculiar facts, the appellate court in *American Products* noted a similarity to a practice that inspired enactment of Proposition 64: "We are mindful of a similar type of practice by the Trevor Law Group. In 2002 and 2003, the Trevor Law Group found financial success by abusing California's unfair competition law. The abuse is a kind of legal shakedown scheme: Attorneys form a front 'watchdog' or 'consumer' organization. They scour public records on the Internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization. Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business . . ., and point out that a quick settlement . . . would be in the business's long-term interest. [Citation omitted.]" (*American Products Co.*, supra, 134 Cal.App.4th at p. 1347.)

such substantive elements at the outset) would gut these legitimate cases.[6]

Reinjecting fraud elements would have three nefarious results which would enfeeble both the deterrent and restitutionary objectives of 17200: (1) emasculate the prior broad parameters of section 17200, which were protective of the rights of injured plaintiffs to retain attorneys where the plaintiffs did have economic transactions with the defendants; (2) eliminate section 17200 class action protections safeguarding consumers with small individual claims, a result contrary to the legislative history of amendments under the Unfair Competition Law and in derogation of the substantive importance attached to class actions in California. (*Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 161 & 161-162 n. 3 (class actions, particularly in the consumer context, are "inextricably linked to the vindication of substantive rights.")); and (3) fail to deter businesses from engaging in deceptive or unfair business practices which impacted a large number of consumers, but in a small dollar amount each, since there would no longer be any economically feasible means

[6] That actual reliance would be the death knell of class action in this area finds an analog in federal securities law. In the federal securities area, a "fraud-on-the-market" theory obviates the need to prove subjective reliance in open market transactions, which shifts the analysis to proving transaction (factual) causation. (*Basic, Inc. v. Levinson* (1988) 485 U.S. 224, 108 S. Ct. 978, 991-92; *Moskowitz v. Lopp* (E.D. Pa. 1989) 128 F.R.D. 624, 630; see also *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1101 n.8.) This doctrine allowed federal securities actions to be certified and vindicated harmed investors without needing to prove reliance, akin to what unfair competition statutes attempt to achieve in the consumer context. (*In re Seagate Technology II Sec. Litig.* (N.D. Cal. 1994) 843 F.Supp. 1341, 1355-1356 ("under the [fraud-on-the-market] theory, even those who never heard the alleged misstatement can recover therefore, whereas such persons would otherwise be unable to recover for lack of reliance." Thus, satisfaction of the numerosity requirement has been made even easier by the fraud-on-the-market theory.").)

for consumers to challenge such practices if the class action device is no longer available.[7]

C. A Litany Of Post-Proposition 64 Decisions Have Followed The *Committee on Children's Television* Test.

Even after the passage of Proposition 64, numerous decisions from California's intermediate appellate courts have continued to follow the "likelihood of deception" test of *Committee on Children's Television*. (See, e.g., *Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 806 [2d Dist., Div. 7, rev. denied]; *McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1471 [2d Dist., Div. 1]; *People ex rel. Dept. of Motor Vehicles v. Cars 4 Cause* (2006) 139 Cal.App.4th 1006, 1016 [2d Dist., Div. 6, rev. denied]; *Wayne v. Staples, Inc.* (2006) 135 Cal.App.4th 466, 484 [2d Dist., Div. 7, rev. denied]; *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 682 [2d Dist., Div. 5, rev. denied]; *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 284 [3d Dist., rev. denied]; *Bell v. Blue Cross* (2005) 131 Cal.App.4th 211, 221 [2d Dist., Div. 1, rev. denied]; *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 49 [2d Dist., Div. 8, rev. denied].)[8]

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[7] The case against Ticketmaster is a class example. The actual damages sustained by the vast majority of the class members are only $10-50 each, but the aggregate of these damages is in excess of $100 million.

[8] Although federal cases are not controlling, we believe that *Anunziato v. eMachines, Inc.*, supra, 402 F.Supp.2d 1133 is persuasive in rejecting the notion that actual reliance is or should be a section 17200 element or class certification requirement in the wake of Proposition 64. At least one other federal court has questioned whether *Tobacco II/Pfizer* were correct in adding reliance as a section 17200 element. (See *Brothers v. Hewlett-Packard Co.* (N.D. Cal. Oct. 31, 2006) 2006 WL 3093685 at *6 ("It is not clear that reliance is a required element under Proposition 64.").)

Post-Proposition 64 decisions are no different than prior opinions in terms of following *Committee on Children's Television* on the breadth of section 17200 and the nature of elements under the "fraudulent" prong of the same statute. *Tobacco II* should be reversed to the extent it decides differently.

D. Section 17200's Causation Requirement Is Liberal And Easily Met In Most Consumer Class Actions.

If this Court determines that actual reliance is not a new post-Proposition 64 element in section 17200 cases, the causation element is easily met in most consumer class actions.

For example, albeit in an analogous Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) context, *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292-1293, rev. denied,[9] determined that causation is commonly proven by showing materiality as to all class members. (See also *Varacallo v. Mass. Mut. Life Ins. Co.* (2000) 332 N.J. Super. 31, 752 A.2d 807, 817.)

Recently, this Court followed similar reasoning in determining that a class representative had standing to represent a class in a used van overcharge case brought under several consumer statutes, including section 17200. In *Fireside Bank v. Superior Court* (Cal. Sup. Ct. Apr. 16, 2007) 2007 WL 1112020, this Court found class representative (Ms. Gonzalez) had standing to represent a putative class because she had been subjected to the same alleged wrong

[9] Ironically, *Massachusetts Mutual* was decided by the same appellate division that issued *Tobacco II*. *Massachusetts Mutual* recognized that common reliance can be inferred in many consumer cases, which should be the rule and not the exception. (97 Cal.App.4th at pp. 1291-1295.)

(deprivation of a fair ability to redeem a financed vehicle, followed by an unlawful payment demand) and had standing to seek restitution (because she made a post repossession payment against the alleged deficiency). (Id. at p. *13.) This closely tracks the materiality test of *Massachusetts Mutual*.

The result is no different at the federal level. *In re Warfarin Sodium Antitrust Litigation* (D. Del. 2002) 212 F.R.D. 231, 249 nicely reasoned why causation becomes a relatively easy element to satisfy under unfair competition statutes where reliance does not need to be demonstrated:

> "Where state consumer fraud statutes do not require proof of reliance, as is the case here, plaintiff 'need only establish a causal link between the [deceptive] conduct at issue and his or her injury,' and this individual issue of causation does not necessarily defeat predominance of the common issues about defendant's course of conduct. *Mulligan v. Choice Mortgage Corp. USA,* No. 96-596-B, 1998 WL 544431, at *11 - *12 (D. N. H. Aug. 11, 1998) (finding common issue of whether defendant's practices were unfair or deceptive in violation of state consumer fraud statute predominated despite need for individual proof of causation, where no proof of individual reliance was required by the statute) . . .."

The causation element is no difficult to surmount, being either inferentially established from a material scheme or easily satisfied by the existence of a factual causal link in the chain of events. *Tobacco II*'s conclusory reasoning otherwise (Slip. Op. at p. 17), made without addressing state or federal authority, cannot stand from an analytical perspective.

III. NOTHING IN PROPOSITION 64 OR CLASS ACTION PRINCIPLES REQUIRES THAT PUTATIVE CLASS MEMBERS, OTHER THAN THE CLASS REPRESENTATIVE, DEMONSTRATE STANDING AT THE CLASS CERTIFICATION STAGE.

A. Proposition 64 Does Not Require That Putative Non-Representative Class Members Demonstrate Injury At The Class Certification Stage.

Tobacco II blithely concluded that class certification was properly denied because "the individual plaintiffs and all class members were now required to show injury in fact consisting of lost money or property caused by the unfair competition." (Slip Op., at p. 4; see also Slip. Op., at p. 8 [". . . the named plaintiff as well as class members must have suffered an injury in fact or lost money or property."].) This conclusion is not borne out by the plain language of Proposition 64.

Proposition 64's "standing" injury requirement facially applies only to the class representative. This conclusion is confirmed by the very syntax of the germane amendment to Business and Professions Code section 17203: "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing

requirements of this section and complies with Section 382 of the Code of Civil Procedure . . .." It is further confirmed by the subsequent carve-out, where governmental prosecutors – which are authorized to representatively sue on behalf of the People of the State of California – do not have to meet the "standing" injury requirement in their representative capacity. The structure of Proposition 64 refutes *Tobacco II*'s inferential leap otherwise and demonstrates that only class representatives are subject to having to show that they are impacted individuals of the putative class.

However, even extrinsic evidence supports amici curiae's position. The Legislative Analyst's analysis of Proposition 64 indicates, in several places, that the "standing" injury requirements apply only to " . . . a person initiating a lawsuit under the unfair competition law" – a requirement applying only to class representatives. The ballot arguments further bolster that only class representatives, rather than putative members, need satisfy section 17200's injury standards. (See, e.g., Argument for Proposition 64 [private lawyers can file a section 17200 "even though they have no client or evidence that anyone was damaged or misled"]; Rebuttal to Argument Against Proposition 64 [Proposition 64 would permit ALL the suits cited by its opponents (i.e., environmental, general health, accounting irregularities, and general consumer suits); only closes the loophole allowing trial lawyers to appoint themselves as attorney generals suing on behalf of the People].)

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B. California Does Not Allow Any Inquiry Into The Merits Of Class Member Claims At The Certification Stage.

Tobacco II reached its conclusion that all class members must show injury by heavily relying on the following isolated language from *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73: "Each class member must have standing to bring the suit in his own right."[10] This parsed reliance on certain language in *Collins* does not lead to the sweeping end result that all class members must demonstrate injury at the class certification stage.

In fact, *Collins*' broad language in this respect was questioned and restrictively reined in subsequently by this Court. Specifically, in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 442-443, Justice Baxter (in writing for a unanimous court) discussed *Collins*' suggestion that the merits of class claims should be assessed, namely, the *Collins* class members being unable to prove loss or harm resulting from the purchase of defendant's eggs. This Court rejected conditioning certification upon a showing that class claims for relief are likely to prevail. In so doing, Justice Baxter later observed that this determination was consonant with the weight of authority in federal and sister state courts. (*Id.*, at pp. 443-444.) *Linder* drastically cut back on the impact of *Collins* which was resurrected and improperly applied by the *Tobacco II* panel.

California law favors the fullest and most flexible use of the class action devise, particularly in the area of consumer protection litigation. (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d

[10] *Collins* is, of course, easily distinguishable because the class representative failed to allege any ascertainable class.

864, 877; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807-809.) This Court in *Vasquez* directed courts in this state to use the class action device as a "group remedy" especially in situations "where numerous consumers are exposed to the same dubious practice by the same sellers so that proof of the prevalence of the practice as to one consumer would provide proof for all." (*Vasquez*, supra, 4 Cal.3d at p. 808.) However, in derogation of the liberality accorded to class actions, *Tobacco II* bucked these precepts followed in most consumer class action litigation contexts:

- The nature of many consumer class actions – involving similar misrepresentations or a common scheme – infers class-wide evidence of impact or actual injury (*Fireside Bank*, supra, 2007 WL 1112020 at p. 13; *Vasquez*, supra, 4 Cal.3d at pp. 814-815; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 363; *Massachusetts Mutual Life Ins. Co. v. Superior Court*, supra, 97 Cal.App.4th at pp. 1292-1295; *In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 413-416; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1351; *Rosack v. Volvo of America Corp.* (1982) 131 Cal.App.3d 741, 753-754, cert. den. (1983) 460 U.S. 1012, 103 S. Ct. 1253);

- Plaintiffs are not required to show that each class member has been injured at the class certification stage (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908,

914, rev. denied);[11] and

- The fact that separate transactions are involved does not prevent a finding of the required community of interest necessary to certify a class (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 56, rev. denied).[12]

Unlike the result reached in *Tobacco II*, California does not force putative class members to demonstrate injury, a merit-based determination, at the class certification stage. Otherwise, this Court's reasoning in *Linder* has been eviscerated by *Tobacco II*'s inferential reading of an intent into Proposition 64 that is plainly not contained in the voters' enactment.

C. Most Federal Class Action Decisions Do Not Require Non-Representative Class Members To Demonstrate Standing At The Certification Stage.

That unnamed class members do not have to establish standing finds expression in numerous federal cases and a leading class action

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[11] In *Hicks*, the trial court denied class certification in a mass residential product liability action because membership in the class could not be ascertained without an individualized analysis of whether each member's concrete slab suffered manifest damage. The Court of Appeal reversed the determination that manifest damage to a slab was a proper precondition for class membership. It observed: "The [trial] court's reasoning is circular because it makes ascertainability depend on the outcome of the litigation on the merits. Our Supreme Court has held, however, courts may not consider the merits of the claim at the certification stage [citing *Linder*, supra, 23 Cal.4th at p. 443 in a footnote]." (*Hicks v. Kaufman and Broad Home Corp.*, supra, 89 Cal.App.4th at p. 914.)

[12] As explained well in *Blakemore*: "Taking plaintiffs' unfair business practices claim as an example, if the class representatives prove Avon engaged in the practices alleged [failing to credit the class members for return of unordered products], each class member need not separately establish Avon's liability for engaging in that practice. The class members need only show they are members of the class – [Avon] representatives who paid for unordered products they returned – and the amount of their damages." (*Blakemore v. Superior Court*, supra, 129 Cal.App.4th at p. 57.)

treatise.

To begin, the Supreme Court has held that unnamed class members do not need to meet all of the requisite federal standing requirements. *Devlin v. Scardelletti* (2002) 536 U.S. 1, 10, 122 S. Ct. 2005, 2011. In reaching the conclusion that a class member who files an objection to a settlement has standing to appeal – even though he is not formally a "party" to the action, *Devlin* observed that unnamed class members do not have to meet all of the requirements for standing, and noted that imposing such a requirement would be destructive to the very goal the class action device is designed to achieve. *Id.* To wit: "[t]he rule that nonnamed class members cannot defeat complete diversity" which is a quintessential federal standing requirement, was "justified by the goals of class action litigation. Ease of administration of class actions would be compromised by having to consider the citizenship of all class members, many of whom may be unknown, in determining jurisdiction." *Id.* The same holds true for injecting an individualized causation requirement into a 17200 class action. Requiring the courts to make such an assessment for each class member at the certification stage would be just as compromising and untenable as requiring a federal court to consider the diversity of each class member.

The identical issue which is the subject of this Court's briefing request on review of *Tobacco II* – must every member of the proposed class versus just the class representative suffer "injury in fact" in order to bring a section 17200 class action – was answered resoundingly in the negative by a federal district court in *Bzdawka v. Milwaukee*

County (E.D. Wis. 2006) 238 F.R.D. 469.[13] Like *Tobacco II*, defendants in *Bzdawka* contended that class action plaintiffs must establish that unnamed class members have standing. The *Bzdawka* court squarely rejected this argument after analyzing other federal decisions that were in agreement as well as distinguishing or criticizing other opinions lacking analytical persuasiveness. It reasoned:

> "In a class action, the unnamed class members are 'passive' in contrast to the named plaintiff, who actively prosecutes the litigation on their behalf. [Citation omitted.] And while standing analysis is concerned with whether the named plaintiff is properly before the court, the represented class members are not only passive but also not before the court. [Citations omitted.] Moreover, to require a plaintiff to show that every class member's claim presents an actual controversy would place a formidable, if not insurmountable, threshold burden on the parties and the court. Since by definition the joinder of class members is impracticable, to require proof of the existence of individualized 'cases' would in

[13] Although *Bzdawka* dealt with class certification standards under the Federal Rules of Civil Procedure, California state courts have found this distinction inconsequential, frequently looking to decisions under the federal rules as instructive for addressing class certification issues in California cases. (*Schneider v. Vennard* (1986) 183 Cal.App.3d 1340, 1345-1346.)

essence be treating the class members as parties. [Citation omitted.]" (*Bzdawka*, supra, 238 F.R.D. at p. 473.)[14]

Other cases and a leading class action commentator endorse a similar analysis. (See, e.g., *Arkansas Ed. Assn. v. Bd. of Ed. of Portland, Ark. School Dist.* (8th Cir. 1971) 446 F.2d 763, 766; *Rozema v. Marshfield Clinic* (W.D. Wis. 1997) 174 F.R.D. 425, 444; *Coleman v. Cannon Oil Co.* (M.D. Ala. 1992) 141 F.R.D. 516, 522-524; *A. Conte & H. Newberg, Newberg on Class Actions*, §§ 2.7, 2.10 (4th ed. 2002).)

A like result occurs under Rule 23(b)(2).[15] "In a class action, the standing question is resolved with regard to the representative plaintiffs. Especially in a putative Rule 23(b)(2) class action, where the potential class members cannot be enumerated, attempting to conduct a standing analysis with respect to those unenumerated class members would be impossible." (*Coleman v. General Motors Acceptance Corp.* (M.D. Tenn. 2004) 220 F.R.D. 64, 88.) Rather, as long as the challenged policy or practice is generally applicable to the class as a whole, certification under Rule 23(b)(2) is proper despite the fact not all class members suffered the injury advanced by class representatives. (See, e.g., *McGee v. East Ohio Gas Co.* (S.D. Ohio

[14] *Bzdawka* went on to explain that the appropriate inquiry "with respect to unnamed class members is not whether they have standing to sue but whether the named plaintiffs may assert their rights," namely, whether the class representative has individual standing and satisfies the Federal Rules of Civil Procedure, rule 23 requirements. (238 F.R.D. at pp. 473-474.)

[15] For a class to be certified under Rule 23(b)(2), the plaintiffs bear the burden of showing that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." F.R.Civ. P. 23(b)(2).

2001) 200 F.R.D. 382, 391 (quoting Rule 23(b)(2)'s Advisory's Committee Note);[16] *Arnold v. United Artists Theatre Circuit, Inc.* (N.D. Cal. 1994) 158 F.R.D. 439, 455 (same).)

If putative unnamed class members not even before the court have to prove standing, class actions are doomed. Federal class action principles so recognize, requiring only that the class representative satisfy any injury "standing" prerequisite. In this way, class actions are preserved as a device to redress common consumer practices impacting an array of persons.

IV. CONCLUSION.

For the reasons set forth above, all *Amici* respectfully submit that this Court should reverse *Tobacco II*, ruling that actual reliance is not a section 17200 substantive element and that only the class representative must satisfy the injury "standing" requirements in consumer class actions.

DATED: April 23, 2007

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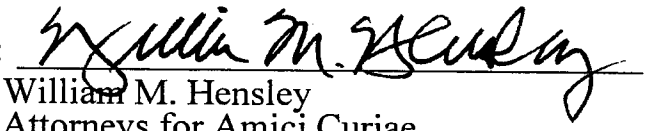
By: 
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[16] "Action or inaction is directed to a class within the meaning of [Rule 23(b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." F.R.Civ.P. 23(b)(2) Advisory Committee's Note.

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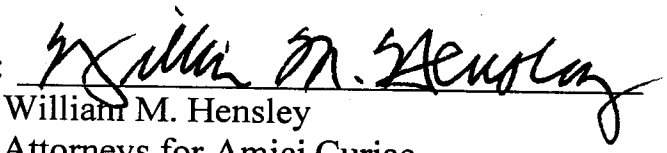
By: 
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I am employed by the law firm of Jackson DeMarco Tidus & Peckenpaugh and my business address is 2030 Main Street, Suite 1200, Irvine, California 92614. I am over the age of 18 and not a party to the action. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing.

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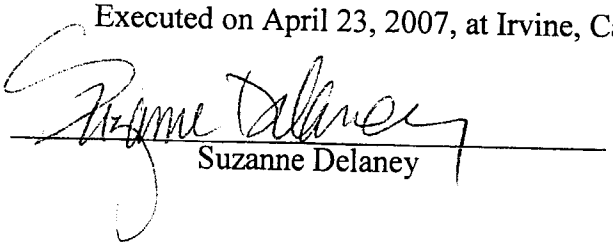

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