No. S147345

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES, JCCP 4042

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

Plaintiffs-Appellants,

vs.

PHILIP MORRIS USA INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION (individually and as successor by merger to THE AMERICAN TOBACCO COMPANY); LORILLARD TOBACCO COMPANY; LIGGETT GROUP INC.; LIGGETT & MYERS, INC.; THE COUNCIL FOR TOBACCO RESEARCH–U.S.A., INC.; and THE TOBACCO INSTITUTE,

Defendants-Respondents.

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

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

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INTRODUCTION

The Court of Appeal here unanimously upheld a trial court order decertifying a class in this action brought under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (UCL)) and the False Advertising Law (Bus. & Prof. Code, § 17500 et seq. (FAL)), in which Plaintiffs-Appellants challenged a wide array of allegedly deceptive statements made over several decades by Defendants-Respondents. (*In re Tobacco II Cases* (2006) 142 Cal.App.4th 891.)[1] Plaintiffs seek this Court's review, arguing that this Court should act immediately to settle various questions concerning the application of Proposition 64's new standing requirements in the context of class actions. For several reasons, the Petition for Review (Petition) should be denied.

The various questions presented in the Petition concerning the proper interpretation of Proposition 64 do not warrant this Court's review at this time. The construction of Proposition 64 is sufficiently well settled by the two appellate decisions thus far to address these issues, namely, the decision below and the decision in *Pfizer Inc. v. Superior Court* (2006) 141 Cal.App.4th 290 (*Pfizer*). Moreover, the decision below is unassailably correct, does not conflict with any decision of this Court, and does not conflict with any decision of another Court of Appeal. Accordingly, review of these issues is not "necessary to secure uniformity of decision," nor is it necessary "to settle an important question of law." (Cal. Rules of court, Rule 28(b)(1).)

The Petition in this case includes a third question concerning whether the Court of Appeal correctly held that the trial court, on the record of this case, properly declined to apply a class-wide presumption of

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[1] For the convenience of the Court, page citations of the Court of Appeal's opinion will be to the typed version attached to the Petition ("Typed opn.").

causation and instead held that the issue of causation was inherently individualized. This factbound issue turns entirely on the application of settled legal principles to the specific facts of this case under a highly deferential standard of review, and this question is plainly unworthy of this Court's review.

In the event that the Court nonetheless were inclined to grant review of the questions presented concerning Proposition 64, then the Court should grant review in *this* case (perhaps in addition to *Pfizer*) and should *not* simply "grant and hold" this case for *Pfizer*. Because this case arises from a direct appeal, under the death-knell doctrine, of a definitive and final order decertifying a class based on an extensive record, the legal issues are well and cleanly presented here, and this case would be an ideal vehicle for deciding them. (*Post*, p. 21 [noting some of the differences between this case and *Pfizer*].)

In addition, if the Court grants review, it should limit and reformulate the questions presented. (Cf. Cal. Rules of Court, rule 29(a)(1).) With respect to the issues concerning the proper construction of Proposition 64, both the Petition in this case and the petition in *Pfizer* phrase the issues in a way that is unduly argumentative and that confusingly blurs together the distinct questions concerning (1) the applicability of Proposition 64's standing requirements to absent class members and (2) the nature of the causation required by Proposition 64's standing requirements. Accordingly, to the extent that the Court is inclined to grant review, it should limit the briefing and argument to the following two questions (which are framed in broad enough terms to capture all of the sub-issues raised in the Petition in this case (and in *Pfizer*) concerning the proper construction of Proposition 64):

1. Where one or more named plaintiffs seek certification of a claim under the Unfair Competition Law, do the amendments made by Proposition 64 to Business and Professions Code sections 17203 and 17204 require that the absent class members, as well as the named plaintiffs, have "suffered injury in fact" and have "lost money or property as a result of such unfair competition"?

2. What showing of causation is required to establish that a person "has suffered injury in fact and has lost money or property as a result of such unfair competition"?

STATEMENT OF THE CASE

I. Proceedings in the Trial Court

A. Plaintiffs' Claims Against Defendants

Since this action was first filed in 1997, the complaint has been amended nine times, and additional named plaintiffs and various causes of action have been added or dropped. (See, e.g., 2 AA 289.)[2] The gravamen of these complaints has been that Defendants engaged in a decades-long conspiracy to conceal the health effects and addictiveness of smoking and made numerous false and misleading statements relating to these subjects and in connection with the marketing of Defendants' cigarettes over the past 50 years. (E.g., 2 AA 301-330.) In the operative Ninth Amended Complaint, three plaintiffs — Plaintiffs Willard Brown, Damien Bierly, and Michelle Buller-Seymore — assert claims only under the UCL and FAL. (2 AA 330-331.)

B. Appellant Brown's First Motion for Class Certification

On January 21, 2000, Appellant Brown — then the sole named

[2] "A.A." refers to Appellants' Appendix in the Court of Appeal, and "R.S.A." refers to Respondents' Supplemental Appendix. Each is preceded by the volume number and followed by the page number.

plaintiff — filed a motion seeking class certification of all claims in his Fifth Amended Complaint, which included both common law claims and a claim under the Consumer Legal Remedies Act (Civ. Code, § 1750, et seq. (CLRA)). (4 RSA 1108; 3 RSA 790-799.) The trial court denied this motion on April 10, 2000, concluding that, inter alia, individual issues concerning causation and injury predominated. (8 RSA 2070-2072.)

C. Appellant Brown's Second and Third Motions for Class Certification

On October 31, 2000, Appellant Brown filed a second motion for class certification, this time seeking certification of only the CLRA claim in his then-pending Sixth Amended Complaint. (9 RSA 2488.) While this motion was pending, Appellant Brown filed in January 2001 a Seventh Amended Complaint that added claims under the UCL and the FAL. (1 AA 1-56.) In February 2001, Appellant Brown filed a third motion for class certification, in which he sought class treatment of these UCL and FAL claims. (1 AA 57.)

On April 11, 2001, the trial court denied Appellant Brown's second CLRA class certification motion. (1 AA 227-230.) The trial court first found that the renewed CLRA motion was an improper motion to reconsider the April 10, 2000 order. (1 AA 227.) The court also held that, in any event, certification of the CLRA claim was inappropriate, because (inter alia) individual issues predominated relating to causation, injury, reliance, exposure to the alleged misstatements, statute of limitations, and choice of law. (1 AA 229-230.)

Nonetheless, at the same time, the trial court granted the class certification motion directed to the UCL and FAL claims. (1 AA 224-227.) The court again acknowledged that "myriad ... distinct issues exist as to each class member's exposure to the alleged deceptive marketing, reliance

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

D. The Trial Court's Ruling on Defendants' Summary Adjudication Motions

On September 30, 2004, the trial court granted summary adjudication with respect to several issues presented by Plaintiffs' UCL and FAL claims, but permitted other claims to go forward. (34 AA 8474-8541.) Specifically, the trial court permitted Plaintiffs to proceed with their claims that Defendants made a variety of allegedly false and misleading statements at different times and of differing content in California during the Class Period: (1) denying that Defendants target minors with their cigarette advertising; (2) claiming compliance with an industry "Cigarette Advertising Code" (which outlined certain standards aimed at reducing the appeal that adult cigarette advertising might have to minors); (3) addressing statements regarding alleged nicotine manipulation, cigarette ingredients or additives, smoker compensation, and the tar and nicotine levels in cigarettes; and (4) denying or disputing the health hazards and addictiveness of cigarette smoking, pursuant to an alleged decades-long conspiracy. (34 AA 8474-8541.)

E. The Trial Court Decertifies the Class After Passage of Proposition 64

On November 3, 2004, Proposition 64 took effect, repealing the formerly broad standing requirements for UCL and FAL claims, and imposing new, stricter requirements. In light of Proposition 64, on March 7, 2005, the trial court granted Defendants' motion to decertify the class as to Plaintiffs' UCL and FAL claims. (40 AA 9892-9893.) As a threshold matter, the court held that Proposition 64's heightened standing requirements of injury-in-fact and causation applied to this pending case. (40 AA 9886-9891.) The court then found that Proposition 64's requirements raised "significant questions ... undermining the purported commonality among the class members." (40 AA 9892.) The court noted that these individual issues included "whether each class member was exposed to Defendants' alleged false statements and whether each class member purchased cigarettes 'as a result of' the false statements." (*Ibid.*) The court concluded that Proposition 64 had thus undermined the distinction the court had previously drawn between the CLRA claims and the UCL and FAL claims: "[c]learly, here, as in Plaintiffs' CLRA case, individual issues predominate, making class treatment unmanageable and inefficient." (40 AA 9892-9893.)

II. The Court of Appeal's Decision

Plaintiffs appealed the class decertification under the "death-knell" doctrine of *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, and the Court of Appeal affirmed.[3]

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[3] Plaintiffs also sought to appeal the trial court's denial of class certification as to the CLRA claim and its partial grant of summary adjudication to Defendants with respect to certain of Plaintiffs' claims. (Appellants' Opening Brief in the Court of Appeals pp. 5, 14-15, 47-69.) The Court of Appeal held that it need not decide whether the appeal of the denial of

Adhering to this Court's recent controlling decision in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223 (*Mervyn's*), the Court of Appeal held that Proposition 64 applies to cases (such as this one) that were pending when the measure was adopted. (Typed opn. p. 5.)

The court rejected Plaintiffs' argument that Proposition 64's standing requirements apply only to a named plaintiff, and not to absent class members. The court noted that, under Business and Professions Code section 17203, a party could bring a class action UCL lawsuit only if it (1) met "the standing requirements of section 17204, that is, [the party] must have 'suffered injury in fact and [have] lost money or property as a result of such unfair competition'" and (2) met "the class action requirements of Code of Civil Procedure section 382." (Typed opn. p. 7, citations omitted.) For at least two reasons, the court held that this explicit requirement of compliance with general class action principles meant that absent class members must likewise satisfy the standing requirements of section 17204, i.e., they must have suffered an injury in fact and lost money or property as a result of the challenged conduct. (*Id.* at pp. 7-8.) First, because the class action statute is merely a "procedural device for collectively litigating substantive claims," it follows that, if a claim "'is

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certification as to the CLRA claim was procedurally proper, as Defendants contended, because the court's conclusion that individual issues predominated as to the UCL claims necessarily meant that the trial court likewise properly denied class treatment to the CLRA claim. (Typed opn. pp. 18-19.) The Court of Appeal declined to reach the merits of the summary adjudication ruling, holding that even if this ruling were erroneous, it would not "resurrect the UCL or CLRA class actions." (*Id.* at p. 19.) Because the summary adjudication ruling thus could not affect the class certification issue, the ruling was outside the scope of the court's limited interlocutory jurisdiction under the death-knell doctrine. (*Ibid.*) The Petition does *not* challenge either of these rulings, and these issues have therefore been waived and are not before this Court. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1094, fn. 3.)

foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class.'" (*Id.* at p. 7, quoting *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1018 (*Feitelberg*).) Second, it was a well-settled aspect of class certification law that "'[e]ach class member must have standing to bring the suit in his [or her] own right.'" (Typed opn. p. 7, quoting *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73 (*Collins*).)

The Court of Appeal held that the trial court did not abuse its discretion in determining that, after passage of Proposition 64, individual issues predominated over common issues. (Typed opn. pp. 8-18.) In particular, because all class members now had to show that they "lost money or property as a result of" Defendants' alleged misrepresentations in order to have standing to sue (Bus. & Prof. Code, § 17204), there was a predominance of individual issues with respect to exposure to the plethora of misrepresentations alleged and the extent to which "class members would have been affected by the misrepresentations." (Typed opn. p. 12.) Reviewing the trial court's order for abuse of discretion, the Court of Appeal emphasized that the suit was not based on a single misrepresentation but on marketing and advertising activities that spanned decades. (*Id.* at pp. 10-11.) The court distinguished cases in which other courts have presumed that misrepresentations detrimentally affected all class members equally, reasoning that the class members in this case were not exposed to or affected by the same or even similar misrepresentations. (*Id.* at pp. 11-13.) The court specifically observed that not even the named plaintiffs were exposed to all the alleged misrepresentations or believed them. (*Id.* at p. 13.)

ARGUMENT

The decision below does not conflict with any decision of this Court or with any decision of another Court of Appeal. Nor do the questions presented appear to be of such pressing importance that they should be decided immediately, without the opportunity for further development of the law in the lower courts. If this Court disagrees, and determines to decide these issues concerning Proposition 64 now, it should do so by granting review in this case, which presents an ideal vehicle for deciding these issues. If the Court grants review, however, it should limit and reformulate the questions presented.

I. The Court of Appeal's Construction of Proposition 64 Was Correct And Does Not Conflict With Any Decision of This Court or of Any Other Court of Appeal

Tthe decision below is unassailably correct, does not conflict with *Mervyn's*, or any other decision of this Court or any other Court of Appeal. Review therefore is not "necessary to secure uniformity of decision." (Cal. Rules of Court, rule 28(b)(1) [identifying this as a ground for granting review].)

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

The Court of Appeal held that Proposition 64's express limitations on the use of representational standing (see Bus. & Prof. Code, § 17203) require that all members of a proposed class action under the UCL must satisfy the initiative's new standing requirements. (See Typed opn. p. 8.) The only other appellate decision squarely to address this issue reached exactly the same conclusion. (*Pfizer*, *supra*, 141 Cal.App.4th at pp. 302-303.) Plaintiffs thus cannot point to any split of authority that might warrant this Court's intervention.

Furthermore, for multiple reasons, the Court of Appeal's holding on this score was entirely correct and does not conflict with any decision of this Court. Plaintiffs are plainly wrong in contending otherwise. (Petition pp. 3-4, 23, 25, 32-39.)

1. Plaintiffs' Construction of Proposition 64 Ignores the Plain Language of the Initiative

Plaintiffs' theory is contradicted by the plain language of the initiative. (*People v. Elliot* (2005) 37 Cal.4th 453, 478 [voter initiatives, like statutes, are construed in accordance with their "plain meaning"].) By its terms, Proposition 64 explicitly prohibits any private-party invocation of representative standing unless the party ***both*** (1) shows that he or she has standing ***and*** (2) "complies with Code of Civil Procedure Section 382" — which in this context means that the party must comply with general class-certification principles. (Bus. & Prof. Code, § 17203; see also *id.*, § 17535.)[4] As the Court of Appeal correctly held (Typed opn. p.7), it is the second requirement that is crucial here: one of the well-settled class-action principles made applicable by this clause is that all of the class members in a properly certified class must satisfy whatever standing requirements would be necessary to maintain a suit in their own right. (See, e.g., *Collins*, *supra*, 187 Cal.App.3d at p. 73 [""Each class member must have standing to bring the suit in his [or her] own right'" (citation omitted)]; see also *Zelman v. JDS Uniphase Corp.* (N.D.Cal. 2005) 376 F.Supp.2d 956, 966 ["defining a class ... limit[s] the class of plaintiffs to those ascertainable individuals who have standing to bring the action"]; *Clay v. American Tobacco Co.* (S.D. Ill. 1999) 188 F.R.D. 483, 490 (*Clay*) ["[T]he definition of a class

[4] As this Court held in *Mervyn's*, the general language of section 382 has been construed as ""authoriz[ing] class suits in California" and also as "permitting associations to sue on behalf of their members." (*Mervyn's*, *supra*, 39 Cal.4th at p. 232, fn. 4, citation omitted.) Plaintiffs rely only on the former.

should not be so broad so as to include individuals who are without standing to maintain the action on their own behalf."].)

Plaintiffs' contrary reading of Proposition 64 simply ignores section 17203's explicit incorporation of ordinary class-certification principles and thereby completely overlooks the textual basis for the Court of Appeal's decision. Indeed, in reproducing the language of section 17203, Plaintiffs go so far as to omit the crucial language on which the Court of Appeal relied and instead replace it with ellipses.[5] (Petition p. 37.) Plaintiffs are thus flatly wrong in asserting that Proposition 64 "*only* says that 'the' claimant pursuing the representative relief must establish standing." (Petition p. 37, emphases altered.) Proposition 64 explicitly imposes a *further* requirement that ordinary class-certification principles be satisfied, and it is *those* principles which require that absent class members also satisfy whatever standing requirements would be necessary to maintain a claim individually.[6]

Plaintiffs contend that, if this had been the objective of the initiative, it would more easily have been accomplished by using more specific

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[5] Section 17203 provides that "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 *and complies with Section 382 of the Code of Civil Procedure* . . . ." Plaintiffs omitted the italicized language. (Petition p. 37.)

[6] For the same reason, Plaintiffs' reliance on federal case law suggesting that Article III requirements might be satisfied based solely on the standing of the named plaintiff (Petition p. 36) is unavailing. In UCL class action cases, the new standing requirements of Proposition 64 require, inter alia, "injury in fact" (similar to Article III), loss of money or property "as a result of" the challenged conduct, ***and*** satisfaction of *class-certification requirements*. (Bus. & Prof. Code, § 17203.) Whether the nature of putative class members' injury is treated as an Article III standing issue or a Rule 23 (or its California law equivalent, Civil Procedure Code Section 382) issue, the result is the same: an "injured" plaintiff cannot represent a putative class made up in part of admittedly *un*injured parties.

language explicitly referring to "all class members." (Petition p. 37.) But in construing a statute or initiative, it is the task of the courts to construe the language as written, not to engage in speculation about whether alternative formulations could have been used to reach the same result. (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 350 ["'The statutory language ... is the best indicator of legislative intent.'" (citation omitted)].) Moreover, Plaintiffs' flawed argument overlooks a crucial difference between the more general language actually used in Proposition 64 and the more specific language Plaintiffs say the initiative should have used if it was intended to reach absent class members. An explicit limitation of section 17203 to "all class members" (as Plaintiffs suggest) *would have eliminated Proposition 64's applicability to suits based on associational standing* — despite the fact that this Court in *Mervyn's* specifically noted that such suits *did* fall within the general language of section 17203 as amended by Proposition 64. (See *Mervyn's*, *supra*, 39 Cal.4th at p. 232, fn. 4; see also *ante*, at p. 10 fn. 4.) Especially in light of Proposition 64's considerable concern about suits brought by uninjured associations (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317), it is little wonder that Plaintiffs' suggested "simple" rewrite was not used: it would have significantly weakened the initiative.

This same analysis confirms that the Court of Appeal's decision does not conflict with *Mervyn's*. Plaintiffs seize upon this Court's observation that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct" (*Mervyn's*, *supra*, 39 Cal.4th at p. 232, quoted at Petition p. 19), but Plaintiffs ignore the crucial last phrase: nothing in the Court of Appeal's opinion even remotely construed Proposition 64 as altering "the substantive rules *governing business and competitive conduct*." (*Mervyn's*, at p. 232, italics added.)

Mervyn's goes on to explain (in a sentence that Plaintiffs ignore) that, in making this statement, this Court simply meant that "[n]othing a business might lawfully do before Proposition 64 is unlawful now, and nothing earlier forbidden is now permitted." (*Ibid.*) Once again, the opinion below is fully consistent with that observation.

The Court of Appeal's decision does not rest on a new rule about the substantive sweep of the UCL or about the types of remedies available in actions properly brought under it (*Mervyn's*, *supra*, 39 Cal.4th at p. 232). The Court of Appeal's decision instead rests on a construction of (1) the general "standing" requirements of section 17204 and (2) the specific standing requirements in section 17203 for invoking the "*procedural* device" of a class action. (Typed opn. p. 7, italics added.) Application of these new "standing provisions" to this case "is not to apply them 'retroactively,' *as* [*this Court*] *has defined that term*," because they do "not change the legal consequences of past conduct by imposing new or different *liabilities* based on such conduct." (*Mervyn's*, at p. 232, italics added; see also *id.* at p. 233 [noting that "the presumption of prospective operation is classically intended to protect" the "right to have *liability-creating* conduct evaluated under the liability rules in effect at the time the conduct occurred"], italics added.)

Ironically, it is Plaintiffs' position that directly conflicts with *Mervyn's*. Plaintiffs argue that applying the standing requirements of Proposition 64 to absent class members adds "substantive elements" that would have triggered the presumption against retroactive application under *Mervyn's*. (Petition p. 2.) At bottom, Plaintiffs' argument rests on the sweeping premise that a change in the law is impermissibly retroactive if it would add to what a plaintiff must show to proceed successfully with a lawsuit. That is precisely the argument that *Mervyn's* rejected when it held

that changes in standing requirements may be applied to pending cases *even if they impair or defeat the plaintiff's ability to go forward*:

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

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

2. Plaintiffs' Reading of Proposition 64 Would Gut the Initiative and Defeat One of Its Primary Purposes

Plaintiffs' construction of Proposition 64 would largely render the initiative a nullity by defeating one of its principal objects. By excusing absent class members from complying with *any* of the standing requirements of Proposition 64, Plaintiffs' theory would permit a single injured plaintiff to represent an entire class of *uninjured* plaintiffs. Plaintiffs' erroneous reading of Proposition 64 would thereby effectively smuggle back into the statutes the very sort of on-behalf-of-the-general-public "representative" actions that the initiative unambiguously sought to eliminate. (See Proposition 64, § 1, subd. (f), reprinted at 36 AA 8948.)

Indeed, this Court in *Mervyn's* emphasized that one of the stated purposes of the initiative was to ensure "'that *only* the California Attorney General and local public officials [would] be authorized to file and prosecute actions on behalf of the general public.'" (*Mervyn's*, *supra*, 39 Cal.4th at p. 228, quoting Proposition 64, § 1, subd. (f), italics added.) Because Plaintiffs' reading of Proposition 64 would allow an injured named plaintiff to represent a broad class of persons without regard to whether those persons suffered any injury, it would effectively add "injured named plaintiffs" to the list of persons who could sue on behalf of the general

public. That Plaintiffs' construction of Proposition 64 would directly conflict with the initiative's express limitations on who may sue for the general public is further proof that that construction is simply wrong.

3. Plaintiffs' Reading of Proposition 64 Would Impermissibly Allow the Class-Action Device to Transform the Claims It Aggregates

Plaintiffs' construction of Proposition 64 would violate well-settled rules that preclude the class-action device from altering the claims it aggregates.

It is hornbook law that a class action is merely a device to aggregate individual claims *that could have been asserted individually*; i.e., it is not intended to permit the class representative to assert "claims" that the absent class members do not have. (See, e.g., *Feitelberg*, *supra*, 134 Cal.App.4th at p. 1018; *Vernon v. Drexel Burnham & Co.* (1975) 52 Cal.App.3d 706, 716.) After the enactment of Proposition 64, a private-party UCL or FAL suit may be "prosecuted" — i.e., brought and maintained — only by a person "who has suffered injury in fact *and* has lost money or property as a result of such unfair competition." (Bus. & Prof. Code, § 17204, italics added; see also *id.*, § 17535.) This individual standing requirement is not eliminated merely because the absent class members' claims are aggregated, and each class member therefore must have "suffered injury in fact" and have "lost money or property as a result of such unfair competition." By allowing absent class members to assert UCL claims they could not bring individually, Plaintiffs' construction of Proposition 64 would violate these settled principles.

4. Plaintiffs' Construction of Proposition 64 Would Cause the Named Plaintiffs, by Definition, to Have Atypical UCL Claims

By urging that Proposition 64 be construed as imposing stricter standing requirements only on the named plaintiffs, Plaintiffs would create an anomalous situation in which the class representatives, by definition, would have UCL claims that are not typical of the absent class members. (*Pfizer*, *supra*, 141 Cal.App.4th at pp. 302-303; see also *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 663-664 [typicality requirement not met where the named plaintiffs and the class members have not sustained the same or similar damage].) Indeed, the whole concept of typicality presupposes that the *claims* of the named plaintiffs can be compared to the *claims* of the absent class members, and a proper class certification therefore cannot embrace persons *who themselves lack standing to bring such claims*.

B. The Court of Appeal Correctly Declined to Adopt Plaintiffs' Argument that Proposition 64's Standing Provisions Only Imposed a Weak Causation Requirement

Plaintiffs contend that Proposition 64's standing requirement that each class member have suffered economic loss "as a result of" the challenged practices should be construed as requiring nothing more than the mere purchase of a product, even where there was no exposure to or impact from the challenged conduct. (See, e.g., Petition, p. 18.) The Court of Appeal did not adopt this watered-down reading of Proposition 64, but instead adhered to the plain language of the initiative: as applied to the class members here, Proposition 64's standing requirement would require an inquiry into, inter alia, "whether their decision to smoke was *as a result of* defendants' misrepresentations (and thus they suffered an injury *due to*

defendants' conduct) *or was for other reasons*." (Typed opn. p. 17, italics added.)

There can be little doubt that the Court of Appeal correctly declined to adopt Plaintiffs' diluted notion of causation. Plaintiffs' theory on this score would improperly render surplusage Proposition 64's explicit imposition of a new causation requirement for standing. (*In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1538 [court must "avoid adopting an interpretation that renders words surplusage"].) It also ignores the ordinary and settled meaning of the phrase "as a result of." (See, e.g., 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 537, p. 624 [requirement that a negligence plaintiff show that his or her injury occurred "as a result of" the defendant's breach means that "proximate or legal cause" must be shown]; see also *People v. Elliot*, *supra*, 37 Cal.4th at p. 478 [voter initiatives are construed in accordance with their "plain meaning"].)[7]

Notably, the very same "as a result of" language appears in the CLRA's standing provision (Civ. Code, § 1780, subd. (a)), which courts consistently have construed as imposing a "causation" requirement. (See, e.g., *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754 (*Wilens*); *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292 (*Massachusetts Mutual*).) That provides further confirmation that Proposition 64's standing provisions require the same showing of causation that would be required under the CLRA. (See, e.g.,

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[7] Plaintiffs suggest that a showing of injury in fact is sufficient to establish standing under Proposition 64 — no matter how remote it may be from the challenged conduct — and that no greater showing of causation is required. (See, e.g., Petition pp. 23-24.) This argument ignores the plain language of Proposition 64, which states that a person has standing only if he or she "has suffered injury in fact *and has lost money or property as a result of* such unfair competition." (Bus. & Prof. Code, § 17204, italics added; see also *id.*, § 17535.)

Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal.4th 754, 766 ["legislation framed in the language of an earlier enactment on the same or an analogous subject that has been judicially construed is presumptively subject to a similar construction"].)[8]

The Court of Appeal's opinion in this case does *not* address whether (much less hold that) the phrase "as a result of" requires a showing of reliance. (Compare *Pfizer*, *supra*, 141 Cal.App.4th at pp. 305-307 [explicitly construing "as a result of" as requiring reliance in the context of a misrepresentations case, and rejecting the contrary conclusion of *Anunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133 (*Anunziato*)] with Typed opn. pp. 14-15 [distinguishing *Anunziato* on its facts, without purporting to address the debate between *Pfizer* and *Anunziato* on the reliance issue].) The Court of Appeal here found it unnecessary to address the issue whether Proposition 64's *causation-of-injury* requirement necessitated a showing of reliance here because the court held that, in any event, the issues of causation and "injury in fact" simply were not amenable to class treatment under the factual circumstances of this case. (Typed opn. pp. 9-17.)

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[8] Plaintiffs note that the phrase "as a result of" occurs in the *remedial* language of the FAL — it also similarly occurs in the remedial language of the UCL — and they contend that this Court nonetheless read that phrase in *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.2d 442 as only imposing a relatively loose requirement of causation of injury. (Petition p. 21.) This argument is highly misleading. Plaintiffs omit the key language from this clause that formed the entire basis of the decision in *Fletcher*: that case only rejected a strict reading of the remedial causation requirement because it applied to money that "'*may have been* acquired by means of any ... [illegal] practice." (*Fletcher*, at p. 451, quoting Bus. & Prof. Code, § 17535 [all alterations and italics added by *Fletcher*].) The new *standing* requirements in the UCL and FAL do not reproduce that key phrase.

Indeed, the Court of Appeal's opinion mentions "reliance" *only* in the context of discussing (Typed opn. p. 12) *Plaintiffs'* attempt to invoke a line of cases in which the courts had permitted class certification of a *fraud* claim by employing a class-wide "inference of *reliance*." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 (*Vasquez*), italics added; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 363 (*Occidental Land*); see also *Massachusetts Mutual*, *supra*, 97 Cal.App.4th at pp. 1292-1293 [invoking *Vasquez*'s and *Occidental Land*'s class-wide presumption of reliance in the context of whether to certify a CLRA case].) The Court of Appeal rejected Plaintiffs' attempt to invoke these cases, holding that, however the causation-of-injury requirement was defined, "the record [here] makes it clear that proof as to the representative plaintiffs will not supply proof as to all class members." (Typed opn. p. 12; see also *post*, pp. 22-25.)

II. There Does Not Appear to Be Any Compelling Need for This Court to Resolve Now These Issues Concerning the Construction of Proposition 64, but if the Court Determines to Do So, It Should Grant Plenary Review in This Case and Should Not Grant and Hold This Case for *Pfizer*

As explained above, the Court of Appeal's construction of Proposition 64 was entirely correct and does not conflict with any decision of this Court or of another Court of Appeal. On the contrary, the only other decision to address these same questions (*Pfizer*) resolved them in a way that is consistent with the Court of Appeal's conclusions here. Review of these decisions is therefore not necessary to "secure uniformity of decision." (Cal. Rules of Court, rule 28(b)(1).)

Accordingly, review of these issues (whether in this case or in *Pfizer*) would be warranted only if this Court were to conclude that the issues presented concerning the construction of Proposition 64 were of such

systemic importance that they should be definitively resolved by this Court sooner rather than later. (Cf. Cal. Rules of Court, rule 28(b)(1) [review may be granted "to settle an important question of law].) Defendants respectfully submit that there is substantial reason to doubt that these questions, which were correctly resolved by the Court of Appeal, need to be definitively resolved *now* by this Court. Ordinarily, it is preferable to "wait for an issue to be debated thoroughly — or 'percolate' — in the Courts of Appeal before review is granted ...." (Eisenberg, et al. (2006) California Practice Guide: Civil Appeal and Writs ¶ 13.73.1.) If a disagreement later emerges among the Courts of Appeal, it would sharpen and refine the issues, thereby assisting this Court in its ultimate review of those questions.

Plaintiffs acknowledge that the ordinary course is to permit the law "to develop in the lower courts before this Court examines the issues," but they argue that immediate review is nonetheless warranted in light of the importance of the issues. (Petition at 11.) Plaintiffs' sole basis for the latter contention is its assertion that the decision below "severely undermines the utility of the UCL in fulfilling its public policy goals." (*Ibid.*) That is wrong. The decision below respects and enforces Proposition 64's intent to ensure that the standing and class certification standards in UCL cases would more closely resemble those in other laws, both in this State and elsewhere. (Petition pp. 22-23 [recounting legislative history on this point].)

Moreover, Plaintiffs' contention that the decision below "effectively terminates the ability of plaintiffs to bring consumer class actions" under the UCL is rhetoric rather than reality: the CLRA has long contained a similar "as a result of" causation requirement that is applicable to each member of a putative class, and yet there is no shortage of classes certified

under the CLRA. (See, e.g., *Massachusetts Mutual*, *supra*, 97 Cal.App.4th at pp. 1294-1295.)

To the extent that the Court is nonetheless inclined to decide these issues now, Defendants respectfully submit that this case would be an ideal vehicle in which to do so and that this case should be granted plenary review (i.e., it should *not* merely be granted and held for *Pfizer*).

For several reasons, the issues are cleanly and well presented in this case. This case arises on a direct appeal under the "death knell" doctrine, after a final, definitive ruling decertifying the class that had been certified under the pre-Proposition 64 version of the UCL and the FAL. (Cf. Answer to Petition for Review in *Pfizer* at pp. 33-34 [noting that the appellate decision in that case is interlocutory and without prejudice to further class certification proceedings in the trial court].) The record in this case is fully and extensively developed, with the trial court having considered on *four* separate occasions the propriety of Plaintiffs' various attempts to certify a class action in this case. (*Ante*, pp. 3-5.) Moreover, because the trial court and the Court of Appeal have both already held that individual issues will predominate and preclude class certification if their legal construction of Proposition 64 is correct, the resolution of those legal issues is presented here in sharp relief. (Cf. Answer to Petition for Review in *Pfizer* at pp. 33-34 [noting that the issue of predominance had not been reached by the Court of Appeal].)

If the Court determines to decide these issues now, it should grant plenary review in this case and set the matter for briefing and argument. Indeed, the Court may wish to grant plenary review in both this case and in *Pfizer* so as to permit the Court to more fully consider the issues in the context of two procedurally and substantively distinct cases.

III. If This Court Were to Grant Review to Decide the Issues Concerning the Construction of Proposition 64, It Should Reformulate the Questions Presented

If the Court were to grant review, it should reformulate the questions presented. Both the Petition in this case and the petition in *Pfizer* phrase the questions presented in a manner that is unduly tendentious and that also confusingly mixes together the question of the applicability of Proposition 64's standing requirements to absent class members with the separate and distinct question of what showing of causation will satisfy those standing requirements. Indeed, the Petition in this case mixes up the two questions in the argument section as well. (See, e.g., Petition 23, 25 [discussing the absent class member issue in the context of arguing about the meaning of the causation requirement].) Defendants would respectfully suggest these two questions be reformulated as stated in the Introduction. (*Ante*, p. 3.)

IV. The Court Should Not Grant Review on the Third Question Presented by the Petition, Which Raises an Entirely Factbound Issue Concerning the Application of Settled Law to the Particular Facts of This Case

Plaintiffs' third question presented relates to whether the Court of Appeal properly concluded that, on the record before it, the trial court did not abuse its discretion in declining to apply a presumption of class-wide causation. (Petition pp. 4-6, 39-46.) In addressing this issue, the Court of Appeal merely applied well settled legal principles to the particular facts of this case, employing the deferential standard of appellate review recently reaffirmed by this Court. The Court of Appeal's factbound resolution of this question raises no issue of general importance and is plainly unworthy of this Court's review.

Where, as here, the trial court has found that individual issues predominate, an appellant challenging that order bears a heavy burden.

"Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded *great discretion* in granting or denying certification." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436, italics added; see also *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*) [same].) The appellate court must "presum[e] in favor of" that ruling "the existence of every fact the trial court could reasonably deduce from the record" (*Sav-On*, at p. 329), and "[a]ny valid pertinent reason stated will be sufficient to uphold the order." (*Id.* at p. 327.) Thus, "a trial court ruling supported by substantial evidence generally will not be disturbed unless (1) improper criteria were used; or (2) erroneous legal assumptions were made." (*Id.* at pp. 326-27, quotation marks and citations omitted.)

Moreover, the law is clear that the determination whether to infer or presume reliance or causation on a class-wide basis is a case-specific determination to be made by the trial court based on the particular claims and evidence before the court. (See, e.g., *Vasquez*, *supra*, 4 Cal.3d at pp. 814-815 [holding that the trial court erred in *sustaining a demurrer* insofar as the complaint in that case alleged a class action for fraud; trial court must evaluate whether plaintiffs could "*demonstrate* that proof of most of the important issues as to the named plaintiffs will supply the proof as to all"]; see also *Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1294, fn. 5 [holding that, where the "class members were provided such a variety of information that a single determination as to materiality is not possible, the trial court has the *flexibility* to order creation of subclasses or *to decertify the class altogether*" (italics added)].)

Here, the Court of Appeal correctly concluded that, on this record, the trial court did not abuse its discretion in declining to apply a class-wide presumption or inference of causation and instead held that the issue of

causation was individualized. (*Wilens*, *supra*, 120 Cal.App.4th at pp. 755-756 [distinguishing *Vasquez* and upholding denial of certification].) Plaintiffs' claims are based on a wide array of statements on a variety of different subjects about different cigarette brands made to different people at different times by different Defendants through different media. This factor alone supports the trial court's decision not to employ a class-wide presumption or inference of causation. (See, e.g., *Massachusetts Mutual*, *supra*, 97 Cal.App.4th at p. 1294, fn. 5 [trial court may decline to apply presumption or inference when "class members were provided such a variety of information"]; *Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 661 ["[t]here was no basis to draw an inference of classwide reliance without a showing that representations were made uniformly to all members of the class"]; cf. *Occidental Land*, *supra*, 18 Cal.3d at p. 359 [affirming trial court's decision to infer class-wide reliance where defendant developer made same fraudulent representation to each plaintiff].)[9]

Accordingly, on this record, the trial court's refusal to adopt a class-wide presumption or inference of reliance or causation was well within its discretion. (See, e.g., *Caro*, *supra*, 18 Cal.App.4th at p. 668; *Brown v. Regents of the Univ. of California* (1984) 151 Cal.App.3d 982, 989-990; see also *Poulos v. Caesars World, Inc.* (9th Cir. 2004) 379 F.3d 654, 667-668; see also *Estate of Mahoney v. R.J. Reynolds Tobacco Co.* (S.D.Iowa 2001) 204 F.R.D. 150, 158-159 [rejecting general presumption of reliance in part because of deposition testimony from two plaintiffs showing that

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[9] Plaintiffs' reliance on the pre-Proposition 64 decision in *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128 is unavailing. Moreover, that case involved a *representative action* under the UCL pursuant to *Kraus v. Trinity Management Services Inc.* (2000) 23 Cal.4th 116, and not a class action. (*Prata v. Superior Court*, *supra*, 91 Cal.App.4th at pp. 1139-1142.)

they were well aware of the risks of smoking and would not have stopped smoking regardless of the warning given]; *Philip Morris Inc. v. Angeletti* (Md. 2000) 752 A.2d 200, 235 [reaching similar conclusion]; *Small v. Lorillard Tobacco Co.* (N.Y. App. 1998) 252 A.D.2d 1, 8 ["[r]eliance on defendants' misrepresentations will not be presumed ... where a variety of factors could have influenced a class member's decision to purchase"]), *aff'd* (1999) 94 N.Y.2d 43.)

Plaintiffs have failed to identify anything about this factbound ruling that would warrant review by this Court. The Petition simply ignores the applicable standard of review and reargues the facts of this case. (Petition pp. 41-46.) Moreover, contrary to what the Petition misleadingly suggests (Petition p. 40), the Court of Appeal explicitly did *not* hold that Plaintiffs could not rely on the cumulative impact of "misrepresentations occurring over time"; on the contrary, it held that, on the facts of this case, the record evidence showed wide individual differences as to how various smokers were affected by Defendants' "marketing and advertising campaign." (Typed opn. p. 16.)

CONCLUSION

The Petition for Review should be denied. If the Court is nonetheless inclined to grant review in this case or in *Pfizer*, it should grant review in this case (perhaps in addition to *Pfizer*), and should order briefing and argument to be limited to the two reformulated questions set forth in the Introduction.

Dated: October 30, 2006 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 28.1(d)(1) of the California Rules of Court, the enclosed Respondents' Answer to Petition for Review is produced using 13-point Roman type including footnotes and contains approximately 7,512 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 30, 2006

Signed: 

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PROOF OF SERVICE VIA OVERNIGHT MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, 27th Floor, San Francisco, California 94105.

On October 30, 2006, I served the foregoing document described as

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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

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Executed on October 30, 2006, at San Francisco, California.

Julie W. Lunsford

SERVICE LIST

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