4/07 - In re TOBACCO II CASES [AC]

S147345

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

IN THE SUPREME COURT OF CALIFORNIA

IN RE TOBACCO II CASES

WILLARD BROWN, ET AL.,

Plaintiffs and Appellants,

vs.

PHILIP MORRIS USA, INC., ET AL.,

Defendants and Respondents.

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

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF VERISIGN, INC. AND AT&T MOBILITY LLC IN SUPPORT OF DEFENDANTS AND RESPONDENTS

HORVITZ & LEVY LLP
LISA PERROCHET (Bar No. 132858)
JOHN A. TAYLOR, JR. (Bar No. 129333)
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
(818) 995-0800 • FAX (818) 995-3157

Attorneys for Amici Curiae
VERISIGN, INC. and AT&T MOBILITY LLC

TABLE OF CONTENTS

Pursuant to California Rules of Court, rule 8.520, subdivision (f), VeriSign, Inc. and AT&T Mobility LLC request permission to file the attached amici curiae brief in support of defendants and respondents, Philip Morris USA Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Holding, Inc. (formerly known as Brown & Williamson Tobacco Corp.), Lorillard Tobacco Company, Liggett Group Inc., Liggett & Myers, Inc., The Council for Tobacco Research-U.S.A., Inc., and The Tobacco Institute.

VeriSign, Inc. is an Internet communications, information and security services company that operates digital infrastructure, enabling and protecting billions of interactions every day across the world's voice and data networks. VeriSign processes as many as 31 billion Internet interactions and supports over 100 million phone calls each day, and runs one of the largest telecommunications signaling networks in the world, facilitating services such as cellular roaming, text messaging, caller ID, and multimedia messaging. It also currently secures over 450,000 Web sites with digital

certificates—including sites for 93 percent of the Fortune 500—and secures over 750,000 Web servers worldwide.

AT&T Mobility LLC (formerly known as Cingular Wireless LLC) is the largest wireless communications company in the United States, with the nation's largest digital voice and data network and more than 61 million subscribers. AT&T Mobility is a non-governmental Delaware limited liability company that is jointly owned by AT&T Inc., a publicly held corporation, and BellSouth Corporation d/b/a AT&T South, a wholly-owned subsidiary of AT&T Inc.

VeriSign and AT&T Mobility have been required to defend against a variety of Unfair Competition Law (UCL) actions in California, both in the class action and non-class representative context. The companies submit this brief to ensure that in this case, in the context of evaluating the viability of plaintiffs' UCL class claims against defendants for alleged misstatements regarding cigarettes, this Court is fully apprised of the extent to which such claims arise within the broader marketplace, and the extent to which clear guidance from this Court is needed regarding the requirements for private party UCL standing after Proposition 64, as well as guidance concerning the ability of plaintiffs to invoke class-wide presumptions or inferences of causation to meet their burden of proving UCL standing. As parties to past and pending UCL litigation, amici curiae are vitally interested in the outcome of those questions and others presented in this case.

As counsel for VeriSign and AT&T Mobility, we have reviewed the briefs filed in this case and believe this Court will benefit from additional briefing on the issues outlined above.[1/] The brief filed concurrently with this

---

1/ We wish to advise this Court that defendant and respondent Philip Morris USA Inc. is a current client of Horvitz & Levy LLP, but only the named represented amici curiae have retained and paid Horvitz & Levy LLP (continued...)

application goes into greater detail on those issues than either the answer brief on the merits filed by defendants or the amicus briefs in their support, and it provides substantive points not made in other briefs. Thus, in accord with their acute interest in the development of UCL and class action jurisprudence in California, amici curiae VeriSign and AT&T Mobility respectfully request that this Court accept and file the attached brief.

INTRODUCTION

In this Unfair Competition Law (UCL) case, the trial court found that a class could not be certified because a threshold question on the path to recovery—that is, the standing of absent class members under the UCL—cannot be answered satisfactorily through the litigation of predominantly common questions of law or fact. At issue in this appeal is whether the trial court's analysis was correct. The answer is yes—the trial court correctly interpreted Proposition 64 and properly exercised its discretion in decertifying the proposed class. Several discrete steps lead ineluctably to that conclusion.

First, one must ask whether *all* class members—both named plaintiffs and unnamed participants—must meet the same standing requirements. For purposes of this brief, we assume that, as other briefs have discussed, they do. (See ABOM 9-22.)

Second, one must determine what those standing requirements are. Again, for purposes of this brief, we assume that, as other briefs have

---

1/ (...continued)
to prepare this brief. Neither Philip Morris USA Inc., its affiliates, nor any other party in this case has retained or paid Horvitz & Levy LLP for its work on this brief.

discussed, the plain language of Proposition 64 provides that private parties have standing to assert UCL claims only if they can prove they suffered a loss *caused by* ("as a result of") the defendant's alleged unfair business practice.

A third issue to address is the argument of plaintiffs (and amici curiae in their support) that giving effect to the plain meaning of Proposition 64's language—i.e., by imposing a traditional causation requirement for standing—would run counter to this Court's analysis in *Californians for Disability Rights v. Mervyn's LLC* (2006) 39 Cal.4th 223 (*Mervyn's*). Specifically, plaintiffs assert that when this Court said Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct" (*id*. at p. 232), it foreclosed a plain meaning interpretation of Proposition 64's "as a result of" causation requirement, because a causation requirement would purportedly change these substantive rules.

In the first section of this brief, we explain why that is not so. *Mervyn's* held that Proposition 64 applies to pending cases because the initiative did not "change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct." (*Mervyn's*, *supra*, 39 Cal.4th at p. 230.) Proposition 64 does not change the scope of conduct covered by the UCL, but only who may sue for that conduct, limiting private party standing to people actually injured by the conduct. The question of what conduct is covered by the UCL is entirely distinct from the question of which private parties may sue for such conduct. Proposition 64 changed only the latter, and left untouched "the substantive rules governing business and competitive conduct" (*id*. at p. 232) that determine when a UCL violation has occurred.

To the extent plaintiffs suggest this Court might have reached a different result in *Mervyn's* if Proposition 64 were read to eliminate some existing right of recovery (which is not the test that this Court did or should

apply in assessing the initiative's applicability to pending cases), the new standing requirements do not, in fact, eliminate any substantive right previously guaranteed under the UCL. Moreover, any limitation that Proposition 64 imposes on the ability of private plaintiffs to prosecute their UCL claims as class actions does not affect any right or expectation that "the presumption of prospective operation is classically intended to protect, namely, the right to have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred." (*Mervyn's*, *supra*, 39 Cal.4th at p. 233.)

Fourth, one might ask what becomes of the result in *Mervyn's* if it *were* necessary to conclude that the causation element added by Proposition 64 to the UCL's standing requirements changed "the substantive rules governing business and competitive conduct" or "'"substantially affect[ed] existing rights and obligations"'" protected by and imposed under the UCL. (*Mervyn's*, *supra*, 39 Cal.4th at pp. 231-232.) Plaintiffs suggest that this Court ignore the plain language of Proposition 64, and impose a watered-down, essentially non-existent causation requirement simply to preserve the *Mervyn's* analysis. But the more principled approach would be to adhere to the language of Proposition 64 and then reach the question that *Mervyn's* found unnecessary to decide—whether the "statutory repeal rule" dictates the same outcome. For the reasons we later explain, the "statutory repeal rule" requires (consistent with *Mervyn's*) that Proposition 64's amendments be found to apply to pending cases.

Finally, proceeding on the understanding that all private party UCL plaintiffs must meet the Proposition 64 standing requirements, and that this standing requirement incorporates a traditional causation standard, one must ask *how* such plaintiffs may meet their burden of proving causation in the context of a class action, and the effect of that burden on trial courts'

decisions whether to certify UCL claims for class treatment. This question brings us back to the ultimate issue here: did the trial court act within its discretion in decertifying the class, notwithstanding plaintiffs' argument that causation could be proved by inferences or presumptions? Yes, the decertification order was correct. Whether or not plaintiffs in *some* cases may avail themselves of certain class-wide inferences from indirect evidence of causation, no such inference properly arises on the facts here. And even if it did, it would not provide the shortcut plaintiffs seek in fulfilling their burden of demonstrating that standing can be proved by predominantly common questions. Given the nature of plaintiffs' claims, due process requirements demand that defendants be given the opportunity to rebut any such inferences through individualized discovery, cross-examination at trial, and so forth. At the class certification stage, the trial court reasonably found that individual issues would predominate when all the evidence proffered by the both sides is submitted to the finder of fact for such consideration.

LEGAL DISCUSSION

I.

PROPOSITION 64'S IMPOSITION OF A CAUSATION REQUIREMENT FOR PRIVATE PARTY STANDING IS CONSISTENT WITH THIS COURT'S ANALYSIS IN *MERVYN'S*.

A. The enforcement of a causation requirement for private party standing is consistent with *Mervyn's* conclusion that Proposition 64 did not change the definition of a UCL violation or impose any new or different liabilities.

This Court held in *Mervyn's* that application of Proposition 64 to pending cases involves no impermissible "retroactive" effect because the amendments did not "change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct," and thus "left entirely unchanged the substantive rules governing business and competitive conduct." (*Mervyn's*, *supra*, 39 Cal.4th at pp. 230, 232.)

Here, plaintiffs (and amici curiae in their support) contend that interpreting Proposition 64's language to impose a "causation" requirement for private party standing in UCL cases would run afoul of this Court's analysis in *Mervyn's*. (See, e.g., OBOM 23-30; CAOC ACB 2, 10-17.) In essence, plaintiffs assert that when this Court said Proposition 64 "left entirely unchanged the substantive rules governing business and competitive conduct," that meant Proposition 64 could not have imposed a causation requirement for private party standing because, according to plaintiffs, such a requirement would change the UCL's "substantive rules." Plaintiffs' contentions are meritless.

Plaintiffs and their amici fundamentally distort this Court's decision and analysis in *Mervyn's*. Proposition 64 does not in any way change the scope of conduct covered by the UCL. Rather, it changes only who has standing to sue for that conduct, by mandating that a private plaintiff has standing only if he or she "has suffered injury in fact and has lost money or property as a result of" a defendant's unfair business practices. (Bus. & Prof. Code, § 17204.) Construing that amendment to mean what it says—i.e., to add a causation requirement for standing—does not "change the legal consequences of past conduct by imposing new or different liabilities based upon such conduct." (*Mervyn's*, *supra*, 39 Cal.4th at p. 230).

Put another way, the statement in *Mervyn's* that Proposition 64 does not change the substantive rules governing business conduct has no bearing

on, and cannot help decide, the question of whether Proposition 64 imposes a causation requirement for private plaintiff standing. The question of what conduct is covered by the UCL is entirely distinct from the question of which private parties may sue for such conduct. Proposition 64 changed only who could bring a UCL action to obtain a civil remedy by narrowing the range of private plaintiffs who may assert a UCL claim to those actually injured as a result of the alleged UCL violation. Public prosecutors such as the Attorney General retain full standing to sue for all UCL violations, including business practices that are likely to mislead the public, without any showing of a loss of money or property "as a result of" a defendant's conduct. Thus, all previously actionable business practices under the UCL remain subject to suit after Proposition 64. Moreover, in an Attorney General action, the full scope of the remedial authority remains completely unchanged.[2/]

2/ Proposition 64's addition of a causation of injury requirement restricting *private party* standing (see Bus. & Prof. Code, § 17203), brings the statute closer in line with its federal counterpart, section 5 of the Federal Trade Commission Act (15 U.S.C.A. § 45(a)), which relies on government actions brought by the FTC rather than on private party actions to enforce the federal Act's broad liability standard:

> [The] breadth of prohibition [against unfair practices in the FTC Act] carried with it a danger that the statute might become a source of vexatious litigation. Expertise was called for . . . to avoid using the statute as a vehicle for trivial or frivolous claims. . . . [¶] . . . [¶] Above all, there is need to weigh each action against the Commission's broad range policy goals and to determine its place in the overall enforcement program of the FTC. [¶] Private litigants are not subject to the same constraints. They may institute piecemeal lawsuits, reflect disparate concerns and not a coordinated enforcement program. The consequence would burden not only the defendants selected but also the judicial system. It was to avoid such possibilities of lack of coherence that Congress focused on the FTC as an exclusive enforcement authority.

(*Holloway v. Bristol-Myers Corporation* (D.C. Cir. 1973) 485 F.2d 986, 990,

(continued...)

Plaintiffs and some of their amici suggest that *Mervyn's* is inconsistent with the fact that, if defendants' interpretation of Proposition 64 is correct, some subset of UCL plaintiffs presumably will be unable to satisfy Proposition 64's new standing requirements. But in light of the continuing standing for affected private plaintiffs and public official plaintiffs, the inability of some private claimants to sue for conduct *that they cannot show caused them to suffer a loss* effects no change in "the substantive rules governing business and competitive conduct." (*Mervyn's*, *supra*, 39 Cal.4th at p. 232.) The test for evaluating whether "substantive rules" have changed within the meaning of the "retroactivity" analysis at issue in *Mervyn's* is whether anything "a business might lawfully do before Proposition 64 is unlawful now," or whether anything "earlier forbidden is now permitted." (*Ibid.*) As previously explained, Proposition 64 did not change or expand what constitutes a UCL violation, but merely changed who has standing to sue based on such violations. The holding in *Mervyn's*—that Proposition 64 applies to cases pending at enactment because the amendments "left entirely unchanged the substantive rules governing business and competitive conduct"—is entirely consistent with an interpretation of Proposition 64 that gives full force to its "as a result of" causation requirement for private party standing.

B. The enforcement of a causation requirement for private party standing is consistent with the conclusion in *Mervyn's* that Proposition 64 did not eliminate any right to recover.

Plaintiffs and their amici are equally wrong to the extent they contend that applying the plain language of Proposition 64 here would have an

---

2/ (...continued)
997-998.)

impermissibly retroactive effect under this Court's retroactivity cases by eliminating pre-existing *substantive* "rights," i.e., "eliminating" a "right to recover" that was previously guaranteed by the UCL. (*Mervyn's, supra,* 39 Cal.4th at pp. 231, 232.)[3/]

As plaintiffs stress in their opening brief, the overall focus of the UCL is on the defendant's conduct, not on injury to individuals. (OBOM 25; see also RBOM 14; CAOC ACB 12-17.) The UCL affords equitable remedies and statutory penalties primarily to deter improper business conduct, rather than as a mechanism for compensating injured parties by affording broad damages relief. (See, e.g., *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1080-1081 [UCL injunctive relief is a *public* remedy].)

Thus, compensatory money damages have *never* been an available remedy in a UCL action. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) Both before and after Proposition 64, the only monetary relief permitted under the UCL in private actions is equitable restitution, which can do no more than *restore* to a plaintiff money or property that the defendant may have acquired "by means of" an unfair practice. (Bus. & Prof. Code, § 17203; see *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1148 ["This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL"]; *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 137 [reversing order of non-restitutionary

---

3/ Notably, *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, cited on that point in *Mervyn's*, clarifies that a statute has an impermissible retroactive effect only if it "imposes a new or additional liability *and* substantially affects existing rights and obligations." (*Id.* at p. 395, emphasis added.) Thus, even if it could be argued that Proposition 64 somehow affects some "rights and obligations" of private parties who cannot meet the causation element of the UCL's new standing requirements, applying Proposition 64 to pending cases would not be an impermissible retroactive application, since Proposition 64 does not *also* impose any new or additional liability on defendants for the reasons stated in subsection A above.

disgorgement in a representative UCL action].) If, as plaintiffs suggest, some persons have in the past been awarded a restitution remedy even though their injuries were not caused by a defendant's UCL violation, such persons were at most *incidental beneficiaries* of UCL remedies imposed on defendants as a means of deterring improper business conduct.[4/]

Moreover, courts have always had discretion to deny a UCL remedy even in cases where a private plaintiff proved both a violation *and* injury caused by the defendant's conduct. (See, e.g., *Cortez v. Purolator Air*

4/ In asserting that a causation requirement for UCL standing would change the UCL's "substantive rules" governing business conduct contrary to *Mervyn's*, plaintiffs argue that pre-Proposition 64 case law allowed some parties to pursue a UCL cause of action without proving "actual deception, reliance or actual damages." (OBOM p. 3, citing *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 453.) First, however, the premise for plaintiffs' argument is questionable because it is not clear what remains of the four-member majority approach in *Fletcher* after subsequent developments such as *Kraus* and *Korea Supply*. Second, even at the time it decided *Fletcher*, this Court indicated that any authorization existing then for certifying a class that included plaintiffs who lacked evidence of reliance was not so much to protect any substantive right of *those* plaintiffs as to set up a *procedure* that would aid recovery by "consumers who *have* been defrauded" (*Fletcher*, at p. 454, emphasis added) and that would deter future misconduct (*id.* at pp. 449-450). The Court clarified that the ultimate remedy to members of such a class should extend only to those who could have relied on the defendant's claimed fraud: "The fact that some members of the class may have been informed of the alleged fraud should not in itself preclude the trial court from affording a remedy for *recovery of those who had no such information*." (*Id.* at p. 454, emphasis added.)

The voters have now determined that the "defrauded" consumers discussed in *Fletcher* must either demonstrate standing to bring their own UCL claims or must rely on public enforcement of the UCL by the Attorney General and other public officials. Thus, imposing a causation requirement for private party standing that bars class participation by those who might at one time have been swept up in a *Fletcher* class does not change the "substantive rules" governing business conduct. It merely alters the *Fletcher* conclusion that an overbroad private class action was an appropriate procedure protecting those who were in fact defrauded.

Filtration Products Co. (2000) 23 Cal.4th 163, 179-180 ["Section 17203 does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court '*may* make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore . . . money or property,'" and "equitable defenses may be considered by the court when the court exercises its discretion over which, *if any*, remedies authorized by section 17203 should be awarded" (first emphasis in original, second emphasis added)]; see also *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 597, fn. 2 (dis. opn. of Brown, J.) [collecting UCL cases in which courts have exercised their equitable powers of abstention and declined to grant relief].)

The features of UCL jurisprudence discussed above demonstrate that, far from guaranteeing any private, individual "right" to recover sums that may not even correlate to losses caused by a defendant's unfair business practices, the UCL is designed to protect public interests (1) by stopping and deterring the alleged unfair business practices through restitutionary disgorgement to affected parties and (2) through injunctions against future misconduct.

In short, given the UCL's specific focus on defendants' conduct, the equitable remedies available under the UCL never granted private individuals any *substantive* "right" (as that term is used in *Mervyn's*) to prosecute a UCL action where they cannot establish the loss of money or property *as the result of* a defendant's unfair business practice. Private parties who have experienced no injury *caused* by a defendant's unlawful conduct have at most lost an inchoate interest in the mere *possibility* they will incidentally benefit from a UCL remedy imposed on a defendant to deter future similar violations. Such persons are in the equivalent position of those described by this Court in *Mervyn's* as "uninjured persons [who] have volunteered to act as private

attorneys general," with the "hope of recovering attorneys' fees under Code of Civil Procedure section 1021.5" based on successful prosecution of a UCL claim. (*Mervyn's, supra*, 39 Cal.3d at p. 233.) As this Court explained, the impairment of such a hope "hardly bear[s] comparison with the important right the presumption of prospective operation is classically intended to protect, namely, the right to have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred." (*Ibid.*)

C. The potential impact of a causation standing requirement on the ability of private parties to seek *class-wide* UCL relief does not affect any rights or expectations that the presumption of prospective operation discussed in *Mervyn's* was intended to protect.

The CAOC's amicus brief suggests that Proposition 64's imposition of a causation element as a threshold standing requirement would change the substantive rules governing business conduct because "[if] such a showing is now required . . . it is highly unlikely that a class action could ever be brought under the statute." (CAOC ACB 10.) Making class actions more difficult, the CAOC argues, would "substantially hinder" the ability of private parties "to invoke [the UCL's] full panoply of remedies." (CAOC ACB 16.) But again, any such ability is not a right or expectation that "the presumption of prospective operation is classically intended to protect, namely, the right to have liability-creating conduct evaluated under the *liability* rules in effect at the time the conduct occurred." (*Mervyn's, supra*, 39 Cal.4th at p. 233, emphasis added.)

First, if cutting off *entirely* the standing of uninjured parties to pursue UCL claims does not, as this Court found in *Mervyn's*, "'significantly impair

the settled rights and expectations of the parties to continue prosecution of their actions'" (*Mervyn's, supra*, 39 Cal.4th at p. 233), then merely subjecting representative actions to long-settled class action procedural requirements cannot do so. Indeed, the *Mervyn's* decision cited similar examples of new statutes whose application to pending cases was "found to be *prospective*, and thus permissible," because they "properly governed the conduct of proceedings following the law's enactment without changing the legal consequences of past conduct." (*Id.* at pp. 231-232.) For example, the court noted that requiring plaintiffs suing under an environmental law to provide a "certificate of merit" or eliminating the right to appeal from the revocation of an administrative decision revoking a physician's license—procedural changes at least as restrictive as adding a causation requirement to establish standing—were statutory changes that properly applied to pending cases. (*Ibid.*)

Second, neither plaintiffs nor the CAOC cite any case holding that merely limiting the scope of a potential class to persons who have standing because they suffered an actual injury affects any substantial right. (See *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1018 [limitations on "class action status do[ ] not alter the parties' underlying substantive rights"]; *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 918 ["'Class actions are provided only as a means to enforce substantive law'" and must not be confused with the substantive law to be enforced]; accord, *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462.) Even where limitations on class relief make pursuit of a claim less convenient, such claims may still be pursued by parties with standing on an individual basis. As noted in *Mervyn's*, "the interest in suing on another's behalf is not a property right beyond statutory control," and no case has applied "the presumption of prospective operation to protect an interest so abstract" as a "civic or philosophic interest in enforcing the UCL" on another's

behalf. (*Mervyn's*, *supra*, 39 Cal.4th at p. 233.)

II.

THE STATUTORY REPEAL RULE PROVIDES AN ALTERNATIVE GROUND FOR APPLYING PROPOSITION 64 (AND ITS CAUSATION REQUIREMENT FOR PRIVATE PARTY STANDING) TO PENDING CASES.

A. The result in *Mervyn's* would be correct regardless of whether Proposition 64's causation requirement for private party standing changed the substantive rules governing business conduct.

Even if this Court were now to find, contrary to *Mervyn's*, that the causation element added by Proposition 64 to the UCL's standing requirements changed "the substantive rules governing business and competitive conduct" or "'"substantially affect[ed] existing rights and obligations"'" protected by and imposed under the UCL (*Mervyn's*, *supra*, 39 Cal.4th at pp. 230-232), which it does not, that would not provide any basis for either (1) departing from the plain language of Proposition 64's standing requirement, or (2) changing the conclusion in *Mervyn's* that Proposition 64 applies to cases pending when the measure was enacted.[5/] The "statutory repeal rule" provides an independent reason why Proposition 64 must apply to pending cases, and supports defendants' position that both the result in *Mervyn's* and defendants'

5/ See *ante*, fn. 3 (Proposition 64 would have to impose a new or additional liability as well as substantially affect existing rights and obligations before it could be held impermissibly retroactive).

construction of Proposition 64 are correct. Under that "well settled rule . . . 'an action wholly dependent on statute abates if the statute is repealed without a saving clause before the judgment is final.'" (*Mervyn's*, 39 Cal. 4th at p. 232, fn. 3, quoting *Younger v. Superior Court* (1978) 21 Cal.3d 102, 109 (*Younger*).)

Proposition 64's amendments to the UCL's standing provision (Bus. & Prof. Code, § 17204) repealed the former statutory authority for private parties to prosecute UCL claims if they were not personally injured by, and did not lose money or property caused by, the defendants' alleged statutory violations. As this Court held in *Mervyn's*, the only private parties who now have the statutory authority to prosecute these statutory claims in their own right are those who indeed suffered "'injury in fact and ha[ve] lost money or property as a result of'" the defendants' challenged practices. (*Mervyn's*, *supra*, 39 Cal.4th at p. 227.) To the extent uninjured persons or those who could not establish causation might previously have enjoyed the statutory authorization to bring and prosecute UCL claims, any such statutory authorization was withdrawn by the voters when they enacted Proposition 64. (*Id*. at pp. 227-228.)

Accordingly, even if this Court were to entertain the baseless arguments of plaintiffs and their amici that applying a plain language interpretation of Proposition 64's causation requirement to this pending action runs afoul of *Mervyn's* and this Court's traditional "retroactivity" jurisprudence, that would simply mean that the Court would need to reach the issue left undecided in *Mervyn's*—whether, as the Courts of Appeal had overwhelmingly held, Proposition 64 applies to pending cases under the "statutory repeal rule."[6/]

6/ The trial court relied on the statutory repeal rule as an alternative ground for applying Proposition 64 to this pending case (see 40 AA 9887-9891), and that result remains correct after *Mervyn's*. Indeed, the Court (continued...)

As detailed below, the "statutory repeal rule" provides an alternative ground for applying Proposition 64 to pending cases such as this one, regardless of whether it operates to change the substantive rules governing business conduct or to obliterate any statutory right to recover that could possibly be recognized under the pre-amended UCL regime.

B. Under the statutory repeal rule, the elimination of a purely statutory right of action or remedy without a savings clause applies immediately to pending cases.

In "a long and unbroken line of California decisions" reaching back more than a century, this Court has consistently applied the statutory repeal rule to hold that intervening enactments eliminating the statutory authorization for purely statutory rights of action or remedies without a saving clause *apply immediately* to all pending cases not involving any non-appealable final judgment. (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 822, 828-831 & fn. 8 (*Mann*); *Younger*, *supra*, 21 Cal.3d at pp. 108-110; *Wolf v. Pacific Southwest etc.* (1937) 10 Cal.2d 183, 184-185 (*Wolf*); accord, *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, 317-318 (*Napa State Hospital*); *People v. Bank of San Luis Obispo* (1910) 159 Cal. 65, 67, 78-79 (*Bank of San Luis Obispo*); *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12; *International etc. Workers v. Landowitz* (1942) 20 Cal.2d 418, 423;

6/ (...continued)
of Appeal in *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1262, correctly held that Proposition 64 applies to pending cases under the statutory repeal rule, in a decision that was not the subject of any grant-and-hold (or depublication) order from this Court.

People v. One 1953 Buick (1962) 57 Cal.2d 358, 365 (*One 1953 Buick*).)[7/]

This "statutory repeal rule" (*Mervyn's*, 39 Cal.4th at p. 232, fn. 3) applies to any "amendment" or other effective "repeal" eliminating the "statutory authority" for any plaintiff's purely statutory right of action or remedy "without a saving clause" while a case remains pending—even if the new enactment does not repeal the entire statutory scheme. (*Younger*, *supra*, 21 Cal.3d at p. 109; *Mann*, *supra*, 18 Cal.3d at pp. 822-823, 828-831; *Wolf*, *supra*, 10 Cal.2d at pp. 184-185 ["A repeal of the statute, *or an amendment thereof*, resulting in a repeal of the statutory provision under which the cause of action arose wipes out the cause of action unless the same has been merged into a final judgment" (emphasis added)].)

The rule's justification is that purely statutory rights of action and remedies "are pursued with full realization" that they may be abolished "at any time" while the case remains pending. (*Younger*, *supra*, 21 Cal.3d at p. 109, internal quotations omitted; accord, *Mann*, *supra*, 18 Cal.3d at p. 829.) Thus, parties in California may not justifiably rely on the continued availability or immutable nature of any purely statutory rights of action or remedies, because they are legally charged with notice that the statutory authority for such claims or remedies may be eliminated at any time prior to non-appealable final

---

7/ In *Younger* and *Mann*, the Court reaffirmed the controlling force of this distinct and "well settled rule" of statutory construction. (*Younger*, *supra*, 21 Cal.3d at pp. 109-110; *Mann*, *supra*, 18 Cal.3d at p. 829 [discussing and applying the "general common law rule" under which any "'cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute'"]). Following *Younger* and *Mann*, courts have repeatedly recognized that new statutory enactments rule apply under the repeal rule to pending cases "without triggering retrospectivity concerns." (*Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 690; accord *Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 489; *Physicians Com. for Responsible Medicine v. Tyson Foods, Inc.* (2004) 119 Cal.App.4th 120, 125.)

judgment. (*Ibid*.; see also Gov. Code, §§ 9605, 9606; *Bank of San Luis Obispo*, *supra*, 159 Cal. at pp. 75-76; *Callet v. Alioto* (1930) 210 Cal. 65, 67-68 (*Callet*).)

The statutory repeal rule applies only to rights of action and remedies that are purely "statutory" in nature. (*Mann*, *supra*, 18 Cal.3d at pp. 829, 830; *Younger*, *supra*, 21 Cal.3d at pp. 109-110.) It "does not apply" to a "right of action which has accrued to a person under the rules of the *common law*" or under statutes merely "codifying" a pre-existing right of action under "the *common law*." (*Callet*, *supra*, 210 Cal. at pp. 67-68, emphases added.) The basis for this distinction is that—unlike a purely statutory claim—a common law claim may constitute a "vested property right" when it accrues. (*Ibid*.) Rights to any purely statutory claims or remedies are *not* "vested" until "final judgment," including exhaustion of appeals. (*Chapman v. Farr* (1982) 132 Cal.App.3d 1021, 1025 (*Chapman*); *South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 616, 618-619; see also *Mann*, at pp. 822, 828-831; *One 1953 Buick*, *supra*, 57 Cal.2d at pp. 365-366; *Bank of San Luis Obispo*, *supra*, 159 Cal. at pp. 67, 78-80; *Napa State Hospital*, *supra*, 134 Cal. at p. 317; *Lemon v. Los Angeles T. Ry. Co*. (1940) 38 Cal.App.2d 659, 671, cited with approval in *Mann*, at pp. 830-831; cf. Gov. Code, § 9606.)

Before a non-appealable final judgment, any statutory right of action or remedy "can be abolished" by the Legislature that created them (*One 1953 Buick*, *supra*, 57 Cal.2d at p. 365), or—as here—by the voters through the initiative or referendum process (e.g., *Wolf*, *supra*, 10 Cal.2d at pp. 184-185; *Chapman*, *supra*, 132 Cal.App.3d at pp. 1023-1025). "In case of a statute conferring civil rights or powers, the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unperfected." (*Bank of San Luis Obispo*, *supra*, 159 Cal. at p. 79; accord, *One 1953 Buick*, at p. 365.)

Thus, where a particular right of action does not exist at common law but rather depends solely on statute, then any intervening repeal of the "statutory authority" (*Younger*, *supra*, 21 Cal.3d at p. 109) or "statutory basis" (*Mann*, *supra*, 18 Cal.3d at p. 829) for a plaintiff's pursuit of that statutory right of action *destroys* the right of action—unless it has been reduced to non-appealable final judgment or a saving clause protects it in pending litigation. (*Napa State Hospital*, *supra*, 134 Cal. at p. 317; *Younger*, at pp. 109-110; *Mann*, at pp. 828-832; *Wolf*, *supra*, 10 Cal.2d at pp. 184-185; *Bank of San Luis Obispo*, *supra*, 159 Cal. at pp. 67, 78-79.)

This Court has applied the statutory repeal rule even where it operated to deprive plaintiffs of statutory rights of action that were viable, indeed meritorious, under the regime in place when the cases were filed, as in *Younger*, *Mann*, and *Wolf*. The result in these cases is based on the "ordinary effect of repeal" under the statutory repeal rule. (*Younger*, *supra*, 21 Cal.3d at p. 110.) That ordinary "effect" of repeal is "to obliterate" the former statutory provision as if it "never existed, except [for those actions] . . . concluded whilst it was an existing law." (*Napa State Hospital*, *supra*, 134 Cal. at pp. 317-318, citation and quotations omitted.)

C. Proposition 64 satisfies all the elements of the statutory repeal rule.

As in *Younger* and this Court's other statutory repeal rule cases, "[e]ach element of the rule" (*Younger*, *supra*, 21 Cal.3d at pp. 109-110) is met with respect to Proposition 64—including its mandate that the only private parties with standing to prosecute UCL claims are those who have suffered injury in fact and lost money or property "as a result of" (i.e., caused by) the defendant's challenged business practices.

First, any purported "right" that plaintiffs might have had to prosecute UCL claims in the absence of injury and causation (as required by Proposition 64) *depends entirely on a statutory basis* under section 17204. Clearly, no standing to prosecute unfair competition claims existed at common law where the plaintiff could not establish injury and causation. (See *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1264 [emphasizing that "statutory" UCL claims "'cannot be equated'" with the "common law tort of unfair competition"].) Thus, any such right of action was "wholly dependent on statute" (*Younger*, *supra*, 21 Cal.3d at p. 109) and "rests solely on a statutory basis" (*Mann*, *supra*, 18 Cal.3d at p. 829).

Second, Proposition 64 repealed the "statutory authority" (*Younger*, *supra*, 21 Cal.3d at p. 109; *Mann*, *supra*, 18 Cal.3d at pp. 822, 826) for private parties to prosecute UCL claims if they were not injured by, and did not lose money or property as a result of, the defendant's challenged practices.

Third, when Proposition 64 took effect, this action remained *pending* and had not been litigated to any non-appealable final judgment. Hence, no rights under the UCL had vested in plaintiffs. (*Ante*, at pp. 18-19 [citing cases].) Any such "rights" were "inchoate, incomplete, and unperfected." (*One 1953 Buick*, *supra*, 57 Cal.2d at p. 365 ["the test to be applied in determining the effect to be given to the repeal is not whether the changes in the law are 'substantive' or 'procedural' but rather whether the rights affected are 'vested' or 'inchoate'"].)

Fourth, there is no "saving clause" in Proposition 64. (*Mann*, *supra*, 18 Cal.3d at p. 829 [any "'cause of action or remedy dependent on a statute falls with the repeal of the statute, even after the action thereon is pending, *in the absence of a saving clause in the repealing statute*,'" quoting *Callet*, *supra*, 210 Cal. at pp. 67-68 (emphasis added).) The "*only* legislative intent relevant" under the statutory repeal rule is the existence of a "saving clause" or some

other clear intention "to save" pending cases from "the ordinary effect of repeal illustrated by such cases as *Mann*." (*Younger*, *supra*, 21 Cal.3d at p. 110, emphasis added.) Here, plaintiffs can point to no saving clause in Proposition 64, nor evidence that the voters otherwise intended "to save" pending cases from "the ordinary effect" of Proposition 64's "repeal" of the statutory authority for private parties to prosecute UCL claims unless they suffered an injury in fact and lost money or property caused by the defendants' challenged practices.[8/]

Hence, Proposition 64 applies to this pending case under the statutory repeal rule. To evade this result, plaintiffs contended in the proceedings below that this Court, in decisions post-dating *Younger* and *Mann*, implicitly abandoned the rule—relying principally on *Myers v. Philip Morris Companies, Inc*. (2002) 28 Cal.4th 828, and *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188. (38 AA 9400-9410 [plaintiffs' opposition to decertification motion]; 40 AA 9897 [trial court order outlining plaintiffs' arguments].) But neither *Myers* nor *Evangelatos* involved new enactments that repealed the statutory authority for purely *statutory* rights of action. Instead, those cases involved circumstances, entirely inapposite here, in which application of new statutes to pending cases would have imposed *new and additional liabilities*

8/ Although some have previously argued that there exists a general "saving clause" in the Business & Professions Code, the frivolous nature of the argument—which no court addressing Proposition 64 has ever remotely countenanced—was thoroughly detailed to this Court in *Mervyn's* and need not be recounted here. (See, e.g., Amicus Curiae Brief of the California Chamber of Commerce et al. in *Californians For Disability Rights v. Mervyn's LLC* (filed Sept. 15, 2005), at pp. 27-34 [explaining that plaintiff's argument is based on a misreading of a Business and Professions Code section that operated only to preclude application of the *original* provisions of the code to subsisting rights and cases commenced before the code took effect in 1937, and not to save *future* suits that might be pending on the effective date of some *subsequent* repeal of a portion of the code].)

on *defendants* based on their past conduct (*Myers*, at p. 828), or interfered with plaintiffs' *vested* rights in their accrued common law claims (*Evangelatos*, at p. 1188). The statutory repeal rule was not applied simply because it was not implicated on the facts of either case. Hence, neither *Myers* nor *Evangelatos* can be read as abandoning or overruling the "long well-established line of California decisions" (*Mann, supra*, 18 Cal.3d at pp. 828-829) in which this Court has consistently applied the "well settled" statutory repeal rule (*Younger, supra*, 21 Cal.3d at p. 109).

III.

CLASS DECERTIFICATION ORDERS SHOULD NOT BE SECOND-GUESSED BASED ON UNPRECEDENTED PRESUMPTIONS OR OVERBROAD INFERENCES OF CLASS-WIDE CAUSATION.

Plaintiffs rely heavily on their claim that a class-wide presumption or inference of causation supports their challenge to the trial court's decertification order. However, for reasons we explain below, this Court should clarify that no such presumption or inference can arise in private false advertising UCL cases that, as here, involve claims based on misrepresentations that vary in content among class members, *or* that were immaterial, *or* that can have had a varied effect on class members' decision to purchase of a product or service. And no class should include (a) persons who never saw the claimed misrepresentation; (b) those who saw it but did not form a mistaken impression about the defendant's product or service because, for example, they knew better or did not give the matter any thought; or (c) those who formed a mistaken impression, but would have purchased the product or service at the offered price anyway.

A. Plaintiffs confuse the two distinct legal concepts of presumptions and inferences, which operate very differently.

Assuming that, as discussed in the previous sections of this brief, all class members are now required to meet a traditional causation test to demonstrate their standing to prosecute private plaintiff UCL claims, this Court must decide whether the trial court properly found individual issues will likely predominate in determining whether plaintiffs have standing. Plaintiffs contend that standing can be determined on a common, class-wide basis using either a presumption or an inference of causation. (OBOM 59-70; RBOM 19.) That argument suggests the need for a short discussion of the differences (which plaintiffs seem to overlook or confuse) between presumptions and inferences under California law.

The Evidence Code defines presumptions and inferences separately. Evidence Code section 600, subdivision (a), provides, "A *presumption* is an assumption of fact that the law *requires* to be made from another fact or group of facts found or otherwise established in the action." (Emphasis added.)[9/] In contrast, Evidence Code section 600, subdivision (b), provides that "an *inference* is a deduction of fact that *may* logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Emphasis added.)

9/ Many cases addressing presumptions of class-wide causation are decided by the federal courts. Like California's Evidence Code, Federal Rule of Evidence 301 provides: "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." The Advisory Committee Notes to Federal Rule 301 explain that a presumption places "upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it."

Subdivisions (a) and (b) of section 600 were enacted at the same time (see Stats. 1965, ch. 299, § 2 [operative Jan. 1, 1967]), and they demonstrate that the Legislature believed presumptions and inferences should be separately analyzed. "'[W]hen *different* words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is compelling that a difference in meaning was intended.'" (*Estate of Joseph* (1998) 17 Cal.4th 203, 220, original emphasis.) And, indeed, on a number of occasions this Court has noted the sharp distinction between presumptions and inferences. (See, e.g., *People v. Bland* (1995) 10 Cal.4th 991, 1003, fn. 5 ["The concurring opinion fails to grasp the difference between an inference and a rebuttable presumption"]; *Anderson v. I. M. Jameson Corp*. (1936) 7 Cal.2d 60, 66 ["The two terms [presumption and inference] are far from synonymous" and, by statute, have "distinctive definitions"].)

In *People v. McCall* (2004) 32 Cal.4th 175, 182-183 (*McCall*), this Court clarified that inferences and "permissive presumptions" should be distinguished from the type of mandatory presumption defined in Evidence Code section 600, subdivision (a). That is, what some courts refer to as a presumption is really permissive in the same sense that an inference is permissive: it "'allows—but does not require—the trier of fact to *infer* the elemental fact from proof by the prosecutor of the basic [fact] and which places no burden of any kind on the defendant'" to rebut the so-called presumption. (*McCall*, p. 182, emphasis added.) On the other hand, "Evidence Code section 600, subdivision (a) defines a *mandatory* presumption, which 'tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.'" (*Ibid*., emphasis added.)

B. This Court should not endorse an unwarranted *presumption* of class-wide causation.

While plaintiffs' opening brief on the merits (like some court opinions) blurs the distinction between inferences, permissive presumptions and mandatory presumptions, their argument that the trial court here was *required* to engage in a presumption of causation supporting class certification suggests they believe a *mandatory* presumption is warranted in this case. On the contrary, however, such presumptions are appropriate only where "the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence." (Recommendation Proposing an Evidence Code (Jan. 1965) 17 Cal.Law Revision Com. Rep. (1965) p. 97; accord, *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 635.)

One example of an established use of a mandatory presumption helps to illustrate by contrast that no such presumption can arise in cases like the one before this Court. Specifically, *in federal securities fraud actions,* the United States Supreme Court has explained that a plaintiff may in some special cases—ones that are very different from the false advertising claims at issue here—invoke a mandatory (albeit rebuttable) presumption that a company's withholding of material information effects a fraud on the entire market of investors. (See *Affiliated Ute Citizens of Utah v. United States* (1972) 406 U.S. 128, 153-154 [92 S.Ct. 1456, 31 L.Ed.2d 741].) The Court reasoned that such conduct uniformly drives up the prices paid for the securities, as reasonable investors rely on market information to the extent that the market for the relevant security is an efficient one. (See *id.* at p. 153; compare *Basic Inc. v. Levinson* (1988) 485 U.S. 224, 241-242, 245-247 [108 S.Ct. 978, 99 L.Ed.2d 194][where claims turned on alleged omissions of material market

information, "fraud on the market" theory supported a presumption of class-wide reliance in a securities fraud action]; with *In re Initial Public Offering Securities Litigation* (2d Cir. 2006) 471 F.3d 24, 42-43 [reversing class certification order where plaintiffs failed to prove market efficiency to justify a presumption of reliance and, "without the *Basic* presumption, individual questions of reliance would predominate over common questions"].)

Outside the federal securities fraud context, however, this Court has rejected the use of a mandatory presumption of reliance in fraud and misrepresentation cases. In *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1087-1088 (*Mirkin*), plaintiff investors filed a putative class action alleging, among other claims, causes of action for deceit and negligent misrepresentation in the sale of securities. Plaintiffs asserted in conclusory fashion that they purchased the relevant securities "'in reliance upon said misrepresentations.'" (*Id.* at p. 1088.) While plaintiffs conceded they could not plead that they had actually read or heard the claimed misrepresentations, they alleged that they had relied upon the integrity of the securities market in purchasing the securities. (*Ibid*.) The trial court found this allegation of reliance was deficient and sustained defendants' demurrers without leave to amend. (*Ibid*.)

On appeal, the plaintiffs in *Mirkin* argued that the "fraud-on-the-market" theory obviated the need to plead and prove actual reliance where material misrepresentations are alleged to have affected the market price of the stock. (*Mirkin*, *supra*, 5 Cal.4th at p. 1088.) This Court disagreed, explaining that a private right of action under SEC rule 10b-5, which may afford plaintiffs a presumption of reliance where the plaintiff demonstrates an efficient market is in place, is different from an action for deceit based on a misrepresentation, which requires a showing of actual reliance. (See *id.* at p. 1101, fn. 7.) This Court thus refused "to adopt the

[Affiliated] Ute presumption as California law." (*Id.* at pp. 1090, 1092-1093, 1103.) This Court specifically rejected the plaintiffs' argument that the law should be reshaped to remove a pleading barrier to class certification. (*Id.* at pp. 1100-1108.) The Court explained that "[a]ctual reliance is more than a pleading requirement; it is an element of the tort of deceit.[10/] As we have previously observed, '[c]lass actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going.'" (*Id.* at p. 1103, quoting *City of San Jose v. Superior Court, supra,* 12 Cal.3d at p. 462.)11/

10/ Similarly, as set forth in the answer brief on the merits and as further discussed in the first section of this brief, actual causation is now a requisite to private party UCL standing under Proposition 64.

11/ Other courts have similarly declined to adopt a variant of the fraud-on-the-market presumption of causation in a variety of contexts where, as here, the specific assumptions underlying the theory available in some securities cases—the existence of an efficient market, reasonable investor reliance on market data, and a defendant's withholding of material market information—do not exist. (E.g., *Gunnells v. Healthplan Services, Inc.* (4th Cir. 2003) 348 F.3d 417, 434-436; *Sikes v. Teleline, Inc.* (11th Cir. 2002) 281 F.3d 1350, 1363 ["The securities market presents a wholly different context than a consumer fraud case, and neither this circuit nor the Supreme Court has extended a presumption of reliance outside the context of securities cases"]; *Buford v. H & R Block, Inc.* (S.D.Ga. 1996) 168 F.R.D. 340, 359 fn. 8 ["the *Affiliated Ute* presumption of reliance does not reach beyond § 10(b)(5) actions"]; *Dunnigan v. Metropolitan Life Ins. Co.* (S.D.N.Y. 2003) 214 F.R.D. 125, 140 & fn. 12 [distinguishing securities litigation, court rejected presumption in an ERISA case where defenses raised a "myriad of individual determinations"]; *Lichoff v. CSX Transp. Inc.* (N.D.Ohio Oct. 6, 2004, No. 3:01 CIV 7388) 2004 WL 2280354, at p. *5 [nonpub. opn.] ["[*Basic's*] presumption does not arise outside the specific circumstances of the securities industry"]; *Gerrity v. R.J. Reynolds Tobacco Co.* (D.Conn. 2005) 399 F.Supp.2d 87, 93 [the *Basic* presumption of reliance is "incompatible with proof of individual reliance, which plaintiff acknowledges is his burden in this (continued...)

After Proposition 64, private plaintiffs in UCL cases must prove standing by demonstrating an injury caused by defendant's alleged violation. And there is no justification for a mandatory class-wide presumption of causation under the Proposition 64 standing requirement, any more than there is in common law deceit cases. In keeping with *Mirkin* and the weight of authority from other jurisdictions, this Court should not accept plaintiffs' invitation here to create a new mandatory presumption of causation in the UCL context that would undermine Proposition 64 by effectively shifting the burden to defendants to disprove plaintiffs' standing. Such an approach would provide plaintiffs with an improper shortcut to prosecuting a private action for alleged unfair business practices. (See, e.g., *Jones v. Ortho Pharmaceutical Corp*. (1985) 163 Cal.App.3d 396, 406 ["There is a limit to the number of presumptions in which the court will indulge solely for the purpose of assisting plaintiff in proving a case"; finding that, on facts of the case, "presumption of causation would be tantamount to a presumption of the instrumentality which caused the injury. Such a quantum leap is justified by neither logic, legal precedent nor public policy"]; accord, *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc*. (2003) 107 Cal.App.4th 1336, 1346-1347 [rejecting plaintiffs' attempt to shift burden to defendants in UCL cases for public policy reasons].)

11/ (...continued)
products liability case"]; and see *Dabush v. Mercedes Benz USA, LLC* (N.J.Super.Ct.App.Div. 2005) 874 A.2d 1110, 1121 [rejecting "fraud on the market" presumption under state consumer protection statutes]; accord *Frelin v. Oakwood Homes Corp.* (Ark.Cir.Ct. Nov. 25, 2002, No. CIV 2001-53-3) 2002 WL 31863487, at p. *10, fn. 45 [nonpub. opn.]; *Ex Parte Exxon Corp.* (Ala. 1998) 725 So.2d 930, 933, fn. 3.)

C. No class-wide *inference* of causation applies where plaintiffs' UCL claims are based on alleged misrepresentations inducing a product purchase, but the circumstances surrounding each plaintiff's purchase varied in significant ways.

1. This Court should decline to expand the scope of class-wide inferences articulated in *Vasquez* and *Occidental Land*, and should reaffirm the *Mirkin* decision's limits on those inferences.

Plaintiffs also invoke an *inference* of causation as a basis for reversing the trial court's class decertification order. (OBOM 59-70; RBOM 19.) The authorities on which they rely provide no support for such an inference under the facts of this case, and the pivotal authority that they fail to cite—this Court's decision in *Mirkin*—defeats their argument.

First, plaintiffs rely heavily on *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 820-821 (*Vasquez*), a consumer fraud case involving the purchase of freezers and meat. This Court reversed an order sustaining a demurrer to class allegations because it was *possible* the plaintiffs could demonstrate a factual foundation for a class-wide inference of reliance at the class certification stage. The plaintiffs had alleged that the defendant made the exact same, word-for-word, misleading sales pitch to each member of the class. (*Id.* at pp. 811-812 [complaint alleged the same misrepresentation was "recited by rote to every member of the class"].) Under these unique circumstances, this Court held it was inappropriate to sustain the defendant's demurrer on the ground that consumer fraud actions are *categorically* inappropriate for class treatment, regardless of "the sufficiency of the

particular allegations to assert a class action." (*Id.* at p. 806.)

Given the procedural posture in *Vasquez*,[12/] this Court held that it must accept the allegations from which, if true, the falsity of defendants' alleged statements "*could* be shown on a common basis" and "*assume[d]"* that the representations "were in fact made to each plaintiff." (*Vasquez, supra,* 4 Cal.3d at p. 812, emphasis added.) Defendants' contention that individual issues would need to be litigated was "unpersuasive *at the pleading stage of the proceedings*" because plaintiffs must be given an opportunity, presumably at the class certification stage, to show "that they can prove their allegations *on a common basis.*" (*Id.* at p. 813, emphasis added.) "For the purpose of determining if the demurrers should have been overruled," this Court held plaintiff need only show a "reasonable possibility" that common issues would predominate, whereas a further examination of their ability to do so could be determined "at a later stage of the proceeding." (*Ibid.*)

In other words, this Court left intact the trial court's discretion at the class certification stage to conclude that no inference of class-wide injury caused by the defendant's conduct would be proper upon a more fully developed factual record. (See *Vasquez*, *supra*, 4 Cal.3d at p. 815 ["It may be,

---

12/ As previously noted, the appeal in *Vasquez* arose at the demurrer stage of the case, and a dismissal of class claims on demurrer is subject to exceptionally close scrutiny. (E.g., *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1234 [demurrer to class actions will be sustained only "where it is clear that there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact"].) In contrast, the burden on a plaintiff moving for class certification is to establish "as a matter of fact" by admissible and substantial evidence that class action requirements are satisfied, not just that there is a "reasonable possibility" of meeting the requirements. (See *Hamwi v. Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 471-472; *Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 245; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106.)

of course, that the trial court will determine *in subsequent proceedings* that some of the matters bearing on the right to recovery require separate proof by each class member" (emphasis added)].) *Vasquez's* approval of a limited *potential* inference on the facts of that case should be read, therefore, in the procedural context in which the discussion appears.

Five years after *Vasquez*, this Court decided *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, in which defendants challenged a trial court's refusal to decertify a class of home purchasers suing a housing developer. Relying principally on *Vasquez* in a relatively brief discussion, this Court held that where each class member was required to sign a report containing the defendant's alleged misrepresentation, the court could not reject as a matter of law an inference that each class member had received the misrepresentation. (*Id*. at pp. 362-363.) Moreover, where it appeared the only individualized factor that might affect the purchase independent of the report was each plaintiff's financial condition, the trial court could find an inference of reliance from purchases that were consistent with reliance on the report. (*Id.* at p. 363 & fn. 6.) However, this Court distinguished plaintiffs' claims based on the report from plaintiffs' other claims based on oral representations that may have been made in different ways to some or all of the plaintiffs. (*Id.* at p. 361.) This Court further distinguished the facts before it from those giving rise to the earlier decision denying class status in *City of San Jose v. Superior Court, supra,* 12 Cal.3d 447, where the questions of liability and damages presented "complex" issues involving plaintiffs with "varied" interests and circumstances. (*Id.* at p. 363.)

Confronted with efforts to expand *Vasquez* and *Occidental Land* beyond the peculiar facts of those cases, this Court in *Mirkin* clarified 17 years later that, while "actual reliance *can* be proved on a class-wide basis *when each class member has read or heard the same misrepresentation*, nothing in

either [*Vasquez* or *Occidental Land*] so much as hints that a plaintiff may plead a cause of action for deceit without alleging actual reliance," and reliance cannot be inferred unless plaintiffs can affirmatively demonstrate that they "read or heard the alleged misrepresentations." (*Mirkin*, *supra*, 5 Cal.4th at pp. 1094-1096, emphasis added.) Thus, in *Mirkin*, this Court held that demurrers to plaintiffs' class claims in the case before it were properly sustained.

In sum, *Vasquez* and *Occidental Land* are unique to their factual settings and do not support the creation of a generalized inference of causation in consumer deceit cases. Such an inference would be improper absent allegations that the plaintiffs all engaged in a uniform type of transaction with the defendant, based on uniform representations, and devoid of factors such as individualized motivations, knowledge, access to additional information, and differences in the factual backdrop against which the plaintiffs made their purchase decisions. [13/]

13/ Plaintiffs also rely on *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, a case pre-dating Proposition 64's imposition of a causation requirement for standing. (OBOM 65, 70-71.) Discussing whether the non-class representative action was appropriate, *Prata* emphasized that plaintiffs' claims there required no showing of causation (*Prata*, at p.1145), so the case has no bearing on the question whether and when an inference properly arises with regard to the new causation standard. Plaintiffs further rely on *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282 (see OBOM 62-65), in which the trial court found an inference of causation could support plaintiffs' CLRA claims based on an allegedly common non-disclosure to purchasers of insurance policies. (*Massachusetts Mutual*, at pp. 1294-1295.) Focusing on defendant's failure to demonstrate it had provided corrective information to class members, the court of appeal said, "there is no evidence any significant part of the class had access to all the information plaintiffs believe they needed before purchasing" defendant's policies. (*Id.* at p. 1295.) The court did not address any other issues that might defeat a showing of reliance, such as individual class members' personal financial interests in the type of policy offered, their knowledge (continued...)

2. No class-wide inference of causation is appropriate where some class members' conduct can logically be explained by factors other than the defendant's alleged misconduct.

Notwithstanding the *Mirkin* decision, plaintiffs here argue that reliance sufficient to prove causation under Proposition 64 can (and even must) be inferred because, they say, their conduct in purchasing defendants' products is "consistent with" plaintiffs' allegations of deceit. (OBOM 68.) But this Court should make clear that, to invoke a class-wide inference of causation, it is not enough for plaintiff to show mere "consistency"—plaintiffs must also show that any alternative reasons for plaintiffs' behavior are illogical or unreasonable.[14/]

In the present case there appear to be multiple personal reasons independent of any allegedly deceptive marketing that explain why individuals purchase cigarettes, or purchase one manufacturer's cigarettes rather than another's. (See ABOM 34-42.) Even now, when the hazards of smoking are well-documented and advertised, many people who know of the health hazards

---

13/ (...continued)
about such policies from other sources, and so forth. The *Massachusetts Mutual* opinion therefore should not be read to endorse certification despite the existence of such myriad individual issues.

14/ One obvious example of a plaintiff who could not demonstrate standing to claim injury caused by a UCL violation is a person who purchases a product in order to join or start a class action. (See *Cattie v. Wal-Mart Stores, Inc.* (S.D.Cal. Mar. 21, 2007) 2007 WL 935582, at *7 ["An attorney who became aware of false advertising but who had no client who was harmed by it could easily "create" a client with standing to sue by directing a willing party who was not deceived by the advertising to make a purchase. Thus, omitting a 'reliance' requirement would blunt Proposition 64's intended reforms"].)

choose to begin smoking, so it cannot logically be said that failure to disclose truths about health risks necessarily underlies every purchase. Similarly, many people choose to drive too fast, eat unhealthy foods, and otherwise gamble with their own welfare, all while cognizant of the risks involved. By the same token, others choose to pay higher prices when equivalent goods can be purchased for less (e.g., buying brand name products when generic equivalents are immediately adjacent on the store shelf, or frequenting neighborhood shops despite lower prices at nearby "box stores").

Because purchasing behavior is driven by complex motivations and disparate circumstances, it is only in the simplest, most uniform case of obvious direct cause-and-effect that an inference of class-wide causation may properly arise. Thus, for example, in *Osborne v. Subaru of America, Inc*. (1988) 198 Cal.App.3d 646, 661, the court affirmed denial of class certification where plaintiffs alleged reliance on an allegedly misleading advertising campaign, but plaintiffs provided no basis upon which to draw an inference of class wide reliance. Observing, among other things, that there was no showing that representations were made uniformly to all members of the class, the court found *Vasquez* and *Occidental* were inapplicable. (*Ibid.*)[15/]

15/ See also, e.g., *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 755-756 ("In CLRA actions alleging fraud on behalf of a class of consumers, causation can sometimes be inferred by the materiality of the misrepresentation. [¶] . . . But the individual issues here go beyond mere calculation; they involve each class member's entitlement to damages. Each class member would be required to litigate 'substantial and numerous factually unique questions to determine his or her individual right to recover,' thus making a class action inappropriate"); *Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 990 (where plaintiffs sought class certification in a fraud case alleging that a medical center misrepresented its level of coronary care to its patients, court distinguished *Vasquez*, refusing to presume reliance on a class-wide basis because the decision to obtain surgery involves complex personal decision-making, and one could not presume that

(continued...)

This principle is further reflected in numerous federal cases recognizing that a class-wide presumption of reliance is improper where there is complexity or variation in how an individual might respond to a particular representation. (See, e.g., Fed. Rules Civ. Proc., rule 23(b)(3), 28 U.S.C.A, 1966 Advisory Committee Notes [consumer fraud claims may be unsuited for class actions where there is "material variation . . . in the kinds or degrees of reliance by the persons to whom [the representations] were addressed"].)

Thus, for example, class certification was inappropriate in *Poulos v. Caesars World, Inc.* (9th Cir. 2004) 379 F.3d 654, 667, where plaintiffs in a RICO action alleged affirmative misrepresentations as well as omissions concerning the defendants' operation of video poker machines. In examining whether class-wide circumstantial evidence of reliance would be sufficient to permit certification, the Ninth Circuit concluded that there was no "common sense" or "logical explanation" necessarily linking the gambling patrons to their use of the machines, so a class-wide inference would not suffice to prove causation. (*Id*. at pp. 658, 664-668.) The court noted that "there may be no single, logical explanation for gambling—it may be an addiction, a form of escape, a casual endeavor, a hobby, a risk-taking money venture, or scores of other things." (*Id*. at p. 668) The court further noted that plaintiffs could not be expected to "share a common universe of knowledge and expectations—one motivation does not fit all," and "individualized reliance, . . . knowledge, motivations, and expectations bear heavily on the causation analysis." (*Id.* at p. 665.)

15/ (...continued)
all patients made decisions based on the same factors); *Shell v. Schmidt* (1954) 126 Cal.App.2d 279, 289 (in class action against housing developer for alleged misrepresentations, inference of reliance was not justified where some purchasers did not see representations, and others had access to information that contradicted representations).

Similarly, in *Oshana v. Coca-Cola Co.* (7th Cir. 2006) 472 F.3d 506, 514, the court affirmed denial of class certification where some class members might not have been deceived by Coca-Cola's alleged failure to disclose that its Diet Coke fountain soda contained saccharine, and others would have purchased the product even if they had known the truth. In *Clark v. Experian Information, Inc*. (N.D. Ill. 2005) 233 F.R.D. 508, 512, the court denied class certification where "[t]he nature of the plaintiffs' claims require an individualized person-by-person evaluation of what the potential class members viewed on the defendants' website, the potential class member's understanding of and reliance on this information, and what damages, if any, resulted." In *Freedman v. Arista Records, Inc.* (E.D.Pa. 1991) 137 F.R.D. 225, 229, the court denied class certification where purchasers of an album by musical group Milli Vanilli sued a record company for misrepresenting that group members sang the songs on the album when, in fact, they "lip-synched" the songs. The court reasoned that the "question of reliance is highly individualized" and "[w]hat causes a person to respond positively to a performance is a complex matter." (*Ibid.*) And in *Rosenstein v. CPC Intern., Inc.* (E.D.Pa. Jan. 8, 1991, No. Civ. A. 90-4970) 1991 WL 1783, at p. *6 [nonpub. opn.], the court found common issues would not predominate in the trial of a class action against the makers of a cooking oil whose ads allegedly misrepresented the product's ability to lower cholesterol levels. The factual issues were "complex and highly individualized," raising questions such as whether each class member believed the ads, would have purchased the oil independent of the ads, and would have purchased it for reasons unrelated to the cholesterol lowering claims. (*Id.* at p. *3.)[16/]

16/ See also *LaBauve v. Olin Corp.* (S.D.Ala. 2005) 231 F.R.D. 632, 674, fn. 89 (where class of property owners sued operator of a "Superfund" plant alleging misrepresentations regarding mercury contamination, reliance (continued...)

Many of the cases discussed above arise in the context of common law fraud actions and other cases in which reliance or similar causation elements are required to prove liability, but the same principles apply here, where a requisite to recovery—specifically, plaintiffs' standing under Proposition 64's causation requirement—is not subject to any legitimate inference applicable to the claims of all class members. Thus, in the present case the trial court not only acted well within its discretion in rejecting any inference of causation, but

---

16/ (...continued)
requirement for fraud claims did not necessarily defeat class certification, but "even where a common core of facts exists, 'a fraud case may be unsuited for treatment as a class action if there was a material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed"); *Clopton v. Budget Rent A Car Corp.* (N.D.Ala. 2000) 197 F.R.D. 502, 509 (reliance requirement for RICO and fraud claims often precludes class-wide resolution); *In re Ford Motor Co. Bronco II Product Liab. Lit.* (E.D.La. 1997) 177 F.R.D. 360, 374 (refusing to infer class-wide reliance for the plaintiffs' fraud claim in light of "discovery responses of numerous named plaintiffs that reveal variations in the information received by the plaintiffs (if received at all), as well as variations in the extent to which they relied on that information in purchasing their vehicle"); *Pipes v. American Sec. Ins. Co.* (N.D.Ala. 1996) 169 F.R.D. 382, 384, fn. 2 (individual issues pertaining to fraud claims almost always preclude class treatment); *Buford v. H & R Block, Inc.*, *supra*, 168 F.R.D. at pp. 359-361 (following *Freedman* and denying class certification in part because each class member's "subjective understanding" of alleged misrepresentation would have to be analyzed); *Martin v. Dahlberg, Inc.* (N.D.Cal. 1994) 156 F.R.D. 207, 217 (where class of consumers sued hearing aid manufacturers and retailers for alleged misrepresentations about efficacy, court distinguished *Vasquez* and *Occidental* and relied instead on *Osborne* because plaintiffs in those cases "specifically pled that the defendants had made *identical representations to each class member*. Accordingly, these decisions do not support an argument for presuming reliance where some guidelines for salespersons may have existed, but where actual representations varied" (emphasis added)); *Carpenter v. BMW of North America, Inc.* (E.D.Pa. June 21, 1999, No. Civ. A. 99-CV-214) 1999 WL 415390, at p. *3, fn. 5 [nonpub. opn.] ("In this case . . . it would be illogical to presume reliance where the effect, if any, of various marketing materials on each class members' purchase will have to be analyzed").

it would have been legal error if the trial court *had* relied on a class-wide inference of causation in order to certify a class.

D. Even if plaintiffs' evidence would support some sort of inference of causation, the trial court could and did reasonably find that individual issues will nonetheless predominate in any trial of plaintiffs' UCL claims.

1. Numerous individual issues can arise as a result of defendants' *due process* right to conduct discovery, to present evidence to rebut the facts underlying any inference of causation, and to present evidence contradicting the inference itself.

Plaintiffs' argument regarding the availability of a presumption or inference of causation, even if correct, would not require class certification in cases such as this one. That conclusion follows directly from a principle stressed by this Court in the *Vasquez* opinion, on which plaintiffs place such great reliance: the "mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest *so long as every member of the alleged class would not be required to litigate numerous and substantial questions to determine his individual right to recover* subsequent to the rendering of any class judgment which determined in plaintiffs' favor whatever questions were common to the class." (*Vasquez, supra,* 4 Cal.3d at p. 809.)[17/]

17/ See also *Vasquez, supra,* 4 Cal.3d at p. 811 (class treatment may be proper "so long as" numerous and substantial individual questions need not be litigated); *id.* at p. 820 (trial court acted improperly in sustaining demurrers (continued...)

These comments from *Vasquez* reflect the fact that, even if a prima facie foundation for a class-wide inference of causation can be presented, defendants in putative UCL class actions like this one must have the right to discover and present direct evidence to the trial court challenging plaintiffs' claim that all their product purchases were caused directly by the defendants' alleged misrepresentations, and that plaintiffs lost money or property as a result, as is required under Proposition 64.[18/] The trial court at the certification stage properly could find that individualized questions would predominate should plaintiffs' claims go to trial as a class action.[19/]

17/ (...continued)
to the class claims because, while "plaintiffs *may* be able to demonstrate a community of interest as to the elements of their claims of fraud, plaintiffs must nevertheless demonstrate that the questions which they will be required to litigate separately are not numerous or substantial and that the action meets the other requirements for a class action . . .").

18/ A defendant has the right to rebut inferences and presumptions (both mandatory and permissive). (See *McCall*, *supra*, 32 Cal.4th at p. 183 ["whether the fact finder *may* find the elemental fact upon proof of the basic fact (a permissive presumption) or *must* find the elemental fact upon proof of the basic fact (a mandatory presumption), the defendant has the opportunity to rebut the presumed connection between the basic and ultimate facts," (emphasis added)]; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 667, fn. 20 ["Defendants could . . . properly introduce evidence to rebut any inference or presumption of reliance arising from [the putative class representative's] evidence of a material misrepresentation"].)

19/ Numerous California cases recognize that the existence of a common issue, provable by inference or otherwise, often does not translate into certification of a class where the defense will require an examination of individual issues. (E.g., *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913 (in claims regarding mineral rights, "the defendants would undoubtedly raise the defense of abandonment of the mineral interests as to each alleged member of the class, which . . . creates a factual issue as to the individual owner's intent"); *Walsh v. Ikon Office Solutions, Inc* (Mar. 1, 2007, A113172) ___ Cal.App.4th ___ [2007 WL 615714, at p. *6] ["In examining whether (continued...)

Defendants' right to litigate individual issues in response to any claimed common inference of causation for Proposition 64 standing purposes has a constitutional due process component. This Court should not sanction plaintiffs' simplistic attempt to meld disparate class members' claims into one as a means of satisfying the burden of proof imposed on each class member to establish standing before recovery is allowed. Such an approach would run afoul of this Court's admonition that "it is inappropriate to deprive defendants

---

19/ (...continued)
common issues of law or fact predominate, the court must consider the plaintiff's legal theory of liability. [Citation.] The *affirmative defenses* of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues"]; *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 544 [as to right of publicity of class of baseball players, "*affirmative defenses* of consent, waiver, or estoppel" would not be common for all members. "The fact that the trial court would be obligated to evaluate each of these defenses for each member of the class [ ] weighed heavily against certification" (emphasis added)]; *Kennedy v. Baxter Healthcare Corp*. (1996) 43 Cal.App.4th 799, 811 [as to class of users of latex gloves, "*[d]efenses* will require individual litigation of claims. Health care workers may have been using latex gloves for a period of time exceeding the statute of limitations, thus requiring an examination of the viability of each plaintiff's claim. Questions will arise concerning assumption of the risk and comparative negligence" (emphasis added)]; *National Solar Equipment Owners Assn. v. Grumman Corp*. (1991) 235 Cal.App.3d 1273, 1284 [reliance *may* be inferred in appropriate cases, but defendant is entitled to reasonable discovery to rebut claim that alleged misconduct "amounted to a 'canned sales pitch' which is sufficiently common to warrant class treatment, as well as to explore the reliance issue and the effect of any alleged omissions" of information conveyed to class members]; *Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 695 ["Even if the common question of law were decided in appellants' favor, the independent factual issues which would have to be separately litigated in this case would be so numerous that the maintenance of the alleged class action could not possibly serve the judicial process or the parties involved. Following are some examples. . . . [W]hat *affirmative defenses* does the state have against each individual claimant?" (emphasis added)].)

of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen." (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749; see also *City of San Jose v. Superior Court, supra*, 12 Cal.3d at p. 462; *Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 461 [class action is merely a "procedural device for collectively litigating substantive claims"]; see also Answer Brief on the Merits, 49, fn. 17 and 52 [noting due process problems with plaintiffs' argument]; Amicus Curiae brief of Pfizer, Inc., 32-33 [same].)

Stated differently, courts must not create rules that enhance a plaintiff's ability to prove his case at the expense of a defendant's ability to defend against it. Indeed, the United States Supreme Court has explained that due process requires a civil defendant to be given "an opportunity to present every available defense." (*Lindsey v. Normet* (1972) 405 U.S. 56, 66 [92 S.Ct. 862, 31 L.Ed.2d 36].)[20/]

2. The trial court was justified in finding individual

20/ See also *duPont v. Southern Nat. Bank of Houston, Tex.* (5th Cir. 1985) 771 F.2d 874, 880 [recognizing that civil litigants have a "due process right to fully and fairly litigate each issue in their case"]; *Sandwich Chef of Texas v. Reliance Nat. Indem.* (5th Cir. 2003) 319 F.3d 205, 220-221 [class certification based on plaintiffs' potential use of circumstantial evidence to prove their case inferentially using expert testimony about customary business practices and proof that allegedly fraudulent invoices contained material misrepresentations was reversed: trial court "did not adequately account for individual issues of reliance that will be components of *defendants' defense*," including evidence that some class members had knowledge of the alleged misrepresentation (emphasis added)]; *In re Masonite Hardboard Siding Products Liab. Lit.* (E.D.La. 1997) 170 F.R.D. 417, 425 ["Masonite cannot receive a fair trial without a process which permits a thorough and discrete presentation of these defenses"]; cf. *Arch v. American Tobacco Co., Inc.* (E.D.Pa. 1997) 175 F.R.D. 469, 489, fn. 21 ["[plaintiffs'] use of [evidence] to establish the elements of causation and injury–without cross-examination or rebuttal evidence–would violate defendants' due process rights"].)

issues will predominate here.

As defendants here have explained (ABOM 34-42), the disputed facts as recounted by the trial and appellate courts in this case do not lend themselves to resolution on a class-wide basis. Simply stated, it is one thing to say circumstantial evidence may be relevant and admissible in some cases to create a rebuttable inference of causation, and quite another to say that such evidence so thoroughly disposes of individual issues that a trial court has no discretion but to find that common issues will predominate over individual questions, including those bearing on private plaintiffs' standing to pursue a UCL action.

Because the facts support the trial court's finding that causation under Proposition 64 will involve an individualized inquiry here, the trial court properly decertified the class.

A contrary rule, requiring certification whenever a central issue *might* be resolved on a class-wide basis *if* the trier of fact ultimately believes an inference is appropriately supported and not rebutted, would place trial courts and litigants in an untenable situation. If a case proceeds all the way through discovery, pretrial litigation and trial, at the end of which the trier of fact (the trial judge, in a UCL case)[21/] decides in light of all the rebuttal evidence not to draw the permissive class-wide inference on which the plaintiffs relied, what then happens to the case? Can and should it be decertified after the trial is completed? And if so, is the case reopened for a new trial to litigate all the individual issues, in contravention of the rules requiring that a class action must not devolve into such an unwieldy proceeding? Or is it dismissed on the

---

21/ See *Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 284-285 (because the gist of a UCL cause of action as well as the relief sought thereunder is equitable, a party is not entitled to a jury trial on a UCL claim).

merits, without any opportunity for the individual claimants to present their cases? Any of these results is problematic—which is why trial courts must retain the discretion at the outset of a putative false advertising UCL class action to conclude that a proposed class-wide inference of causation in lieu of plaintiff-specific evidence to satisfy the threshold inquiry of standing is too weak to justify certifying the case for class treatment.

CONCLUSION

For the foregoing reasons, this Court should (a) adopt defendants' interpretation of Proposition 64 as imposing a causation requirement for all plaintiffs' private party standing to pursue UCL claims, and (b) reject plaintiffs' attempt to invoke class-wide presumptions or inferences to fulfill their burden of proving that common issues will predominate in establishing their standing in this case.