IN THE SUPREME COURT OF CALIFORNIA

IN RE TOBACCO II CASES, JCCP 4042	
WILLARD BROWN; DAMIEN BIERLY; and MICHELLE SEYMORE, on behalf of themselves and all those similarly situated, Plaintiffs and Appellants, v. PHILIP MORRIS USA INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION (individually and as successor by merger to THE AMERICAN TOBACCO COMPANY); LORILLARD TOBACCO COMPANY; LIGGETT GROUP INC.; LIGGETT & MYERS, INC.; THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC.; and THE TOBACCO INSTITUTE, Defendants and Respondents.	CASE NO. S147345 [Service on the Attorney General and the District Attorney required by Bus. & Prof. Code, § 17209] Court of Appeal, Fourth Appellate District, Division One, Case No. D046435 Superior Court of County of San Diego, Honorable Ronald Prager, Judge, Case No. 711400, JCCP No. 4042

BRIEF OF CONSUMERS UNION OF UNITED STATES, INC., AS AMICUS CURIAE, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Supreme Court with a question of statutory construction that cuts to the heart of consumer protection and the unfair competition and false advertising laws as the courts and public have understood them for over thirty years. Resolution of this question should be relatively straightforward, as this brief explains below (*post*, section IV, at pp. 11-14); but the consequences of the Court of Appeal's erroneous construction are momentous for California's consumers, for it effectively reverses thirty years of consumer protection law in California.

In order to protect consumers and the public, California's unfair competition and false advertising laws authorize private lawsuits to stop unlawful, unfair or fraudulent business practices, and unfair, deceptive, untrue or misleading advertising. For over thirty years, a cause of action under these laws has not required proof that actual deception, reliance or damages have already occurred, but only a likelihood thereof. For decades, consumers have been able to secure restitution of monies wrongfully taken and held; and they have been able to obtain injunctions to protect against proposed future harms before the injury can occur.

In 2004, California's voters enacted Proposition 64 and amended certain standing requirements for private actions under these laws. The initiative did not change the broad definition of unfair competition, the elements of a cause of action, nor the remedies available to consumers. As the Court acknowledged last year, Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 232.)

Instead, the voters were responding to concerns articulated by the initiative's proponents about frivolous or "shakedown" lawsuits filed by some attorneys who had no injured client. The initiative declared the intent to "eliminate frivolous unfair competition lawsuits while protecting the

right of individuals to retain an attorney and file an action for relief." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 1, subd. (d), at p. 109.) The balance the initiative struck was amending the standing requirements for the named plaintiff, so that attorneys must have a client who had suffered injury in fact. Untouched was the long-standing, proper use of the unfair competition laws in numerous cases (discussed below, *post*, section III, at pp. 7-11) where an effective cause of action against unfair competition or false advertising did *not* require allegations and proof of individual injury, deception, or reliance. What was true before Proposition 64 remains true afterwards:

> To state a cause of action under these statutes for injunctive relief, it is necessary only to show that "members of the public are likely to be deceived." . . . Allegations of actual deception, reasonable reliance, and damage are unnecessary. The court may also order restitution without individualized proof of deception, reliance and injury if it "determines that such a remedy is necessary 'to prevent the use or employment' of the unfair practice . . . ."

(*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211 [citations omitted].)

Contrary to Proposition 64's explicit language and the voters' expressed intent, the Court of Appeal below construed the initiative so that now no consumer class action may be brought unless and until every class member proves actual injury in fact and loss of money or property as a result of the challenged practice. No longer is it necessary only to show that "members of the public are likely to be deceived;" under the Court of Appeal's construction, one must show that all members of the class were actually deceived. This effectively reverses thirty years of consumer protection law in California.

Proposition 64's amendments applied the additional standing requirements only to the "claimant" or "person . . . pursu[ing] representative claims or relief on behalf of others." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 2, at p. 109 [amending Bus. & Prof. Code, § 17203].) Rather than continue to allow one to pursue a representative

action on behalf of the general public, the amendments instead required the named plaintiff to comply with Code of Civil Procedure section 382 and proceed by class action. The Court of Appeal erroneously construed Proposition 64 to require that, besides the named plaintiff, every absent class member must also demonstrate actual injury and damage in reliance on the challenged practice.

This erroneous construction drastically constricts the scope of the unfair competition and false advertising laws and the protection available to California's consumers. As this very case demonstrates, it can be the difference between potential classwide relief for a proposed class of consumers exposed to defendants' advertising of tobacco products, and narrow relief for the named plaintiffs alone who meet Proposition 64's additional standing requirements. The superior court had originally certified the class; adopting this erroneous construction of Proposition 64, it then decertified the class.

Consumers Union of United States, Inc. ("Consumers Union") is the non-profit publisher of *Consumer Reports*, and is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance.[1] Consumers Union submits this brief as amicus curiae because this issue of statutory construction holds such critical importance for the future of consumer protection in California. While Consumers Union was one of the organizations which signed the ballot argument against Proposition 64, it does not reargue the merits of passage here. This brief accepts the balance struck by the People and instead respectfully prays that the Court correct the Court of Appeal's erroneous construction below.

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[1] Consumers Union's publications have a combined paid circulation of approximately 7.4 million and regularly carry articles on its own product testing, health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's income is solely derived form the sale of *Consumer Reports*, its other publications and services, and from noncommercial contributions, grants, and fees, and Consumers Union's publications and services carry no outside advertising and receive no commercial support.

The questions presented are key, and the consequences for consumer protection against unfair competition and deceptive advertising in California are momentous. The Supreme Court wrote in 1972: "We conclude that in a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices." (*Barquis v. Merchants Collection Assn. of Oakland, Inc.* (1972) 7 Cal.3d 94, 111, emphasis added.) Since then, the Internet and other new media have exploded the exposure to these psychological and advertising stimulants. Businesses and advertisers are now undertaking neurological research to manipulate how we respond to tastes, scents, images, and words. Scams abound. Even if the Supreme Court might otherwise affirm the order denying class certification on alternative grounds, Consumers Union respectfully requests that the Court resolve and correct the Court of Appeal's erroneous construction of Proposition 64's amendments, as we explain below.

I. THE COURT OF APPEAL'S DECISION

The appeal below and the Court's review arise from an order decertifying a class action for claims under the unfair competition law, Bus. & Prof. Code, § 17200 et seq., and the false advertising law, Bus. & Prof. Code, § 17500 et seq. (Typed opn. pp. 3-4.) The superior court had initially certified a class on these claims "because these statutes do not require individualized determinations as to reliance." (*Id.* at p. 4.) Once Proposition 64 amended "the standing requirements for UCL lawsuits," the superior court decided that "to establish standing 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." (*Id.* at p. 4.)

The Court of Appeal decided that both a named plaintiff and every absent class member must meet Proposition 64's additional standing requirements (Typed opn. pp. 7-8), even though, on its face, Proposition 64

applied those standing requirements to the named plaintiff only. The opinion reasons mostly from the terms and cases construing Code of Civil Procedure section 382, on class actions. For example, the Court of Appeal quoted *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, for the general proposition that "a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. Each class member must have standing to bring the suit in his [or her] own right." (Typed opn. p. 7, quoting *Collins*, *supra*, 187 Cal.App.3d at p. 73.) The opinion also quotes *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, for the equally general proposition that "class action status does not alter the parties' underlying substantive rights. [Citations.] If a specific form of relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class." (Typed opn. p. 7, quoting *Feitelberg*, *supra*, 134 Cal.App.4th at 1018.)

Connecting these two generic principles--the named plaintiff and the absent class member both must have standing, and because the named plaintiff must show actual injury in order to establish standing, every absent class member must as well--the Court of Appeal concluded: "Thus, the named plaintiff as well as class members must have suffered an injury in fact and lost money or property." (Typed opn. p. 8.)

The Court of Appeal's opinion presumes but nowhere discusses, however, whether the *same* standing requirements must apply to both the named plaintiff and the absent class member. It does not necessarily follow, from the general proposition that named plaintiffs and absent class members must have standing, that named plaintiffs and absent class members must meet the *same* standing requirements where the statute provides otherwise. This is not a surprise. It is already well recognized that, to maintain a class action, a named plaintiff must meet *additional* requirements not imposed upon absent class members, such as fiduciary duties to the class and demonstrated adequacy to represent absent class members. (E.g., *Sav-On Drug Stores, Inc. v. Superior Court (Rocher)*

(2004) 34 Cal.4th 319, 326 [class representatives can adequately represent the class]; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 871 [plaintiff who sues on behalf of a class assumes a fiduciary obligation to the members of the class and surrenders any right to compromise the group action in return for an individual gain].) It is equally valid to examine initiative's plain language, and if necessary, its legislative history, to determine whether Proposition 64 imposed its additional standing requirements upon named plaintiffs but did not impose those same additional standing requirements upon absent class members. This brief does so below. (*Post*, sections IV-VI, at pp. 11-22.)

II. STANDARD OF REVIEW

The Court of Appeal affirmed the order decertifying the class based upon its construction of Proposition 64's amendments to Business and Professions Code sections 17203, 17204, and 17535. The proper construction of Proposition 64 presents a question of law, subject to the Court's review de novo. (E.g., *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.)

Although appellate courts review orders granting or decertifying class certification for abuse of discretion (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326), improper criteria or errors of law are reviewed de novo.

> When reviewing an order granting or denying class certification, we reverse if the order is based upon improper criteria or incorrect legal assumptions """even though there may be substantial evidence to support the court's order."""" (Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435-436, 448.) "In other words, we review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial." (Bartold v. Glendale Federal Bank (2000) 81 Cal.App.4th 816, 829.) If the trial court's ruling that the UCL claim could not be maintained as a class action as a matter of law is legally flawed, no other basis remains for sustaining the court's ruling.

(*Corbett v. Superior Court (Bank of America, N.A.)* (2002) 101 Cal.App.4th 649, 658.)

III. UNDER CALIFORNIA'S UNFAIR COMPETITION AND FALSE ADVERTISING LAWS, ALLEGATIONS AND PROOF OF ACTUAL INJURY, DECEPTION, OR RELIANCE ARE UNNECESSARY FOR A CAUSE OF ACTION.

To understand what Proposition 64 did--and did not--change about standing to sue under the unfair competition law, Business and Professions Code section 17200 et seq., and the false advertising law, Business and Professions Code section 17500 et seq., it is important first to understand what Proposition 64 left entirely unchanged. As the Supreme Court stated, Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct. Nothing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted. Nor does the measure eliminate any right to recover." (*Californians for Disability Rights v. Mervyn's, LLC*, *supra*, 39 Cal.4th at p. 232.)

A. THE UNFAIR COMPETITION LAW, BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ.

The fundamental definition of "unfair competition" remains unchanged. Both before and after Proposition 64's amendments, unfair competition "shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." (Bus. & Prof. Code, § 17200.) Any business practice which violates another statute is unfair competition in violation of Business and Professions Code section 17200 as well. (E.g., *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at pp. 210-211.)

A business practice which is not unlawful may still be unfair, also in violation of the unfair competition law. (E.g., *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180-181.) The legislature intended the definition of unfair competition to sweep broadly, going beyond the original tort of unfair business competition, which protected business competitors from unfair competition, in order to protect actual and potential consumers from unfair competition, fraud, and deceit. (See, e.g., *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 209; *Barquis v. Merchants Collection Assn. of Oakland, Inc.*, *supra*, 7 Cal.3d at pp. 109-111;[2] *Bank of the West v. Superior Court (Industrial Indemnity Co.)* (1992) 2 Cal.4th 1254, 1264 [the common law tort of unfair competition did not provide an effective remedy for consumers].) Accordingly, "to state a claim under the act one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'" (*Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at pp. 1266-1267, quoting *Chern v. Bank of America* (1976) 15 Cal.3d 866, 876.)

"[T]he Legislature . . . intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, . . . the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable '"new schemes which the fertility of man's invention would contrive."'" (*Barquis v. Merchants Collection Assn. of Oakland, Inc.*, *supra*, 7 Cal.3d at pp. 109-111, quoting *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 698; accord *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 181.)

The courts' power to provide relief is similarly broad. Business and Professions Code section 17203 incorporates this statutory definition of

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[2] *Barquis* was decided under Civil Code section 3369, which the legislature subsequently recodified as Business and Professions Code section 17203. (See generally *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129-130 [summarizing legislative history].)

unfair competition and authorizes a court to enjoin "[a]ny person who engages, has engaged, or proposes to engage in unfair competition." (Bus. & Prof. Code, § 17203.) A court may also "make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (*Ibid.*)

The courts' power serves to provide relief for harms which have already occurred (for example, restitution and disgorgement) *and* to prevent harms and deter violations which have yet to occur and have yet to cause any loss of money or property (for example, injunction). (E.g., *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963, 973 ["the court's authority to 'prevent the use or employment' of unfair business practices and false advertising necessarily includes the authority to make orders to prevent such activities from occurring in the future," and thus court has authority to order warnings placed on defendants' milk products]; *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 540, 542 ["This power necessarily includes the authority to make orders to prevent such activities from occurring in the future. . . . The injunctive relief ordered by the court protects the environment and forest resources from any future cavalier and unlawful actions."].)

The purpose of such orders under section 17203 is "'to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains.'" (*Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1267, quoting *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 449.) "The Legislature considered this purpose so important that it authorized courts to order restitution without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice." (*Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1267.) As this Court summarized:

> To state a cause of action under these statutes for injunctive relief, it is necessary only to show that "members of the public are likely to be deceived." . . . Allegations of actual deception, reasonable reliance, and damage are unnecessary. The court may also order restitution without individualized proof of deception, reliance and injury if it "determines that such a remedy is necessary 'to prevent the use or employment' of the unfair practice . . . ."

(*Committee on Children's Television v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 211 [citations omitted].)

This substantive law applied irrespective of whether the action was filed as a class action under Code of Civil Procedure section 382, or otherwise. As this brief explains in more detail below (*post*, section VI, at pp. 18-22), absent class members need not allege and prove actual injury, deception, fraud, or reliance. (E.g., *Fletcher v. Security Pacific National Bank*, *supra*, 23 Cal.3d at p. 451 ["Thus a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud, as an effective means to accomplish this disgorgement."].)

B. THE FALSE ADVERTISING LAW, BUSINESS AND PROFESSIONS CODE SECTION 17500 ET SEQ.

The definition of false or deceptive advertising likewise remains unchanged. Both before and after Proposition 64's amendments, false advertising means "to make or disseminate or cause to be made or disseminated . . . any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . ." (Bus. & Prof. Code, § 17500.) The law prohibits "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626, citing *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 211; *Chern v. Bank of America*, *supra*, 15 Cal.3d at p. 876; accord *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951, cert. dism. as improvidently granted (2003) 539 U.S.

654.) "A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under these sections." (*Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 332-333.)

The issue is whether members of the public are likely to be deceived; again, allegations and proof of actual deception are not necessary. (E.g., *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 211; *Chern v. Bank of America*, *supra*, 15 Cal.3d at pp. 875-876; *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at pp. 1266-1267.) Likewise, the advertiser's intent and the plaintiff consumer's knowledge are irrelevant to determining whether the public is likely to be deceived and a cause of action exists. (E.g., *Chern v. Bank of America*, *supra*, 15 Cal.3d at pp. 875-876.) Section 17500 "'affords protection against the probability or likelihood as well as the actuality of deception or confusion.'" (*Id.* at p. 876, quoting *Payne v. United California Bank* (1972) 23 Cal.App.3d 850, 856.)

IV. UNDER WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION, PROPOSITION 64'S AMENDMENTS APPLY TO NAMED PLAINTIFFS, NOT TO ABSENT MEMBERS OF A REPRESENTED CLASS OR THE PUBLIC.

In construing Proposition 64's amendments to the unfair competition and false advertising laws described above, courts apply the same rules of statutory construction to initiatives as they apply to statutes. (E.g., *Robert L. v. Superior Court (The People)* (2003) 30 Cal.4th 894, 900-901; *Horwich v. Superior Court (Acuna)* (1999) 21 Cal.4th 272, 276.) Thus, courts "'turn first to the language of the statute, giving the words their ordinary meaning.'" (*Robert L.*, *supra*, 21 Cal.4th at p. 276, quoting *People v. Birkett* (1999) 21 Cal.4th 226, 231.) Only if the language is ambiguous, courts "'refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.'" (*Robert L.*, *supra*, 21 Cal.4th at p. 276, quoting *Birkett*, *supra*, 21 Cal.4th at p. 243.)

Turning to the language of Proposition 64, the initiative amended just three of the numerous provisions of the existing unfair competition law and false advertising law, two of which are relevant here.[3]

By its terms, Proposition 64 amended standing requirements only, not the substance of a cause of action under the unfair competition or false advertising laws. (See Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 2, at p. 109 [amending section 17203 to provide that the "claimant" filing the representative claim or relief on behalf of others must meet the "standing requirements" of section 17204]; *id.*, § 5, at p. 110 [amending section 17535 to provide that the "claimant" filing the representative claim or relief on behalf of others must meet the "standing requirements" of section 17535].) Proposition 64 applied the additional standing requirements only to the named plaintiff, the "person . . . pursu[ing] representative claims or relief on behalf of others." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 2, at p. 109 [amending Bus. & Prof. Code, § 17203].) By definition, absent class members are not the "person . . . pursu[ing] representative claims or relief on behalf of others"; they are the "others" distinguished from the named plaintiff or "claimant."

First, the initiative amended one element of section 17204, on actions for relief. Both before and after Proposition 64, section 17204 has authorized actions for relief by the Attorney General, a district attorney, a county counsel, a city attorney, and "any person." (See Bus. & Prof. Code,

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[3] Proposition 64 also amended section 17206 on civil penalties for violations of the chapter. Both before and after Proposition 64, section 17206 mandated that "[a]ny person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation" in any action brought by one of the specified governmental attorneys. Proposition 64 specified that the resulting funds shall be for "the exclusive use" by the governmental attorney "for the enforcement of consumer protection laws." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 4, at p. 109 [amending Bus. & Prof. Code, § 17206, subds. (c), (e)].) It also incorporated a parallel restriction in section 17536 of the false advertising law. (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 6, at p. 110 [amending Bus. & Prof. Code, § 17536, subd. (c)].)

§ 17204.) Proposition 64 added the requirement that, where a person prosecutes the action for any relief pursuant to the chapter, it must be a "person who has suffered injury in fact and has lost money or property as a result of such unfair competition." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 3, at p. 109 [amending Bus. & Prof. Code, § 17204].) The initiative expressly applies the additional standing requirement only to the "person" who "prosecutes" the action--the named plaintiff.

Second, the initiative made a related amendment to section 17203, on the courts' powers to order relief. Both before and after Proposition 64, section 17203 has authorized any court to enjoin "[a]ny person who engages, has engaged, or proposes to engage in unfair competition" and to make any order needed "to prevent the use or employment by any person of any practice which constitutes unfair competition" or "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (Bus. & Prof. Code, § 17203.) Proposition 64 added the requirement that, where "any person pursues representative claims or relief on behalf of others," the "claimant [must] meet[] the standing requirements of Section 17204 and compl[y] with Section 382 of the Code of Civil Procedure [authorizing class actions]." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 2, at p. 109 [amending Bus. & Prof. Code, § 17203].) Again, the initiative expressly applies the requirement only to the "person" or "claimant" that "pursues" the representative claims or relief "on behalf of others"--the named plaintiff.

Proposition 64 made parallel amendments to section 17535 of the false advertising law to incorporate the same procedural requirements added to sections 17203 and 17204. (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 5, at p. 110 [amending Bus. & Prof. Code, § 17535].) These amendments likewise refer only to the named plaintiff.

If there be any lingering ambiguity, one may turn to other indicia of the voters' intent. (See, e.g., *Robert L. v. Superior Court*, *supra*, 21 Cal.4th

at p. 276.) Proposition 64 sets forth findings and declarations of intent in section 1.

The findings make clear that the initiative and its standing requirements focus on preventing "misuse" of the unfair competition laws by "some private attorneys" who "[f]ile frivolous lawsuits." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 1, subd. (b), at p. 109.) The voter's findings concern the attorney's "client" who files the action, not the unnamed proposed class member. (Ibid.) The findings nowhere mention absent class members.

Proposition 64's declarations of intent likewise focus only on the named plaintiff filing the lawsuit. Proposition 64's expressed intent was to "eliminate frivolous unfair competition lawsuits while protecting the right of individuals to retain an attorney and file an action for relief." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) text of Prop. 64, § 1, subd. (d), at p. 109.) This balance between eliminating frivolous lawsuits and protecting consumers' unchanged substantive rights was struck by amending the standing requirements for the named plaintiff, so that the attorney would have a client who had suffered injury in fact.[4]

In short, both the initiative's language and its delimitations of intent attach Proposition 64's standing requirements to the named plaintiff only, not absent class members.

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[4] In urging the voters to pass the initiative, Proposition 64's proponents asserted a need to "protect small businesses from frivolous lawsuits--close the shakedown loophole." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) argument in favor of Prop. 64, at p. 40.) It warrants remembering that the unfair competition law *protects* consumers against shakedown lawsuits by businesses. (See, e.g., *Barquis v. Merchants Collection Assn. of Oakland, Inc.*, *supra*, 7 Cal.3d 94 [class action challenging defendant collection agency's alleged practice of willfully filing collection actions in improper counties pursuant to statutorily inadequate form complaints in order to obtain default judgments against credit customers of large retailers such as J. C. Penney Co. and H. C. Capwell Co.].)

V. PROPOSITION 64'S AMENDMENTS TO CERTAIN STANDING REQUIREMENTS FOR NAMED PLAINTIFFS DID NOT CHANGE A CAUSE OF ACTION FOR UNFAIR COMPETITION OR FALSE ADVERTISING.

In making these amendments to standing requirements, Proposition 64 did not change the substantive rules governing business practices and advertising under these laws, explicitly or implicitly. Standing and merits are distinct. As the Supreme Court explained in *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, standing focuses upon the *party* filing the claim, not the claim itself which the party wishes to have adjudicated. (See *Harman, supra*, 7 Cal.3d at p. 159; cf. *Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520, 532 ["[H]aving standing to sue is not the same as prevailing on the merits."].) Where a cause of action exists in someone, standing focuses on whether the party in question is one to bring it.

For example, courts may decide causes of action under the unfair competition law to enforce other statutes under which the plaintiff would otherwise lack standing, because the named plaintiff does have standing under the unfair competition law. (E.g., *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 560-563 [even if plaintiff would lack standing to challenge defendant retailer's sale of cigarettes directly under Penal Code section 308 or the Stop Tobacco Access to Kids Enforcement Act, Bus. & Prof. Code §§ 22950-22959, plaintiff had standing to challenge the violation of those laws under the unfair competition law]; *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at pp. 210-211 [even if plaintiff would lack standing to challenge defendant cereal manufacturer's false advertising directly under the Sherman Food, Drug and Cosmetic Law, plaintiff had standing to challenge the violation of that law under the unfair competition law, stating, "the question [whether a private right of action must exist under the predicate statute] is immaterial since any unlawful business practice . . . may be redressed by a private action charging unfair competition in violation of Business and Professions Code

sections 17200 and 17203."]; *Consumers Union of United States, Inc. v. Fisher Development, Inc.* (1989) 208 Cal.App.3d 1433, 1439-1444 [although plaintiff would lack standing to challenge defendant real estate developer's age discrimination directly under the Unruh Civil Rights Act, plaintiff had standing to challenge the violation of the Unruh Civil Rights Act under the unfair competition law].) Similarly, state courts may decide federal questions on the merits even when the parties do not satisfy federal standing requirements but do satisfy state standing requirements. (E.g., *Stocks v. City of Irvine*, *supra*, 114 Cal.App.3d at p. 528.) Standing is a creature of statute, and so Proposition 64 could and did impose its additional standing requirements upon named plaintiffs, but not upon absent class members.

In amending these standing requirements, Proposition 64 left unchanged the substantive rules governing business and competitive conduct under the unfair competition and false advertising laws. (*Californians for Disability Rights v. Mervyn's, LLC*, *supra*, 39 Cal.4th at p. 232.)[5] A proper cause of action under the unfair competition and false advertising laws was untouched. Proposition 64 was <u>not</u> intended to prevent the long-standing proper use of the unfair competition laws in numerous cases, some cited in the margin,[6] where individual injury,

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[5] The companion case, *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, incorporated this distinction in recognizing that plaintiffs whose standing Proposition 64 revoked may seek leave to amend their complaints to substitute a new plaintiff meeting Proposition 64's standing requirements, not to amend the complaint to state a new cause of action. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 239; accord *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19-21; see also *Branick*, *supra*, 39 Cal.4th at pp. 241-242 ["[T]o bar a meritorious action prosecuted by a substituted plaintiff 'who *has* suffered injury in fact and *has* lost money or property as a result of' unfair competition or false advertising (§§ 17204, 17535, italics added), serves none of the voters' articulated objectives."].)

[6] E.g., *Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at p. 951 [section 17500 broadly construed to proscribe "'not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.'"]; *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1267; *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 211 ["To state a cause of action under these statutes for injunctive relief,

deception, or reliance was *not* required in order to state a proper cause of action against unfair competition or false advertising.

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it is necessary only to show that 'members of the public are likely to be deceived.' . . . Allegations of actual deception, reasonable reliance, and damage are unnecessary."]; *Fletcher v. Security Pacific National Bank, supra*, 23 Cal.3d at p. 453 ["Thus we conclude that the trial court erred in determining that the question of each borrower's individual knowledge constituted an insuperable obstacle to the imposition of a class restitution remedy under section 17535. Under the section, the court retains the authority to order restitution without an individualized showing on the knowledge issue if the court determines that such a remedy is necessary 'to prevent the use or employment' of the unfair practice at issue in this case."]; *Chern v. Bank of America, supra*, 15 Cal.3d at p. 876 ["Under this section, a statement is false or misleading if members of the public are likely to be deceived. Intent of the disseminator and knowledge of the customer are both irrelevant. Referring to both section 17500 and Civil Code section 3369, it has been said: 'The statute affords protection against the probability or likelihood as well as the actuality of deception or confusion. [Citation omitted.]'"]; *Massachusetts Mutual Life Ins. Co. v. Superior Court (Karges)* (2002) 97 Cal.App.4th 1282, 1289 ["Since *Fletcher* [23 Cal.3d 442] was decided, our courts have not departed in any manner from the principle that liability for restitution under either the specific false advertising provisions of Business and Professions Code section 17500 or the broader provisions of the UCL may be found without any individualized proof of deception and solely on the basis a defendant's conduct was likely to deceive consumers."]; *Prata v. Superior Court (Bank One, N.A.)* (2001) 91 Cal.App.4th 1128, 1144 [reversing trial court's decision terminating a representative action under unfair competition law, because a cause of action under the UCL does not require proof "that members of the public actually were deceived, relied upon the fraudulent practice, or sustained any damage" and thus did not require the trial court to determine which members of the public actually relied upon which advertisements, disclosures or representations]; id. at pp. 1136-1137; *Day v. AT&T Corp., supra*, 63 Cal.App.4th at pp. 332-333 [causes of action under unfair competition law and false advertising law, Bus. & Prof. Code sections 17200 et seq. and 17500 et seq., "encompass not only those advertisements which have deceived or misled *because* they are untrue, but also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . [T]he concept encompassed in the phrase 'likely to be deceived' has no relationship to the concept of common law fraud, which is also sometimes referred to as deception. A fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief under section 17200 or 17500. A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under these sections."].)

VI. PROPOSITION 64'S REQUIREMENT THAT A PERSON PURSUING A REPRESENTATIVE CLAIM OR RELIEF ON BEHALF OF OTHERS MUST COMPLY WITH CODE OF CIVIL PROCEDURE SECTION 382 GOVERNING CLASS ACTIONS DOES NOT, SUB SILENTIO, IMPOSE THE NAMED PLAINTIFFS' STANDING REQUIREMENTS UPON THE ABSENT CLASS MEMBERS AS WELL.

Neither defendants nor the Court of Appeal below maintain that Proposition 64 states explicitly that its standing requirements apply to absent class members. Instead, the argument proceeds somewhat circuitously: Proposition 64 applies its standing requirements to the named plaintiff. It also requires that the named plaintiff or "claimant" "compl[y] with Code of Civil Procedure Section 382," which in turn means "general class-certification principles," which in turn means the statement in *Collins v. Safeway Stores, Inc.*, *supra*, 187 Cal.App.3d at p. 73, that "each class member must have standing to bring the suit in his own right." (Respondents' Answer Brief on the Merits, at pp. 1, 9-22 (Respondents' Brief).)

It does not follow from the statutory reference to Code of Civil Procedure section 382, however, that each absent class member, too, must have suffered injury in fact and have lost money or property as a result of the unfair competition or advertising. *Before* Proposition 64, courts certified class actions under Code of Civil Procedure section 382 *without* requiring a showing of individual injury, deception, or reliance by class members. There is nothing intrinsic to class certification under Code of Civil Procedure section 382 before or *after* Proposition 64 that requires absent class members to show injury or reliance when a cause of action under the unfair competition and false advertising laws does not.

In *Fletcher v. Security Pacific National Bank*, *supra*, the Supreme Court decided that Business and Professions Code section 17535

> is unquestionably broad enough to authorize a trial court to order restitution without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction. Hence defendant's

> argument clearly fails to defeat the class action. . . . [¶] Thus a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud, as an effective means to accomplish this disgorgement.

(*Fletcher v. Security Pacific National Bank*, *supra*, 23 Cal.3d at pp. 451-452; *id.* at p. 454 [concluding that a UCL claim could properly be brought as a class action and that the trial court improperly rejected class certification of a UCL claim because plaintiffs could not prove that each individual borrower in the class lacked knowledge of the bank's unfair practice]; see also *Kraus v. Trinity Management Services, Inc.*, *supra*, 23 Cal.4th at p. 134 [noting that this Court had already held in *Fletcher* that "once an unfair trade practice was established, a class action could proceed without individualized proof of lack of knowledge of the fraud."].)

The Supreme Court reached the same conclusion in other cases, as did other appellate courts. For example, in *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1983) 33 Cal.3d 816, the Court decided that allowing a class action to proceed without requiring individualized proof of customers' lack of knowledge of the fraud (regarding compounding of interest by securities broker on customers' debit-balance accounts) was an effective method of accomplishing the disgorgement of property obtained by illegal means. (*Id.* at p. 821.) In *Massachusetts Mutual Life Ins. Co. v. Superior Court*, *supra*, 97 Cal.App.4th 1282, the Court of Appeal upheld an order certifying a class pursuant to Code of Civil Procedure section 382, finding that liability under Bus. & Prof. Code § 17200 et seq. does not require class members to present proof of deception, reliance or injury. (*Id.* at pp. 1288-1292.)[7]

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[7] Cf. *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 204, fn. 1 [in a class action against cereal manufacturer, grocery store, and two advertising agencies challenging the marketing of sugared cereals or "candy breakfast," Supreme Court noted that defendants' demurrers did not challenge the suitability of the case as a class action]; *Corbett v. Superior Court*, *supra*, 101 Cal.App.4th 649 [as a matter of law, claims under the unfair competition law may be brought as class actions]; *Barquis v. Merchants Collection Assn. of Oakland, Inc.*, *supra*, 7 Cal.3d at p. 100 & fn. 3 [reversing dismissal of class action against collection agency to challenge agency's alleged practice of filing actions in improper counties pursuant to statutorily inadequate complaints for

The Court of Appeal below nonetheless relied upon a quote from *Collins v. Safeway Stores, Inc.*, *supra*, 187 Cal.App.3d at 73, that "[e]ach class member must have standing to bring the suit in his [or her] own right." (Respondents' Brief, at pp. 1, 8, 12 [quoting *Collins*].)[8] In part the reliance is misplaced, and in part it begs the very question before the Court for decision.

Relying upon the quote from *Collins* is misplaced because *Collins* is inapposite. *Collins* was discussing a claim for recovery of damages (*Collins*, *supra*, 187 Cal.App.3d 62, 72), and damages are *not* available under the unfair competition law. (See, e.g., *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at pp. 1266, 1272 [damages are not available under Bus. & Prof. Code § 17203, and the only nonpunitive monetary relief available under the unfair competition law, Bus. & Prof. Code, § 17200 et seq., is disgorgement of money that has been wrongfully obtained]; *Chern v. Bank of America*, *supra*, 15 Cal.3d at p. 875 [same under false advertising law, Bus. & Prof. Code, § 17535]; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1201, fn. 7 [following *Bank of the West*, *supra*].). Damages was one of the remedies under the common law tort of unfair competition which the legislature excluded when it enacted the broader unfair competition law, and allegations of actual deception, reasonable reliance, and damage were no longer necessary. (See *Bank of the West*, *supra*, 2 Cal.4th at pp. 1265-1266; *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 211.)

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purposes of impairing consumers' ability to defend the actions and obtaining increased number of default judgments].)

[8] The quoted language actually comes from a decision by the United States District Court in and for the District of South Dakota, in *McElhaney v. Eli Lilly & Co.* (D.S.D. 1982) 93 F.R.D. 875, 878, which was construing the requirements of Federal Rules of Civil Procedure, rule 23, rather than California's unfair competition or false advertising law, or even Code of Civil Procedure section 382. The appellate court in *Collins* was summarizing and quoting from the district court's decision, not announcing a holding of its own about the requirements of section 382. (See *Collins v. Safeway Stores, Inc.*, *supra*, 187 Cal.App.3d at 73.)

Defendants' reliance upon the quote from *Collins* also begs the very question before the Court, because asserting that each class member must have standing does not answer what particular requirements establish standing under the unfair competition and false advertising laws. For example, as discussed above, one could have standing under the unfair competition law without having standing under the predicate statute establishing an unlawful business practice. And one could certify a class action under the unfair competition law irrespective of the general class-certification principles defendants cite in their brief.

Code of Civil Procedure section 382 provides, in relevant part, that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." (Code Civ. Proc., § 382.) The "community of interest" criterion comprises three factors: (1) common questions of law or fact predominate; (2) class representatives have claims or defenses typical of the class; and (3) class representatives can adequately represent the class. (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326.)

Defendants argue in effect that applying Proposition 64's standing requirements to claimants only, as written, and not to absent class members as well, is inconsistent with the "community of interest" criterion as a matter of law, for the named plaintiff's "claims" are no longer "typical of the absent class members." This confuses standing with claims. While Proposition 64 augmented the standing requirements for the named plaintiff, a claim under the unfair competition law and false advertising law remains unchanged. (E.g. *Californians for Disability Rights v. Mervyn's, LLC*, *supra*, 39 Cal.4th at p. 232.)

Nor is the named plaintiff asserting a claim that the absent class members do not have. (Compare Respondents' Brief at p. 11, citing *Feitelberg*, *supra*, 134 Cal.App.4th at p. 1018.) As the courts have held in numerous cases for thirty years, a proper claim does not require allegations of actual deception, reliance, or injury, and after Proposition 64, both the

named plaintiff and the absent class member continue to hold that claim in common even if the named plaintiff must satisfy the augmented standing requirements to ensure that the attorney has not filed a frivolous lawsuit. (E.g. *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal.3d at p. 211 ["To state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.' . . . Allegations of actual deception, reasonable reliance, and damage are unnecessary."]; *Fletcher v. Security Pacific National Bank*, *supra*, 23 Cal.3d at p. 453 ["trial court erred in determining that the question of each borrower's individual knowledge constituted an insuperable obstacle to the imposition of a class restitution remedy under section 17535"].) Thus, while the named plaintiff must meet Proposition 64's additional *standing* requirements, the named plaintiff asserts the same cause of action that absent class members *do* have. This is no different than a plaintiff having a valid cause of action but no standing under one statute, yet being able to bring and prevail on that same cause of action with standing under the unfair competition law.

In short, it does not follow from Proposition 64's reference to Code of Civil Procedure section 382 that each absent class member, too, must have suffered injury in fact and have lost money or property as a result of the unfair competition or advertising. The named plaintiff's claim may easily remain typical of the absent class member's claim. Both named plaintiff and absent class member remain injured, because both have a cause of action under the unchanged substantive law which does not require allegations of actual deception, reliance, or injury.

Conclusion

The Court of Appeal's erroneous construction of Proposition 64 is inconsistent with both the initiative's text and the voters' intent and, if left uncorrected, effectively reverses thirty years of consumer protection law in California. Before, classwide consumer protection did not require

allegations and proof of actual injury, deception or reliance; now, no consumer class action could be brought unless and until all absent class members prove actual injury in fact and loss of money or property as a result of the challenged practice. The numerous cases cited above illustrate the vast scope of protection that would be withdrawn from consumers across the board.

It is worth recalling at length this Court's opinion in *Vasquez v. Superior Court (Karp)* (1971) 4 Cal.3d 800, regarding the importance of class actions for consumer redress, and thus the importance of the question presented for consumer protection in California:

> Thirty years ago commentators, in urging the utility of the class suit to vindicate the rights of stockholders, made this incisive observation: "Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one." (Kalven and Rosenfield, Function of Class Suit (1941) 8 U.Chi.L.Rev. 684, 686.)
>
> What was noteworthy in the milieu three decades ago for stockholders is of far greater significance today [then 1971] for consumers. Not only have the means of communication improved and the sophistication of promotional and selling techniques sharpened in the intervening years, but consumers as a category are generally in a less favorable position than stockholders to secure legal redress for wrongs committed against them. For these reasons, the desirability of consumers suing as a class for fraud or other improper conduct of predatory sellers has been the topic of much thoughtful analysis in recent years. Numerous commentators have urged adaptation of class proceedings to consumer frauds. (See, e.g., Starrs, The Consumer Class Action (1969) 49 B.U.L.Rev. 211-250, 407-513; Eckhardt, Consumer Class Actions (1970) 45 Notre Dame Law. 663; Goldhammer, The Consumer Class Action in California (1970) 45 L.A.Bar Bull. 235.)

> Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society. According to the report of the Kerner Commission, many persons who reside in low income neighborhoods experience grievous exploitation by vendors using such devices as high pressure salesmanship, bait advertising, misrepresentation of prices, exorbitant prices and credit charges, and sale of shoddy merchandise. State laws governing relations between consumers and merchants are generally utilized only by informed, sophisticated parties, affording little practical protection to low income families. (Report of National Advisory Commission on Civil Disorders (Bantam ed. 1968) pp. 275-276; Hester, Deceptive Sales Practices and Form Contracts -- Does the Consumer Have a Private Remedy? (1968) Duke L.J. 831.) The alternatives of multiple litigation (joinder, intervention, consolidation, the test case) do not sufficiently protect the consumer's rights because these devices "presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention.'" (*Dolgow v. Anderson* (E.D.N.Y. 1968) 43 F.R.D. 472, 484.)
>
> Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

(*Vasquez v. Superior Court (Karp)* , *supra*, 4 Cal.3d at pp. 807-808, quoted in part by *Fletcher v. Security Pacific National Bank*, *supra*, 23 Cal.3d at p. 451; accord *Barquis v. Merchants Collection Assn. of Oakland, Inc.*, *supra*, 7 Cal.3d at p. 111 ["We conclude that in a society which enlists a variety of psychological and advertising stimulants to induce the consumption of goods, consumers, rather than competitors, need the greatest protection from sharp business practices."].)

For the reasons above, Consumers Union respectfully urges the Supreme Court to correct the Court of Appeal's erroneous construction of Proposition 64 and protect class actions for consumer redress against the ever widening exposures to unfair competition and deceptive advertising.

Dated in San Francisco, California, on the 13th of April, 2007.

Respectfully submitted,

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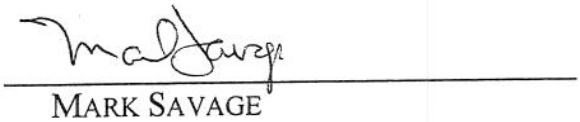

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CERTIFICATE OF LENGTH

I, Mark Savage, declare:

1. I am Senior Attorney and counsel of record in this proceeding for Amicus Curiae Consumers Union of United States, Inc. ("Consumers Union"). I am duly admitted to practice before all courts of the State of California.

2. In accordance with California Rules of Court, rule 8.520(c)(1), I relied upon the word count of the computer program used to prepare the amicus brief above, and certify that the computer program counts 8,252 words in the brief, not including the caption page, the table of contents, the table of authorities, this certificate of length, and any attachments.

3. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I executed this declaration at San Francisco, California, this 13th day of April, 2007.

MARK SAVAGE

PROOF OF SERVICE

I, the undersigned, hereby declare:

1. I am a citizen of the United States of America over the age of eighteen years. My business address is 1535 Mission Street, San Francisco, California, 94103-2512. I am not a party to this action.

2. On April 13, 2007, I caused service of a true and correct copy of this document, **Brief of Consumers Union of United States, Inc., as Amicus Curiae in Support of Plaintiffs-Appellants**, dated April 13, 2007, upon the persons below, in the following manner:

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I declare under penalty of perjury that the foregoing is true and correct, and that I executed this proof of service in San Francisco, California, this 13 th day of April, 2007.

EVALUZ BARRAMEDA
Declarant