No. S147345

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES, JCCP 4042

WILLARD BROWN, DAMIEN BIERLY, and MICHELLE BULLER-SEYMORE, on behalf of themselves and all those similarly situated,

Plaintiffs-Appellants,

vs.

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-Respondents.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One (No. D046435)

[Service on the Attorney General and the District Attorney required by Bus. & Prof. Code, § 17209.]

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INTRODUCTION AND SUMMARY OF ARGUMENT

Invoking the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (UCL)) and False Advertising Law (Bus. & Prof. Code, § 17500 et seq. (FAL)), Plaintiffs purport to represent millions of California smokers who seek to recover the cost of their cigarette purchases based on a wide array of allegedly deceptive statements made by Defendants over the course of 50 years, to various audiences, on different subjects, through different media, and with respect to different cigarette products. In a unanimous opinion, the Court of Appeal upheld the trial court's determination that, in light of the new standing requirements imposed by Proposition 64, individualized issues of causation of injury predominated and precluded Plaintiffs from maintaining this suit as a class action. (*In re Tobacco II Cases* (Sept. 5, 2006, D046435) typed opn. pp. 6-18 (typed opn.).) The three issues raised by Plaintiffs on review were each correctly resolved by the Court of Appeal, and the judgment below should be affirmed.

First, the Court of Appeal properly held that, in a class action brought under the UCL as amended by Proposition 64, both the named plaintiffs and the absent class members must satisfy the standing requirements imposed by that initiative. (*Post*, pp. 9-22.)

On its face, Proposition 64 permits a private party to assert representative claims only if the party shows both that he or she has standing *and* "complies with Code of Civil Procedure Section 382" — i.e., complies with general class-certification principles. (Bus. & Prof. Code, § 17203.) Those established principles include the requirement that "'[e]ach class member must have standing to bring the suit in his [or her] own right.'" (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73 (*Collins*), citation omitted.) Indeed, the rule could not be otherwise: a class action is merely a procedural device to aggregate claims *that could have*

been asserted individually; i.e., it is not intended to permit the class representative to assert "claims" that the absent class members do not have. (See, e.g., *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1018 (*Feitelberg*).)

Contrary to what Plaintiffs suggest, application of Proposition 64's standing requirements to *all* class members "is not to apply them 'retroactively,' as [this Court] has defined that term," because to do so does "not change the legal consequences of past conduct *by imposing new or different liabilities based on such conduct.*" (*Californians for Disability Rights v. Mervyn's* (2006) 39 Cal.4th 223, 232 (*Mervyn's*), italics added.) *Mervyn's*' observation that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct" was not a reference to the *standing* requirements of the initiative, but instead referred to the fact that "[n]othing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." (*Ibid.*) Moreover, *Mervyn's* squarely holds that, even though Proposition 64 withdraws *standing* from persons who previously could have pursued claims under the UCL, it "need not for that reason be described as operating retroactively." (*Ibid.*)

Plaintiffs' view that only the named plaintiffs must satisfy Proposition 64's standing requirements would violate settled class-certification principles for the further reason that it would create an anomalous situation in which the class representatives, by definition, would have UCL claims that are not typical of the absent class members. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 663-664 (*Caro*).) And Plaintiffs' argument that injured class representatives may maintain a "class action" in which they represent a class of *uninjured* persons would effectively revive the very sort of private attorney general actions that

Proposition 64 expressly eliminated. Indeed, Plaintiffs' construction would lead to the perverse result that a named plaintiff who lacked the requisite standing to maintain a UCL suit — as the trial court found with respect to the three named plaintiffs here (40 A.A. 9893)[1] — could obtain a recovery by instead becoming an absent class member.

Second, the Court of Appeal properly held that, by its plain terms, Proposition 64 limits standing under the UCL to those private plaintiffs who suffered injury in fact and a loss of money or property that was *caused* by the challenged conduct of the defendant. (*Post*, pp. 23-31.) Proposition 64 requires that the plaintiff have suffered such injury and loss "as a result of" the challenged conduct, and that phrase has a settled meaning denoting proximate or legal causation. (See, e.g., 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 537, p. 624 [requirement that a negligence plaintiff show that his or her injury occurred "as a result of" the defendant's breach means that "proximate or legal cause" must be shown].) Moreover, the very same "as a result of" language appears in the standing provision of the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1780, subd. (a)), which courts have consistently construed as imposing such a "causation" requirement. (See, e.g., *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754 (*Wilens*); *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292 (*Massachusetts Mutual*).)

Third, the Court of Appeal correctly held that, in light of the causation-of-injury requirement applicable to all class members, the trial court did not abuse its discretion in concluding that Plaintiffs' claims raised predominantly individualized issues. (*Sav-On Drug Stores, Inc. v. Superior*

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[1] "A.A." refers to Appellants' Appendix in the Court of Appeal, and "R.S.A." to Respondents' Supplemental Appendix. "P.O.B." refers to Plaintiffs-Petitioners' Opening Brief on the Merits in this Court.

Court (2004) 34 Cal.4th 319, 326-327 (*Sav-On*).) (*Post*, pp. 32-46.)

Plaintiffs' UCL claim challenges literally scores of statements covering a host of different issues, including the extent to which Defendants complied with their self-imposed "Cigarette Advertising Code"; whether Defendants targeted youth in their advertising; whether Defendants falsely denied that they targeted youth; Defendants' statements concerning various brands of "Lights," "No Additives," and "All Natural" cigarettes; the nicotine levels in cigarettes; the use of additives; the addictiveness of cigarettes; and the various health risks of smoking. (15 A.A. 3708-3789; 36 A.A. 9027 – 37 A.A. 9132.) Notwithstanding Plaintiffs' effort to recast the case on appeal as one about an "orchestrated advertising campaign" (P.O.B. p. 8), the record below makes clear that Plaintiffs' claims were based in large measure on disparate statements made in newspapers, television and radio news programs, press releases, brochures, pamphlets, congressional testimony, letters to government officials, proxy statements, website statements, deposition testimony, pleadings, and trial testimony over many years. (15 A.A. 3708-3789; 36 A.A. 9027 – 37 A.A. 9132.) The record in this case also confirms that the extent to which the challenged statements had any causal effect on a class member's smoking behavior and purchasing decisions would necessarily vary from person to person. (Typed opn. 16-17; 40 A.A. 9892.) The trial court's findings that individual issues predominated with respect to each class member's exposure to the alleged misstatements, and whether each class member purchased Defendants' cigarettes "as a result of" such misstatements, are supported by substantial evidence and by the overwhelming weight of legal authority.

STATEMENT OF THE CASE

I. Proceedings in the Trial Court

A. Plaintiffs' Claims Against Defendants

In the operative Ninth Amended Complaint, three plaintiffs — Plaintiffs Willard Brown, Damien Bierly, and Michelle Buller-Seymore — assert claims on behalf of a putative class only under the UCL and FAL. (2 A.A. 330-331.) The gravamen of the complaint is that Defendants engaged in a decades-long conspiracy to conceal the health effects and addictiveness of smoking and made numerous false and misleading statements relating to cigarettes over the past 50 years. (E.g., 2 A.A. 301-330.)

The contours of these claims were subsequently narrowed by a stipulation that enumerated the specific issues remaining in the case. (11 R.S.A. 3077.) Thereafter, in responding to Defendants' summary adjudication motions, Plaintiffs further refined these remaining claims so as to embrace only the following six numbered "Issues":

(1) Defendants allegedly (a) targeted minors in their advertising and (b) made false statements denying that they targeted minors.

(2) Defendants allegedly made false and deceptive statements regarding "Light" cigarettes.

(3) Defendants R.J. Reynolds and Brown & Williamson purportedly made false statements concerning "No Additive" and "Natural" Cigarettes.

(4) Defendants allegedly made a variety of false statements regarding the use of additives in cigarettes and purported nicotine manipulation.

(5) Defendants allegedly made false statements asserting compliance with their self-imposed "Cigarette Advertising Code" (which outlined certain standards aimed at reducing the appeal that adult cigarette advertising might have to minors).

(6) As part of an alleged decades-long conspiracy, Defendants purportedly made numerous false and misleading statements concerning the health hazards and addictiveness of smoking.

(15 A.A. 3708-3757.)

In September 2004, the trial court granted summary adjudication with respect to some of these Issues. (34 A.A. 8474-8541.) The court held that the express preemption clause contained in the Federal Cigarette Label and Advertising Act, 15 U.S.C. § 1334 (FCLAA) barred Plaintiffs' claims that Defendants' advertising allegedly targeted youth (Issue No. 1(a)), Plaintiffs' claims with respect to the marketing of Lights (Issue No. 2), and Plaintiffs' claims concerning the marketing of "No Additives" and "Natural" Cigarettes (Issue No. 3). (34 A.A. 8476.) The court also concluded that the Lights and No-Additive/Natural claims failed on other grounds as well. (34 A.A. 8476, 8482-8492, 8505, 8531-8535.) The trial court, however, denied summary adjudication with respect to the remaining issues. (*Id.*)

B. The Parties' Motions Concerning Class Certification

Plaintiff Brown — at the time the sole named plaintiff — initially filed two successive motions seeking, respectively, class certification of all claims in his Fifth Amended Complaint and class certification of only the CLRA claim in his then-pending Sixth Amended Complaint. (4 R.S.A. 1108; 9 R.S.A. 2482.) The trial court denied both motions, concluding that, inter alia, individual issues concerning causation and injury predominated. (8 R.S.A. 2070-2072; 1 A.A. 227-230.)

While his second motion for class certification was still pending, Plaintiff Brown filed a Seventh Amended Complaint that added claims under the UCL and the FAL (1 A.A. 1-56), and he thereupon filed a third motion for class certification as to these claims. (1 A.A. 57.) The trial court granted this third motion. (1 A.A. 224-227.) The court

acknowledged that, as with the CLRA claims, "myriad ... distinct issues exist as to each class member's exposure to the alleged deceptive marketing, reliance thereon, whether same was a causal factor of the person's smoking and whether each class member sustained injury," but the court held that these individualized issues did not preclude certification of the UCL and FAL claims because such issues were "wholly outside the purview" of these statutes. (*Ibid.*) Accordingly, the court certified a class consisting of "[a]ll people who at the time they were residents of California, smoked in California one or more cigarettes between June 10, 1993 through April 23, 2001, and who were exposed to defendants' marketing and advertising activities in California." (2 A.A. 340.)

On November 3, 2004, Proposition 64 took effect, repealing the formerly broad standing requirements for UCL and FAL claims, and imposing new, stricter requirements. In light of Proposition 64, the trial court granted Defendants' motion to decertify the class as to Plaintiffs' UCL and FAL claims. (40 A.A. 9892-9893.) The court held that Proposition 64's standing requirements make clear that "a showing of *causation* is required as to each class member's injury in fact (specifically, the phrase 'as a result of' the UCL violations)." (40 A.A. 9892, italics added.) The court noted that the required showing of standing raised numerous individual issues, including "whether each class member was exposed to Defendants' alleged false statements and whether each class member purchased cigarettes 'as a result' of the false statements." (*Ibid.*) The court concluded that Proposition 64 had undermined the distinction the court had previously drawn between the CLRA claims and the UCL and FAL claims: "[c]learly, here, as in Plaintiffs' CLRA case, individual issues predominate, making class treatment unmanageable and inefficient." (40 A.A. 9892-9893.) The trial court also held that decertification was

required for the additional reason that the record showed "that not even Plaintiffs' named class representatives satisfy Prop[osition] 64's standing requirement." (40 A.A. 9893.)

C. The Court of Appeal's Decision

Plaintiffs appealed the class decertification order under the "death-knell" doctrine of *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, and the Court of Appeal affirmed.

The court rejected Plaintiffs' argument that Proposition 64's standing requirements apply only to a named plaintiff, and not to absent class members. The court noted that under section 17203, a private party could bring a class action UCL lawsuit only if it (1) met "the standing requirements of section 17204, that is, [the party] must have 'suffered injury in fact and [have] lost money or property as a result of such unfair competition'" and (2) met "the class action requirements of Code of Civil Procedure section 382." (Typed opn. p. 7, citations omitted.) Because it is a well-settled aspect of class certification law that "'[e]ach class member must have standing to bring the suit in his [or her] own right,'" Proposition 64's express incorporation of general class-action principles means that each class member likewise must have standing. (Typed opn. p. 7, quoting *Collins*, *supra*, 187 Cal.App.3d at p. 73.) Moreover, because the class action statute is merely a "procedural device for collectively litigating substantive claims," it follows that, if a claim "'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 p. 1018.) Accordingly, the court held that because "Prop[osition] 64 forecloses relief to a private plaintiff who has not suffered an injury in fact and lost money or property as a result of an unfair business practice,"

named plaintiffs "as well as class members must have suffered an injury in fact and lost money or property." (Typed opn., pp. 7-8.)

The Court of Appeal held that the trial court did not abuse its discretion in determining that, after passage of Proposition 64, individual issues predominated over common issues. (Typed opn. pp. 8-18.) In particular, because all class members now must have "lost money or property as a result of" Defendants' alleged misrepresentations in order to have standing to sue (Bus. & Prof. Code, § 17204), there was a predominance of individual issues with respect to the class members' exposure to the plethora of false statements alleged and the extent to which "class members would have been affected by the misrepresentations." (Typed opn. p. 12.)[2]

ARGUMENT

I. The Court of Appeal Correctly Held That Proposition 64's Standing Requirements Apply to Absent Class Members

The Court of Appeal correctly ruled that Proposition 64's express limitations on the use of representational standing (see Bus. & Prof. Code,

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[2] The Court of Appeal held that Plaintiffs' attempt to appeal the earlier denials of class certification of the CLRA claims would fail for the same reasons, and it therefore did not reach Defendants' argument that review of this issue was procedurally improper on multiple grounds. (Typed opn. pp. 18-19.) The court also concluded that review of the summary adjudication ruling was beyond its limited appellate jurisdiction because the issue would not "resurrect the UCL or CLRA class actions." (*Id.* at p. 19.) Plaintiffs' petition for review did not challenge these holdings, and these issues have therefore been waived. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1094, fn. 3.) As a result, the Lights claims, the No-Additive/Natural cigarettes claims, and the youth-targeting claims (which Plaintiffs did not even raise in the Court of Appeal) are not before this Court.

§ 17203) require that all members of a proposed UCL class action must satisfy the initiative's new standing requirements. (See Typed opn. p. 8.)[3]

A. By Virtue of Proposition 64's Explicit Incorporation of General Class Action Requirements, All Class Members Must Have Standing

Proposition 64 imposes express limits on the ability of a private party to "pursue representative claims or relief on behalf of others" under the UCL. (Bus. & Prof. Code, § 17203.) Specifically, section 17203 of the Business and Professions Code now provides, in pertinent part:

> Any person may pursue representative claims or relief on behalf of others *only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure*, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

(*Ibid.*, italics added.) By its terms, Proposition 64 permits a private UCL claimant to pursue a representative action only if the claimant *both* meets the new standing requirements of section 17204 *and* "complies with Section 382 of the Code of Civil Procedure." (Bus. & Prof. Code, § 17203.) The Court of Appeal correctly held that, given Proposition 64's express incorporation of Code of Civil Procedure section 382 (hereafter section 382) — which is the provision that generally "authorizes class action suits in California" (*Mervyn's*, *supra*, 39 Cal.4th at p. 232, citation omitted) — all class members must satisfy the UCL's current standing requirements.

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[3] Because Proposition 64 makes essentially identical amendments to the UCL and the FAL (Bus. & Prof. Code, §§ 17203, 17204, 17535), the effect of the initiative on each is the same. (P.O.B. p. 2, fn. 1.) For ease of reference, Defendants will refer only to the "UCL" in the discussion below.

Section 382 provides 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.) Under this provision, a party seeking to certify a class "must establish the existence of both an ascertainable class and a well-defined community of interest among the class members." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).)[4] These fundamental requirements of ascertainability and common interest reflect the hornbook principle that a class action is merely a procedural device for aggregating claims *that could have been asserted individually*. A class action, the courts have stressed, is not intended to permit the class representative to assert "claims" that the absent class members do not have. (*Feitelberg, supra*, 134 Cal.App.4th at p. 1018 ["If a specific form of relief is foreclosed to [class action] claimants as individuals, it remains unavailable to them even if they congregate into a class"]; *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716; see also *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 & fn. 9.) Accordingly, a named class representative may assert, on behalf of absent class members, only those claims that the absent class members could *themselves* assert were they to bring individual actions. (*Daar v. Yellow Cab Co., supra*, 67 Cal.2d at pp. 714-715 [noting that the propriety

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[4] The "community of interest" requirement, in turn, has three elements: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104 (*Lockheed*).) In addition, "trial courts are required to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts." (*Linder, supra*, 23 Cal.4th at p. 435, citations and internal quotation marks omitted.)

of class treatment of claims is assessed in light of the individual actions that might otherwise be brought to assert those claims].)

Because *standing* is essential to any individual's cause of action, the standing of the absent class members "to maintain the action on their own behalf" must necessarily be considered in assessing whether class treatment of such claims is proper. (*Collins*, *supra*, 187 Cal.App.3d at p. 73.) "'Each class member must have standing to bring the suit in his [or her] own right,'" and "'[t]he definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf.'" (*Ibid.*, citations omitted.) Thus, it is settled that *all* of the class members in a properly certified class must satisfy whatever standing requirements would be necessary to maintain a suit in their own right. (See, e.g., 7AA Wright, Miller & Kane, Federal Practice and Procedure (3d ed. 2005) § 1785.1, p. 387 (hereafter Wright & Miller) ["An appropriate application of standing in class suits necessitates an inquiry into whether *the class members* have been injured by the defendant's conduct ...," italics added]; *Adashunas v. Negley* (7th Cir. 1980) 626 F.2d 600, 604 [class certification properly denied where it was not clear "that the proposed class members have all suffered a constitutional or statutory violation warranting some relief"]; *Zelman v. JDS Uniphase Corp.* (N.D.Cal. 2005) 376 F.Supp.2d 956, 966 [class must be limited "to those ascertainable individuals who have standing to bring the action"].)[5]

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[5] (See also *In re Copper Antitrust Litigation* (W.D.Wis. 2000) 196 F.R.D. 348, 353 ["Implicit in [Fed. R. Civ. P.] 23 is the requirement that the plaintiffs and the class they seek to represent have standing."]; *Ex parte Central Bank of the South* (Ala. 1996) 675 So.2d 403, 406-407 ["Each class member must have standing to bring the suit in his own right. [Citation.]"; *Zine v. Chrysler Corp.* (Mich.App. 1999) 600 N.W.2d 384, 400 [class members "must have suffered actual injury" so as to "have standing to sue"]; accord *Clay v. American Tobacco Co.* (S.D. Ill. 1999) 188 F.R.D.

By incorporating section 382 and its general class action principles, Proposition 64 thus requires that all members of a properly certified UCL class action have standing, including absent class members. Because, as discussed more fully below (see *post* at pp. 23-31), the UCL now expressly limits private actions to those plaintiffs who have "suffered injury in fact and ... lost money or property as a result of" the alleged unfair competition (Bus. & Prof. Code, § 17204), absent class members likewise must satisfy these statutory standing criteria. (See, e.g., *Oshana v. Coca-Cola Co.* (7th Cir. 2006) 472 F.3d 506 [affirming denial of class certification because "[c]ountless member's of Oshana's putative class" could not satisfy the standing-to-sue requirement of the Illinois Consumer Fraud and Deceptive Practices Act because they "could not show any damage, let alone damage proximately caused by Coke's alleged deception"].)

Put another way, class action principles have *always* required that individual standing criteria be considered, and Proposition 64 does not alter those principles; the initiative simply changes the nature of the individual standing criteria to which those (unchanged) class action standards are applied.[6] Thus, to the extent that, under prior law, class certification might

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483, 490; *McElhaney v. Eli Lilly & Co.* (D.S.D. 1982) 93 F.R.D. 875, 878; cf. *Denney v. Deutsche Bank AG* (2d Cir. 2006) 443 F.2d 253, 264 (*Denney*) ["no class may be certified that contains members lacking Article III standing"].) The fact that all class members must have the requisite standing does not mean that each member of a properly certified class must *personally* submit evidence of his or her individual standing at the time of any class certification; rather, it means that the standing of the absent class members, and whether that standing is amenable to class-wide proof, must be considered in determining the propriety of class certification. (*Id.* at pp. 263-264.)

[6] Under prior law, a UCL plaintiff could also attempt to pursue relief on behalf of others *either* by seeking class certification or by bringing a "representative action," i.e., "a UCL action that is not certified as a class action in which a private person is the plaintiff and seeks disgorgement

be more readily obtained in UCL cases than in non-UCL cases, that was not due to any difference in the class action criteria to be applied; on the contrary, it was a result of the fact that the class action device was being applied to a "unique" statute that granted an individual standing to seek relief "without proof of individual deception, reliance, and injury." (*Massachusetts Mutual, supra*, 97 Cal.App.4th at p. 1291.) Under Proposition 64's revised standing provisions, however, an individual can no longer maintain a UCL cause of action unless he or she has "suffered injury in fact and has lost of money or property as a result of" the challenged conduct. (Bus. & Prof. Code, § 17204.) Because the class action device must not alter the underlying requirements (including standing) of the individual claims it aggregates, these issues of injury and causation must now be considered in determining the suitability of class treatment of UCL claims under the traditional criteria of section 382.

This analysis confirms Plaintiffs' error in contending that class-wide application of Proposition 64's standing requirements would impermissibly allow the class action device to alter the nature of the claims it aggregates. (P.O.B. pp. 4-5.) On the contrary, it is *Plaintiffs'* construction of Proposition 64 that would have that effect: under Plaintiffs' view, application of the class action device essentially shears off the standing requirements that now concededly apply to *individual* UCL actions. To permit the class action device to have this sort of transformative effect — such that a person may assert a claim *as an absent class member* that he or she could not assert individually (or even as a named plaintiff) — violates

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and/or restitution on behalf of persons other than or in addition to the plaintiff." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126, fn. 10 (*Kraus*); see also *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 453-454 (*Fletcher*).) Proposition 64's insistence on compliance with section 382 necessarily eliminates the ability to bring the sort of "representative" action described in *Kraus*.

the most basic principles of class certification law. (*Feitelberg*, *supra*, 134 Cal.App.4th at p. 1018; see also *City of San Jose v. Superior Court*, *supra*, 12 Cal.3d at p. 462 & fn. 9; *Vernon v. Drexel Burnham & Co.*, *supra*, 52 Cal.App.3d at p. 716.)

For similar reasons, Plaintiffs' construction of Proposition 64 is flatly inconsistent with this Court's decision in *Mervyn's*. Plaintiffs vigorously contend that, because Proposition 64's standing requirement imposes new obligations to show "injury in fact" and causation of injury, application of any such requirement to the absent class members would be a "substantive" change that cannot be applied retroactively to this case, which was filed before Proposition 64 was adopted. (P.O.B. pp. 26-30.) But as explained above, the class action device is ultimately not the *source* of any new standing requirement; on the contrary, that purely procedural device neutrally carries forward any requirements that happen to apply to the underlying *individual* causes of action. Plaintiffs' argument thus implicitly rests on the premise that application of Proposition 64's standing requirement to an uninjured plaintiff *in an individual action* is impermissibly "substantive" and retroactive because Proposition 64 withdraws that person's standing to sue. (See also P.O.B. pp. 26, 30 [broadly suggesting that *any* application of Proposition 64's causation requirement would have an impermissible retroactive effect].) This, however, is precisely the argument unanimously rejected by this Court in *Mervyn's*:

> In effect, section 17203, as amended, *withdraws the standing* of persons who have not been harmed to represent those who have. *But the section need not for that reason be described as operating retroactively.* For a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed.

(*Mervyn's*, *supra*, 39 Cal.4th at p. 232, italics added.)

Application of these new "standing provisions" to the individual claims of named plaintiffs and absent class members — which claims are aggregated together by the class action device — "is not to apply them 'retroactively,' as [this Court] has defined that term," because to do so does "not change the legal consequences of past conduct *by imposing new or different liabilities based on such conduct.*" (*Mervyn's*, *supra*, 39 Cal.4th at p. 232, italics added; see also *id.* at p. 233 [noting that "the presumption of prospective operation is classically intended to protect" the "right to have *liability-creating conduct* evaluated under the liability rules in effect at the time the conduct occurred," italics added].) Although Plaintiffs seize upon this Court's observation that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct" (*Mervyn's*, at p. 232, quoted at P.O.B. p. 27), they neglect to note that *Mervyn's* goes on to explain that this simply means that "[n]othing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." (*Mervyn's*, at p. 232.) Application of Proposition 64's standing requirements to all class members is fully consistent with that observation.

Moreover, even if Plaintiffs were correct that application of Proposition 64 had a "substantive" effect here, that would not mean that it cannot be applied to this case. Rather, the Court would then have to confront the question it reserved in *Mervyn's*, namely, whether the application of Proposition 64 to pending cases may also be sustained under the well-established "statutory repeal rule." (*Mervyn's*, *supra*, 39 Cal.4th at p. 232, fn. 3.) Because Proposition 64 withdraws a statutory standing to sue by repealing the UCL's prior permissive grant of standing, it would apply to this pending case under this well established rule. (See, e.g., *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA,*

Inc. (2005) 129 Cal.App.4th 1228, 1262; see also *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109.)

B. Plaintiffs' Contrary Construction is Inconsistent with the Text and Purpose of Proposition 64

Plaintiffs' contrary construction of Proposition 64 flouts the initiative's plain language, frustrates its express policy objectives, and would produce anomalous results.

1. In Limiting Proposition 64's Standing Requirements to Named Plaintiffs, Plaintiffs' Proposed Interpretation Violates Settled Canons of Statutory Construction

In arguing that only the named plaintiffs must meet Proposition 64's standing requirements (P.O.B. p. 44), Plaintiffs ignore the initiative's language explicitly incorporating class-certification principles and thereby overlook the textual basis for the Court of Appeal's decision. Indeed, in reproducing the language of Business and Professions Code section 17203, Plaintiffs omit the crucial language on which the Court of Appeal relied and instead replace it with ellipses. (P.O.B. p. 44.) This Court, however, must "strive to give effect and significance to every word and phrase" in that section. (*The Copley Press Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1285.) In addition to reiterating that the named plaintiffs must satisfy the standing requirements of section 17204, Proposition 64 expressly imposes, and thereby reaffirms, the *further* requirement that ordinary class-certification principles be satisfied, and it is *those* principles which require that absent class members also satisfy whatever standing requirements would be necessary to maintain a claim individually.

Plaintiffs argue that, if the intent of Proposition 64 was to require that all class members meet the standing requirements, that objective could more easily have been accomplished by using more specific language

explicitly accomplishing that result. (P.O.B. pp. 44-45.) But in construing a statute or initiative, it is the task of the courts to construe the language as written (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 350); it is irrelevant whether Plaintiffs think "the Legislature could have drafted the statute more clearly." (*People v. Bransford* (1994) 8 Cal.4th 885, 892; see also *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1071, fn. 20 ["[W]e decline to ignore the language employed by the Legislature merely because of a subjective evaluation that a differently worded statute would more effectively achieve the statutory goal"].) As explained above, the language that the initiative *does* use is more than sufficient to make clear that all class members must have standing.[7]

Plaintiffs attempt to salvage their interpretation by analogizing Proposition 64 standing to Article III standing. (P.O.B. pp. 46-49.) But this argument fares no better, for the federal case law confirms that a class may not be certified unless its members have standing. Plaintiffs cite a treatise for the proposition that if the class representative can demonstrate Article III standing to sue, "there remains no further separate class standing requirement *in the constitutional sense*." (P.O.B. p. 46, citing 1 Newberg on Class Actions (4th ed. 2002) § 2:5, p. 75, emphasis altered.) All that the cited language establishes is that *the U.S. Constitution itself* does not

[7] Moreover, Plaintiffs' argument overlooks a key reason why the drafters of the initiative may have preferred to use a more general reference to the "requirements of Code of Civil Procedure section 382." (Bus. & Prof. Code, § 17203.) As this Court noted in *Mervyn's*, suits based on "associational standing" also fall within the scope of section 382, and the more general language of section 17203 thus ensures that these cases, as well as class actions, will likewise be subject to the strictures of Proposition 64. (*Mervyn's, supra*, 39 Cal.4th at p. 232, fn. 4.) Especially in light of Proposition 64's considerable concern about suits brought by uninjured associations (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317), it is hardly surprising that the initiative uses the broader, general language that it does.

impose any standing requirement on the absent class members. But the very treatise that Plaintiffs cite goes on at length to explain that, *by operation of the general class action requirements* of Federal Rule of Civil Procedure 23, "the class representative must share standing with class members." (*Id.*, § 2:7, p. 97; *ibid.* ["'The class should consist only of those who stand in the same position as plaintiff,'" citation omitted]; *Denney, supra,* 443 F.3d at p. 264 [agreeing with Newberg that Article III did not itself impose a standing requirement on absent class members, but noting that, under class action principles, "*no class may be certified that contains members lacking Article III standing*," italics added].)[8] In the same way, section 17203's incorporation of general class certification principles likewise ensures that the named plaintiffs and the absent class members must share standing to sue.

2. Plaintiffs' Construction Would Frustrate Proposition 64's Express Objectives

Citing Proposition 64's ballot materials, Plaintiffs contend that the initiative's purpose was solely to bar "actions in which no client had suffered an injury in fact," and that this objective would be met by imposing the standing requirement only on the representative plaintiff. (P.O.B. p. 45.) But Plaintiffs may not ignore Proposition 64's express reference to section 382 — and to the class certification principles it codifies — by resorting to the underlying ballot materials. (*DaFonte v. Up-*

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[8] (See also *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (S.D.N.Y. 2003) 244 F.Supp.2d 289, 334 [noting that "each member of the class must have standing with respect to injuries suffered as a result of defendants' actions"]; *O'Neill v. Gourmet Sys. of Minn. Inc.* (W.D.Wis. 2002) 219 F.R.D. 445, 453 (*O'Neill*); *Adashunas*, *supra*, 626 F.2d at p. 604; see generally 7AA Wright & Miller, *supra*, § 1785.1, p. 390 ["[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention."].)

Right, Inc. (1992) 2 Cal.4th 593, 602 ["[B]allot materials can help resolve ambiguities in an initiative measure [citation], but they cannot vary its plain import."].) In any event, by excusing absent class members from complying with the standing requirements of Proposition 64, Plaintiffs' construction would undercut at least two of the initiative's objectives.

First, the ballot materials show, consistent with the statutory text, that the electorate sought to subject UCL class actions to generally applicable class certification principles. The Legislative Analyst's assessment specifically noted that, under the pre-amendment UCL, "persons initiating unfair competition lawsuits do not have to meet the requirements for class-action lawsuits," including certification of the class as "persons with a common interest." (39 A.A. 9643; see also *ante*, pp. 13-14, fn. 6 [discussing "representative actions" under *Kraus*].) The initiative, the Legislative Analyst explained, changed the law to demand that private parties "meet the additional requirements of class action lawsuits." (39 A.A. 9643-9644.) Yet, under Plaintiffs' construction, absent class members would be exempted from the settled requirement of standing.

Second, Plaintiffs' proposed reading, if adopted, would effectively smuggle back into the statute the very sort of private attorney general actions that the initiative unambiguously eliminated. (See Proposition 64, § 1, subd. (f).) As this Court noted in *Mervyn's*, one of the expressly stated purposes of the initiative was to ensure "'that *only* the California Attorney General and local public officials [would] be authorized to file and prosecute actions on behalf of the general public.'" (*Mervyn's*, *supra*, 39 Cal.4th at p. 228, quoting Proposition 64, § 1, subd. (f), italics added.) Because Plaintiffs' reading of Proposition 64 would allow an injured named plaintiff to represent a broad class of persons without regard to whether those persons suffered any injury, it would effectively — and

impermissibly — add "injured named plaintiffs" to the list of persons who could sue on behalf of the (uninjured) general public.

3. Plaintiffs' Construction Would Have the Anomalous Effect of Producing Class Action Claims that Inherently Lack Typicality

Plaintiffs' construction not only would defeat the purpose of Proposition 64's class action amendments, it also would lead to anomalous results. If absent class members were not required to have standing under Proposition 64, the necessary consequence would be that the named plaintiffs could not establish the requisite "typicality" to allow class certification.

This Court has interpreted the "community of interest" requirement to mean that, inter alia, the named plaintiffs must have "claims or defenses *typical* of the class." (*Lockheed*, *supra*, 29 Cal.4th at p. 1104, italics added.) This inquiry "centers upon whether the [named] plaintiffs are truly representative of the absent, unnamed class members." (*Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal.App.3d 435, 438.) Although the named plaintiff need not "have identical interests with the class members," he must be "similarly situated" to the proposed class members. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 46.) Where, as here, the applicable statute imposes a causation-of-injury requirement as an element of the plaintiff's standing to sue (Bus. & Prof. Code, § 17204), the requirement that the named plaintiff's claims be typical of the class necessarily means that the "'members who make up the class [must] have sustained the same or similar damage. [Citation.]'" (*Caro*, *supra*, 18 Cal.App.4th at p. 664 [making this point in the context of the CLRA].)

Under Plaintiffs' contrary construction of Proposition 64, a named plaintiff who had shown the injury and causation required by section 17204 could proceed to represent UCL claimants who had *no* injury, much less an

injury "as a result of" the challenged business practice. The resulting obvious disparity between the claims of the named plaintiff and those of the class members would necessarily mean that the named plaintiff's claims were *atypical*. That is, because the class would include members who had not suffered harm as a result of the defendant's misconduct, the named plaintiff could not "possess the same interest and suffer the same injury as the class members." (*General Tel. Co. v. Southwest Falcon* (1982) 457 U.S. 147, 156.) The courts have repeatedly held that typicality is lacking when the absent class members the plaintiff seeks to represent have suffered no injury. (*Caro*, *supra*, 18 Cal.App.4th at p. 664 ["[T]here can be no class certification unless it is determined by the trial court that similarly situated persons have sustained damage"]; see also *O'Neill*, *supra*, 219 F.R.D. at p. 453 [refusing to certify a proposed class of persons possessing tribal-issued identifications in a lawsuit alleging discriminatory refusal to accept them, holding that "it is likely that many of the members of plaintiff's proposed classes have suffered *no injury at all* because they possess a form of identification [that is] acceptable," italics in original]; *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.* (S.D.Tex. 1999) 190 F.R.D. 422, 426 [refusing to certify a proposed class consisting of physicians participating in defendants' HMO plans and agreeing that "plaintiffs' claims are not typical of those of the other members of the putative class because many of the putative class members have suffered no injury in that their annual incomes have increased"].)[9]

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[9] Plaintiffs' contrary argument rests on irrelevant cases that merely confirm that the typicality requirement does not require that the named plaintiff's claims be *identical* to those of the class. (P.O.B. pp. 50-53.) The problem here is that, under Plaintiffs' reading of Proposition 64, the named plaintiffs' claims would be *fundamentally different* from those of the class. (See 7A Wright & Miller, *supra*, § 1764, p. 1769 [typicality "may have independent significance when it is used to screen out class actions in

II. The Court of Appeal Correctly Declined to Adopt Plaintiffs' Argument that the Mere Purchase of a Product Is Sufficient to Establish the Causation Required by Proposition 64

According to Plaintiffs, the only "causation" required by Proposition 64 is that a UCL plaintiff — and in this case, an absent class member — "be one of the people from whom the defendant obtained money or property *while* engaged in its unfair business practice." (P.O.B. p. 35, italics added.) This argument is meritless.

A. To Demonstrate an Injury Suffered "As a Result of" the Defendants' Alleged Misrepresentations, Plaintiffs Must Show Proximate or Legal Cause

Proposition 64 authorizes a private action "by any person who has suffered injury in fact and has lost money or property *as a result of* unfair competition." (Bus. & Prof. Code, § 17204, italics added.) For multiple reasons, the express requirement that the plaintiff have lost money or property "as a result of" the challenged acts of the defendant requires the plaintiff to show proximate (or "legal") causation.

First, the words in amended section 17204, if given their ordinary meaning, require a plaintiff to show that his or her economic loss was the effect or consequence of the alleged violation — i.e., that his or her loss was *caused* by the defendant's misconduct. (*People v. Elliot* (2005) 37 Cal.4th 453, 478 [voter initiatives are construed in accordance with their plain meaning].)

Second, the phrase "as a result of" was not newly devised out of whole cloth by the drafters of Proposition 64. On the contrary, the phrase is a familiar one with a clear and settled legal meaning. A requirement that a plaintiff show the existence of an injury occurring "as a result of" the

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which the legal or factual position of the representatives is markedly different from that of other members of the class"].)

defendant's conduct means that "*proximate or legal cause*" must be shown. (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 537, p. 624, italics added; accord, e.g., *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 586 [noting that under "well-established common law principles," a negligence plaintiff must establish that the defendant's conduct "was a proximate cause" in "order to recover damages sustained as a result of an indivisible injury"]; *Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1013 [noting that "injury to plaintiff as a result of the breach (proximate or legal cause)" is an element of negligence].) Where an act or initiative uses terms with a settled legal meaning, it is presumed that the voters intended those terms to have that same meaning. (*People v. Weidert* (1985) 39 Cal.3d 836, 845-846 ["Where the language of a statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms have been used in the precise and technical sense which had been placed upon them by the courts," citations and quotations omitted].)

Third, this conclusion is further reinforced by the fact that the very same "as a result of" language appears in the standing provision of California's other main consumer-protection statute, the CLRA (Civ. Code, § 1780, subd. (a)), and courts consistently have construed that act as imposing a proximate causation requirement. (See, e.g., *Wilens, supra,* 120 Cal.App.4th at p. 754; *Massachusetts Mutual, supra,* 97 Cal.App.4th at p. 1292.) That the standing requirement of the UCL now mirrors, in this respect, the standing requirement of the most closely analogous California statute confirms that the same showing of causation is required under both. (See, e.g., *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 766 ["legislation framed in the language of an earlier enactment on the

same or an analogous subject that has been judicially construed is presumptively subject to a similar construction"].)

Fourth, this construction is consistent with the decisions of other state courts construing and applying their state consumer protection statutes. In interpreting identical language in such statutes, numerous courts have held that a private plaintiff must make a showing of proximate cause. (See, e.g., *Oliveira v. Amoco Oil Co.* (Ill. 2002) 776 N.E.2d 151, 155, 161 (*Oliveira*) [declining to determine whether reliance was required in a misrepresentation case brought under the Illinois consumer protection statute, but reasoning that "[t]he 'as a result of' language in ... [the statute] imposes an obligation upon a private individual seeking actual damages under the [statute] to demonstrate that the fraud complained of proximately caused' those damages in order to recover for his injury"]; *Abrahams v. Young & Rubicam, Inc.* (Conn. 1997) 692 A.2d 709, 712 (*Abrahams*) [noting that "[t]he language 'as a result of' [in Connecticut's unfair trade practice statute] requires a showing that the prohibited act was *the proximate cause* of a harm to the plaintiff," italics added].)

Accordingly, to establish standing under Proposition 64, a plaintiff must show that his or her injury in fact and loss of money or property were proximately caused by the challenged conduct.

B. Proposition 64 Requires More Than "Injury in Fact"

In arguing that Proposition 64 does not impose any causation requirement beyond what might be required to establish an "injury in fact" in the Article III sense (P.O.B. p. 43), Plaintiffs ignore the plain language of the initiative. By its terms, Proposition 64 authorizes a private action only by a "person who has suffered injury in fact *and* has lost money or property as a result of unfair competition." (Bus. & Prof. Code, § 17204, italics added.) By ignoring the word "and" and the clause that follows it,

Plaintiffs' argument violates the fundamental canon that "a construction that renders a word surplusage should be avoided." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 799.) The initiative's use of the conjunctive confirms that it sought to impose *two* distinct requirements for UCL standing: an injury in fact, and a loss of money or property, both suffered "as a result of" unfair competition. (See *Kobzoff v. Los Angeles Harbor/UCLA Med. Center* (1998) 19 Cal.4th 851, 861 ["The Legislature's use of the word 'and' shows it intended courts to construe in the conjunctive the two requirements [set forth in the relevant statute"].) Whereas the first requirement is one of injury, the phrase "as a result of" imposes an *additional* requirement of a causal connection.

Plaintiffs argue that the ballot materials support a contrary conclusion, but that is wrong. As an initial matter, it is improper to resort to extrinsic indicia of voter intent where, as here, the language of the initiative is plain. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) In any event, the ballot materials themselves refute Plaintiffs' contention that Proposition 64 requires only an "injury in fact" and does not demand a showing of causation. (P.O.B. pp. 41-43.) In the official title and summary for Proposition 64, the Attorney General specifically stated that the initiative "[l]imits [an] individual's right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered financial/property loss *because of*, an unfair business practice." (39 A.A. 9641, italics added.) This statement must be deemed to reflect the voters' intent (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 673, fn. 14), and it expressly recognizes the role of causation in limiting private standing under the UCL.

Plaintiffs also overlook the fact that the overarching purpose of Proposition 64, as reflected in the ballot materials, was effectively to

normalize the UCL's private cause of action by making it more analogous to other consumer protection laws both in California and in other jurisdictions. "'No statute of which we are aware in this state or nation confers the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review....'" (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 584 (dis. opn. of Brown, J.), citation omitted.) The ballot materials are explicit in declaring the voter's intention to eliminate this singular laxity and to make the UCL more like other laws. The ballot pamphlet's argument in favor of the initiative points to the UCL's lax standing provisions allowing anyone to sue and specifically notes that "*[n]o other state allows this.*" (39 A.A. 9647, italics in original; see also 39 A.A. 9650 [the initiative "[s]tops fee-seeking trial lawyers from exploiting a loophole in California law — *a loophole no other state has* — that lets them 'appoint' themselves Attorney General and bring lawsuits on behalf of the People ....," italics in original].) Because the unfair competition laws of other jurisdictions generally require a showing of injury *and* causation for standing to sue,[10] the ballot materials

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[10] (See, e.g., *Oliveira*, *supra*, 776 N.E.2d at p. 160 [treating as separate elements "actual damage to the plaintiff" and "proximately caused by the deception"]; *Abrahams*, *supra*, 692 A.2d at p. 712 [rejecting a claim under Connecticut's unfair trade practices statute because the "violation was not the proximate cause of the injuries to the plaintiff's reputation and business"]; *Feitler v. The Animation Celection, Inc.* (Or. Ct. App. 2000) 13 P.3d 1044, 1047 [interpreting Oregon's Unlawful Trade Practices Act, which requires a showing of "ascertainable loss of money or property ... as a result of [a violation]," to mean that the plaintiff must establish "causation ('as a result of')" as well as "damage ('ascertainable loss')"]; cf. *Walls v. The American Tobacco Co.* (Okla. 2000) 11 P.3d 626, 630 [because "[a]n essential element of a claim under [Oklahoma's Consumer Protection Act] is actual injury or damage caused by a violation," a plaintiff may not bring suit "solely as a result of his or her payment of the purchase price for [the defendant's] product" even assuming it violated the Act].)

confirm what the text of Proposition 64 says: the voters sought to impose both of these requirements on private UCL claims.

In any event, Proposition 64's causation-of-injury requirement for standing is fully consistent with Plaintiffs' more crabbed reading of the purpose of Proposition 64. Even if the framers of the initiative and the electorate were particularly concerned with the "unaffected plaintiff" (P.O.B. p. 32), Plaintiffs overlook the fact that the initiative's proximate causation requirement equally promotes that very same goal: an uninjured plaintiff will be even more effectively screened out by a causation-of-injury requirement.

Finding no support for their interpretation in the initiative's text or ballot materials, Plaintiffs assert that construing the initiative's "as a result of" language to require causation for standing "would undermine the fundamental public policy purposes of the UCL" by impeding the ability of private UCL suits to effectuate full disgorgement. (P.O.B. pp. 54-55.) Plaintiffs' disagreement with the balance struck by the voters is hardly a basis for refusing to apply the plain language of the initiative. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632 [courts must apply a statute's plain meaning "whatever may be thought of the wisdom, expediency, or policy of the Act," citations and quotations omitted].) Although Plaintiffs rely heavily on the description of the UCL's purposes in *Fletcher, supra,* 23 Cal.3d 442, Plaintiffs overlook the fact that *Fletcher* was interpreting language in the FAL defining the statute's *remedies*. (*Id.* at pp. 450-51.) *Fletcher*'s analysis therefore presumes that the named plaintiffs and the class members have the requisite standing, which is not the case here.

Moreover, the remedial language on which *Fletcher* relied (section 17535 of the FAL) differs critically from the new standing provisions

imposed by Proposition 64: as *Fletcher* noted, section 17535 authorizes a court to order restitution of that which "'*may have been* acquired by means of any ... [illegal] practice." (*Ibid.*, quoting Bus. & Prof. Code, § 17535 [all alterations and italics added by *Fletcher*].) Notably, the standing requirement imposed by Proposition 64 contains nothing like the italicized phrase upon which *Fletcher* placed dispositive weight. *Fletcher* provides no assistance in construing the quite different language in Proposition 64's standing provision.[11]

Similarly wide of the mark is Plaintiffs' insistence that the Court of Appeal's decision will eviscerate the UCL's ability to protect consumers. (P.O.B. p. 40.) By imposing standing requirements of injury in fact and proximate causation, Proposition 64 merely brings the UCL more in line with the CLRA and the consumer protection statutes of other jurisdictions. (*Ante*, pp. 26-28.) Courts applying such laws have not had difficulty certifying class actions in appropriate cases where the traditional requirements of a class action were met. (See, e.g., *Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1287.) Moreover, the initiative leaves intact the power of the Attorney General and other prosecuting agencies to bring enforcement actions *without* a showing of injury or causation. (Bus. & Prof. Code, § 17203.)[12]

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[11] Although Plaintiffs misread *Fletcher* as authorizing disgorgement as an end unto itself (i.e., untethered to the limited restitutionary remedy afforded by the UCL), this Court has confirmed that no such disgorgement remedy is available under the UCL or the FAL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1146-1148.)

[12] Plaintiffs' rhetoric about the need for effective disgorgement rings particularly hollow here in light of the fact that the California Attorney General has already brought a UCL action with respect to the same conduct alleged by Plaintiffs and obtained a historic multi-billion-dollar settlement. (1 A.A. 206.)

C. Whether Proximate Causation Requires a Showing of Reliance in a Misrepresentation Case Is Irrelevant Here

Plaintiffs argue at great length that the causation required by Proposition 64 should not be construed as imposing a *reliance* requirement in this context. (E.g., P.O.B. pp. 23-24, 31, 43, 49, 54.) This argument is something of a red herring, because (as Defendants expressly noted in their Answer to the Petition for Review) the Court of Appeal's opinion in this case does *not* address whether (much less hold that) the phrase "as a result of" requires a showing of reliance.

The courts have disagreed about whether, in a misrepresentation case, a requirement of proximate causation necessarily devolves, as a practical matter, into a reliance requirement. (Compare, e.g., *Weinberg v. Sun Co.* (Pa. 2001) 777 A.2d 442, 446 [noting that the phrase "as a result of" in Pennsylvania's unfair trade practices law "means, in this case, a plaintiff must allege reliance") and *Feitler*, *supra*, 13 P.3d at p. 1047 ["Where, as here, the alleged violations are affirmative misrepresentations, the causal/'as a result of' element requires proof of reliance-in-fact by the consumer"] with *Oliveira*, *supra*, 776 N.E.2d at p. 161 [not deciding issue] and *Anunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133 [holding that reliance is not always required].) There are undoubtedly cases in which the nature of the particular claims is such that the requirement of proximate causation can effectively be satisfied only by showing reliance. (See *Poulos v. Caesars World, Inc.* (9th Cir. 2004) 379 F.3d 654, 664 ["In some cases, reliance may be 'a milepost on the road to causation.' [Citation.]"]; *Sanders v. Francis* (Or. 1977) 561 P.2d 1003, 1006 ["In many cases plaintiff's reliance may indeed be a requisite cause of any loss, i.e., when plaintiff claims to have acted upon a seller's express representations."].) The Court of Appeal here found it unnecessary to decide whether this was such a case, because the court held that, in any

event, the issue of *proximate causation* was not amenable to class treatment under the circumstances of this case. (Typed opn. pp. 9-17.)[13]

The Court of Appeal's analysis is unassailable. Even assuming *arguendo* that the "as a result of" language in amended section 17204 does not require a showing of reliance (P.O.B. p. 31), the individual issues raised by Plaintiffs' UCL claims still foreclose class certification under the proximate causation standards indisputably incorporated by that language. (*Post*, pp. 34-45.) As such, the question whether "reliance" is required is essentially academic here. (See, e.g., *Oliveira*, *supra*, 776 N.E.2d at p. 161 [concluding that it was unnecessary to determine "the precise relationship" between causation and reliance, because the plaintiffs' claim failed under general proximate causation principles].)[14]

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[13] The Court of Appeal's opinion discusses "reliance" *only* in the context of addressing Plaintiffs' attempt to invoke a line of cases in which the courts had permitted class certification of a *fraud* claim by employing a class-wide "inference of *reliance*." (Typed opn. p. 12 [citing cases].) The Court of Appeal held that, however the causation-of-injury requirement was defined, "the record [here] makes it clear that proof as to the representative plaintiffs will not supply proof as to all class members." (Typed opn. p. 12; see also *post*, pp. 34-45.) The trial court likewise held that any issue of causation *or* reliance would be inherently individualized in this case. (40 A.A. 9892 [decertification ruling]; 1 A.A. 225 [CLRA class certification ruling].)

[14] Even more academic is Plaintiffs' discussion of case law addressing the meaning of the term "fraudulent" in the conduct-regulating provisions of the UCL. (P.O.B. pp. 24-26.) A statement has traditionally been deemed to be "fraudulent" within the meaning of the UCL if "members of the public are likely to be deceived" by it (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 49), and Proposition 64 did not alter this "substantive rule[] governing business and competitive conduct" (*Mervyn's*, *supra*, 39 Cal.4th at p. 232). The point is irrelevant here for the simple reason that the trial court's decertification ruling did not rest on an analysis of the "fraudulent" clause of the UCL, but rather on the entirely distinct requirements of *standing* that now must be satisfied under a different clause of the UCL.

III. The Court of Appeal Correctly Upheld the Trial Court's Discretionary Ruling that Individual Issues Precluded a Presumption of Causation

As set forth below, the trial court did not abuse its discretion in declining to apply a class-wide presumption of causation and instead holding that the issue of proximate causation (now imposed by Proposition 64) was individualized.

A. Plaintiffs Must Show that the Trial Court Abused its Discretion in Refusing to Presume Causation

A trial court's decision to decertify a class action is subject to the same deferential standard of review that governs the court's initial decision whether to certify a class in the first instance. (*Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360-361 (*Occidental Land*); *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 741-742.) "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded *great discretion* in granting or denying certification." (*Linder*, *supra*, 23 Cal.4th at p. 435, italics added.) The appellate court must "presum[e] in favor of" that ruling "the existence of every fact the trial court could reasonably deduce from the record," and "[a]ny valid pertinent reason stated will be sufficient to uphold the order." (*Sav-On*, *supra*, 34 Cal.4th at pp. 329, 327.) An appellate court will not disturb a denial of class certification supported by "substantial evidence" unless "(1) improper criteria were used; or (2) erroneous legal assumptions were made." (*Linder*, *supra*, 23 Cal.4th at pp. 435-436.)

Consistent with these principles, California law makes clear that the decision whether to infer or presume reliance or causation on a class-wide basis is a case-specific determination to be made by the trial court. (*Occidental Land*, *supra*, 18 Cal.3d at pp. 361-363 [in reviewing whether class certification was appropriate, including whether an inference of

reliance or causation was warranted, "the sole question is whether the court abused its discretion"]; *Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1294 & fn. 5 [holding that it is for the trial court to determine whether an inference of reliance is appropriate in light of the circumstances of the case and that the question on appeal is whether the record "supports the trial court's determination"]; see also *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814-815 (*Vasquez*) [holding that the trial court erred in *sustaining a demurrer* insofar as the complaint in that case alleged a class action for fraud, but that it was for the trial court on remand to evaluate whether plaintiffs could "*demonstrate* that proof of most of the important issues as to the named plaintiffs will supply the proof as to all," italics added].)

Plaintiffs' disregard for the applicable standard of review is made clear by their opening brief. Without ever mentioning those standards, Plaintiffs instead present an argument more suited to the trial court than to this Court — namely, that a presumption of reliance was "not only possible, but *reasonable*" on the certification record here. (P.O.B. p. 65, italics added.) But the question is *not* whether this Court or the trial court, "'believing other evidence, or drawing *other* reasonable inferences, might have reached a contrary conclusion.'" (*Sav-On*, *supra*, 34 Cal.4th at p. 331, citation omitted.) Rather, the question is whether, "[p]resuming in favor of the [trial court's] order ... the existence of every fact the trial court could reasonably deduce from the record," there is "substantial evidence" to justify denying Plaintiffs a class-wide presumption of causation and reliance. (*Id.* at p. 329.) The extensive record in this case — which Plaintiffs largely ignore — demonstrates that the trial court's finding of a predominance of individual issues is abundantly supported by substantial evidence: if anything, it would have been an abuse of discretion for the trial court *not* to have decertified the class.

B. Substantial Evidence Supports the Trial Court's Determination that Plaintiffs' UCL Claim Raised Individual Issues Precluding a Class-Wide Presumption of Causation

The record confirms that the trial court correctly declined to apply a class-wide presumption or inference of causation, and instead held that the issue of causation was specific to each putative class member.

1. The Trial Court Correctly Concluded that Plaintiffs Must Establish that Each Class Member Was Exposed to, and Affected by, the Alleged Misrepresentations

Throughout this litigation, Plaintiffs' UCL claims have been based on the premise that Defendants made a wide variety of false statements in order "to obtain both initial and continued cigarette purchases." (38 A.A. 9413-9414.) Plaintiffs contended that "the harm suffered by the class representatives and the class members is that they purchased cigarettes," thereby "spen[ding] substantial sums in making those purchases." (38 A.A. 9413; see also 40 A.A 9892 ["the injury in fact that each class member must show for standing purposes in this case would presumably consist of the cost of their cigarette purchases"].) In this case, therefore, Proposition 64's requirement of proximate causation of a loss of money or property turns on whether the challenged conduct *caused* the "initial and continued cigarette purchases." (38 A.A. 9414.)

As the trial court recognized, that question in turn depends upon a number of individual questions, including "whether each class member was *exposed* to Defendants' alleged false statements" and "whether each class member purchased cigarettes 'as a result of' the false statements" *or instead as a result of other factors*. (40 A.A. 9892, italics added; see also typed opn. p. 9 [noting that exposure was built into Plaintiffs' class definition].) Exposure is a key issue on this record because, if the information in the

challenged statement never found its way to the class members, then it could not have affected their purchasing decisions. (See, Prop. 64, § 1, subd. (b)(3) [stating that one purpose of the new standing requirements was to eliminate claims by "clients who have not ... viewed the defendant's advertising"]; cf. *Zekman v. Direct Am. Marketers Inc.* (Ill. 1998) 695 N.E.2d 853, 861 [holding that the plaintiff had failed to demonstrate an injury proximately resulting from allegedly misleading statements on a phone bill, in part because he acknowledged, at deposition, that "he did not read or pay the bills himself, delegating those duties to his secretary"]; *Robichaud v. Hewlett Packard Co.* (Conn. Ct. App. 2004) 848 A.2d 495, 499 [holding that defendant's alleged misrepresentations "did not influence the plaintiff's decision to purchase [its] printers," noting that one of the plaintiffs chose the printer for different reasons and "without seeing any [of the allegedly false] information on the packaging"].) Likewise, if the ultimate purchasing decisions were caused by other factors rather than Defendants' alleged statements, then those statements did not proximately cause those purchases. (*Caro*, *supra*, 18 Cal.App.4th at p. 668 [noting that the class action plaintiff himself did not believe the representations about "fresh" orange juice for which he sought class certification]; see also *Viner v. Sweet*, (2003) 30 Cal.4th. 1232, 1239-1240 [but-for causation is required for proximate causation].)

As set forth below, the Court of Appeal correctly held that the trial court did not abuse its discretion in concluding that these issues of (1) exposure and (2) ultimate causation were inherently individualized, making class treatment of the UCL claims inappropriate. (Typed opn. pp. 8-18; 40 A.A. 9892-9893.)

2. The Trial Court Properly Exercised its Discretion In Refusing to Presume or Infer Causation

a. Plaintiffs' UCL Claim Raises Individualized Issues About the Exposure of Putative Class Members to the Alleged Misrepresentations

The trial court expressly found that, "as in Plaintiffs' CLRA case," the issue of "expos[ure] to Defendants' alleged false statements" was inherently individualized. (40 A.A. 9892; see also 1 A.A. 229; cf. *Philip Morris Inc. v. Angeletti* (Md. 2000) 752 A.2d 200, 235 ["Prospective class members may have heard or read some, all or none of the misrepresentations allegedly made by Petitioners."]; *Insolia v. Philip Morris Inc.* (W.D.Wis. 1998) 186 F.R.D. 535, 545 ["[T]o the extent that these statements reached class members, they did so through different channels and with varying degrees of success"].) The certification record confirms that the exposure of each class member to the challenged statements is inherently fact-intensive, and precludes any inference or presumption of reliance.

Plaintiffs' complaint alleged an array of different statements made to different audiences at different times, on different subjects, through different media, with respect to different products over the course of many years. (2 A.A. 308-315, 329-330.) Plaintiffs' interrogatory responses highlight the enormous diversity of these statements. In their responses, Plaintiffs describe their UCL claim as being based on oral representations (e.g., congressional, deposition, and trial testimony) and written statements (e.g., advertising, press releases, and proxy statements) made in a variety of electronic media (e.g., television and Internet), radio outlets (e.g., news programs), and paper media (e.g., newspaper advertisements, and trial pleadings). (36 A.A. 9027 – 37 A.A. 9132.) The wide variation in the form of the challenged statements is exacerbated by the range of topics they address, which include: (1) nearly 60 statements concerning a host of

different issues related to nicotine levels (36 A.A. 9027-9051); (2) more than 110 statements relating to various different issues bearing on the health effects and addictiveness of cigarette smoking (36 A.A. 9053 – 37 A.A. 9092); and (3) more than 70 different statements concerning the effect of cigarette advertising on youth (37 A.A. 9094-9132).

The trial court did not abuse its discretion in concluding class members would differ widely in the extent to which they had been exposed to this panoply of statements, which included, for example:

- a 1999 statement on a company website asserting that "Cigarette brand advertising does not appear in public[ations] directed primarily to those under 21 years of age, including college media" (37 A.A. 9111);
- a 1995 public statement concerning the reasons why ammonia is added to cigarettes (36 A.A. 9044);
- a website statement asserting that tar and nicotine yields have dropped since the 1950s (15 A.A. 3734);
- a proxy statement concerning the anti-youth-targeting provisions of the Master Settlement Agreement (37 A.A. 9112); and
- a press release addressing the use of particular blends of tobacco (36 A.A. 9041).

Plaintiffs' own deposition testimony further underscores the need for a plaintiff-specific inquiry concerning the extent to which each class member was exposed to various statements on this range of topics. Plaintiffs Brown and Bierly testified that they only recalled hearing Respondents' statements in connection with their Chief Executive Officers' 1994 testimony before Congress, whereas Plaintiff Buller-Seymore recalled only having seen traditional cigarette brand advertising. (38 A.A. 9349-9350 [Brown]; 38 A.A. 9363-9367 [Bierly]; 38 A.A. 9376-9377 [Buller-Seymore].) Plaintiffs' testimony confirms what common sense suggests —

the various class members were each exposed to different alleged misstatements, and some may not have read or heard any of the challenged misstatements.[15] On this record, it is simply impossible to say that there is no "substantial evidence to support [the] trial court's certification order." (*Sav-On*, *supra*, 34 Cal.4th at p. 327.)

Plaintiffs argue that this Court's prior decisions suggest that neither the number of challenged misrepresentations nor their temporal span precludes a presumption or inference of causation. (P.O.B. p. 62 [asserting that the claims in *Massachusetts Mutual* involved representations allegedly made to 33,000 people over 15 years]; *id.* 65-66 [asserting that *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128 (*Prata*) involved a variety of misrepresentations to 300,000 consumers].)[16] But as the Court of Appeal noted, the record here (unlike *Massachusetts Mutual*) includes challenged statements that vary along multiple axes — e.g., speaker, time, medium, and subject matter — and thus differs critically from "those cases where the courts have essentially presumed misrepresentations detrimentally affected all class members on an equal basis." (Typed opn. p. 11.) As this Court has explained, one necessary (but not sufficient) requirement for drawing a classwide inference of causation or reliance is that "the same material misrepresentations have actually been communicated to each member of a class." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095.) Even that minimum predicate is missing here, and the trial court acted well within its discretion in deciding not to presume or infer causation on this record.

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[15] The expert testimony presented by Defendants further showed that "[e]xposure to, and awareness levels of" Defendants' alleged misstatements "would necessarily vary among class members." (36 A.A. 8912-8913.)

[16] Plaintiffs' reliance on *Prata* is also unavailing because that decision preceded Proposition 64 and involved not a class action, but a *representative action* under the UCL. (*Prata*, *supra*, 91 Cal.App.4th at pp. 1139-1142.)

(E.g., *Wilens*, *supra*, 120 Cal.App.4th at pp. 755-756 [distinguishing *Vasquez* and upholding denial of certification]; *Osborne v. Suburu of America, Inc.* (1988) 198 Cal.App.3d 646, 661 ["[t]here was no basis to draw an inference of classwide reliance without a showing that representations were made uniformly to all members of the class"]; cf. *Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1294, fn. 5 [trial court may decline to apply presumption when "class members were provided such a variety of information"].)

b. Plaintiffs' UCL Claim Raises Individualized Issues About the Effect of the Alleged Misrepresentations on Putative Class Members

The Court of Appeal properly held the trial court's finding that the extent to which the alleged misrepresentations affected a consumer's decision to purchase and smoke cigarettes would necessarily vary from person to person. (Typed opn. pp. 16-18; 40 A.A. 9892; cf. *Philip Morris USA Inc. v. Hines* (3 Dist. Ct. App. 2003) 883 So.2d 292, 294 [observing that "the smoker's reasons for choosing to smoke 'light' cigarettes could preclude an individual smoker's entitlement to damages"], petn. for review pending; *Clay v. American Tobacco Co.* (S.D. Ill. 1999) 188 F.R.D. 483, 503 [denying certification because the "causal link" between cigarette purchases and the alleged violation of a consumer protection statute "cannot be proven without asking each plaintiff and potential class member why they chose to purchase [defendant's] cigarettes," which "will involve innumerable individual questions"].) This finding is firmly supported by the certification record, and further underscores that the trial court acted within its discretion in declining to apply a presumption of causation (or reliance).

Plaintiffs' own deposition testimony vividly illustrates how different class members made the decision to smoke, and to continue to smoke, based on different influences; that class members had different exposures and reactions to Defendants' statements and advertising; and that they also each had access to additional information about smoking and health. Ironically, one thing that emerges from Plaintiffs' testimony is that Defendants' challenged statements were not a causal factor in these three named Plaintiffs' smoking purchases: the trial court specifically (and properly) found that, on this record, Plaintiffs had *failed* to establish that they individually satisfied Proposition 64's causation requirement for standing. (40 A.A. 9893.) The substantial evidence that supports these findings includes the following plaintiff-specific testimony:

- ***Testimony that Plaintiffs were not influenced by Defendants' statements***:

  - When asked whether it was true that "[t]here are no statements made by any of the defendants in this case which have had any influence on your decisions about smoking," Plaintiff Brown answered, "That is correct." (38 A.A. 9351-9352.)

  - Likewise, Plaintiff Bierly, when asked whether there were any statements by Defendants (other than the 1994 congressional testimony by the cigarette companies' CEOs or generic cigarette advertisements) that "you claim have in any way influenced your decisions about cigarette smoking," he responded, "I don't think I can remember anything." (38 A.A. 9367.)

  - Plaintiff Buller-Seymore testified that, other than traditional cigarette brand advertising, she had no recollection of even reading or hearing any statement by any Defendant. (38 A.A. 9376-9377.) She also testified that she had never heard anyone

say that cigarette smoking "won't hurt your health" or that it is not addictive. (38 A.A. 9373.)

- ***Testimony that Plaintiffs already knew, apart from anything Defendants did or did not say, that smoking was dangerous and addictive***:

  - Plaintiff Brown admitted that he had known for years that smoking is addictive and can lead to deadly diseases, but that this information had not been sufficient, in and of itself, to cause him to quit smoking. (38 A.A. 9352.)

  - Plaintiffs Brown and Bierly both testified that they thought at the time that Respondents' CEOs were *not* telling the truth in their 1994 congressional testimony. (38 A.A. 9348 [Brown]; 38 A.A. 9362 [Bierly].)

  - Plaintiff Buller-Seymore testified that she had never heard anyone say that smoking is not dangerous or that it is not addictive; on the contrary, all of the information she heard about smoking and health was that smoking was bad. (38 A.A. 9371-9375.) She denied, however, that she knew that smoking was addictive at the time she began smoking. (38 A.A. 9375.)

- ***Testimony as to the varying influences on Plaintiffs' decisions to smoke***:

  - Plaintiff Buller-Seymore claimed that her decision to smoke was influenced by her desire to be "cool" with her high school friends. (38 A.A. 9583.) She also stated that the use of positive imagery and attractive people in cigarette advertising made her want to smoke, as did seeing "[b]uff guys wearing a Marlboro shirt." (38 A.A. 9586-9589.)

  - Plaintiff Bierly testified that, although positive-image cigarette advertising influenced his decision to smoke, "[o]nce I hit a

self-awareness point and I knew what I was doing to my body and I knew how bad it was, I knew that I was being pitched too young, that I made that decision on my own. And I would say that's when I became an adult, at 18." (39 A.A. 9627.)

- By contrast, Plaintiff Brown testified that he was not influenced to continue smoking by any perceived positive attribute of smoking, but only because "I couldn't stop." (38 A.A. 9339.)

As this testimony illustrates, the alleged misrepresentations did not have a monolithic effect on smokers. (Typed opn. p. 12.) Rather, class members were exposed to Defendants' alleged statements to varying degrees, received different information about smoking and health from other sources, and weighed this information in different ways. Indeed, as the trial court found (40 A.A. 9893), Plaintiffs' testimony makes clear that they *themselves* lack standing to assert their UCL claims under Proposition 64's standards, because the challenged statements of Defendants did not appear to have affected their decision to smoke.

The individualized nature of the decision to continue smoking is further highlighted by Plaintiffs' testimony on addiction. Plaintiffs Brown and Buller-Seymore both testified that their addiction to cigarettes played a major causal role in their continuing to purchase and smoke cigarettes (38 A.A. 9339-9340 [Brown]; 38 A.A. 9374-9375 [Buller-Seymore]), and the courts have held that the role of nicotine addiction entails a "'highly individualistic inquiry'" precluding class certification. (*Thompson v. American Tobacco Co.* (D. Minn. 1999) 189 F.R.D. 544, 554, citation omitted; see also *Barnes v. American Tobacco Co.* (3d Cir. 1998) 161 F.3d 127, 146 (*Barnes*); *Angeletti, supra*, 752 A.2d at p. 236 [same].)

When, as in this case, a given class member's decision to purchase the defendant's product can be potentially affected by multiple factors, it is reasonable — and certainly not an abuse of discretion — to decline to apply

a class-wide presumption of causation (or reliance). (E.g., *Brown v. Regents of the Univ. of California* (1984) 151 Cal.App.3d 982, 989-990; *Poulos*, *supra*, 379 F.3d at pp. 667-668; *Angeletti*, *supra*, 752 A.2d at p. 235; *Estate of Mahoney v. R.J. Reynolds Tobacco Co.* (S.D.Iowa 2001) 204 F.R.D. 150, 158-159 [rejecting general presumption of reliance in part because of deposition testimony from two plaintiffs showing that they were well aware of the risks of smoking]; *Small v. Lorillard Tobacco Co.* (N.Y.App. 1998) 252 A.D.2d 1, 8 ["[r]eliance on defendants' misrepresentations will not be presumed ... where a variety of factors could have influenced a class member's decision to purchase"]) *aff'd* (1999) 94 N.Y.2d 43).) Indeed, even if (contrary to the reality) a class-wide presumption of causation could be said to have arisen in this case, the evidence in this case is more than sufficient to rebut any such presumption. (*Caro*, *supra*, 18 Cal.App.4th at p. 667, fn. 20 [in determining whether the requisite community of interest had been shown, trial court must consider any evidence presented by Defendants rebutting any claimed inference or presumption of reliance]; see also 40 A.A. 9893 [noting that the evidence showed that the Plaintiffs had failed to show standing as to themselves].) On this record, whether the challenged statements had any effect on a given plaintiff's reasons or motivation for smoking would depend on the particular information he or she received and the conclusions, if any, he or she drew from that information. (Cf. *Poulos*, *supra*, 379 F.3d at p. 665 [refusing to certify claims alleging misrepresentations by casinos, noting that "[g]amblers do not share a common universe of knowledge and expectations — one motivation does not 'fit all'"].)[17]

[17] Far from being an abuse of discretion, the trial court's refusal to presume causation or reliance avoids the constitutional concerns raised by Plaintiffs' contrary view. Drawing a class-wide inference of causation on *this* record, which abundantly shows the inherently plaintiff-specific nature of the

Plaintiffs erroneously maintain that the trial court should have presumed causation on the purported strength of their "compelling" expert testimony. (P.O.B. p. 68.) First, a trial court may credit one side's evidence on such points, and a reviewing court has "no authority to substitute [its] own judgment for the trial court's respecting this or any other conflict in the evidence." (*Sav-On*, *supra*, 34 Cal.4th at p. 331.) Second, even if it were appropriate to second-guess the trial court's determination, the testimony is not "compelling." Plaintiffs highlight an expert declaration asserting that cigarette advertising in general influences smokers (P.O.B. p. 75), but that declaration does not address the key issue posed by Proposition 64's causation requirement — whether that influence varies with the particular statement seen, the other information available to given smokers, and competing influences. (39 A.A. 9652-9659.)

Plaintiffs' attempt to rely upon the trial record in *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635 (*Whiteley*) and *Boeken v. Philip Morris Inc.* (2004) 127 Cal.App.4th 1640 (*Boeken*) is also misplaced. (See P.O.B. pp. 71-77.) *Whiteley* and *Boeken* involved individual personal injury actions, and did not purport to address any issue concerning the propriety of class certification. (See Typed opn. pp. 15-16.) Moreover, both courts undertook precisely the sort of *individualized* record examination that would be required here to determine whether the smoking decisions of putative plaintiffs were affected by the misstatements and concealments alleged by Plaintiffs. (*Boeken*, *supra*, 127 Cal.App.4th at p. 1660 [reviewing "the evidence particular to Boeken" on these points]; *id.*

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causation inquiry, would violate due process by allowing composite or generalized proof impermissibly to obscure and alter the nature of the underlying claims being aggregated by the class action device. (See, e.g., *Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998); *In re Fibreboard Corp.* (5th Cir. 1990) 893 F.2d 706, 711.)

at pp. 1663-1666; *Whiteley*, *supra*, 117 Cal.App.4th at pp. 679-684, 693 [reviewing evidence in detail and noting that the plaintiff did not "contend that reliance upon the misrepresentations could be presumed from her purchase of cigarettes"].)[18]

c. The Lower Courts Properly Declined to Disregard Settled Limits on the Class-Action Device

Plaintiffs contend that the trial court's refusal to presume causation has the "anomalous effect" of rewarding "the worst offenders" for making "more creative" and "more extensive" misrepresentations. (P.O.B. p. 69.) Once again, Plaintiffs' dire predictions are impossible to square with the fact that courts applying ordinary consumer protection statutes — i.e., statutes that do not have the sort of highly anomalous features of the pre-Proposition 64 UCL — have had no difficulty certifying class actions in appropriate cases, including cases involving widespread practices. (*Ante*, p. 38 [noting that *Massachusetts Mutual* certified a class action under the CLRA that, as plaintiffs themselves describe it, involved 33,000 consumers

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[18] Plaintiffs contend that the trial court should have presumed causation here because their UCL claim rested, in part, on alleged material omissions by Defendants. (P.O.B. pp. 61-65, 68.) But such a presumption is improper where, as here, individual class members' access to, and knowledge of, the allegedly omitted information would vary widely. (Cf. *Massachusetts Mutual*, *supra*, 97 Cal.App.4th at pp. 1294-1295 [upholding the trial court's inference of causation in part because there was "*no evidence* any significant part of the class had access to all the information plaintiffs believe they needed," italics added] [distinguishing *Caro*, *supra*, 18 Cal.App.4th at pp. 668-669].) Here, the information that Plaintiffs assert was withheld by Defendants — information "about the risk of injury and addiction" (P.O.B. p. 68) — was ultimately the subject of government warnings, warnings by public health organizations, and other public statements. (Typed Opn. pp. 10-11.) Moreover, courts have expressed reluctance to presume or infer causation in a case involving "mixed" claims of misrepresentations and material omissions. (E.g., *Poulos*, *supra*, 379 F.3d at p. 667.)

over 15 years].) Plaintiffs' rhetoric also wrongly assumes that the many public officials with authority to enforce the UCL — authority left untouched by Proposition 64 — will idly sit by as mere spectators to such a parade of horribles.

At bottom, Plaintiffs' argument is that the class action device, and the standing requirements of Proposition 64, should be distorted and stretched to accomplish the sort of class-wide recovery that they believe would be good policy. This ends-justifies-the-means approach contravenes fundamental due process principles and distorts the purpose of the class action device. (Cf. *City of San Jose v. Superior Court, supra,* 12 Cal.3d at p. 462 ["Altering the substantive law to accommodate procedure would be to confuse the means with the ends — to sacrifice the goal for the going"; *Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 613 [explaining that a class action cannot "abridge, enlarge or modify any substantive right"]; *Expanding Energy, Inc. v. Koch Indus. Inc.* (S.D.Tex. 1990) 132 F.R.D. 180, 183 ["The device of the class action cannot be permitted to relieve plaintiffs of their burden of proof in this RICO action that the class was injured in its business or property."].) The Court of Appeal correctly held that the trial court properly decertified the class.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: January 29, 2007 Respectfully submitted,

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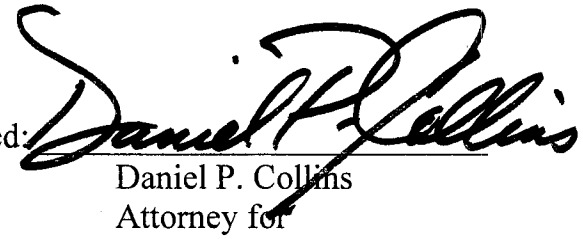
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Respondents' Brief is produced using 13-point Roman type including footnotes and contains approximately 13,997 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 29, 2007

Signed: 

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PROOF OF SERVICE VIA OVERNIGHT MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 355 S. Grand Avenue, 35th Floor, Los Angeles, CA 90071.

On January 29, 2007, I served the foregoing document described as

RESPONDENTS' ANSWER BRIEF ON THE MERITS

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Executed on January 29, 2007, at Los Angeles, California.

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