



PACIFIC LEGAL FOUNDATION

June 2, 2015

The Honorable Chief Justice Tani G. Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Animal Legal Defense Fund v. LT Napa Partners LLC, et al.*, No. S225790

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pacific Legal Foundation (PLF) files this letter brief as Amicus Curiae pursuant to Rule 8.500 of the California Rules of Court in support of LT Napa Partners LLC and the petition for review.

Proposition 64 limits standing under California's Unfair Competition Law (UCL) to parties that have suffered an injury-in-fact and financial loss as a result of a proscribed business practice. Cal. Bus. & Prof. Code § 17204. The Court of Appeal held that the Animal Legal Defense Fund satisfied this requirement because the Fund advocates against the production and consumption of *foie gras*, and La Toque's purported sale of *foie gras* therefore frustrated its mission—requiring it to divert funds from its advocacy efforts to investigating and combating violations of California's ban on *foie gras* sales. Such a holding expands standing under the UCL beyond Proposition 64's strict requirements, and invites exactly the type of mischief Proposition 64 was enacted to curtail.

This is an issue of exceptional importance for California businesses. By deeming harm to an organization's advocacy efforts an "injury" under Proposition 64, the lower court's holding allows plaintiffs to manufacture standing and bring predatory lawsuits that threaten the state's economy. PLF respectfully requests that this Court grant the petition so that the Court can give full effect to Proposition 64.

INTEREST OF AMICUS

PLF was founded over 40 years ago and is widely recognized as the largest and most experienced non-profit legal foundation of its kind. PLF engages in litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, property rights, individual rights, and a balanced approach to environmental protection. PLF's Free Enterprise Project regularly submits amicus briefs in cases involving abuses of the civil justice system in this Court, particularly in cases

involving standing under the Unfair Competition Law. *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009). PLF believes its litigation and public policy experience will aid the Court in considering the petition.

I

THE DECISION BELOW EXPANDS STANDING TO NEARLY ANYONE WHO IS OFFENDED BY THE ALLEGED VIOLATION OF THE LAW

The lower court held that the Plaintiff has standing, in part, because the organization advocated for California's *foie gras* ban and it advocates against *foie gras* consumption and sales generally. *Animal Legal Defense Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1280 (2015). Any sale of *foie gras* therefore "harms" the Fund's "organizational mission." *Id.* at 1282. This holding would effectively flip Proposition 64 on its head, and give plaintiffs standing under the UCL merely because they are offended by a business practice.

Prior to Proposition 64, plaintiffs could sue under the UCL based on any business conduct they considered unfair, misleading, or unlawful—regardless of whether they were injured, or even affected, by it. The fact that anyone could bring suit for any perceived violation was compounded by the fact that the UCL's "unfair" prong is inherently subjective and broad. What one plaintiff thinks "unfair," another might expect to be normal business practice. For example, in one case preceding Proposition 64, a court was forced to explain that the UCL did not prohibit retailers from selling at a profit. *Kunert v. Mission Fin. Servs. Corp.*, 110 Cal. App. 4th 242, 265 (2003).

Under such a broad grant of standing, litigation proliferated. Plaintiffs brought suit merely because they disagreed with certain conduct, or worse, as a means of extorting businesses. *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 178 n.10 (2007). Abusive lawsuits had a hazardous effect on the economy, increasing the price of doing business, over-deterring beneficial conduct, driving businesses to flee the state, and wasting judicial resources. *See* Cal. Proposition 64 § 1(c) ["Findings and Declarations of Purpose"]; *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (1999). In response, voters enacted Proposition 64. That measure preserves the ability of citizens to bring lawsuits under the UCL, but only in those cases where they can demonstrate an interest in the case that is not wholly ideological. *See* Cal. Bus. & Prof. Code § 17204.

Proposition 64 achieves this goal in two ways. First, it adopts a standing requirement modeled on Article III's injury-in-fact standard, *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1346 (2009), which not only demands that plaintiffs show an injury, but that they be among those injured. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973). By limiting standing to plaintiffs that can demonstrate a "personal stake" in the case, Proposition 64 eliminates the ability of plaintiffs' lawyers to bring lawsuits for their own enrichment

on behalf of willing plaintiffs. Moreover, it limits the ability of parties to bring suit merely because they have an ideological dispute with the defendant, or because they seek to foist their own policy preferences upon them. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (injury-in-fact requirement recognizes that “other governmental institutions” are “more competent to address [policy] questions”); *SCRAP*, 412 U.S. at 687 (Article III standing “prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders.”). In sum, Proposition 64’s standing requirement ensures that parties have the proper motivations and that courts arbitrate concrete disputes—not policy debates. *Townley v. Miller*, 722 F.3d 1128, 1335 (9th Cir. 2013).

Secondly, Proposition 64 limits standing to plaintiffs that have suffered monetary loss as a result of the challenged practices. See Cal. Bus. & Prof. Code § 17204. Again, this requirement eliminates the ability of plaintiffs to bring suit based on ideological disputes. Together, the two standing requirements restrict the number and kind of suits that can be brought by citizens, and reserve policy disputes or lawsuits brought on behalf of the general public to public officials. *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 818 (2007).

“Harm” to an organizational plaintiff’s mission satisfies neither prong of Proposition 64. First, it is not an “injury-in-fact.” See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (“No matter how deeply committed petitioners may be to upholding [the law] . . . that is not a ‘particularized’ interest sufficient to create a case or controversy.”). Cases since Proposition 64 have made clear: parties may not sue merely because they personally oppose the defendant’s conduct, *Boysen v. Walgreen Co.*, No. C 11-06262 SI, 2012 WL 2953069, at *7 (N.D. Cal. July 19, 2012) (plaintiff did not have standing merely because fruit juices had levels of lead “unsatisfactory to him”), even if that conduct is illegal. *Medina v. Safe-Guard Products*, 164 Cal. App. 4th 105, 115 (2008) (buyer of insurance was not injured under UCL by purchasing policy from unlicensed seller). Proposition 64 was enacted for the purpose of preventing these types of cases.

Nor does disapproval of a defendant’s business practices satisfy the second prong of Proposition 64. Even if the plaintiff spends money in the course of its advocacy efforts—the dispute is purely a moral one. In *Animal Legal Def. Fund v. Mendes*, 160 Cal. App. 4th 136, 147 (2008), the same plaintiff as in this case, and others, brought a UCL action against ranchers for allegedly violating a state animal protection statute. The plaintiffs alleged that they suffered an injury when they “bought milk they otherwise would not have bought if they had thought some of the producing herd may have been raised by [the ranchers] in cruel conditions.” *Id.* at 146. The plaintiffs classified this as an economic injury, but the court held that plaintiffs’ disapproval of the ranchers’ business practices caused them only “moral” harm. *Id.* at 147. The only injury to the plaintiffs was their unhappiness when they “learn[ed] ‘the truth’ about industrial farming,” and this injury was “not economic.” *Id.*

The Fund claims that it is dedicated to ensuring that animal rights laws like California’s ban on *foie gras* sales remain on the book and are obeyed, and that Defendants’ behavior undermines that

advocacy. This is neither an injury-in-fact, nor an economic harm; it is simply a moral one. The court below's decision to the contrary deputizes any one who votes for a law, who posts a bumper sticker on her car, or who donates to an advocacy organization to sue under the UCL. In a sense, *everyone* is harmed by *any* violation of the law, and made better by a suit vindicating that violation. But even though a plaintiff "may derive great comfort and joy from the fact that . . . the Nation's laws are faithfully enforced, that psychic satisfaction . . . does not redress a[n] . . . injury[-in-fact]." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Proposition 64 reserves policy disputes and general enforcement of the laws to the Attorney General.

II

A PLAINTIFF CANNOT SPEND MONEY INVESTIGATING VIOLATIONS OF THE LAW TO BOOTSTRAP STANDING

The lower court also held that the Fund had standing because it diverted resources to investigating violations of California's ban on *foie gras* sales. *LT Napa Partners LLC*, 234 Cal. App. 4th at 1280. But this holding reads the causation element out of Proposition 64, and permits plaintiffs to bootstrap standing under the UCL through their own behavior.

Proposition 64 requires not just that plaintiffs demonstrate they have been injured, but that they have been injured "as a result" of the defendant's conduct. Cal. Bus. & Prof. Code § 17204. "The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of causal connection." *Hall v. Time*, 158 Cal. App. 4th 847, 855 (2008). Courts require causation as a matter of fairness—it is not fair to hold people responsible for injuries they did not cause, and were not their fault. *Payton v. Abbott Labs.*, 437 N.E.2d 171, 188 (Mass. 1982). For the same reason, the law imposes a duty to mitigate, *State Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026, 1043 (2003), and allows contributory negligence as a defense in tort. *See Li v. Yellow Cab Co. of Cal.*, 13 Cal. 3d 804, 811 (1975). In the context of Proposition 64, causation serves the bill's reform purpose by reserving private rights of action to those actually injured by unfair practices—therefore preventing opportunistic abuse of the UCL's citizen suit provisions. *Buckland*, 155 Cal. App. 4th at 818; *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 948 (S.D. Cal. 2007).

Accordingly, courts have required plaintiffs that sue for fraud or misrepresentation under the UCL to allege that they *relied* on the misrepresentation when purchasing the product. *See, e.g., South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 871 (1999); *Brown v. Bank of America, N.A.*, 457 F. Supp. 2d 82, 84 (D. Mass. 2006). If the plaintiff did not rely on the misrepresentation, a plaintiff may have been harmed, but that harm did not arise due to the defendant's conduct.

Thus, plaintiffs that investigate violations of the law for the purpose of suffering an injury have not suffered an injury caused by the defendant. *Buckland*, 155 Cal. App. 4th at 816. In *Buckland*, the plaintiff bought cosmetic products because she suspected that they violated FDA marketing regulations. The Court of Appeal held that the costs she incurred to “investigate claims against” the defendants did not constitute an economic loss *caused by* the defendants under the UCL. “To hold otherwise would gut the injury in fact requirement”—a plaintiff could obtain standing by seeking out an injury. *Id.* Yet the lower court’s opinion allows the very bootstrapping that *Buckland* rejects: it deems the Fund’s deliberate investigations into La Toque’s suspected sale of *foie gras* a loss of money that allows it to pursue litigation. In such a case, the injury is caused by the plaintiff herself, and cannot be used to fabricate standing.

The appellate court distinguished *Buckland* on the basis that the Fund tried to persuade authorities to take action against La Toque before bringing suit. *LT Napa Partners LLC*, 234 Cal. App. 4th at 1280. Any resources spent speaking with the authorities, it said, were spent independently of the litigation—and thus constitute an injury. *Id.* Of course, this too is circular: it was only because the Fund spent money investigating the violation that it was able to obtain the information the Fund then shared with authorities. The lower court’s holding now permits plaintiffs to circumvent *Buckland*’s limits by stopping off at the police station on the way to the court house.

If the causation element of Proposition 64 is to have any meaning, plaintiffs must not be allowed to deliberately incur injuries during the course of an investigation into business practices. After Proposition 64, the UCL only reaches harm “reasonably avoidable by consumers themselves.” *In re Firearm Cases*, 126 Cal. App. 4th 959, 978 (2005).

III

THE LOWER COURT’S OPINION INVITES THE VERY MISCHIEF PROPOSITION 64 WAS ENACTED TO CURTAIL

Proposition 64 was enacted specifically to curtail abuse of the UCL by plaintiffs who have not themselves suffered any particular injury, and instead seek to use the courts to press generalized social or political grievances. *See, e.g.*, Robert Carlin, *Chapter 17: Giving San Francisco a Leg to Stand on in UCL Actions*, 39 McGeorge L. Rev. 392, 397 (2008). Under the UCL’s original lax standing requirements, the law became a tool for abuse by litigants who sought to vindicate general social grievances more suited for legislative redress.

In one case, the plaintiff alleged that an airline engaged in unfair competition by failing to provide sufficient leg room for extraordinarily tall passengers, *Tall Club of Silicon Valley v. Alaska Airlines*, No. A102863, 2004 WL 363529 (Cal. Ct. App. Feb. 27, 2004). In others, the plaintiffs alleged that it was “unfair” for a hotel to charge a fee for room service, *Michaelson v. Ritz-Carlton Hotel Co.*

LLC, No. G032032, 2004 WL 553008 (Cal. Ct. App. Mar. 22, 2004), and “misleading” to use abbreviations like “APR on their paperwork instead of writing Annual Percentage Rate.” John Wildermuth, *Measure Would Limit Public Interest Suits*, S.F. Chron., May 31, 2004, at B1. While defendants often prevailed in these cases, they did so only after expending significant time and money on legal representation. And these decisions represent only a fraction of the actual number of cases filed under the UCL, many of which are settled with a payoff or result only in an unpublished trial court decision.

Others used the UCL’s lax standing requirements to enrich themselves under the guise of protecting the general public. The most notorious example of abuse of the UCL was the case of the Trevor Law Group,¹ which was estimated to have taken home 82 percent of the settlement funds it racked up in its lawsuits. *See Am. Products Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP*, 134 Cal. App. 4th 1332, 1347 (2005); Eugene S. Suh, *Stealing from the Poor to Give to the Rich? California’s Unfair Competition Law Requires Further Reform to Properly Restore Business Stability*, 35 Sw. U. L. Rev. 229, 230 (2006). But the Trevor Law Group was far from the only UCL abuser. Indeed, in a case not involving the Trevor Law Group, the court of appeal explained how attorneys frequently exploit the UCL as part of “legal shakedown scheme[s]”: “[a]ttorneys form a front ‘watchdog’ or ‘consumer’ organization,” and then “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 the front organization.” *Am. Products Co., Inc.*, 134 Cal. App. 4th at 1347 (citing *People ex rel Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317 (2004)). The attorneys “then contact the business . . . and point out that a quick settlement . . . would be in the business’s long-term interest.” *Id.* The attorneys ultimately profit “[s]ince even frivolous lawsuits can have economic nuisance value.”

In *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 585 (1998), a dissenting justice recounted how the plaintiff’s attorney had filed eight nearly identical lawsuits against 431 retailers (most of which were small businesses), asking for more than \$50 billion in restitution and attorney fees. The attorney had filed the case on behalf of a non-profit he had started with his mother, after the pair sued several computer software companies. *Id.* The organization had no employees, and attorney fees were the only source of its funding. *Id.* The attorney informed the defendants in that case that he would “get the most in attorney fees from whoever stays in [the suit] longest.” *Id.* But because the UCL allowed a party to sue though he suffered “no injury at all,” *id.* at 561, the Court was forced to allow the plaintiff to proceed.

¹ Those attorneys were eventually recommended for disbarment, but resigned before those proceedings were concluded. Michael Hiltzik, *Consumer-Protection Law Abused in Legal Shakedown*, L.A Times, July 21, 2003, available at <http://articles.latimes.com/2003/jul/21/business/fi-golden21> (last visited May 29, 2015).

In sum, abuse by plaintiffs who either had only social qualms or who wanted to exploit the UCL for private gain were rampant by the time Proposition 64 was passed in 2004, and they inflicted serious damage on California businesses—leading voters overwhelmingly to pass Proposition 64. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 37 (2005).

The lower court’s opinion essentially nullifies Proposition 64 by giving the parties the opportunity to sue when they have only social grievances, or when they investigate money for the purposes of bringing a lawsuit. The Fund does not allege that it interacted personally with the Defendants, nor that it was misled by La Toque, nor that it even bought a product from La Toque—it simply hired a detective to do that. The Fund does not allege that it would not have bought the product if it knew the sale of *foie gras* was illegal—indeed the Fund knew that selling *foie gras* was illegal when it deliberately commissioned the purchase. Instead, the Fund alleges that it disagreed with La Toque’s practice of giving away *foie gras* with certain purchases, and so it spent money for the purpose of investigating the legality of that practice. If this is considered “harm,” the UCL will once again become a tool for plaintiffs who have only political grievances with business practices or who seek to abuse the statute for private enrichment rather than the general public good. UCL standing is reserved for those plaintiffs who suffer an injury due to an unfair or unlawful practice, not those that manufacture injuries by seeking out violations.

CONCLUSION

Proposition 64 reserves citizen standing to plaintiffs that are injured by prohibited business conduct, and leaves general enforcement of the laws to the Attorney General. Because the lower court’s holding would subvert the purposes of Proposition 64, and invite the abuses that prompted the measure, this Court should grant the petition and restore the proper limits on standing under the UCL.

Respectfully submitted,

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