FINAL 12/15/06

S147345

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES

WILLARD BROWN, ET AL.
Plaintiffs and Appellants,

vs.

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

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

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 14.5, plaintiffs and their counsel certify that apart from the attorneys representing the plaintiffs in this action, as disclosed on the cover of the brief and the attachment thereto, the plaintiffs and their counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the plaintiffs or their counsel reasonably believe the justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: December 15, 2006

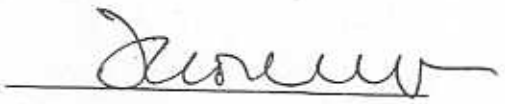

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATISES

INTRODUCTION

By Order filed November 1, 2006, this Court granted the Petition for Review in this matter.

A. Questions Presented

The issues for decision, as stated by this Court in granting review, are:

(1) In order to bring a class action under Unfair Competition Law (Business & Professions Code section 17200, et seq.), as amended by Proposition 64 (Gen. Elec. (Nov. 2, 2004), must every member of the proposed class have suffered "injury in fact," or is it sufficient the class representative comply with that requirement?

(2) In a class action based on a manufacturer's alleged misrepresentation of a product, must every member of the class have actually relied on the manufacturer's representations?

These questions must be answered on the basis of the language and intent of both the Unfair Competition Law and Proposition 64, as

well as the correct application of class action principles. That examination leads irrevocably to the conclusion that the Court of Appeal's decision requires reversal.

B. **Answer to Question No. 1: There is no proper basis for imposing a standing requirement on the individual class members. Requiring each class member to establish "injury in fact" would add substantive requirements to the UCL cause of action itself. Doing so, however, would contradict the intent of Proposition 64, would violate this Court's conclusion that Proposition 64 did not alter the substantive requirements of the UCL, and would improperly permit the class action statute - which is solely a procedural device - to impose additional substantive requirements on a cause of action.**

The substantive requirements for a fraud-prong cause of action under the UCL[1] and FAL have been firmly established by this Court:

[1] This case deals with the application of the Unfair Competition Law, Business & Professions Code section 17200, et seq. ("the UCL"). However, Proposition 64 similarly amended the False Advertising Law, Business & Professions Code section 17500, et seq. ("the FAL").

There is no substantive requirement in the cause of action itself for proving actual deception, reliance or actual damages. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197; *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442.)

This Court confirmed in *Californians for Disability Rights v. Mervyn's LLC* (2006) 39 Cal.4th 223 that Proposition 64 "left *entirely unchanged* ***the substantive rules*** *governing business and competitive conduct.*" (*Id.*, at 64; emphasis added.)

The amendments to the UCL and the FAL required by Proposition 64 provide that an action for unfair competition or false advertising may be brought "by any person who has suffered injury in fact and has lost money or property as a result of" that conduct. (Business & Professions Code sections 17203, 17535.) Further, Proposition 64 stated "[a]ny person may pursue representative claims or relief on behalf of others only if ***the claimant*** meets the standing requirements of Section 17204 [or section 17535] and complies with section 382 of the Code of Civil Procedure . . . ." (Business & Professions Code sections 17203 and

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Additionally, for purposes of the "likely to mislead" standard which is at issue in this case, this Court has previously held that the same principles apply equally to both the UCL and the FAL. (*Committee on Children's Television v. General Foods Corp.* (1983) 35 Cal.3d 197, 211.) Thus, for purposes of this brief, the UCL and the FAL will be used interchangeably.

17535; emphasis added.)

On its face, then, Proposition 64 only requires "the claimant," i.e., the "person [pursuing] representative claims or relief on behalf of others," is required to establish standing to bring an action. Nowhere did Proposition 64 purport to impose that same standing requirement on the individual class members.

This Court's conclusion in *Mervyn's* means that once "the claimant," i.e., the class representative, meets the standing requirement, there can be no other substantive change in the cause of action. That, in turn, means there can be no requirement that the class or its individual members are required to demonstrate actual deception, reliance or damages. Rather, once the class representative meets the standing requirement, the usual substantive rules apply and the class representative need only demonstrate the defendant made representations that were likely to mislead and that the class members are entitled to restitution of money obtained by the defendant.

This conclusion is consistent with standard class action principles. The requirement in Proposition 64 that the claimant comply with Code of Civil Procedure section 382, the class action statute, cannot impose a standing requirement on the individual class members. That is because -

as this Court has previously discussed - the class action statute is nothing more than a procedural vehicle that is superimposed over the underlying substantive requirements of the relevant cause of action. (*City of San Jose v. Superior Court (Lands Unlimited)* (1974) 12 Cal.3d 447, 462 ["Class actions are provided only as a means to enforce substantive law. ***Altering the substantive law to accommodate procedure would be to confuse the means with the ends - to sacrifice the goal for the going.***" (Emphasis added)]; *Washington Mutual Bank, FA v. Superior Court (Briseno)* (2001) 24 Cal.4th 906, 918.)

Superimposing the class action procedural device over the underlying UCL cause of action cannot impose additional substantive requirements on that cause of action that do not otherwise exist. Contrary to the appellate courts' decisions in this case and in *Pfizer v. Superior Court (Galfano)* (2006) 45 Cal.Rptr.3d 840, the "typicality" requirement for class action certification does not require identity. (*Claussen v. Weller* (1983) 145 Cal.App.3d 27, 46-47.) The class representative's claims must be typical of those of the class, but the reverse is not true. In other words, there may be an additional procedural requirement imposed on the class representative (e.g., standing) that is not imposed on the class, but there could never be a substantive

requirement of the cause of action that is imposed on the class that is not met by the class representative. Thus, in a UCL class action after Proposition 64, the class representative has additional procedural hurdles (i.e., demonstrating an "injury in fact") that is not imposed on the class. At that point, the class representative's substantive claim is the same as it always was: Proving that the defendant's conduct was "likely to mislead."

Since Proposition 64 did not change the substantive rules governing the UCL and the FAL, and the class action device cannot do so, the only logical application of Proposition 64's language is that it requires only the class representative to establish an "injury in fact" in order to demonstrate standing. This conclusion balances the intent and purpose of Proposition 64 with the public policy concerns underlying the UCL and FAL.

C. **Answer to Question No. 2: Even if Proposition 64 added substantive requirements to the cause of action, the doctrine of presumed reliance should apply, especially where a defendant engages in a targeted, comprehensive and successful marketing campaign that**

is rife with lies and is deliberately designed to lull consumers into purchasing a dangerous product.

As a general matter, this Court and the appellate courts have long applied the doctrine of presumed reliance to class action cases, in both the context of standard class actions and in class actions brought under the Consumer Legal Remedies Act ("CLRA"), Civil Code section 1750, et seq. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814-815; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 363; *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282; *Chamberlan v. Ford Motor Co.* (2005) 369 F.Supp.2d 1138.) Furthermore, that same doctrine has already been applied in the context of a UCL fraud claim in *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1139-1140. There is neither logical nor legal justification for refusing to apply that doctrine in the context of a UCL or FAL class action - and there are strong public policy reasons that warrant the application of the doctrine in this context.

And applying the presumed reliance doctrine in the context of a manufacturer's alleged misrepresentations about its product is particularly appropriate where, as here, those misrepresentations were made as part of a highly sophisticated, calculated, integrated and well-

orchestrated advertising campaign that specifically targeted a class of consumers and which was essentially designed to "implant" the misrepresentations in the public's mind. Indeed, the consistency and effectiveness of the misleading campaign - not the number of misrepresentations or the length of time over which they were made - should be a hallmark for application of the presumed reliance doctrine.

Thus, in addition to the fact that there is no basis for refusing to apply the presumed reliance doctrine to UCL class actions in the first place, the evidence in this case provides a compelling example of the ideal type of case in which it should be applied.

SUMMARY OF FACTS

It is now well-documented - in both case law and in numerous other sources, including expert evidence in this case - that the tobacco industry engaged in a decades-long marketing campaign up to and through the class period which promulgated a series of misrepresentations to the consumers of California. These misrepresentations give rise to the following pertinent factual issues:

(1) Defendants continue to market to minors despite their public statements to the contrary;

(2) Defendants made misrepresentations regarding the nature of the products they market as "light" cigarettes;

(3) Defendants market products as "natural" or as containing "no additives," despite knowing those labels to be false and or misleading;

(4) Defendants represent that they do not manipulate cigarette constituents when, in fact, they do;

(5) Defendants agreed to principles set forth in the Cigarette Advertising Code, which they regularly violate;

(6) The industry knew that cigarettes were addictive and that they at least caused significant health problems and, at their worst, caused death;

(7) The industry engaged in a integrated, well-orchestrated and highly manipulative marketing campaign designed to deceive the public regarding each and every one of the aforementioned issues in an effort to create a favorable market for their products and secure new smokers

A. The industry's knowledge and intent was directly contrary to their public pronouncements.

This action seeks to hold the Defendants liable for their actions during the class period designed to enhance their public image (among which one of the more egregious is their marketing of products to the youth of California despite their public pronouncements that they did not) and the ways they unfairly manipulated their products in order to actually enhance their addictive nature. The Plaintiffs believe the Defendants must be held accountable for their misrepresentations to the public, concealing adulterations and manipulations, targeting of particularly vulnerable groups, and concealing facts they had a duty to disclose in order to correct their own misleading representations.

As recited by two appellate courts in upholding personal injury verdicts against Philip Morris, by the mid-1950's "the tobacco industry knew and admitted privately that smoking causes lung cancer" and by 1957, "'all serious scientists" had "accepted" that "smoking was a cause of lung cancer," a fact that thereafter "was not seriously questioned." (*Whiteley v. Philip Morris* (2004) 117 Cal.App.4th 635, 644; *see, also*, *Boeken v. Philip Morris* (2005) 127 Cal.App.4th 1640, 1667 ["The evidence supports the conclusion that Philip Morris knew in the late

1950s . . . that cigarettes caused lung cancer."].)

Further, the *Whiteley* court noted, industry members "destroyed incriminating documents, including reports containing adverse data" and "hid sensitive research on cancer and addiction at industry-friendly labs or in other countries outside the subpoena range of the United States." And, the court went on, "Defendants terminated research that threatened the industry, confiscating or destroying records of adverse data." (*Id.*, at 646.)

In the same vein, throughout the class period Defendants marketed numerous brands of cigarettes as so-called "Light Cigarettes," "low tar" and/or "ultra-light" purporting to deliver less tar and/or nicotine than traditional cigarettes. Defendants *affirmatively* made false statements and disseminated false and misleading information designed to deceive consumers and that Defendants' "light," "ultra-light" and "low-tar" brands of cigarettes are better, less harmful than regular cigarettes, deliver less tar to consumers, possess attributes making them better than regular brands; and that switching from regular brands to low tar, light, or ultra light brands was recommended for all smokers. Defendants realized that "Light" cigarettes were a valuable deterrent to losing customers through quitting and positioned so-called "Light" cigarettes as

an alternative to quitting smoking by creating the illusion they were less harmful. Defendants did this despite the fact they were aware that these products, when actually smoked by human smokers, delivered equivalent levels of harmful constituents as traditional cigarettes.

Defendants were aware that the overwhelming majority of new entrants to the cigarette market are minors and repeatedly noted in internal documents the need to attract new entrants to the cigarette market as critical to their continued financial success. To that end throughout the class period, defendants tracked sales of their cigarettes to minors. At the same time Defendants repeatedly pledged not to market and/or sell their cigarettes to minors, both through the Cigarette Advertising Code (CAC) and various public statements prior to and during the class periods. Meanwhile Defendants published advertisements in the state of California that were intentionally designed to appeal to minors.

B. **The industry embarked on a campaign of misinformation and lies.**

The *Whiteley* court discussed the tobacco industry's campaign to minimize the addictive and health effects of cigarette smoking, noting that in "the early 1950's, the studies from medical research began to leak into the popular press." In response, "Defendants and other cigarette manufacturers agreed to act together to counter mounting scientific evidence of the health risks of cigarette smoking." To do so, "Defendants launched a massive public relations campaign - to discredit and distort the truth about smoking and cancer, to deny any link between smoking and serious illness, and to persuade the public that 'there is no proof that cigarette smoking is a cause of lung cancer' - the underlying purpose of which was 'reassurance of the public.'" (*Id.*) And, despite promises to do so, the industry failed to publish adverse results. (*Id.*, at 646.)

The industry established the Tobacco Institute in 1958 as "a public relations group that issued false press releases" and provided false information to doctors, dentists, medical schools and pharmacies containing false health claims related to cigarettes. (*Id.*, at 646.) "Other

strategies" by the industry "included manipulating the mass media to suppress or make light of adverse studies or reports." (*Id.*)

As the *Whiteley* court discussed, "[t]he defendants' disinformation campaign was a deliberate 'holding strategy' or 'delaying action' to keep the public smoking without fear." The underlying goal was to create "'doubt about the health charge without actually denying it.'" (*Id.*, at 647.)

The industry even took on the federally-mandated warning labels, assuring "the public that they disagreed with these warnings" and "denying it had been proved that smoking was 'hazardous' or 'dangerous' or caused disease, and by publicly disavowing the warnings." (*Id.*, at 649.)

Defendants, through their advertising of "light" cigarettes, exploited consumer misconceptions that "light" cigarette products were less harmful than traditional cigarettes. In spite of their pledge to provide complete and accurate information to the public regarding smoking and health, defendants made no effort to disabuse smokers of the misconception that "light" cigarettes were less harmful than traditional cigarettes. In fact, defendants conspired among themselves to prevent one another from revealing the truth about so-called "light" cigarettes.

As stated in Monograph 13 commissioned by the federal government and published by the National Cancer Institute through Defendants' advertising and marketing of so-called "light" cigarettes, a number of deceptive practices went "wholly unchecked."

Plaintiffs in this case presented the lower courts with a survey of California consumers showing the impact of the advertising being targeted at the vulnerable youth of California. There is no question that the tobacco companies have engaged in a long term and pervasive media blitz regarding their products. There is also no question that campaign has been targeted at and impacted the members of the class which was decertified.

Beyond simply personal observation and common sense in that regard the Appellants presented evidence of those facts in the form of Appellees own documents and advertisements and expert declarations. One expert declaration was directed at showing how a campaign as pervasive as the tobacco industries influences the consuming public, consistently and constantly. The second was directed at establishing how the vulnerable youth group is particularly susceptible to the unfair advertising and tactics of the Appellees.

C. **The industry's campaign worked.**

The massive, long-term public campaign by the tobacco industry worked beautifully - people who were already addicted to cigarettes used the industry's propaganda to rationalize their refusal to stop smoking and people who wanted to smoke (usually adolescents) used it as justification to start smoking. [AA 39, 9660-9668.]

These issues were discussed in *Boeken*. There, the tobacco defendants asserted that the plaintiff's inability to recall a "particular advertisement that made him decide to smoke" rendered his fraud-based claims insufficient for lack of reliance. (*Id.*, at 653-654.) *Boeken* then summarized the extensive evidence of the plaintiff's expert on marketing and consumer behavior. That expert testified that "Boeken's inability to recall being influenced by any particular advertisement does not mean that it was not a cause of his smoking." The expert described the effect of a marketing campaign and the resulting "associative learning" that occurs:

> Goldberg described the various media for advertising, and explained that the average person receives about 1000 advertising messages per day, too many for most people to process; so most are perceived in glimpses, making

repetition an important feature in advertising. Thus, even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become familiar, creating associations in the minds of people who do not think them through. This results in "associative learning," and those influenced by it are unlikely to be aware of it.

Associative learning is particularly effective with children. The Surgeon General's reports of 1994 and 1996 concluded that advertising encourages youth smoking. Studies have shown that the more children are exposed to cigarette advertising, the more they overestimate the number of smokers, and are persuaded that smoking is the norm. Such a belief among children is one of the highest risk factors for youthful smoking. They smoke because "it's the thing to do." (*Boeken*, at 654.)

These same observations and opinions - rendered by plaintiffs' experts, including Marvin Goldberg (the expert quoted and relied on by

the *Boeken* court) were submitted by plaintiffs in opposition to the motion to decertify the class in this case. [AA 39; 9652-9659; 9660-9668] Those experts establish that the defendants did not expect - let alone intend - that any member of the public would be able to specifically identify any particular ad in making the decision to smoke. Rather, defendants' marketing programs - consistent with general principles applicable to marketing and learning - were intended to create a general, cultural understanding on the part of the target audience - smokers and potential smokers - that cigarettes were safe and non-addictive. Having achieved that goal, defendants are now bound by its impact, i.e., smokers bought cigarettes because of their general understanding - resulting from defendants' own unfair conduct - that they could safely smoke. [AA 14, pp 3512:13-3517:1; 3521:25-3535:4]

SUMMARY OF PROCEEDINGS

This action was filed on June 10, 1997. As originally filed, the case asserted class action claims based on common law causes of action. Through pleading challenges and as the result of the trial court's denial of an earlier class certification motion, the claims were refined to

consumer class claims under the UCL and the CLRA. In April, 2001, the trial court certified a class consisting of all people "who, at the time they were residents of California, smoked in California one or more cigarettes between June 10, 1993 and April 23, 2001 and who were exposed to defendants' marketing and advertising activities in California." The court, however, denied certification of the CLRA claims.

As reflected in the class definition, the plaintiffs and the putative class members in this action are smokers. The defendants are the major tobacco companies and their trade and "research" associations (collectively, "defendants"). This action seeks to impose liability on the defendants for their violation of California consumer law resulting from their unfair, deceptive, untrue or misleading advertising and public statements about their products.

Notably, this action does not seek to compensate smokers for physical injuries caused by smoking. Nor does it seek reimbursement for governmental or insurance company expenditures for treatment of tobacco-related illnesses. It does seek to require defendants to provide restitution for their violation of California law under the UCL and for statutory damages under the CLRA arising from their lies promulgated to the public about their products and the ways they unfairly manipulated

their products in order to actually enhance their addictive nature and use.

After class certification, defendants sought summary adjudication on numerous issues. Ultimately, the trial court issued its rulings on the motions, granting adjudication of only some issues.

After Proposition 64 became effective on November 3, 2004, defendants moved to decertify the class on the grounds that Proposition 64 applied retroactively rendered the issues no longer amenable to class treatment. Plaintiffs opposed the motion on several grounds and sought to substitute appropriate class members should the trial court be inclined to decertify the class. The trial court granted defendants' motion, concluding Proposition 64 is retroactive, and refused to permit substitution of the class representatives. Pursuant to the parties' stipulation, the trial court stayed the remainder of the proceedings pending this appeal.

At the appellate court level, plaintiffs raised several issues:

- Is Proposition 64 retroactive?
- If it is, does Proposition 64 properly preclude the class claims asserted here?
- Did the trial court correctly dispose of plaintiffs' substantive claims on the "light" cigarette issue and the "no additive" and

"natural" cigarette issues?

The appellate court correctly concluded, based on this Court's *Mervyn's* decision, Proposition 64 did, indeed, apply to pending cases. It also affirmed the trial court's decision to decertify the class on the basis that each putative class member was required to demonstrate they saw and relied on the defendants' advertising in deciding to smoke which would, in turn, make the individual issues predominate over the class issues. The appellate court also held that the presumed reliance doctrine could not apply in the context of this case because there were simply too many advertisements made over the course of too long a period.

Because of those determinations, the appellate court declined to decide the other, substantive issues presented in plaintiffs' appeal.

This Court accepted review of this action on November 1, 2006.

ARGUMENT

1.

QUESTION:

IN ORDER TO BRING A CLASS ACTION UNDER UNFAIR COMPETITION LAW (BUSINESS & PROFESSIONS CODE SECTION 17200, ET SEQ.), AS AMENDED BY PROPOSITION 64 (GEN. ELEC. (NOV. 2, 2004), MUST EVERY MEMBER OF THE PROPOSED CLASS HAVE SUFFERED "INJURY IN FACT," OR IS IT SUFFICIENT THAT THE CLASS REPRESENTATIVE COMPLY WITH THAT REQUIREMENT?

ANSWER:

IF THE CLASS REPRESENTATIVE MEETS THE STANDING REQUIREMENTS ESTABLISHED BY PROPOSITION 64, THAT IS SUFFICIENT TO PERMIT THE ACTION TO PROCEED AS A CLASS. TO REQUIRE OTHERWISE WOULD VIOLATE THE SPIRIT AND THE LETTER OF THE UCL, PROPOSITION 64, AND THIS COURT'S *MERVYN'S* DECISION.

A. The substantive requirements for a UCL action do not include proof of actual deception, reliance or damages.

Under the UCL there has never been a reliance or causation requirement in the strict common law sense. Essentially, if the defendant engages in an unfair business practice, and thereby obtains money from a consumer, the UCL provides a vehicle for restitution to the consumer, without any showing that the unlawful conduct itself "caused" the customer to purchase the product or engage in the transaction. Rather, the statute was held to be one of strict liability: You engage in wrongful conduct and you must give back the money.

This concept that the UCL is a "strict liability" statute has been repeatedly expressed by this Court and the appellate courts. (*Cortez v. Purolator Air Filtration Products Co.,* Inc. (2000) 23 Cal.4th 163, 181; *Stearns v. Wyndham International, Inc.* (2002) 102 Cal.App.4th 1327, 1333; *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-878; *Community Assisting Recovery v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 886, 891; *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1137; *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 520.

Further, this Court has confirmed that to state a claim under the

UCL before Proposition 64,"one ***need not plead and prove the elements of a tort***; instead, one need only show members of the public are likely to be deceived." (*Charles J. Vacanti, M.D. Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 827-828.) The decisions on this subject have been explicit that there is no substantive requirement under the UCL fraud prong that restitution is dependent on proving actual deception, reasonable reliance or damage. (*Committee on Children's Televison, Inc. v. General Foods* Corp. (1983) 35 Cal.2d 197, 211; *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 49; *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1167; *Podolsky v. First Healthcare Corp.* (1966) 50 Cal.App.4th 632, 647-648.)

The fact that, prior to Proposition 64, the UCL did not require proof that the consumer purchased a product in reliance on the defendant's misrepresentations in the strict fraud sense is exemplified by the so-called "bait-and-switch" cases. There, the courts granted relief under the UCL to a customer lured into the store by an advertisement for one product, and who was then steered to buy a similar, but more expensive, product. (See, e.g., *People v. Toomey* (1984) 157 Cal.App.3d 1; *People v. Custom Craft Carpets, Inc.* (1984) 159 Cal.App.3d 676; *California Association of Dispensing Opticians v. Pearle Vision Center,*

Inc. (1983) 143 Cal.App.3d 419.) While the advertising lured the customer into the store, it defies common sense to then say that it was the sole and exclusive reason (i.e., "the cause") for buying a ***different product***. Yet recovery was permitted.

The court in *Albillo v. Intermodal Container Services, Inc.* (2003) 114 Cal.App.4th 190 outlined the basic requirements for establishing a UCL claim, quoting from this Court's decision in *Vacanti*:

> As explained in *Vacanti*, the unfair competition law (Bus. & Prof.Code, § 17200 et seq.) "***focuses solely on conduct*** and prohibits 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" (Emphasis added.)

Under that formulation, the ***defendant's conduct*** is the focus of the UCL assessment and if the conduct violates the UCL, the "fruits" of that misconduct must be returned to the consumers - even if they didn't know they were victims of the misconduct.

This "likely to mislead" standard has permeated UCL jurisprudence for decades. (See, e.g., *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442; *Korea Supply Co. v. Lockheed*

Martin Corp. (2003) 29 Cal.4th 1134, 1151.) The upshot of this standard is that for a cause of action seeking injunctive or restitutive relief under the UCL, a plaintiff need only prove that the defendant's statements were "***likely*** to mislead" the public, not that anyone was ***actually*** misled. Hence,"[a]llegations of actual deception, reasonable reliance, and damage are unnecessary." (*Committee on Children's Television v. General Foods Corp.* (1983) 35 Cal.3d 197, 212.)

Thus, prior to Proposition 64, the substantive requirements for asserting a cause of action under the UCL or the FAL, did not include any showing of actual deception, reasonable reliance or damages.

B. Imposing new substantive requirements for bringing a UCL class action would conflict with this Court's decision in *Mervyn's*.

The fundamental question in this case is whether the standing requirement imposed by Proposition 64 mandates proof of reliance or causation in UCL and FAL actions where none previously existed. The answer is no.

In *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, this Court addressed the question of whether Proposition 64 could be applied to cases pending at the time it was passed by the voters.

This Court acknowledged the general rule that new legislation is only to be "addressed to the future, not to the past," absent an express retroactivity provision. (*Mervyn's*, at 230.) After examining the general parameters for retroactive application of new statutes, this Court concluded that "[t]o apply Proposition 64's standing provisions to the case before us is not to apply them 'retroactively,' as we have defined that term, because the measure does not change the legal consequences of past conduct by imposing new or different liabilities on such conduct." (*Id.*, at 232.) Rather, this Court held, Proposition 64 "***left entirely unchanged the substantive rules governing business and competitive conduct.***" (*Id.;* emphasis added.) "Nor," this Court went on, "does the measure eliminate any right to recover." (*Id.*)

In essence, *Mervyn's* held that application of Proposition 64 to pending cases was not an impermissible retroactive application of the statute because the amendments only impose a procedural requirement (i.e., standing), not a substantive change in the cause of action itself. And this conclusion is consistent with the language and legislative intent expressed in Proposition 64: The proponents did not modify or amend Business & Professions Code section 17200 - which specifies the types of practices that are considered to be unfair competition. Nor did the

proponents of Proposition 64 add definitions or limitations to restrict the substantive scope of the action - despite long-held case law establishing that a cause of action could be brought under the UCL without any showing of reliance or damages.

Nor does the legislative history of the proposition support the conclusion that additional substantive requirements were intended to be grafted on to the statute. All that the proponents of Proposition 64 purportedly sought to accomplish was stopping ***frivolous*** lawsuits. (Proposition 64, §§ 1(b)(1-4), (c), (d).) No intent was evidenced to stop lawsuits with ***merit*** from going forward on the same parameters that applied to UCL lawsuits prior to the passage of Proposition 64. The proponents of Proposition 64 argued that the best way to limit ***frivolous*** lawsuits is to require that the ***class representative*** demonstrate economic loss, or injury in fact, "as a result of" the UCL violation. Nothing in the proposition, in the ballot, or in the campaign materials supporting Proposition 64 hints at any necessity to impose new substantive requirements, i.e., strict legal causation, on UCL claims.

In fact, the official website for the proponents of Proposition 64 confirms that no substantive changes were intended to be added to a 17200 claim:

"[W]hile Proposition 64 stops frivolous lawsuits by closing a loophole in California law that allows trial lawyers to extort millions from California businesses, ***it does nothing to inhibit environmental or consumer protection - and there is not one case in which these protections would be prevented by its passage***." [AA 39, pp 9638-39]

The proponents go on to represent that "'[u]nder Proposition 64, as in every other state, environmental and consumer groups will still be able to file a lawsuit on their own' if they show harm, or make claims using one of the dozens of existing state or federal environmental and consumer protection laws." [*Id.*] Thus, the intent of the proponents - and therefore the apparent intent of the voters - was that a showing of some harm must be made, but that only the individual plaintiff must meet the injury-in-fact requirements.

As discussed above, the substantive rules that apply to UCL actions are well-established: No showing of actual deception, reliance or damages is necessary. Rather, a plaintiff seeking injunctive or restitutive relief on behalf of others need only demonstrate that the defendant's conduct was "likely to deceive." Once that showing is made, the

defendant can be required to pay restitution for the money it obtained. Any change in those standards, any addition of a causation requirement, would necessarily have the effect of changing the substantive scope of the UCL and would conflict with the *Mervyn's* decision.

C. Since the class action device is merely a procedural vehicle, its use cannot impose additional substantive requirements on the underlying cause of action.

There is another compelling reason for rejecting the analysis that Proposition 64 imposes new substantive requirements on UCL class actions: This Court has already concluded that because the class action device is merely a procedural vehicle, its use cannot impose additional substantive requirements on the underlying cause of action. But application of Proposition 64's standing requirement to the putative class members would violate that precept because it would suddenly add substantive requirements - i.e., knowledge, reliance and damages - where none existed under prior law.

This Court has repeatedly refused to alter substantive law elements in order to permit class certification. For example, in *City of San Jose*, this Court reversed an order certifying a class action brought by

a group of neighbors surrounding a local airport. This Court held that the unique nature of each parcel of land, and the airport's effect on it, precluded class certification and refused to alter the substantive rule in order to make class certification appropriate. Similarly, in *Washington Mutual*, this Court refused to alter substantive rules regarding contractual choice of law provisions in order to make an action more amenable to class certification, again because the use of the procedural device cannot alter the underlying substantive requirements of the cause of action.

The same principle should apply in the contrasting situation presented here. As discussed, above, the substantive requirements of a UCL cause of action have long been established and do not include proof of actual deception, reliance or damages. Superimposing the class action procedural vehicle over that cause of action should not add substantive requirements to the cause of action just as using the class action device cannot eliminate substantive requirements.

D. Proposition 64 does not impose a reliance requirement even on the representative plaintiff.

Proposition 64 itself declares that its purpose was to stop "frivolous" lawsuits and to stop the filing of UCL actions for "clients

who have not used the defendant's product or service, viewed the defendant's advertising *or* had any other business dealings with the defendant." (Proposition 64, § 1(b), emphasis added.) Essentially, Proposition 64 was designed to do away with the so-called "unaffected" plaintiff, i.e., a plaintiff who had had no dealings with the defendant.

In order to accomplish that purpose, Proposition 64 requires a representative plaintiff to demonstrate that he or she has "suffered injury in fact and has lost money or property as a result of such unfair competition." (See Business & Professions Code sections 17203 and 17204, as amended.)

The appellate court below presumed, without analysis, that Proposition 64's added standing language imposed a reliance or causation requirement on the representative plaintiff and then extrapolated that requirement to the putative class members. But that analysis proceeds from a faulty premise. In fact, the "as a result of" language of Proposition 64 does not impose a stringent causation requirement on the representative plaintiff.

This Court has previously held that such statutory "causation" language does not, in fact, impose a stringent causation requirement in UCL-type actions. In *Fletcher v. Security Pacific National Bank* (1979)

23 Cal.3d 442, this Court sustained the trial court's order denying class certification on a breach of contract claim, but reversed the order denying class certification of an FAL claim. The distinction between the two causes of action was that for breach of contract, individualized assessments of the knowledge of each borrower would be required; but, for the FAL claim, this Court held that the FAL "clearly authorizes a trial court to order restitution in the absence of proof of the individual borrower's lack of knowledge of the alleged fraud if the court determines that such a remedy is necessary to deter future violations of the unfair trade practice or to foreclose the defendant's retention of any ill-gotten gains." (*Fletcher*, at 454.)

The defendant in *Fletcher* argued that the specific language of Business & Professions Code section 17535 "authorizes restitution ***only*** upon proof that the money which is to be returned has in fact been obtained by the defendant ***as a direct result of the unlawful business practice***." (*Fletcher*, at 450; emphasis added.) The language of the FAL relied on by the *Fletcher* defendant for that argument states that the court may order restitution "to any person in interest any money or property, real or personal, which ***may have been acquired by means of any practice in this chapter declared to be unlawful.***" (Emphasis added.)

The *Fletcher* defendant argued that the "acquired ***by means of***" phrase required proof of causation - just as the appellate courts here and in *Pfizer* construed Proposition 64's "as a result of" language as requiring proof of reliance and/or causation.

This Court rejected that analysis in *Fletcher*. As discussed in more detail in section 1.F., below, this Court held that the public policy goals underlying the UCL and FAL would be undermined if such a showing were required. (*Fletcher*, at 451.)

Thus, this Court has already rejected the argument that "causation" language analogous to that used in Proposition 64 can or should be construed as imposing a standard type of causation requirement in a UCL case.

Obviously, even in pre-Proposition 64 cases there had to be some logical link or nexus between the misconduct and the restitution. A court could not, for example, order a defendant to restore the purchase price to customers who bought Product A where the defendants' misrepresentations or unlawful conduct related solely to Product B. But it makes perfect sense to force that defendant to provide restitution to

purchasers of Product B.[2] The question in pre-Proposition 64 cases was always whether a defendant violated the UCL and, if it did, to restore balance to the marketplace by requiring the defendant to return the money it gained while engaging in that practice - even if there was no actual deception, reliance or damages caused to consumers.

The same analysis can - and should be - used in applying the "as a result of" language of Proposition 64's standing requirement. As in *Fletcher*, the language of Proposition 64 can only be reasonably construed - not as a requirement for demonstrating direct causation - but as a requirement for showing a factual nexus. In other words, to establish standing, the representative plaintiff need only be one of the people from whom the defendant obtained money or property while engaging in its unfair business practice. That construction satisfies the goal of Proposition 64, i.e., precluding actions by "unaffected plaintiffs", while still maintaining the consumer protection elements of the UCL.

That analysis is also consistent with Proposition 64's own stated

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[2] The decision in *In re Firearm Cases* (2005) 126 Cal.App.4th 959 supports this analysis. The *Firearm Cases* court specifically distinguished between "legal causation" and the need for some "link" or "factual nexus" in a UCL case. As discussed above, the "link" or "nexus" requirement is essentially what has always been required, i.e., a defendant can't be forced to provide restitution with respect to a product or activity where it did nothing wrong.

findings that the standing requirement is intended to mirror "the standing requirements of the United States Constitution." (Proposition 64, § 1(e).) Those requirements - established in Article III of the federal Constitution - involve three elements: (1) "Distinct and palpable" injury to the plaintiff; (2) A "fairly traceable causal connection" between that injury and the challenged conduct; and (3) A "substantial likelihood" that the relief requested will redress or prevent the injury. (See, Stern, *California Practice Guide: Bus. & Prof. Code section 17200 Practice* (Rutter 2006), ¶ 7:73; *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560; *Warth v. Seldin* (1975) 422 U.S. 490, 498; *Duke Power Co. V. Carolina Environmental Study Group, Inc.* (1978) 438 U.S. 59, 78.)

All these factors are met even in the absence of a stringent causation standard:

- There is, by definition, a distinct and palpable injury in every UCL restitution case. As this Court held in *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126-127, the UCL permits restitution, which this Court defined as an order "compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was

taken, that is, to persons who had an ownership interest in the property or those claiming through that person." Thus, the money or property taken represents an actual, palpable injury.

- The purpose of the "fairly traceable causal connection" element is to "insure that the injury alleged by a plaintiff is attributable to the defendant." (*Garelick v. Sullivan* (2nd Cir. 1993) 987 F.2d 913, 919.) There is inherently a "fairly traceable causal connection" in any UCL case because the money taken from the defendant and returned to "persons in interest" must, as this Court said in *Kraus*, have been obtained through the use of the unfair business practice by the defendant.
- This Court also established in *Fletcher* that the UCL, by its nature, and through the disgorgement of ill-gotten gains by the defendant is inherently designed to "redress or prevent the injury."

Proposition 64's goal of precluding UCL actions by unaffected plaintiffs can be met without imposing a strict reliance or causation requirement on representative plaintiffs. So long as the representative

plaintiff is, in fact, a "person in interest" from whom the defendant obtained money or property through the use of an unfair business practice, the protective goals of Proposition 64 have been met. Thus, the "as a result of" language of Proposition 64 should be construed in the same way as the "by means of" language addressed in *Fletcher* and the overarching goal of protection of the marketplace should be the touchstone for determining whether a representative plaintiff meets Proposition 64's standing requirements.

This conclusion is further supported by the federal district court's discussion of the interpretation and application of the "as a result of" language in Proposition 64 in *Anunziato v. eMachines, Inc.* (C.D. Cal. 2005) 402 F.Supp.2d 1133. The *Anunziato* court's analysis is on point and is the only published decision that effectuates Proposition 64's goals while preserving the underlying public policy protections of the UCL.

In *Anunziato*, the plaintiff brought claims under both the UCL and the FAL. The court concluded that Proposition 64's "as a result of" language does not require a showing of reliance in order to establish standing. The court first rejected the argument that the same language in the Consumer Legal Remedies Act ("the CLRA"), Civil Code section 1750 does require a showing of reliance by noting that the CLRA

provides for recovery of actual damages, attorneys' fees and punitive damages, whereas the UCL, even after Proposition 64, is focused on the defendant's misconduct.

The *Anunziato* court then went on to discuss situations in which imposing a reliance requirement in a UCL case would disadvantage consumers and undermine the protective purposes of the UCL.

> The goal of both the UCL and the FAL is the protection of consumers. However, the Court can envision numerous situations in which the addition of a reliance requirement would foreclose the opportunity of many consumers to sue under the UCL and the FAL. One common form of UCL or FAL claim is a "short weight" or "short count" claim. For example, a box of cookies may indicate that it weighs sixteen ounces and contains twenty-four cookies, but actually be short. Even in this day of increased consumer awareness, not every consumer reads every label. If actual reliance were required, a consumer who did not read the label and rely on the count and weight representations would be barred from proceeding under the UCL or the FAL because he or she could not claim reliance on the

representation in making his or her purchase. Yet the consumer would be harmed as a result of the falsity of the representation.

* * *

The goal of consumer protection is not advanced by eliminating large segments of the public from coverage under the UCL or the FAL where they suffer actual harm merely because they were inattentive or for one reason or another lacked the language skills to appreciate the particular unfair or false representation in issue. **A construction of these statutes that reduced them to common law fraud would not only be redundant, but would eviscerate any purpose that the UCL and the FAL have independent of common law fraud**. (*Id.*, at 1137-1138; emphasis added.)

The *Anunziato* court then engaged in a statutory construction analysis, demonstrating that nothing in the language of the UCL or FLA after the amendments mandated by Proposition 64 - and nothing in the language of Proposition 64 itself - imposes a reliance requirement:

The Court need not torture the language of the UCL and the FAL statutes to conclude that harm in fact will meet the "as a result of" requirement. Where the manufacturer of a product makes a false representation as to weight or count, to continue the above example, the consumer is unquestionably harmed as a result of the falsity because he was shortchanged.

The Court finds that the remedial purposes of Proposition 64 are fully met without imposing requirements which go beyond actual injury. Significantly, none of the ballot materials which accompanied Proposition 64 - the California Attorney General's summary, the commentary prepared by the California Legislative Analyst's Office, or the arguments for and against the Proposition - mention reliance. They do stress injury in fact.

The intent of Proposition 64 was to eliminate the filing of frivolous lawsuits brought to recover attorney's fees without a corresponding public benefit and the filing of

> lawsuits on behalf of the public welfare without any accountability to the public. (Prop.64, § 1(b).) The California voters identified the gateway for these abuses as the "unaffected plaintiff," which was often the sham creation of attorneys, and expressed their intent "to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Prop.64, § 1(e).) See *Molski v. Mandarin Touch Restaurant*, 347 F.Supp.2d 860, 867 (C.D.Cal. 2004); *People ex rel. Lockyer v. Brar*, 115 Cal.App.4th 1315, 1316-17, 9 Cal.Rptr.3d 844 (2004) (observing that the Trevor Law Group has achieved infamy in California for carrying out shakedown schemes under Section 17200 et seq.). An injury in fact requirement achieves these goals. (*Anunziato*, at 1138-1139; emphasis added.)

Defendants here, in fact, sold a product that was dangerous, harmful and addictive. And the representative plaintiffs - and every class member - suffered an "injury in fact" ***because they bought cigarettes***.

They actually spent their money and purchased the dangerous, harmful and addictive product peddled by defendants through their unfair business practices. As the *Anunziato* court explained so well, it is not necessary to establish any closer link than that and it would wholly undermine the protective goals and public policies underlying the UCL to impose any reliance requirements at all.

In such cases, the *Anunziato* court's analysis makes good sense and is the standard that should be applied. Proposition 64 only requires an "injury in fact" and should not be interpreted to impose a reliance requirement.

E. If Proposition 64's standing requirement imposes a reliance requirement at all, it does so only with respect to the class representative, not to the class members.

Even if Proposition 64's standing language is strictly construed to require proof of reliance and causation by the representative plaintiff, there is no basis for extending that requirement to the class members.

(1) **The express language of Proposition 64 only requires that the class representative establish standing, not the individual class members.**

Proposition 64 amended the standing requirements for a representative plaintiff as follows: "Actions for any relief pursuant to this chapter shall be prosecuted . . . by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." (Business & Professions Code section 17204; emphasis added.) The court below and the court in *Pfizer* concluded that this additional standing requirement was meant to be imposed on not only the representative plaintiff, but on the putative class members as well.

But that conclusion is in direct conflict with the language of Proposition 64 that explicitly addresses representative actions brought under the UCL: "Any person may pursue representative claims or relief on behalf of others only if ***the claimant*** meets the standing requirements of Section 17204 . . . ." (Business & Professions Code section 17203; emphasis added.)

Thus, contrary to the appellate courts' reasoning, the statute expressly and explicitly provides that only "the claimant" - defined as the representative pursuing the claim - must meet the standing requirement.

Had the voters had intended that ***everyone*** - both the representative claimant and the putative class members - had to meet the added standing requirements, it would have been simple to say so.

But Proposition 64 did not say that. It only says that "***the* claimant**" pursuing the representative relief must establish standing. It is a fundamental maxim of statutory construction that the express words of a statute must be accepted on their face and a court cannot, in construing the language, change the plain meaning of the statute or correct a perceived omission. (*CPF Agency Corp. v. R & S Towing* (2005) 132 Cal.App.4th 1014, 1027-1028.)

And - most importantly - imposing the standing requirement on the representative plaintiff, but no others, strikes an appropriate balance. The goal of Proposition 64 was to stop the use of the UCL by unscrupulous attorneys filing actions in which no client had suffered an injury in fact. (Prop. 64, § 1(b).) But, Proposition 64 also acknowledged, the UCL "is intended to protect California businesses and consumers." (Prop. 64, §1(a).) By requiring the representative plaintiff to have suffered an injury-in-fact, Proposition 64 stopped the inappropriate use of the UCL. And by limiting the standing requirement to the representative plaintiff, Proposition 64 did not significantly impair

the use of the UCL in legitimate cases. To extend the standing language of Proposition 64 beyond its express terms, i.e., to the putative class members, would destroy that balance and would, as a result, undermine the public policy protections that are an essential part of the UCL.

(2) The conclusion that standing need not be established by each class member is consistent with federal class action law.

The conclusion that the putative class members need not establish individual standing once it is determined that the class representative has standing is also consistent with federal class action law. As explained in the leading treatise on class actions, *Newberg on Class Actions*, "[o]nce threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains ***no further separate class standing requirement*** in the constitutional sense." (1 Newberg on Class Actions, § 2.5 (4th Ed.); emphasis added.)

As *Newberg* goes on to explain, putative class members "need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the

court." (*Id.*, at § 2.7.) As *Newberg* states, "[w]hether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is ***neither a standing issue nor an Article III case or controversy issue . . . .***" (*Id.*; emphasis added.)

In conflict with that general rule, the appellate court below concluded that Proposition 64 requires that ***each*** putative class member must fulfil the same standing requirements as the representative plaintiff. In support of that erroneous proposition the appellate court cited *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73. The *Collins* case does contain the language cited in the appellate court's opinion that, "[e]ach class member must have standing to bring a suit in his own right." But *Collins* was quoting a passage from a federal district court decision, *McElhaney v. Eli Lilly & Co.* (D.S.D. 1982) 93 F.R.D. 875, 878 and such language does not in any way stand for the proposition that the lower courts espouse which is that as a prerequisite to class certification each class member would be required to establish standing. The language which precedes that cited by the trial court is actually the key, which is that the "definition of a class cannot be so broad as to include individuals who are without standing to maintain an action on their own behalf." *Collins, supra.*, 187 Cal.App.3d 73, citing *McElhaney, supra.*,

93 F.R.D. 878. Plaintiffs would concede that the "definition of a class cannot be so broad as to include individuals who are without standing to maintain an action on their own behalf." But the issue of standing should not be confused with the separate and distinct question of whether the case meets class action criteria.

Newberg discusses the distinction between standing requirements and typicality or commonality requirements and notes that many courts have incorrectly imposed a requirement that the class plaintiff have shared standing with or be a part of the class. (*Newberg*, at § 2:5.) That, as *Newberg* explains, is improper. The correct analysis is to determine whether the representative plaintiff has standing in the constitutional sense and then, as a separate, distinct and independent assessment, to apply the class action criteria to determine whether commonality, typicality and adequacy requirements are met.

As *Newberg* explains, under standard federal class action principles, a demonstration that the representative plaintiff has standing is all that is required - there is no requirement for showing that the individual class members have standing. Proposition 64 is wholly consistent with this standard analysis. It requires the representative plaintiff (and ***only*** the representative plaintiff) to establish standing on

the basis of specific requirements and thereafter - and appropriately - leaves the assessment of whether the standard class action criteria are otherwise met in the unique context of UCL claims to the court in ruling on a class certification motion.

(3) Neither typicality nor commonality require a showing that each UCL class member is required to establish reliance or causation, even if the class representative is required to.

Assuming that the class representative in this case has demonstrated - or can demonstrate - standing as defined in Proposition 64, the next step is to determine whether that representative's claim meets the standard class action criteria.

In California, a class may be certified where there is "an ascertainable class, and . . . a well-defined community of interest in the questions of law and fact involved." (*Vasquez v. Superior Court (Karp)* (1971) 4 Cal.3d 800, 809.) The "community of interest" factor consists of three elements: predominant common questions of law or fact, class representatives whose claims are typical of the class and class representatives who can adequately represent the class. (*Richmond v.*

Dart Industries, Inc. (1981) 29 Cal.3d 462, 470.)

But typicality does not equate with identity. As the court in *Classen v. Weller* (1983) 145 Cal.App.3d 27, 46-47 said, "it has never been the law in California that the class representative must have ***identical*** interests with the class members." (Emphasis in original.) Rather, the test is whether the "representative is similarly situated so that he or she will have the same motive to litigate on behalf of all class members." (Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (Rutter 2006) ¶ 14:29.) Thus, in *Classen*, the appellate court held that a builder who purchased a lot in a development could represent the class of other buyers in the development challenging improper covenants and building fees, even though his interests were otherwise different - because all the purchasers had the same interests with respect to the improper provisions of the agreement.

This rule is equally applicable in construing Proposition 64. Simply because there are *different* requirements imposed on a representative plaintiff in order to establish standing under Proposition 64, i.e., causation and reliance (assuming, arguendo, that is how the "as a result of" phrase is interpreted), does not mean that the representative plaintiff's claims for remedies are different than that of the class - they

are not. Indeed, the remedy claims are identical - restitution of the monies obtained by the defendant through the use of the unfair business practice. Thus, the representative's claims are typical of those of the class.

That analysis is also supported by federal class action law. As discussed by the court in *Tanne v. Autobytel, Inc.* (C.D. Cal. 2005) 226 F.R.D. 659, 666-667, the claims of the class representative need not be substantially identical to the claims of the class members, so long as the legal theory upon which recovery is based is essentially the same:

> "The typicality inquiry is intended to assess whether . . . the [Lead Plaintiffs] have incentives that align with those of absent class members so . . . that the absentees' interests will be fairly represented." [Further] "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." [Citation omitted.] "Typicality [thus] entails an inquiry whether the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be

based."

In fact, under federal class action law, it is not even necessary that the class representative suffer the same injury as the class; all that is required is that recovery - whatever it is - be predicated on the same legal theory. (*Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1020.) As with the underlying public policy in UCL actions, the focus in the typicality assessment for class actions should be "on the defendant's conduct and plaintiff's legal theory" rather than on the plaintiff's injury. (*Rosario v. Livaditis* (7th Cir. 1992) 963 F.2d 1013, 1018.)

Whether looking at the defendant's conduct, the legal theory or even the injury, all those consideration support a finding of typicality in a post-Proposition 64 class action, even where the class representative has additional requirements to meet in order to establish standing: The defendant's conduct is the same (engaging in unfair business practices), the legal theory is the same (e.g., violation of the UCL's proscription against making statements that are likely to mislead) and the remedy is the same (restitution of the money or property obtained from the class).

As the trial court explained in originally certifying the class in this case "the named Plaintiff has demonstrated that his claims are typical of

the putative class. The named Plaintiff herein asserts identical claims on behalf of the class, are brought pursuant to the same statutory provisions and are premised upon the same alleged conduct of the Defendants which was directed to the members of the putative class on a class-wide basis." [AA 1, p. 226]

At most, the only thing that changed after Proposition 64 is that although the representative's claims are still typical of the class, the claims of the class are not necessarily typical of the representative's, i.e., because the representative is required to demonstrate reliance for standing purposes whereas the class is not.

The same analysis applies with respect to commonality. The representative's claims are common to the class, i.e., they are all predicated on the same violations of the UCL by the defendant, and seek the same remedy. (*Neal v. Casey* (3rd Cir. 1994) 43 F.3d 48, 56 ["demonstrating that all class members are subject to the same harm" is sufficient to establish commonality].)

The bottom line is that even imposing a reliance or causation requirement on the class representative for standing purposes does nothing to make the representative's fundamental underlying legal theories, or the remedies sought, any different from the rest of the class.

Accordingly, even if a reliance requirement is imposed on the class representative in order to ameliorate Proposition 64's standing concerns, it is neither appropriate nor necessary to add those substantive requirements to the cause of action itself.

F. Imposing reliance or causation requirements on UCL class members would undermine the fundamental public policy purposes of the UCL - a result the voters expressly decried in passing Proposition 64.

In *Fletcher*, this Court engaged in an extensive public policy analysis of the goals and purposes of the UCL and FAL - an analysis that has been repeatedly cited by this Court and the appellate courts in numerous cases over the last three decades. (See, e.g., *Kraus v. Trinity Management Services,* Inc. (2000) 23 Cal.4th 116, 125; Bank *of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.) In its discussion in *Fletcher*, this Court emphasized the importance of focusing on the defendant's conduct and the need to deter abuses of the marketplace:

> [I]nasmuch as "(p)rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society" [Citation], we

must effectuate the full deterrent force of the unfair trade statute. Indeed our concern with thwarting unfair trade practices has been such that *we have consistently condemned not only those alleged unfair practices which have* ***in fact*** *deceived the victims, but also those which are* ***likely*** *to deceive them.*

The discussion in *Fletcher* raised another issue relevant to this analysis. A defendant that violates the UCL is not forced to provide restitution because the customers were, in fact, individually "victimized" by the conduct, i.e., because they relied on a misrepresentation and thereby bought the product. The ameliorative effect of the restitutionary remedy under the UCL is founded on strong public policy - a policy that strives to keep the marketplace trustworthy and imposes restitution as a deterrent. This sentiment was forcefully expressed in *Fletcher*:

We do not deter indulgence in fraudulent practices if we permit wrongdoers to retain the considerable benefits of their unlawful conduct.

As one court has stated, "The injunction against future violations, while of some deterrent force, is only a partial remedy since it does not correct the consequences of past conduct. ***To permit the (retention of even) a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement (of the law) is to be achieved. One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom.***" [Citations.] Thus a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud, ***as an effective means to accomplish this disgorgement.***

* * *

A court of equity may exercise its full range of powers "in order to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved." [Citations.]

* * *

> ***Thus we conclude that the trial court erred in determining that the question of each borrower's individual knowledge constituted an insuperable obstacle to the imposition of a class restitution remedy*** under section 17535. Under the section, ***the court retains the authority to order restitution without an individualized showing on the knowledge issue if the court determines that such a remedy is necessary "to prevent the use or employment" of the unfair practice*** at issue in this case. (*Fletcher*, at 453-454; emphasis added.)

Nothing in Proposition 64 changes how reliance and injury may be established in UCL claims once the injury-in-fact and some economic loss on the part of the representative plaintiff has been alleged. Indeed, as *Fletcher* explains, doing so would create "***an insuperable obstacle to the imposition of a class restitution remedy***." (*Id.*)

Here, the evidence demonstrates that defendants have engaged in fraudulent, misleading and unfair conduct. That conduct resulted in the sale of cigarettes. Under the UCL, even after Proposition 64, that conduct warrants imposition of liability on defendants. Given that there is an injury in fact, i.e., the loss of money through the purchase of cigarettes, the goal of Proposition 64

- to stop shakedown lawsuits where an attorney brings an action without a client who has suffered *some* loss - has been achieved and there was no basis for dismissing the class action in this case.

2.

QUESTION:

IN A CLASS ACTION BASED ON A MANUFACTURER'S ALLEGED MISREPRESENTATION OF A PRODUCT, MUST EVERY MEMBER OF THE CLASS HAVE ACTUALLY RELIED ON THE MANUFACTURER'S REPRESENTATIONS?

ANSWER:

NO. THE DOCTRINE OF PRESUMED RELIANCE SHOULD APPLY TO UCL ACTIONS AS IT DOES TO ANY OTHER FRAUD-BASED CLASS ACTION AND PARTICULARLY WHERE THE MANUFACTURER'S MARKETING CAMPAIGN IS A LONG-TERM, INTEGRATED AND HIGHLY DECEPTIVE EFFORT TO MARKET A PRODUCT THE MANUFACTURER KNOWS IS DANGEROUS.

A. **The doctrine of presumed reliance has a long history in California class action jurisprudence.**

Nearly 35 years ago, this Court firmly established the principle of inferred or presumed reliance in class action common law fraud cases. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814-815.) There, the class members had all purchased freezers and a food supply from the defendant. The defendant, however, misrepresented the quality of the freezers and the quantity of the food purchased. This Court reversed the trial court's dismissal of the action, holding that class certification would be proper because reliance on the material misrepresentations could be inferred under the circumstances and individual testimony on reliance was unnecessary. As this Court noted:

> The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence. '*The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction* which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect.'

[Citations.]

Williston speaks in terms of a presumption: '***Where representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed that the representations were relied on.***' (12 Williston on Contracts (3d ed. 1970) 480.) (*Vasquez, supra.*)

This Court also added an important comment in footnote 9: ***The requirement that reliance must be justified in order to support recovery may also be shown on a class basis. If the court finds that a reasonable man would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise.*** (*Vasquez, supra.*)

This Court and other courts have consistently applied the *Vasquez* principle of presumed reliance in other class action cases. As this Court reiterated in *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d

355, 363, "an inference of reliance arises if a material representation was made to persons whose acts thereafter were consistent with reliance upon the representation."

Other cases have focused on the materiality of the misrepresentation in order to establish causation on a class-wide basis in common law fraud claims. For example, in *Chamberlan v. Ford Motor Co.* (N.D. CA 2005) 369 F.Supp.2d 1138, the federal court held that proof of class-wide reliance in a CLRA class action was appropriate in the context of non-disclosed material information. This is, of course, relevant in this case because one aspect of the fraud alleged is that defendants failed to disclose what they knew about the risk of injury and addiction associated with their products.

In *Chamberlan*, the plaintiffs sued an automobile manufacturer for failing to disclose defects in the vehicle's intake manifolds. The court said that in order to prove that the non-disclosed information is "material," the plaintiffs "must be able show that 'had the omitted information been disclosed, one would have been aware of it and behaved differently.'" Further, the court stated, "[m]ateriality is judged by the effect on a "reasonable consumer." (*Chamberlan*, at 1144-1145.)

Similarly, the Fourth District, Division One, approved class

certification in a CLRA insurance fraud case, *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282. In *Massachusetts Mutual*, over the course of **15 years** the defendant insurer misrepresented to **33,000 people** - each in individual transactions - that their life insurance premiums would eventually be paid by the increases in interest payments on their whole life insurance policies. These are known as "vanishing premium" policies. In fact, those representations were made at a time when the insurer knew full well that there was every possibility that those interest rates would not support future premium obligations and that, in fact, the insureds would have to continue premium payments far into the future.

The insurer naturally argued that the case was not suitable for class treatment because - just as the lower courts concluded here - each individual insured would have to prove causation. The appellate court rejected that argument, quoting from *Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891, 907, fn 22 and from *Vasquez*:

> "***Causation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class.*** The fact a defendant may be able to defeat the showing of

causation as to a few individual class members does not transform the common question into a multitude of individual ones; ***plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all.***" [Citation.] Thus, "[i]t is sufficient for our present purposes to hold that ***if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class.***" (*Mass. Mutual, supra*, at 1292-1293.)

This Court went on to discuss this Court's holdings on presumed or inferred reliance in both *Vasquez* and *Occidental Land* and concluded:

Like the circumstances discussed in *Vasquez* and *Occidental*, here the record permits an inference of common reliance. The plaintiffs contend Mass Mutual ***failed to disclose its own concerns*** about the premiums it was paying and ***that those concerns would have been material to any reasonable person*** contemplating the purchase of an N-Pay premium payment plan. If plaintiffs are successful in proving these facts, the purchases

common to each class member would in turn be sufficient to give rise to the inference of common reliance on representations which were materially deficient. (Emphasis added.)

That analysis can be directly adapted to the claims in this case: Like the circumstances discussed in *Vasquez* and *Occidental*, here the record permits an inference of common reliance. The plaintiffs contend that throughout the class period [the tobacco industry] failed to disclose its own concerns [about the health risks and known addiction associated with cigarettes; that they purposefully designed and manipulated their "light" products so the tar or nicotine readings, would not reflect the actual dose of tar or nicotine a consumer would receive from smoking those cigarettes; that they secretly adulterated their products by adding harmful ingredients (such as ammonia) and implemented other modifications of their cigarette products so as to ensure consumer addiction; and that they published advertisements in the state of California that were

> intentionally designed to appeal to minors] and that those concerns would have been material to any reasonable person contemplating the purchase of [cigarettes]. If plaintiffs are successful in proving these facts, the purchases common to each class member [i.e., cigarettes] would in turn be sufficient to give rise to the inference of common reliance on representations which were materially deficient.

Thus, under the appellate court's own analysis, class-wide proof of reliance is not only possible, but reasonable.

Additionally, in *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1139-1140, the defendant argued that because the alleged misrepresentations were made to different people, at different times and with at least 19 different ads to some 300,000 consumers, a UCL claim could not lie because each consumer's transaction would have to be examined. The *Prata* court rejected that argument, noting that "there is no need to examine each consumer transaction to establish a violation of section 17200. The issue is, instead, whether ***the program as a whole*** was likely to mislead." (*Prata*, at 1143.)

There is no reason in law or in logic why the doctrine of presumed reliance should not be applied to UCL claims, post-Proposition 64. Again, the focus of Proposition 64 was to stop frivolous lawsuits brought by unaffected plaintiffs. If the doctrine of presumed reliance is sufficient in common law fraud cases like *Vasquez*, *Occidental Land*, *Massachusetts Mutual* and the like, it should be equally appropriate in UCL actions.

B. The presumed reliance doctrine is most appropriately applied where, as here, the misrepresentations are made in the context of a long-term, multi-faceted, targeted and integrated marketing campaign.

Under *Vasquez* and its progeny, both reliance and justification for the reliance can be proven on a class-wide basis through the use of inference and presumption. In the context of this tobacco litigation, presumed reliance on a class basis is especially appropriate.

First, as plaintiffs' experts explained, the defendants' decades-long campaign, which continued up to and throughout the class period, of misinformation, misleading information, undisclosed information and outright lies about the health risks and addiction associated with cigarette

smoking was publicly disseminated on a wide scale to virtually every Californian and resulted in a pervasive "common knowledge" that cigarettes are not dangerous and a "friendly familiarity" that induces favorable opinions regarding smoking. [AA 14, 3491:8-3494:15; 3496:2-3498:11; 3499:2-3537:1] Moreover, the class definition was expressly limited to class members who were, in fact, exposed to defendants' advertising campaigns and misleading public statements. [AA 2, p. 297]

Obviously, information about the health effects and addictive nature of cigarette smoking was material information and a reasonable person, knowing that information before smoking for the first time, would reasonably have declined to engage in the transaction, i.e., buying cigarettes. Indeed, plaintiffs' expert testified that smoking is actually causally related to the industry's advertising. [AA 14, 3512:13-3517:1; 3521:25-3535:4] The case law agrees. (*Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635; *Boeken v. Philip Morris* (2004) 127 Cal.App.4th 1640.)

Additionally, as the *Vasquez* court noted in footnote 9, "a misrepresentation may be the basis of fraud if it was a substantial factor in inducing the plaintiff to act and that it need not be the sole cause of damage." (*Vasquez, supra.*) Thus, the fact that many people started

smoking because of peer pressure does not impair the propriety of establishing presumed reliance on a class-wide basis, for two reasons. First, the perception that smoking is "cool" was itself the result of defendants' own marketing campaigns; and, second, while peer pressure may have been *a* factor in getting people to smoke, it clearly was not the only one, and defendants' misrepresentations to the public that smoking was not dangerous or addictive would presumably have an impact on a reasonable person's decision to smoke. (See *Whiteley, supra; Boeken, supra.*) [AA 14, 3803:26-3806:11]

Every smoker's purchase of cigarettes is consistent with their reliance on defendants' widespread advertising, marketing and public statement campaigns that was promulgated through the class period. [AA 14, 3491:8-3494:15; 3496:2-3498:11; 3499:2-3537:1; 3512:13-3517:1; 3521:25-3535:4]

And, as in *Chamberlan*, the lack of disclosure by the industry of information known to it about the dangers of cigarettes is, of course, relevant in this case because one aspect of the fraud alleged is that defendants failed to disclose what they knew about the risk of injury and addiction associated with their products.

Here, the evidence by plaintiffs' experts is compelling:

defendants' entire marketing plan was a calculated, integrated campaign that was designed to essentially "implant" the misrepresentations in the public's mind. Clearly, the "program as a whole" demonstrates the materiality of the misrepresentations and the reasonableness of the public's reliance on them. [AA 14 3491:8-3494:15; 3496:2-3498:11; 3499:2-3537:1; 3512:13-3517:1; 3521:25-3535:4] The appellate courts in recent tobacco personal injury cases have reached exactly this conclusion. (*See, also, Whiteley, supra, Boeken, supra.*)

The appellate court here expressed the opinion that it would be inappropriate to certify a class where there were so many different misrepresentations made over such a long period of time. There are three fundamental problems with that conclusion:

- It has the anomalous effect of insulating the worst offenders: The more lies they tell, the more creative the ways that the lies are told and the more extensive the dissemination of the lies, the less likely the effects of those lies can be ameliorated;
- It ignores the expert evidence demonstrating the fundamental fact that - as a whole - the entire marketing campaign conveyed the same basic message about the

product, even though the individual advertisements changed. This principle is amply evidenced by Dr. Goldberg's declaration submitted in opposition to defendants' motion to decertify the class. [App. 39, 9652-9659]. As Dr. Goldberg explains, we must start with "the recognition that the average person receives about 1,000 advertising messages per day from various advertising media. . . . if people were to focus on this as their central activity, they could not function and cope with the main tasks in their lives. As a result, advertising is processed in a peripheral fashion - in glimpses - as consumers pursue the rest of their lives. It is for this reason that repetition . . . is so important. It is through repetitive, peripheral attention to advertising that the advertising images/icons/feelings shaped by the advertising campaigns . . . are successfully transferred to and associated with the cigarette brand in question";

- It conflicts with existing case law, e.g., *Massachusetts Mutual*, in which a class was certified for misrepresentations made to over 33,000 people over the

course of 15 years and *Prata*, in which the misrepresentations were made through over 300 different advertisements to over 300,000 people.

The logical conclusion to all of this is that the more extensive and the more comprehensive the marketing misrepresentations made by a defendant, the greater the necessity of applying the doctrine of presumed reliance in order to effectuate the public policy goals of the UCL.

C. **As determined by *Whiteley* and *Boeken* the tobacco industry's marketing campaign was sufficient to establish reliance and causation in individual fraud causes of action. There is no reason in law or in logic to preclude the application of the same principles in a UCL class action.**

Two recent decisions in tobacco personal injury cases are also relevant to the question of the materiality of the tobacco industry's "program as a whole" in inducing people to smoke and in keeping them smoking. Two different courts have upheld fraud claims in tobacco personal injury cases based not on the plaintiffs' recollection of or

reliance on specific ads, but on the fact that plaintiffs were part of a the public deliberately and knowingly targeted by those ads and that, as such, reliance was established. If reliance can be established in strict common law fraud actions against the tobacco industry through such implied or generalized reliance, that standard should equally apply to establish injury in fact (i.e., spending money to buy cigarettes) that occurred "as the result of" defendants' decades-long deceptive marketing campaigns under Proposition 64.

In *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, the plaintiff sought personal injury damages from defendants based on a fraud claim, among others. The plaintiff testified that she could not recall specific advertisements she had viewed, but that she had a general understanding that cigarettes were safe as the result of defendants' advertising statements. (*Whiteley*, at 643, 679.) Philip Morris asserted, as the appellate court concluded here, that specific evidence of detrimental reliance on specifically-identified ads was essential to prove the fraud claim. (*Id.*, at 680.) The appellate court rejected that argument and concluded that:

> ***Whiteley did not have to prove that she saw or heard any specific misrepresentations of fact*** or false promises that

> defendants made or that she heard them directly from defendants or their agents. ***It was sufficient that the statements were issued to the public with the intent that they reach smokers and potential smokers*** and that Whiteley, ***as a member of the intended target population, heard them.*** (*Whiteley*, at 680-681.)

Thus, even if Proposition 64 imposes an actual reliance/causation requirement, it is not one that mandates testimony from each class member about specific misrepresentations they heard or saw. As smokers, each class member is, by definition, a member of the intended target population that defendants sought to reach and that is sufficient to establish causation on the statutory fraud claim. (*Whiteley*, at 680-681.)

Similarly, in *Boeken v. Philip Morris* (2004) 127 Cal.App.4th 1640, the tobacco defendants asserted that the plaintiff's inability to recall a "particular advertisement that made him decide to smoke" rendered his fraud-based claims insufficient for lack of reliance. (*Id.*, at 653-654.) *Boeken* then summarized the extensive evidence of the plaintiff's expert on marketing and consumer behavior. That expert testified that "Boeken's inability to recall being influenced by any

particular advertisement does not mean that it was not a cause of his smoking." The expert described the effect of a marketing campaign and the resulting "associative learning" that occurs:

> Goldberg described the various media for advertising, and explained that the average person receives about 1000 advertising messages per day, too many for most people to process; so most are perceived in glimpses, making repetition an important feature in advertising. Thus, even if advertising images remain in the background, and are perceived only in glimpses, repetition causes them to become familiar, creating associations in the minds of people who do not think them through. This results in "associative learning," and those influenced by it are unlikely to be aware of it.

> Associative learning is particularly effective with children. The Surgeon General's reports of 1994 and 1996 concluded that advertising encourages youth smoking. Studies have shown that the more children are exposed to cigarette advertising, the more they overestimate the number of

> smokers, and are persuaded that smoking is the norm. Such a belief among children is one of the highest risk factors for youthful smoking. They smoke because "it's the thing to do." (*Boeken*, at 654.)

These same observations and opinions - rendered by plaintiffs' experts, including Marvin Goldberg - were submitted by plaintiffs in opposition to the motion to decertify the class in this case. [AA 39; 9652-9659; 9660-9668] Those experts establish that defendants did not even expect - let alone intend - that any member of the public would be able to specifically identify any particular ad in making the decision to smoke. Rather, defendants' marketing programs - consistent with general principles applicable to marketing and learning - were intended to create a general, cultural understanding on the part of the target audience - smokers and potential smokers - that cigarettes were safe and non-addictive. Having achieved that goal, defendants are now bound by its impact, i.e., smokers bought cigarettes because of their general understanding - resulting from defendants' own unfair conduct - that they could safely smoke. In other words, smoking is causally related to the industry's marketing and public image campaign. [AA 14, pp 3512:13-

3517:1; 3521:25-3535:4]

To the extent actual reliance is introduced as a new element in a UCL class action after Proposition 64, much of the proof is still amenable to class-wide treatment, including, e.g., the impact of addiction on individuals' perceptions of information conveyed to them and placed in the public domain, and the tendency of addicts to grasp at straws and hang on to any sliver of information that supports their addictive conduct, even in the face of overwhelming contrary information. [AA 3491:8-3537:1; 3793:2-3806:11] Plaintiffs need not prove that time and again individually when it can be proven once on a class-wide basis.

As the *Whiteley* court held, it is enough that "the statements were issued to the public with the intent that they reach smokers and potential smokers and that Whiteley, ***as a member of the intended target population, heard them.***" (*Whiteley*, at 680-681.) In this case, the fact that each class member is a smoker makes each class member - by definition - a member of the targeted population. Under *Whiteley,* that is sufficient to meet the causation requirement for fraud. The class definition itself (i.e., that each class member is a smokers) provides all the necessary evidence and common proof required to establish any necessary reliance element. Reliance is, in this case at least, itself a

commonality that supports class certification. [AA 14, pp 3512:13-3517:1; 3521:25-3535:4]

CONCLUSION

The goal in this case must be two-fold: Effectuate the voters' intent in passing Proposition 64 while avoiding any effect that would undermine the effectiveness of the UCL. That goal can be accomplished without imposing a stringent reliance requirement on a UCL class representative or the class. At the very least, the doctrine of presumed reliance can properly be invoked in the UCL context, just as it is in every other class action.

Respectfully submitted,

Dated: December 15, 2006

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CERTIFICATION OF LENGTH

I hereby certify that this brief contains 13, 990 words, including footnotes, but not including the cover, tables, this certification or the proof of service, as established by the word count of the computer program utilized for the preparation of this brief.

I declare and certify under the laws of the State of California that the foregoing statement is true and correct and that this certification was executed on December 15, 2006 at San Diego, California.

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I certify that I am over the age of 18 years and not a party to the within action; that my business address is:

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