S 147345

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.

Petition for Review from 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*

PETITION FOR REVIEW

Mark P. Robinson, Jr.
(SBN 054426)
Sharon J. Arkin
(SBN 154858)
ROBINSON, CALCAGNIE & ROBINSON
620 Newport Center Dr., #700
Newport Beach, CA 92660
Telephone: 949.720.1288
Facsimile: 949.720.1292

Donald F. Hildre, Esq.
(SBN 066188)
William O. Dougherty, Esq.
(SBN 041654)
Thomas Haklar, Esq.
(SBN 169039)
DOUGHERTY & HILDRE
2550 Fifth Avenue, Suite 600
San Diego, CA 92103
Telephone: (619) 232-9131
Facsimile: (619) 232-7317

And the Castano Plaintiffs' Legal Committee Members (see attached list)
Attorneys for Plaintiffs and Appellants Willard Brown, et al.

S_____

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.

Petition for Review from 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

PETITION FOR REVIEW

Mark P. Robinson, Jr.
(SBN 054426)
Sharon J. Arkin
(SBN 154858)
ROBINSON, CALCAGNIE & ROBINSON
620 Newport Center Dr., #700
Newport Beach, CA 92660
Telephone: 949.720.1288
Facsimile: 949.720.1292

Donald F. Hildre, Esq.
(SBN 066188)
William O. Dougherty, Esq.
(SBN 041654)
Thomas Haklar, Esq.
(SBN 169039)
DOUGHERTY & HILDRE
2550 Fifth Avenue, Suite 600
San Diego, CA 92103
Telephone: (619) 232-9131
Facsimile: (619) 232-7317

And the Castano Plaintiffs' Legal Committee Members (see attached list)
Attorneys for Plaintiffs and Appellants Willard Brown, et al.

BROWN PLAINTIFFS' LEGAL COMMITTEE (PLC) MEMBERS

Mr. Daniel E. Becnel, Jr.
Becnel, Landry & Becnel
106 West Seventh Street
Reserve, LA 70084
Phone: (985) 536-1186 - Fax: (985) 536-6445

Mr. Terry P. Bottinelli
Hertin, Burstein, Sheridan, et al.
Court Plaza North, 25 Main St.
Hackensack, NJ 07601-7032
Phone: (201) 342-6000 - Fax: (201) 342-6611

Mr. Turner Branch
Branch Law Firm
2025 Rio Grande Boulevard, N.W.
Albuquerque, NM 87104
Phone: (505) 243-3501 - Fax: (505) 243-1665

Mr. Joseph M. Bruno
Bruno & Bruno
855 Baronne Street
New Orleans, LA 70113
Phone: (504) 525-1335 - Fax: (504) 581-1493

Mr. Alvaro R. Calderon, Jr.
650 Munoz Rivera, Suite 303
San Juan, PR 00918
Phone: (787) 753-5050 - Fax: (787) 765-8028

Mr. Kenneth M. Carter
Carter & Cates
1100 Poydras St., Suite 1230
New Orleans, LA 70130
Phone: (504) 569-2005 - Fax: (504) 569-2008

Mr. Stanley M. Chesley
Waite, Schneider, Bayless & Chesley
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
Phone: (513) 621-0267 - Fax: (513) 621-0262

Mr. John R. Climaco
Climaco, Lefkowitz, Peca, Wilcox & Garofoli
900 Halle Building, 1228 Euclid Avenue
Cleveland, OH 44115
Phone: (216) 621-8484 - Fax: (216) 771-1632

Mr. Paul Due
Due, Caballero, Price & Guidry
8201 Jefferson Highway
Baton Rouge, LA 70809
Phone: (225) 929-7481 - Fax: (225) 924-4519

Mr. Gary Eubanks
Gary Eubanks & Associates
708 West Second Street
Little Rock, AR 72201
Phone: (501) 372-0266 - Fax: (501) 688-7741

Mr. Calvin C. Fayard, Jr.
Fayard & Honeycutt
519 Florida Boulevard
Denham Springs, LA 70726
Phone: (225) 664-4193 - Fax: (225) 664-6925

Mr. Gary Fine
Rodham & Fine
633 SE 3rd Ave., Suite 4-R
Ft. Lauderdale, FL 33301
Phone: (954) 467-5440 - Fax: (954) 524-5143

Ms. Celeste Gauthier
Gauthier, Downing, et al.
3500 N. Hullen Street
Metairie, LA 70002
Phone: (504) 456-8600 - Fax: (504) 456-8624

Mr. Russ M. Herman
Herman, Herman, Katz & Cotlar
820 O'Keefe Avenue
New Orleans, LA 70113
Phone: (504) 581-4892 - Fax: (504) 561-6024

Mr. Donald Hildre
Dougherty, Hildre & Haklar
2550 5th Avenue, Suite 600
San Diego, CA 92103
Phone: (619) 232-9131 - Fax: (619) 232-7317

Mr. J.D. Lee
Lee, Lee & Lee
422 South Gay Street
Knoxville, TN 37902
Phone: (865) 544-0101 - Fax: (865) 544-0536

Mr. Walter J. Leger, Jr.
Leger & Mestayer
9th Floor, 600 Carondelet Street
New Orleans, LA 70130
Phone: (504) 588-9043 - Fax: (504) 588-9980

Mr. Kenneth B. Moll
Kenneth B. Moll & Associates, Ltd.
Three First National Plaza, 54th Flr.
Chicago, IL 60602
Phone: (312)558-6444 - Fax: (312) 558-1112

Mr. Stephen B. Murray
Murray Law Firm
909 Poydras St., Suite 2550
New Orleans, LA 70112
Phone: (504) 525-8100 - Fax: (504) 584-5249

Ms. Dianne M. Nast
Roda & Nast, P.C.
801 Estelle
Lancaster, PA 17601
Phone: (717) 892-3000 - Fax: (717) 892-1200

Ms. Maria Ortiz
Ortiz Toro & Ortiz-Brunet
Post Office Box 192064
Hato Rey, PR 00919-2064
Phone: (787) 754-7713 - Fax: (787) 766-1596

Mr. Robert L. Redfearn
Simon, Peragine, Smith & Redfearn
1100 Poydras St., 30th Flr.
New Orleans, LA 70163
Phone: (504) 569-2030 - Fax: (504) 569-2999

Mr. Mark P. Robinson, Jr.
Robinson, Calcagnie & Robinson
620 Newport Center Dr., Suite 700
Newport Beach, CA 92660
Phone: (949) 720-1288 - Fax: (949) 720-1292

Mr. Louie Roussel,III
414 Northline
Metairie, LA 70005
Phone: (504) 837-2230 - Fax: (504) 831-8269

Mr. Richard Sandman
Rodman, Rodman & Sandman, P.C.
442 Main Street
Malden, MA 02148
Phone: (781) 322-3720 - Fax: (781) 324-6906

Mr. Marc C. Saperstein
Davis, Saperstein & Soloman
375 Cedar Lane
Teaneck, NJ 07666
Phone: (201) 907-5000 - Fax: (201) 692-0444

Mr. W. James Singleton
4050 Linwood Avenue
Shreveport, LA 71108
Phone: (318) 621-9400 - Fax: (318) 636-7759

Mr. Mike Williams
Williams Dailey O'Leary, et al.
1001 S.W. 5th Ave., Suite 1900
Portland, OR 97204
Phone: (503) 295-2924 - Fax: (503) 295-3720

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: October 13, 2006

Thomas D. Haklar, Esq.
DOUGHERTY & HILDRE

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ISSUES PRESENTED AND WHY REVIEW SHOULD BE GRANTED	1
1. Does Proposition 64 impose additional substantive requirements, such as actual deception, reliance and damages, under a UCL or FAL action, in light of this Court's decision in *Californians for Disability Rights v. Mervyn's LLC* (2006) 39 Cal.4th 223?	1
2. Does Proposition 64 require that each putative class member prove individual standing?	3
3. Should a defendant who promulgates a massive variety of misrepresentations over a long period of time as part of a cohesive, targeted marketing campaign obtain protection from application of the doctrine of presumed reliance in certification of class action cases?	4
BACKGROUND	7
LEGAL ARGUMENT	11
1. THE APPELLATE COURT'S DETERMINATION THAT PROPOSITION 64 IMPOSES ADDITIONAL SUBSTANTIVE REQUIREMENTS, SUCH AS RELIANCE AND DAMAGES, IS INCOMPATIBLE WITH EXISTING LEGAL PRINCIPLES AND CONFLICTS WITH THIS COURT'S *MERVYN'S* DECISION	12

TABLE OF CONTENTS
CONTINUED

A. The appellate court's holding conflicts with this Court's determination in *Mervyn's* that Proposition 64 did not effect any substantive change in the UCL..... 12

B. The language and legislative history of Proposition 64 further undermines the appellate court's rationale..... 20

C. The public policy goals of the UCL will be undermined if the appellate court's rationale is permitted to stand..... 25

2. THE APPELLATE COURT ERRONEOUSLY APPLIED PROPOSITION 64 TO REQUIRE STANDING ON THE PART OF PUTATIVE CLASS MEMBERS..... 32

3. THE APPELLATE COURT ERRONEOUSLY CONCLUDED THAT THE DOCTRINE OF PRESUMED RELIANCE DOES NOT APPLY IN UCL CLASS ACTIONS WHERE THE DEFENDANT MAKES MISREPRESENTATIONS THROUGH A VARIETY OF WAYS AND OVER A LONG PERIOD OF TIME..... 39

CONCLUSION..... 47

CERTIFICATION..... 48

TABLE OF AUTHORITIES

FEDERAL CASES

Anunziato v. eMachines, Inc.
(C.D. Cal. 2005) 402 F.Supp.2d 1133 .....25, 26, 28, 30, 31, 40
In re Leapfrog Enterprises, Inc. Securities Litigation
(N.D. Cal. 2005) 2005 WL 3801587 .....3, 36
LaDuke v. Nelson
(1985) 762 F.2d 1318, 1325 .....3, 36
McElhaney v. Eli Lilly & Co.
(D.S.D. 1982) 93 F.R.D. 875, 878 34
Molski v. Mandarin Touch Restaurant,
347 F.Supp.2d 860, 867 (C.D.Cal. 2004) 30
Northeastern Florida Contractors v. City of Jacksonville
(1993) 508 U.S. 656, 665 23

STATE CASES

Albillo v. Intermodal Container Services, Inc.
(2003) 114 Cal.App.4th 190 Vacanti 15
Blakemore v. Superior Court
(2005) 129 Cal.App.4th 36, 49 14
California Association of Dispensing Opticians v. Pearle Vision Center, Inc.
(1983) 143 Cal.App.3d 419 14
Californians for Disability Rights v. Mervyn's, LLC,
(2006) 39 Cal.4th 223 .....1, 2, 6, 12, 19, 30, 33

TABLE OF AUTHORITIES
CONTINUED

Cel-Tech Communications v. L.A. Cellular
(1999) 20 Cal.4th 163 13

Collins v. Safeway Stores, Inc.
(1986) 187 Cal.App.3d 62, 73 ..... 34, 35

Committee on Children's Television, Inc. v. General Foods Corp.
(1983) 35 Cal.3d 197, 219 ..... 1, 14, 33, 40

Community Assisting Recovery v. Aegis Security Ins. Co.
(2001) 92 Cal.App.4th 886, 891 13

Cortez v. Purolator Air Filtration Products Co., Inc.
(2000) 23 Cal.4th 163, 181 13

CPF Agency Corp. v. R & S Towing
(2005) 132 Cal.App.4th 1014, 1027-1028 38

Fletcher v. Security Pacific National Bank
(1979) 23 Cal.3d 442.) 1, 6, 15, 16, 18, 21, 33

Hewlett v. Squaw Valley Ski Corp.
(1997) 54 Cal.App.4th 499, 520 13

Massachusetts Mutual Life Ins. Co. v. Superior Court
(2002) 97 Cal.App.4th 1282 45

Occidental Land, Inc. v. Superior Court
(1976) 18 Cal.3d 355, 363 ..... 4, 45

People v. Toomey
(1984) 157 Cal.App.3d 1 14

People v. Custom Craft Carpets, Inc.
(1984) 159 Cal.App.3d 676 14

TABLE OF AUTHORITIES
CONTINUED

People ex rel. Lockyer v. Brar,
115 Cal.App.4th 1315, 1316-17, 9 Cal.Rptr.3d 844 (2004) 30, 33

Pfizer v. Superior Court (Galfano)
Supreme Court Case No. S145755 2

Podolsky v. First Healthcare Corp.
(1966) 50 Cal.App.4th 632, 647-648 14

Prata v. Superior Court
(2001) 91 Cal.App.4th 1128, 1139-1140 .....13, 41

Richmond v. Dart
(1981) 29 Cal.3d 462 3

Rothchild v. Tyco International (US), Inc.
(2000) 83 Cal.App.4th 488, 494 13

Charles J. Vacanti, M.D. Inc. v. State Comp. Ins. Fund
(2001) 24 Cal.4th 800, 827-828 13

Schnall v. Hertz Corp.
(2000) 78 Cal.App.4th 1144, 1167 14

South Bay Chevrolet v. General Motors Acceptance Corp.
(1999) 72 Cal.App.4th 861, 877-878 13

State Farm Fire & Casualty Co. v. Superior Court
(1996) 45 Cal.App.4th 1093, 1102 13

Stearns v. Wyndham International, Inc.
(2002) 102 Cal.App.4th 1327, 1333 13

Vasquez v. Superior Court
(1971) 4 Cal.3d 800, 808, 814-815 .....4, 6, 45

TABLE OF AUTHORITIES CONTINUED

Vasquez, supra; Occidental Land, Inc. v. Superior Court

(1976) 18 Cal.3d 355 .....4, 45

Whiteley v. Philip Morris, Inc.

(2004) 117 Cal.App.4th 635 .....43, 44

STATE STATUES

Business & Professions Code section 17200 .....1, 15, 20, 22, 23, 30, 41

Business & Professions Code section 17203.....37

Business & Professions Code section 17204.....32, 37

Consumer Legal Remedies Act ("the CLRA"), Civil Code section 1750.....5, 9, 26

False Advertising Law ("FAL"),

Business & Professions Code section 17500.....1, 3, 4, 19, 21, 26, 27, 28

STATE RULES

Code of Civil Procedure section 382.....3

ISSUES PRESENTED AND WHY REVIEW SHOULD BE GRANTED

1. **Does Proposition 64 impose additional substantive requirements, such as actual deception, reliance and damages, under a UCL or FAL action, in light of this Court's decision in *Californians for Disability Rights v. Mervyn's LLC* (2006) 39 Cal.4th 223?**

Prior to the enactment of Proposition 64, the law in California was that an action under the fraud prong Unfair Competition Law ("the UCL") (Business & Professions Code section 17200, et seq.) or the False Advertising Law ("the FAL") (Business & Professions Code section 17500, et seq.) did not require proof of certain substantive elements, i.e., 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.) Rather, all that was required was a showing that the defendant's conduct was "likely to mislead" the public, not that it did in fact mislead anyone.

In *Mervyn's*, this Court held that Proposition 64 applied to pending cases because "[t]he measure left entirely unchanged the substantive rules governing business and competitive conduct." (*Id.*, at 64.) But the appellate court in this tobacco case held that after Proposition 64, a plaintiff bringing a representative action under the UCL must not only demonstrate that he or she was actually deceived and actually sustained damages, but that every member of the class did as well, as a pre-requisite to class certification. The addition of these substantive elements to the cause of action conflicts with this Court's conclusion in *Mervyn's* that the substantive requirements under the UCL did not change.

The appellate court's ruling presents an insurmountable conflict that requires this Court's determination as soon as possible in order to appropriately guide the trial courts, the appellate courts and practitioners in the further litigation of these critical and important cases. This same issue has also been submitted to this Court for review in *Pfizer v. Superior Court (Galfano)*, Supreme Court Case No. S145755. Should review be granted in *Pfizer*, at the very least a grant-and-hold should be ordered in this case since both cases present this same issue.

2. **Does Proposition 64 require that each putative class member prove individual standing?**

As a matter of standing, Proposition 64 requires that a plaintiff seeking to act in a representative capacity must demonstrate that he or she has suffered an injury in fact and lost money or property as a result of the defendant's violation of the UCL or FAL and must comply with Code of Civil Procedure section 382, the class action statute. The appellate court here held that the language of Proposition 64 mandates that each class member must establish standing independent of the class representative, i.e., it must be proven that each and every putative class member suffered an injury in fact and lost money and property as a result of a defendant's violation of the UCL. Such a rule is in conflict with this Court's decision in *Richmond v. Dart* (1981) 29 Cal.3d 462 (holding that typicality does not require absolute identity) and federal class action law requiring only that the class representative have standing. (*In re Leapfrog Enterprises, Inc. Securities Litigation* (N.D. Cal. 2005) 2005 WL 3801587, *3; *LaDuke v. Nelson* (1985) 762 F.2d 1318, 1325.) Applying the rule stated by the appellate court in this case would render it virtually impossible to use the

UCL or FAL to protect consumers and competitors and would negate the ability of representative plaintiffs to bring class actions in future UCL or FAL cases.

3. **Should a defendant who promulgates a massive variety of misrepresentations over a long period of time as part of a cohesive, targeted marketing campaign obtain protection from application of the doctrine of presumed reliance in certification of class action cases?**

As explained in more detail, below, this case involves the tobacco industry's long-term and massive campaign of deception and misrepresentation about the safety and addictive nature of its products. In affirming the trial court's decertification of the class, the appellate court concluded that because the industry's deceptive advertising occurred over a long period of time and was of such a varied nature, class certification could not be premised on the doctrine of presumed reliance as articulated and adopted by this Court, and others, in numerous cases, including *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814-815; *Occidental Land,*

Inc. v. Superior Court (1976) 18 Cal.3d 355, 363.

But the evidence in this case demonstrated that the tobacco industry's campaign of misleading misinformation was calculated and deliberately designed to inculcate that misinformation into the public's consciousness. And it worked. But the appellate court's ruling creates an anomalous situation: No matter how cohesive and consistent the ultimate message, the more misrepresentations a defendant makes, and the longer they are made, the ***less*** likely that those misrepresentations can be ameliorated through a class action. The appellate court's rule thus encourages unscrupulous businesses to make more misrepresentations rather than less. Such a rule requires correction by this Court.

These issues are of significant importance because they impact whether California consumers can ever bring class actions under the UCL following the passage of Proposition 64. The appellate court's ruling would sweep aside the UCL's consumer protections - a result specifically rejected by Proposition 64. (Proposition 64, section 1(a), (d).) The ruling also obliterates several well-established tenets of California law.

Review is required because the appellate court's decision is in direct conflict with the existing law of California, is contrary to this Court's recent holding in *Mervyn's* and is contrary to the intent of the electorate when passing Proposition 64 to preserve the UCL as a consumer protection tool. The appellate court's published decision effectively terminates the ability of plaintiffs to bring consumer class actions under the pertinent sections of the UCL, allows courts to discard the likely to deceive standard and allows defendants to insulate themselves from any kind of class treatment by promulgating numerous representations over a lengthy period of time.

This approach would serve to undo the significant body of jurisprudence establishing that because "'[p]rotection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society' *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808, we must effectuate the full deterrent force of the unfair trade statute." *(Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 451.) Such a significant departure from the California courts' previous recognition of the importance of consumer protection warrants the review of this Court and the reversal of the lower court.

BACKGROUND

As originally filed, this case asserted class action claims based on common law causes of action. [Supp.App. S1., pp S1-S80.[1]] Through pleading challenges and as the result of the trial court's denial of an earlier class certification motion [Supp.App. S1, pp S84- S86], the claims were refined to consumer class claims under the UCL and the CLRA. [AA 1, pp. 1-56[2]] In April, 2001, the trial court certified a class under the UCL consisting of all 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." [AA 2, p. 297] As the trial court found in certifying the class, "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 are

---

[1] This citation format references the Supplemental Appendix filed in the appellate court.

[2] This citation format references the Appellants' Appendix filed in the appellate court.

directed to the members of the putative class on a class-wide basis." [AA1, p. 226] The only change in circumstance since that certification was the passage of Proposition 64.

As reflected in the class definition, the plaintiffs 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. In accord with a Stipulation and Order plaintiffs' claims were refined and focused to include the following bases for action under the UCL:

- Defendants continue to market to minors despite their public statements to the contrary;
- Defendants' misrepresentations regarding the nature of the products they market as "light" cigarettes;
- Defendants market products as "natural" or as containing "no additives," despite knowing those labels to be false and or misleading;
- Defendants represent that they do not manipulate cigarette constituents

when, in fact, they do;

- Defendants promulgate and agree to abide by the principles set forth in the Cigarette Advertising Code, which they regularly violate.

Plaintiffs seek to require defendants to provide restitution (primarily in the form of a cy pres or fluid recovery fund) for their violation of California law under the UCL and for statutory damages under the CLRA arising from the lies they told to the public about their products, the lies that they told the public to enhance their image (e.g. that they do not market to minors) and the ways they unfairly manipulated their products in order to actually enhance their addictive nature.

After class certification, defendants sought summary adjudication on numerous issues. [AA 2, p 370 - 4, p. 1858] Ultimately, the trial court issued its rulings on the motions, granting adjudication of only some issues. [AA 34, pp 8836-8391] These rulings served to remove plaintiffs' claims based upon the misrepresentations as to light cigarettes and the no additive cigarettes from plaintiffs' case.

After Proposition 64 became effective on November 3, 2004,

defendants moved to decertify the class on the grounds that Proposition 64 applied retroactively and, if applied, rendered the issues no longer amenable to class treatment. [AA 36, pp 8873, et seq.] Plaintiffs opposed the motion and sought to substitute appropriate class members should the trial court decertify the class. [AA 38, p. 9392- 39, p. 9668] The trial court granted defendants' motion, concluding that Proposition 64 is retroactive, decertifying the class and refusing to permit substitution of the class representatives. [AA 39, pp 9791-9798] Plaintiffs thereafter appealed that ruling to the Fourth District Court of Appeal, Division One, seeking to vacate the trial court's order in its entirety. Pursuant to the parties' stipulation, the trial court has stayed the remainder of the proceedings pending appeal. [AA 40, pp 9965-9966] The appellate court affirmed the order of the trial court decertifying the class and finding that under its ruling that no class could be certified and thus not allowing any substitution of class representatives. (See Opinion, attached as Exhibit A.)

LEGAL ARGUMENT

As does any enactment that modifies existing statutes, Proposition 64 raises a host of legal issues. The interpretation and application of newly-promulgated law is normally permitted to develop in the lower courts before this Court examines the issues. But that course of action in the context of Proposition 64 is not in the best interests of the public, the bench or the bar. The UCL and the FLA are unique statutes whose purpose is the protection of consumer rights and the protection of the marketplace. And even Proposition 64 itself articulated its desire to preserve the UCL as a consumer protection tool. (Proposition 64, section 1(a), (d).) The appellate court's decision in this case, however, severely undermines the utility of the UCL in fulfilling is public policy goals. Immediate review is necessary in order to restore the viability of the UCL as a means of vindicating the public's interest in prohibiting dissemination of misinformation in the marketplace.

1.

THE APPELLATE COURT'S DETERMINATION THAT PROPOSITION 64 IMPOSES ADDITIONAL SUBSTANTIVE REQUIREMENTS, SUCH AS RELIANCE AND DAMAGES, IS INCOMPATIBLE WITH EXISTING LEGAL PRINCIPLES AND CONFLICTS WITH THIS COURT'S *MERVYN'S* DECISION

A. The appellate court's holding conflicts with this Court's determination in *Mervyn's* that Proposition 64 did not effect any substantive change in the UCL.

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 a strict liability one: 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. 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; *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1102, disapproved on other grounds in *Cel-Tech Communications v. L.A. Cellular* (1999) 20 Cal.4th 163; *Rothchild v. Tyco International (US), Inc.* (2000) 83 Cal.App.4th 488, 494.)

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 that 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 (or, "as the result of") the defendant's misrepresentations 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 were 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 for buying a ***different product***.

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. As this Court explained in *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.2d 442, 451:

> [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.*

Thus, actual deception, actual reliance and actual causation have never been required elements under a UCL cause of action.

Fletcher raises another issue relevant here. That is, a defendant that violates the UCL is not forced to provide restitution because the customers were, in fact, individually "victimized" by the conduct, but to keep the marketplace trustworthy using 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.] As we stated recently, "***Even in the absence of the specific authorization contained in section 17535, a trial court has the inherent power to order restitution as a form of ancillary relief.***" [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. **On remand, the court should determine the appropriateness of the requested relief in light of the statutory language and purpose**. (*Fletcher*, at 453-454.)

Clearly, then, before Proposition 64, the UCL did not require legal causation or reliance either as substantive requirements under a UCL claim or to authorize restitution of the monies received by a defendant engaging in an unfair business practice. At most, all that was required was some logical link or nexus between the misconduct and the restitution. Thus, heeding the mandate of this Court to "look to the conduct," the threshold issue has

always been whether a defendant violated the UCL and, if it did, to then restore fairness to the marketplace by requiring the defendant to return the money it gained from engaging in that practice.

There is incontrovertible authority demonstrating that that focus has not changed under Proposition 64: Because this Court said so in *Mervyn's*. This Court held in *Mervyn's* that Proposition 64 applies to cases pending at the time it was enacted because the legislation makes no substantive changes to the statute:

> The measure left ***entirely unchanged*** the **substantive rules** governing business and competitive conduct. (*Id.*, at 46 Cal.Rptr. 57, 64; emphasis added.)

If Prop. 64 did not affect the substantive rules, and it therefore applies to pending cases, that creates an irreconcilable conflict with the conclusion of the appellate court here that it also adds substantive requirements to proving a case under the fraud prong of the UCL or under the FAL, i.e., reliance, causation and "damages."

This inherent conflict requires this Court's review and resolution.

B. The language and legislative history of Proposition 64 further undermines the appellate court's rationale.

This Court's conclusion that Proposition 64 did not make substantive changes to the statute is supported by the legislative history of the proposition: The proponents did not modify or amend Business & Professions Code section 17200 itself, which establishes that an action may be brought for any conduct that is unfair, unlawful or fraudulent, nor did they add definitions or limitations to restrict the substantive scope of those terms - despite long-held case law establishing that a cause of action could be brought under the UCL without any showing of reliance or damages.

The language of Proposition 64 does not support the conclusion that the substantive criteria for obtaining relief under the UCL were intended to be altered. The appellate court relied on the language of Proposition 64 requiring that the representative plaintiff suffer the loss of money or property "as a result of" the defendant's unfair competition. That language, the appellate court held, imposes a reliance requirement. But this Court has

already rejected a similar argument in the context of the FAL.

Even before enactment of Proposition 64, Business & Professions Code section 17535 provided that relief was available only with respect to money or property "acquired ***by means of*** any practice" declared to be unlawful in the FAL. (Emphasis added.) In *Fletcher*, this Court rejected the argument that this language required a showing of actual deception, individual reliance or actual damages. (*Id.*, at 449.) Rather, this Court confirmed that all that is required is a showing that the statements were likely to mislead. If proof of reliance is not required where the statute is limited to restitution of property "acquired by means of" the unlawful conduct, there is no justification for imposition of a reliance requirement simply because Proposition 64 states that standing requires loss of property "as a result of" the prohibited conduct.

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 the stopping of ***frivolous*** lawsuits. [AA 38, p. 9568; 39, pp 9647-51] 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 Prop. 64 confirms that no substantive changes - other than the injury-in-fact requirement - was 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 thus the apparent intent of the voters - was that a showing of some harm must be made, but that only the individual plaintiff needs to meet the injury-in-fact requirements. The appellate court's conclusion that legal causation of an injury to every class member must be proven by a 17200 plaintiff under Proposition 64 conflicts with that expressed intent, and this Court's conclusions.

And the fact that a direct causation requirement is not an element of injury-in-fact is reflected in the United States Supreme Court's decision in *Northeastern Florida Contractors v. City of Jacksonville* (1993) 508 U.S. 656, 665. There the court held that a contractor proved injury-in-fact where it established that it was not allowed to compete for a government contract on equal footing with other bidders even though ***the contractor did not show that it would have otherwise obtained the contract***. Thus, under an

injury-in-fact requirement, the only showing that must be made is that the plaintiff suffered harm, not that the harm was **directly** caused by the defendant's conduct.

Here, the harm suffered by both the class representatives and the class members is that they purchased cigarettes and became addicted and the evidence demonstrates that the defendants have engaged in fraudulent, misleading and unfair conduct, which resulted in the sale of cigarettes. Under the UCL, even after Proposition 64, such conduct warrants imposition of liability on defendants. Given that here an injury in fact occurred, i.e., the loss of money through the purchase of cigarettes, the goal of Proposition 64 - to stop shakedown lawsuits brought on behalf of a class representative who suffered no loss - has been achieved and there was no basis for dismissing the class action.

Indeed, the class representatives here testified that they saw defendants' ads and they bought defendants' products. [AA 38, p 9581 - 39, 9636][3] The defendants' ads were likely to mislead and the class

---

[3] Class representatives Michelle Buller-Seymore and Damian Bierly both testified during their depositions that: They saw defendants'

representatives lost money as the result of buying cigarettes.

Proposition 64, at most, requires that the representative plaintiffs (and not the class members) demonstrate that they lost money or property "as the result of" the defendants' unfair conduct, The representative plaintiffs here have done precisely that. [AA 38, p. 9581 - 39, p. 9636] Thus, to the extent that there is any requirement for showing harm, it is a requirement that applies only to the class representatives, not to each class member and has been met.

C. The public policy goals of the UCL will be undermined if the appellate court's rationale is permitted to stand.

Finally, the underlying public policy goals of the UCL will be severely hampered if the appellate court's decision is not corrected. And the federal district decision in *Anunziato v. eMachines, Inc.* (C.D. Cal.

---

advertisements; they purchased defendants' products; seeing cigarette advertisements, in general, triggered a desire in them to smoke a cigarette. Willard Brown was not asked during deposition whether he saw any of defendants' advertisements (other than an Omni Cigarette ad).

2005) 402 F.Supp.2d 1133 explains why.

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 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. Although lengthy, the *Anunziato* court's analysis is an extremely appropriate and valuable assessment of the issues:

> 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 that which should be applied. Proposition 64 only requires an "injury in fact" and nowhere imposes a reliance requirement.

This class has always been defined on the basis of people who purchased cigarettes - and thereby lost money. In the larger sense, all cigarette purchases are tied to the entire campaign by defendants over the past decades to addict people and keep them addicted. [AA 14, pp 3512:13-3517:1; 3521:25-3535:4.] The cigarettes were purchased by the class members "as a result of" the lies and deceptions embodied in defendants' public statements, advertisements and campaign of misinformation. Thus, the class members' claims are no different than - and are typical of - the class representatives' claims.

Decertification of the class in this case on the basis of Proposition 64 - and the appellate court's affirmance of that decertification - conflicts with this Court's holding in *Mervyn's* and requires review.

2.

THE APPELLATE COURT ERRONEOUSLY APPLIED PROPOSITION 64 TO REQUIRE STANDING ON THE PART OF PUTATIVE 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.) On the face of the statute, then, it is only the person ***bringing*** the action as a representative plaintiff who must demonstrate the loss of money or property, **not the class members**.

Proposition 64 thereby requires only that the representative plaintiff

meet the standing provision. Indeed, to find otherwise would mean that Proposition 64 affects the substantive requirements of the UCL since - in the past - restitution has not been predicated on a true, common-law causation requirement. (*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.) Again, this conclusion of the appellate court is in direct conflict with this Court's ruling that Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct." *(Californians for Disability Rights v. Mervyn's, LLC,* (2006) 39 Cal.4th 223.)

Proposition 64 was intended, proposed, drafted and enacted to address a single issue that its proponents had with alleged abuse of the statute caused by its expansive standing to bring representative suits. "The abuse is a kind of legal shakedown scheme: Attorneys form a front 'watchdog' or 'consumer' organization. They scour public records on the internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of a front organization." *(People ex. rel. Lockyer v. Brar* (2004) 115 Cal.App.4th

1315, 1316-1317.)

Thus all that was intended or accomplished was simply to prevent the use of so called "professional plaintiffs" who had no connection or interest in the case and to require that the representative plaintiffs be persons that actually had an interest in the case. That is, that the person actually filing the complaint must have been a victim of the unfair business practice complained of in order to be able to bring suit under the UCL.

The appellate court below concluded that these changes require a showing 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, "Each 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. In *Collins,* the problem was that the plaintiff did not even allege that any member of the class, other than herself, sustained any injury or damage. Such a failure to even establish the existence of a class is

enough to deny class certification. (*Collins, supra.*, 187 Cal.App.3d 73.)

But that is distinctly different than the situation here. 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]

The conclusion in *Collins* says it all, "Better that the fluid method of distribution be reserved for those cases where public policy will be served by curbing the excesses of the predatory and the unscrupulous or where substantial harm to the class is demonstrable." (*Collins v. Safeway Stores, Inc.*, (1986) 187 Cal. App. 3d 62, 75.) It is hard to imagine a case where the policy of "curbing the excesses of the predatory and the unscrupulous" would be better served than the instant suit.

The appellate court's conclusion in this case that the putative class members must each prove standing also conflicts with federal law and the

express language of Proposition 64 itself.

First, under standard federal class action law, the individual class members are **not** required to establish their own independent standing. Rather, the standing of the class representative is sufficient as to all:

> Article III standing simply requires that the class representatives satisfy standing individually. No more is required. Once threshold individual standing by the class representatives is met, a proper party to raise a particular issue is before the court, ***and there remains no separate class standing requirement*** in the constitutional sense. ***Once the class representatives individually satisfy standing, that is it: standing exists***. The presence of individual standing is sufficient to confer the right to assert issues that are common to the class, speaking from the perspective of any standing requirements." (*In re Leapfrog Enterprises, Inc. Securities Litigation* (N.D. Cal. 2005) 2005 WL 3801587, *3; *LaDuke v. Nelson* (1985) 762 F.2d 1318, 1325; emphasis added.)

That conclusion - that only the class representative is required to establish standing - is mimicked in Proposition 64 itself. Proposition 64 is explicit: "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.)

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 represented parties - had to meet the added standing requirements, it would have been simple to say so. For example, section 17203 could have been amended to read:

> Any person may pursue representative claims or relief on behalf of others only if ***all class members*** meet the standing requirements of Section 17204. . . .

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 other consumers, would destroy that balance and would, as a result, undermine the public policy protections that are an essential part of the UCL.

Since both federal class action law and the language of Proposition 64 agree that only the class representative must establish standing, the appellate court's contrary conclusion must be corrected.

3.

THE APPELLATE COURT ERRONEOUSLY CONCLUDED THAT THE DOCTRINE OF PRESUMED RELIANCE DOES NOT APPLY IN UCL CLASS ACTIONS WHERE THE DEFENDANT MAKES MISREPRESENTATIONS THROUGH A VARIETY OF WAYS AND OVER A LONG PERIOD OF TIME

The Court of Appeal's decision in this case also establishes a rule of law that if a defendant promulgates a large number of misrepresentations and/or presents its misrepresentations over a long enough period of time, that defendant insulates itself from a class action, no matter how egregious its conduct. And that is precisely the factual situation here: Defendants engaged in a decades-long campaign of lies and deceit about the health

effects and addictive nature of cigarettes. This is not the kind of conduct that the courts should be telling the purveyors of unfair business practices is protected from class action treatment.

In addition to ignoring the basis for the rationale in *Anunziato* and articulating a bad rule of law, the appellate court's decision also ignores the case law already established in California. In fact, this Court has ruled:

> ***A long-term advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date.*** Children in particular are unlikely to recall the specific advertisements which led them to desire a product, but ***even adults buying a product in a store will not often remember the date and exact message of the advertisements which induced them to make that purchase. Plaintiffs should be able to base their cause of action upon an allegation that they acted in response to an advertising campaign even if they cannot recall the specific advertisements.*** (*Committee on Children's*

Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 219; emphasis added.)

Thus, this Court has recognized that a long term advertising campaign undertaken with a wide range of advertisements may seek to persuade by cumulative impact and should be viewed in that context.

Similarly, in *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1139-1140, that court rejected the defendant's argument that the alleged misrepresentations having been made through some 19 different ads to some 300,000 consumers, that each consumer's transaction would have to be examined thereby defeating the UCL claim, finding 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).

Here, defendants' misrepresentations occurred in the context of a highly sophisticated and well- orchestrated advertising campaign that specifically targeted the class. [AA 14, 3491:8-3494:15; 3496:2-3498:11;

3499:2-3537:1; 3512:13-3517:1; 3521:25-3535:4] 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]

Indeed it is this decades-long, deliberate and integrated marketing campaign that demonstrates the commonality of the issues. As testified to by plaintiffs' experts, even the tobacco industry never expected any smoker to see and rely on a single advertisement in choosing to smoke, or even in choosing the brand of cigarettes to smoke. [AA 14, 3491:8-3494:15; 3496:2-3498:11; 3499:2-3537:1; 3512:13-3517:1; 3521:25-3535:4; AA 39; 9652-9659; 9660-9668.] And the marketing campaign was not even limited to advertisements, but included broader media information, including news stories and free media about the "controversy" regarding tobacco's dangers, to convince the public to begin and continue smoking. The entire marketing campaign was a long-term, coordinated and integrated campaign [*id.*] that

was never intended to function at the level of the "trees" but was always intended to function at the level of the "forest."

And it worked. As plaintiffs' experts testified, defendants' integrated, long-term marketing campaign was fantastically successful for decades. [*Id.*] It convinced millions of people that it was safe to start smoking and that it was safe to continue smoking. And that is proven by the very evidence defendants rely on in an effort to demonstrate that individual issue predominate. The fact that they were successful in getting people to smoke, in addicting them, and in keeping them smoking even while it was costing them enormous amounts of money and potentially hurting them, supports the conclusion that generalized causation and reliance principles should be applied.

Therefore, since defendants intended to convince the public - as a whole - that smoking was safe and non-addictive, the question for class certification, then, should not be whether each class member saw or relied on a specific advertisement, but whether a reasonable person would, in light of defendants' campaign of misrepresentations, buy - and continue to buy - cigarettes. Indeed, that was the conclusion of the court in *Whiteley v. Philip*

Morris, Inc. (2004) 117 Cal.App.4th 635:

> Furthermore, the question here is not whether the *public* adequately appreciated the health risks of smoking to excuse defendants' misrepresentations and false promises. Instead we will presume in support of the judgment that the jury found on substantial evidence that even if there were ample information in the public domain to convince reasonable observers of the hazards of smoking, ***defendants and their agents deliberately interfered with the assimilation of that information, particularly by smokers and prospective smokers***. It was this class to which Whiteley belonged and to which defendants presumably owed a primary duty not to mislead. Nonsmokers were far less directly affected by the issue. Evidence was presented in this case that smokers were less attuned to warnings and more ready to believe defendants than were nonsmokers. (*Whiteley*, at 691-692; initial emphasis in original, latter emphasis added.)

The class-wide presumed reliance and causation concept has been utilized in numerous cases in California, with the express approval of this Court. (*Vasquez, supra; Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355; *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282.) Because of the way defendants marketed their products, it is particularly appropriate here.

But the appellate court's decision turns those principles on their head by concluding that the tobacco industry's campaign was so broad and wide-ranging that presumed reliance cannot be applied. Rather, the court held, only precise and limited advertisements can serve as a basis for application of the presumed reliance doctrine. That conclusion raises three problems.

The first, of course, is that it conflicts with the prior holdings of this Court (see, e.g., *Committee on Children's Television; Vasquez; Occidental Land)* and other courts of this State. That, alone, is a sufficient basis for grant of review.

Second, the appellate court's blanket conclusion that a variety of misrepresentations are not actionable in a class action ignores the

fundamental principle of the presumed reliance doctrine: i.e., that it is the materiality and consistency of the misrepresentation, not its form, that is controlling. As the plaintiffs' experts in this case confirmed, the fundamental message conveyed by all of the tobacco industry's ads was the same: Cigarette smoking is safe and non-addictive. It simply should not matter that they conveyed this fundamental, material message in a variety of ways.

Most importantly, the appellate court's decision simply sends the wrong message to businesses interested in escaping liability for their misinformation and misrepresentations. The Court of Appeal's decision draws a roadmap: Make a lot of different misrepresentations and/or make them over a long period of time and you can - by your own action - prevent any class action remedy for your wrongs. This erroneous application of existing law - and the message it sends to the public and unscrupulous businesses must be corrected.

CONCLUSION

Because of the importance of this statute scheme in assuring that the marketplace remains trustworthy and in order to assure its continuing effectiveness as a deterrent to misinformation and misrepresentations from affecting consumers and competitors, the issues presented in this petition should be reviewed and guidance provided to businesses, the bench and the bar.

Dated: October 13, 2006

Respectfully submitted,

Thomas D. Haklar, Esq.

DOUGHERTY & HILDRE

CERTIFICATION AS TO WORD COUNT

The word count for this Petition, excluding Table of Contents, Table of Authorities, Proof of Service, and this Certification is approximately 7939 words. This count was calculated utilizing the word count feature of the word processing software used to create this document.

Dated: October 13, 2006

Respectfully submitted,

Alison Crawford

Alison Crawford

DOUGHERTY & HILDRE

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re TOBACCO II CASES	D046435
	(JCCP No. 4042)

APPEAL from orders of the Superior Court of San Diego County, Ronald S. Praeger, Judge. Affirmed.

Dougherty & Hildre, Donald F. Hildre, William O. Dougherty, Frederick M. Dudek, Thomas D. Haklar; Robinson, Calcagnie & Robinson, Mark P. Robinson, Sharon J. Arkin and Karen Karavatos for Plaintiffs and Appellants.

Munger, Tolles & Olson LLP, Gregory P. Stone, Daniel P. Collins, Steven B. Weisburd, Joseph S. Klapach, Daniel B. Levin; Seltzer Caplan McMahon Vitek, Gerald L. McMahon and Daniel E. Eaton for Defendant and Respondent Philip Morris USA Inc.

Dechert LLP, H. Joseph Escher III; Wright & L'Estrange, Robert C. Wright; Jones Day and William T. Plesec for Defendants and Respondents R.J. Reynolds Tobacco Company and Brown & Williamson Holdings, Inc., formerly known as Brown & Williamson Tobacco Corporation.

Loeb & Loeb LLP, and Sharon S. Mequet for Defendant and Respondent The Council for Tobacco Research-U.S.A., Inc.

DLA Piper Rudnick Gray Cary US LLP, William S. Boggs and Brian A. Foster for Defendant and Respondent Lorillard Tobacco Company.

Reed Smith LLP, and Mary C. Oppedahl for Defendant and Respondent The Tobacco Institute.

The Lendrum Law Firm and Jeffrey P. Lendrum for Defendants and Respondents Liggett Group Inc. and Liggett & Myers, Inc.

Plaintiffs Willard R. Brown, Damien Bierly and Michelle Denise Buller-Seymore (hereafter plaintiffs) appeal an order decertifying a class action for claims under the unfair competition law (UCL) (Bus. and Prof. Code,[1] § 17200 et seq.); an order denying class certification for claims under the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.); and an order granting summary adjudication of some issues in favor of defendants Phillip Morris USA Inc., R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, The Council for Tobacco Research-U.S.A., Inc., Liggett Group, Inc., Liggett & Myers, Inc., and The Tobacco Institute, Inc. (hereafter defendants or the tobacco companies).

Plaintiffs contend the court erred in ruling they lack standing to pursue the UCL

---

1 Statutory references are to the Business & Professions Code unless otherwise stated.

claim because Proposition 64 applies retroactively and eliminates the ability of individuals who have suffered no injury or monetary loss from pursuing UCL claims. They also contend the court erred in ruling that individual issues predominate so this is an inappropriate case for a class action under the UCL or CLRA; and in granting summary adjudication on some class-action causes of action. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

The proposed class is composed of smokers who were residents of California between June 10, 1993, and April 23, 2001, and who were exposed to defendants' "marketing and advertising activities in California." Plaintiffs sought to recover economic losses resulting from purchasing cigarettes.

The complaint was originally filed in 1997 and amended many times. In January 2000, Brown, who was then the only named plaintiff, filed a motion seeking class certification of all claims in his fifth amended complaint, which included both common law claims and a CLRA claim. The trial court denied certification concluding, inter alia, individual issues of causation and injury predominate over common issues. In October 2000, Brown sought certification of a CLRA claim in his then-pending sixth amended complaint, but subsequently filed a seventh amended complaint adding claims under the UCL and the false advertising law (FAL) and also sought class treatment of these additional claims.

In April 2001, the court denied Brown's second CLRA class action motion because it was an improper motion to reconsider the 2000 denial and found that individual issues relating to causation, injury, reliance, materiality, exposure to the

alleged misstatements, statutes of limitations, and choice of law predominate. The trial court, however, granted class certification as to the UCL and FAL claims because these statutes do not require individualized determinations as to reliance.

In 2004, the trial court granted summary adjudication in favor of defendants as to UCL and FAL claims involving defendants' use of the terms "lights," "low tar," "all natural," and "no additives." The court found all the claims are preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq.), and further that plaintiffs had failed to present adequate evidence to establish the falsity of the "all natural" and "no additives" claims. The trial court permitted plaintiffs to proceed with a class action as to other UCL claims that the tobacco companies had made false and misleading statements denying or disputing the health hazards and addictiveness of cigarette smoking and their targeting of minors.

After the standing requirements for UCL lawsuits by private individuals were changed by the passage of Proposition 64 in the General Election of November 2, 2004, defendants successfully moved to decertify the class. The trial court ruled that to establish standing the individual plaintiffs and all class members were now required to show injury in fact consisting of lost money or property caused by the unfair competition. The trial court found the requirement of individual reliance meant the individual issues predominate over the common issues thus making the case unsuitable for a class action.

DISCUSSION

I

Applicability of Proposition 64

Brown contends the trial court erred in ruling the changed standing requirements of Proposition 64 apply to this case, which was pending when the measure was adopted in November 2004.

Before Proposition 64 was adopted, both public attorneys, such as the Attorney General, and private citizens could bring lawsuits under the UCL on behalf of the general public without a showing that anyone had actually been harmed by an unfair business practice. Proposition 64 continues to grant standing to public attorneys to bring lawsuits on behalf of the general public without a showing of harm but significantly restricts the standing of private citizens to bring UCL lawsuits. After Proposition 64, a private citizen has standing to bring a UCL lawsuit only if he or she "has suffered injury in fact and has lost money or property as a result of such unfair competition." (§§ 17204, 17203.)

This issue has now been resolved by the California Supreme Court. In *Californians for Disability Rights v. Mervyns, LLC* (2006) 39 Cal.4th 223, the court held Proposition 64's new standing requirements apply to pending cases. We are bound by this decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we uphold the trial court's ruling that Proposition 64's standing requirements apply to this case.

II

Class Decertification was Proper

After finding Proposition 64 applies to this lawsuit, the court decertified the class. The court noted there are "significant questions" that "undermin[e] the purported commonality among the class members, such as whether each class member was exposed to [d]efendants' alleged false statements and whether each member purchased cigarettes 'as a result' of the false statements. Clearly, here, as in [p]laintiffs' CLRA case, individual issues predominate, making class treatment unmanageable and inefficient. Further, it appears from the record that not even [p]laintiffs' named class representatives satisfy Prop 64's standing requirement."

The court's decision denying certification for the CLRA cause of action more fully detailed the court's determination that common issues do not predominate. Among other things, the court noted there were "differing representations associated with a multitude of products, altered over the course of the many years at issue . . . ." The court noted, "The sheer plethora of misrepresentations alleged by [p]laintiff is but one example of the divergent possible scenarios surrounding each putative class member's claim." Further, the court observed, "Whether the information disseminated/concealed by [d]efendants over the vast span of years at issue was the causative factor of each class member's smoking and presumptive resulting addiction is fact specific to each putative member of the class depending upon their then knowledge and behavioral activity." The court observed there are statute of limitation issues as to "when each putative class member discovered or should have discovered his/her injury was sustained as a consequence of

the wrongful acts allegedly committed by the [d]efendants" and questioned whether Brown was an adequate class representative since he admitted "he was not in fact deceived by the host of alleged misrepresentations asserted by the putative class endemic to successful assertion of a cause of action under the CLRA . . . ."

An individual bringing a class action UCL lawsuit must meet the standing requirements of section 17204, that is, an individual must have "suffered injury in fact and [have] lost money or property as a result of such unfair competition" (§ 17204) and meet the class action requirements of Code of Civil Procedure section 382. (Bus. & Prof. Code § 17203.)

Section 382 of the Code of Civil Procedure authorizes class suits in California "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." The class action statute is a procedural device for collectively litigating substantive claims. (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 461; *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 670.) " 'The definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. Each class member must have standing to bring the suit in his [or her] own right.' " (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73.) "[C]lass action status does not alter the parties' underlying substantive rights. [Citations.] If a specific form of relief is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class." (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1018.) Proposition 64 forecloses relief to a private plaintiff

who has not suffered an injury in fact and lost money or property as a result of an unfair business practice. (§ 17203.) Thus, the named plaintiff as well as class members must have suffered an injury in fact or lost money or property. Only the Attorney General, district attorneys, county counsels, city attorneys, and city prosecutors are exempted from the UCL and class action standing requirements and may pursue a class action on behalf of the general public without a showing of an injury in fact. (§ 17203.)

" 'The burden is on the party seeking certification to establish the existence of both an ascertainable class and a well-defined community of interest among the class members.' " (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.) "The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.) "A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Ibid.*) The trial court must " 'carefully weigh respective benefits and burdens and . . . allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.' " (*In re Cipro Cases I & II* (2004) 121 Cal.App.4th 402, 410.)

Trial courts are "afforded great discretion in granting or denying certification" because they are "ideally situated to evaluate the efficiencies and practicalities of

permitting group action." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) We review the trial court's decision for an abuse of discretion. (*Sav-On Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th 319, 326.) "[W]e will affirm the trial court so long as [its class certification] ruling is supported by substantial evidence and is not based on improper criteria or erroneous legal assumptions." (*Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 752.)

Here, the proposed class consists of smokers who were residents of California between June 10, 1993, and April 23, 2001, and who were exposed to defendants' "marketing and advertising activities in California." Plaintiffs sought restitution, that is, the cost of purchasing cigarettes. Plaintiffs' theory of liability is that the class members became smokers and purchased defendants' cigarettes as a result of defendants' misrepresentations about the health risks and addictiveness of smoking. Therefore, the class excludes persons who were unaware of defendants' advertising and marketing campaign or did not believe their representations as to the health risks and addictiveness of smoking.

The lawsuit is not based on a single misrepresentation but a general marketing and advertising campaign. Plaintiffs contend "defendants' marketing programs . . . were intended to create a general, cultural understanding on the part of the target audience — smokers and potential smokers — that cigarettes are safe and non-addictive. Having achieved their goal, defendants are bound by it. Smokers bought cigarettes because of their general understanding — resulting from defendants' own unfair conduct — that they could safely smoke." Plaintiffs explain, "[T]he question for class certification . . . is not

whether each class member saw or relied on a specific advertisement, but whether a reasonable person would, in light of defendants' campaign of misrepresentations, buy — and continue to buy — cigarettes." Plaintiffs argue the fact a class member continued to smoke after becoming fully aware of the health risks is irrelevant since at that point the class member had already become addicted. Under plaintiffs' theory, the key misrepresentations occurred before an individual class member began to smoke.

The marketing and advertising campaign consisted of a myriad of representations occurring over a long period, indeed, over more than half a century. The complaint[2] alleges the tobacco companies were aware cigarette smoking was harmful in the 1950's and by the 1960's were fully aware nicotine was addictive. In the 1940's and 1950's, the tobacco companies ran advertisements suggesting cigarettes had no harmful effects, could protect against colds, and claimed filters were effective in removing tar and nicotine. In the 1970's, The Tobacco Institute ran advertisements suggesting there was continuing scientific debate about the connection between smoking and lung cancer. In 1994, tobacco company executives, during hearings by the congressional subcommittee on health and environment on the potential regulation of nicotine-containing products, claimed nicotine was not addictive.

Over this period, changes occurred in the dissemination of information about the health hazards of smoking and in cigarette marketing. For example, in the mid-1960's, Congress enacted the Federal Cigarette Labeling and Advertising Act requiring health

---

2 When we refer to the complaint, we mean the ninth amended complaint.

warnings on cigarettes. (15 U.S.C. § 1331 et seq.) The act was amended in 1970 and 1984 and currently requires all cigarette packages, billboards and other advertising to display one of four different rotating warnings. (15 U.S.C. § 1333.) Plaintiffs' expert, Martin Goldberg, noted there were only a small number of anti-smoking articles through 1979, thus people who smoked before 1979 were exposed to fewer anti-smoking messages than those who started smoking after 1979. While lawsuits by smokers were generally unsuccessful during the 1950's through the 1980's, in the 1990's litigation was renewed and different strategies used resulting in the disclosure of internal memoranda from the tobacco companies revealing that the tobacco companies had known about but concealed the harmful effects of smoking. (Scott, *The Continuing Tobacco War: State and Local Tobacco Control in Washington* (2000) 23 Seattle U.L.Rev. 1097, 1101.) Excerpts from these documents are contained in the complaint. Restrictions on the marketing, advertising and promotion of cigarette advertising occurred in 1998 as a result of the four major tobacco companies entering into a Master Settlement Agreement (MSA) with the Attorneys General of 46 states, the District of Columbia and five United States territories. (Patel, *The Tobacco Litigation Merry-Go-Round: Did the MSA make it stop?* (2005) 8 DePaul J. Health Care L. 615, 615-617.)

Because of the number of misrepresentations and the lengthy period involved, this case is unlike those cases where the courts have essentially presumed misrepresentations detrimentally affected all class members on an equal basis. It is evident that not all class members here were exposed to the same or even similar misrepresentations.

For example, some of the class members were not born until decades after the initial misrepresentations were made. Further, because of the long period, changing representations and changing dissemination of information about the harmful effects of smoking, not all class members would have been affected by the misrepresentations to the same degree. While the Supreme Court has recognized that in some situations, a misrepresentation may be so material that it can be inferred or presumed that all class members relied on the misrepresentation (see *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 (*Vasquez*)), this is not such a case. In *Vasquez*, the court reasoned that proof as to the representative plaintiffs "will supply the proof as to all." (*Id.* at p. 815; see also *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, 1292-1293.) In *Vasquez*, it was alleged defendant's salesmen used a common sales pitch from a manual, made the same representations to all class members and the falsity was common to all class members. (*Vasquez, supra,* at pp. 811-812.) In that situation, the Supreme Court indicated it could be presumed that material representations were relied upon by all class members. (*Id.* at p. 814.) However, the Supreme Court in *Vasquez* also recognized that if the alleged misrepresentations vary too much among the class members, then certification of a class action may not be based on presumed or inferred reliance. (*Id.* at p. 819.)

Here, the record makes it clear that proof as to the representative plaintiffs will not supply proof as to all class members. As we pointed out above, merely as a function of the lengthy time covered by the complaint, different class members would have heard

different statements by defendants and would have had differing degrees of other sources of information available to them to assess the health risks and addictiveness of smoking.

Not even the representative plaintiffs were exposed to all the misrepresentations nor believed them.[3] For example, Brown began to smoke sometime before the mid-1960's. He was not aware of any bad publicity in the 1960's, but by the mid-1970's he knew he was addicted to cigarettes, by 1986 he knew smoking could cause lung cancer, and by the 1994 congressional hearings when the tobacco company executives denied nicotine was addictive, it crossed his mind that they were lying. Although he had known for years that cigarette smoking was addictive and harmful, that information alone was not sufficient to persuade him to quit smoking. Bierly testified he knew before he started smoking that cigarettes were addictive. He thought the tobacco executives were lying during the 1994 congressional hearings. Buller-Seymore testified she never heard

---

3 We note that plaintiffs in their opening brief to support their contention that the named plaintiffs "testified that they saw defendants' ads and they bought defendants' products" cite over 50 pages of the appellants' appendix. It is a party's duty to support the argument in its briefs by appropriate references to the record, which includes providing exact page citations, and the court may strike a brief which does not meet this requirement. (Cal. Rules of Court, rule 14(a)(1)(C); *People v. Woods* (1968) 260 Cal.App.2d 728, 731.) "As a practical matter, the appellate court is unable to adequately evaluate which facts the parties believe support their position when nothing more than a block page reference is offered in the briefs--e.g., CT 1-20, which upon examination turns out to be twenty non-sequential pages of deposition testimony." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) Nonetheless, we have read the excerpts of the plaintiffs' depositions contained in the record.

anyone claim smoking was safe, would not hurt her health or was not addictive.[4] Thus, even the three named plaintiffs reflect a range from being unaware that smoking is unhealthy at the commencement of smoking to being aware that smoking is harmful and addictive and yet began to smoke anyway.

This case is also distinguishable from *Anunziato v. eMachines, Inc., supra,* 402 F.Supp.2d 1133 (*Anunziato*), upon which plaintiffs heavily rely. *Anunziato* is a post-Proposition 64 case interpreting the standing requirements in a UCL class action. In *Anunziato*, the plaintiff, alleged inter alia, a violation of the UCL and FAL based on misrepresentations as to a computer that overheated. The *Anunziato* court found most of the defendant's representations were mere puffery but concluded the defendant's representation the computer had been subjected to the "most stringent of quality control tests" was actionable. (*Id.* at p. 1140.) *Anunziato* held that all class members, regardless of whether they had actually read or relied on the defendant's representation the computer had been subjected to quality control testing had suffered a cognizable injury in fact under the UCL. In the course of its discussion, *Anunziato* rejected an argument that it is necessary to prove each individual class member relied on the misrepresentation, explaining:

> "The goal of both the UCL and the FAL is the protection of consumers. However, the Court can envision numerous situations in

---

4 We note Buller-Seymore's opinion that tobacco advertising was deceptive was primarily based on the tobacco companies' use of "beautiful young models" instead of "old wrinkly ladies who have been smoking," making "it appear as though you're going to be gorgeous and beautiful" and "get the hot guy" or "get the girl to look like a supermodel" and failure to emphasize the health hazards.

> 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." (*Anunziato, supra,* at p. 1137.)

Plaintiffs interpret *Anunziato* and its cookie analogy as supporting a conclusion they were not required to show that the individual class members heard or relied on any particular misrepresentations and therefore that this class action based on a general advertising and marketing campaign is proper. This is an over-broad reading of the holding in *Anunziato*. *Anunziato* did not address a situation where the complaint alleged numerous misrepresentations occurring over a lengthy period and where not all of the misrepresentations were made to all class members. In *Anunziato*, both the computer misrepresentation and the cookie example involved a single false statement that was made to each and every class member. *Anunziato* is factually distinguishable and provides little aid to plaintiffs.

Plaintiffs also rely on two cases involving lawsuits by smokers, *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635 and *Boeken v. Philip Morris, Inc.* (2004) 127 Cal.App.4th 1640, for the proposition that recovery may be based on misrepresentations occurring over time rather than based on a discrete statement in a single advertisement.

While these cases may lend some support to this position,[5] they do not support a conclusion that in this case it should be presumed all class members were similarly affected by defendants' marketing and advertising campaign. Both *Whiteley* and *Boeken* involved individual plaintiffs and individual proof as to how the specific plaintiff was influenced by the respondents' statements. As we pointed out above, not even the named plaintiffs were similarly affected by defendants' marketing and advertising campaign.

Moreover, to the extent plaintiffs assert that the only reasonable inference is that all class members began to smoke and became addicted to cigarettes because of defendants' advertising and marketing campaigns, we disagree. Plaintiffs argue even if class members did not believe defendants' representations about the health risks and addictiveness of cigarette smoking, defendants' misleading advertising and marketing campaign induced class members to begin smoking. They contend the positive imaging broadcast by defendants induced them to smoke out of a desire to "be cool." Such a vague representation, that using a product will make a person "cool" or successful, is little more than puffery used to promote a variety of products from toothpaste to automobiles and is insufficient to support a claim of an unfair business practice or false advertising. (See *Anunziato, supra,* 402 F.Supp.2d at p. 1139.) Moreover, becoming

---

5 See *Whiteley v. Philip Morris, Inc., supra,* 117 Cal.App.4th at pages 680-681 ("Contrary to defendants' contention, Whitely 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"); *Boeken v. Phillip Morris, supra,* 127 Cal.App.4th at page 1666 (sufficient evidence to show plaintiff was a target of tobacco company's "misrepresentations and that he actually relied upon its campaign of doubt").

addicted to a harmful substance does not require an advertising campaign minimizing health risks and suggesting an individual may "be cool" if he or she uses a particular product. For example, numerous people have become addicted to heroin despite the absence of any advertising or marketing campaign promoting its use and despite undisputed, widely distributed information detailing its harmfulness and addictiveness.

We agree with the trial court's determination this case is not suitable for class action on the basis that individual issues predominate over common issues. There were numerous misrepresentations occurring over more than a half a century. The representations changed over time as did the general dissemination of information about the health risks and addictiveness of cigarette smoking. Further, while the class was restricted to smokers who resided in California between 1993 and 2001, these class members began to smoke at different points over several decades and some class members were not even born when some of the representations were made. Therefore, all class members were not exposed to the same representations or information about the health risks and addictiveness of cigarettes. Individual determinations would have to be made as to when the class members began smoking, what representations they were exposed to, what other information they were exposed to, and whether their decision to smoke was a result of defendants' misrepresentations (and thus they suffered an injury due to defendants' conduct) or was for other reasons. The numerous individual determinations render this case unsuitable for a class action.

This conclusion is consistent with that reached by other courts. As one Maryland court observed, "A myriad of federal and state courts have shown a predominant, indeed

almost unanimous reluctance to certify, or, in the case of appellate courts, to uphold the certification of class actions for mass tobacco litigation. Moreover, this aversion bears out regardless of (1) whether the plaintiffs represented a putative class membership that was nationwide or one that was restricted to a singular forum state, (2) whether the filed lawsuit presented multifaceted causes of action, more streamlined complaints, or even a single claim, and (3) whether the relief sought was comprised of compensatory damages, punitive damages, injunctive remedies, or a combination thereof." (*Philip Morris, Inc. v. Angeletti* (2000) 358 Md. 689, 729-730; see also *Estate of Mahoney v. R.J. Reynolds Tobacco Co.* (D. Iowa 2001) 204 F.R.D. 150, 157 [class certification denied, " 'What influenced a particular individual to start smoking inevitably varies from person to person . . . .' "].)

We find no abuse of discretion in the trial court's decision to decertify the UCL class action.

III

Denial of Class Certification for CLRA Claims

The parties dispute whether plaintiffs may properly raise in this appeal the denial of their motion for class certification of the CLRA claims. Defendants contend the time has long since expired for appealing the denial of class certification for the CLRA claims and the CLRA class action claims were waived because they are not included in plaintiffs most recently amended complaint. Plaintiffs respond that the CLRA class action issue was not properly appealed until the court decertified the UCL class action and thus rang the "death knell" for the class action.

We need not resolve this dispute since our determination that the individual issues predominate making this case unsuitable for a class action moots plaintiffs' arguments.

IV

Summary Adjudication

The parties dispute whether plaintiffs can raise in this appeal the court's granting of summary adjudication on causes of action based on advertising relating to "light," "low tar, "natural," or "no additive" cigarettes. They argue these summary adjudication issues "tie directly into the class certification issues" and thus should be addressed in this appeal.[6]

We need not address this issue. Plaintiffs' argument that we should address the summary adjudication is premised on a theory we will resurrect the UCL or CLRA class actions. They argue the interests of judicial economy favor our consideration of these additional class action issues. This argument fails since we have affirmed the trial court's conclusion this case is not suitable for a class action. We adhere to the general rule that summary adjudications are not appealable orders. (See *Jennings v. Marralle* (1994) 8 Cal.4th 121, 128; *Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1070.)

---

6 Defendants made a motion we take judicial notice of three judicial decisions addressing class actions addressing light and lowered nicotine and tar cigarettes. These matters are suitable for judicial notice but given our holding that these issues are mooted, it is not necessary to judicially notice these decisions.

DISPOSITION

The orders are affirmed. Defendants are awarded their costs on appeal.

CERTIFIED FOR PUBLICATION

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.

PROOF OF SERVICE

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

DOUGHERTY & HILDRE
2550 Fifth Avenue, Suite 600
San Diego, California 92103
Telephone: (619) 232-9131
Facsimile: (619) 232-9131

and that on this date I placed a true copy of the foregoing document(s) entitled:

PETITION FOR REVIEW

on the parties in this action by placing a true copy thereof in a sealed envelope addressed as stated

(X) on the attached mailing list

( ) as follows:

____ I caused each envelope to be sent by Overnight Courier

____ (By Mail) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego, CA in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_____ (By Personal Service) I caused to be delivered such envelope by hand to the offices of the addressee.

_____ (By FAX) I caused each document to be sent by FAX to the following numbers:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 13, 2006, at San Diego, California.

Alison Crawford

Alison Crawford

SERVICE LIST

Brown, et al. V. Philip Morris USA, Inc., et al.
Court of Appeal Case No. D046435

California Supreme Court
Ronald Reagan Building,
300 South Spring Street,
Los Angeles, CA 90013
14 copy via personal service

Ronald A. Reiter
Supervising Deputy Attorney General
Office of the Attorney General
Consumer Law Section
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
1 copy via USPS

San Diego County District Attorney
Consumer Fraud Division
Hall of Justice
330 W. Broadway
San Diego, CA 92101
1 copy via personal service

Carlotta Tillman
Administrative Office of Court
455 Golden Gate Avenue, 6th Floor
San Francisco, CA 94102
1 copy via USPS

Jeffrey P. Lendrum
THE LENDRUM LAW FIRM
4275 Executive Square, Suite 910
La Jolla, CA 92037
Tel: (858) 334-0555
Fax: (858) 334-0554
1 copy via USPS

Defendant
LIGGETT GROUP, INC.
(LIGGETT &MYERS)

William S. Boggs
DLA PIPER RUDNICK GRAY CARY US LLP
401 B Street, Suite 2000
San Diego, CA 92101-4240
Tel: (619) 699-2758
Fax: (619) 699-2701
1 copy via USPS

Defendant LORILLARD TOBACCO COMPANY

Gregory P. Stone
MUNGER TOLLES &OLSON LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
Tel: (213) 683-9100
Fax: (213) 687-3702
1 copy via personal service

Defense Liaison Counsel and Co-Counsel for Defendant PHILIP MORRIS USA INC.

Martin D. Bern
Patrick J. Cafferty, Jr.
MUNGER TOLLES & OLSON LLP
33 New Montgomery Tower, 19th Floor
San Francisco, CA 94105-9781
Tel: (415) 512-4000
Fax: (415) 512-4077
1 copy via USPS

Defense Liaison Counsel and Co-Counsel for Defendant PHILIP MORRIS USA INC.

Gerald L. McMahon SELTZER CAPLAN McMAHON VITEK 2100 Symphony Towers 750 "B" Street San Diego, CA 92101 Tel: (619) 685-3003 Fax: (619) 685-3100 **1 copy via USPS**	Defense Co-Liaison Counsel and Co-Counsel for Defendant PHILIP MORRIS USA INC.
H. Joseph Escher III Bobbie J. Wilson HOWARD RICE NEMEROVSKY CANADY FALK &RABKIN Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4065 Tel: (415) 434-1600 Fax: (415) 217-5910 **1 copy via USPS**	Co-Counsel for Defendants R.J. REYNOLDS TOBACCO COMPANY and BROWN & WILLIAMSON TOBACCO CORP.
Sharon Mequet LOEB &LOEB LLP 10100 Santa Monica Boulevard, Suite 2200 Los Angeles, CA 90067-4164 Tel: (310) 282-2000 Fax: (310) 282-2200 **1 copy via USPS**	Defendant THE COUNCIL FOR TOBACCO RESEARCH U.S.A. INC.
Mary C. Oppedahl CROSBY HEAFEY ROACH &MAY 1999 Harrison Street Oakland, CA 94612-3573 Tel: (510) 763-2000 Fax: (510) 273-8832 **1 copy via USPS**	Defendant THE TOBACCO INSTITUTE, INC.
Robert C. Wright Wright & L'Estrange 701 B Street, Suite 1550 San Diego, CA 92101 **1 copy via USPS**	Co-Counsel for Defendants R.J. REYNOLDS TOBACCO COMPANY and BROWN & WILLIAMSON TOBACCO CORP.
William T. Plesec Jones Day North Point, 901 Lakeside Avenue Cleveland, Ohio 44114 **1 copy via USPS**	Co-Counsel for Defendants R.J. REYNOLDS TOBACCO COMPANY and BROWN & WILLIAMSON TOBACCO CORP.