No. S147345

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE TOBACCO II CASES, JCCP 4042

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

Plaintiffs-Appellants,

vs.

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

Defendants-Respondents.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One (No. D046456)

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

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INTRODUCTION

Respondents respectfully petition for rehearing of the decision issued in this case on May 18, 2009 (Typed opn.). Rehearing is warranted because the Court's opinion fails to address the overwhelming federal authority holding that Federal Rule of Civil Procedure 23 requires that the absent class members must share the same standing as the class representatives. Instead, the Court's opinion relies heavily on an aberrant district court decision that was subsequently *vacated* by the U.S. Court of Appeal for the Fifth Circuit, which squarely held that "a class representative must 'possess the same interest and suffer the same injury' as the class members." (*Vuyanich v. Republic National Bank of Dallas* (5th Cir. 1984) 723 F.2d 1195, 1199 [vacating class certification on review from final judgment].) Rehearing should be granted for the additional reason that the Court's decision conflicts with long-settled law by allowing the purely procedural device of a class action to transform the *individual* UCL claims it aggregates—each of which, brought individually, would unquestionably require a showing of standing under Proposition 64.

REHEARING SHOULD BE GRANTED

I. The Court's Opinion Disregards the Overwhelming Federal Authorities Cited by Respondents and Instead Relies on an Aberrant District Court Decision That Was Later Vacated

Respondents are aware of no authority for the proposition that a class action may include, as absent class members, an individual who concededly lacks statutory standing to bring a suit in his or her own right. The Court's unprecedented endorsement of that proposition in this case was based on a mistaken analysis of federal authorities on class actions, and rehearing should be granted to reconsider this decision.

The Court's opinion properly observes that the California courts look to federal law "when seeking guidance on issues of class action procedure." (Typed opn., p. 19.) The opinion then cites several authorities which state that, under federal law, the question of whether there is Article III standing to maintain a suit "is assessed solely with respect to class representatives, not unnamed members of the class." (*Id.*, p. 20.) But as Respondents explained in their Answering Brief on the Merits (at pages 18-19), such authorities merely establish that if the class representative can demonstrate Article III standing to sue, *an action may be maintained* in the federal courts—because federal jurisdiction over the case exists under the U.S. Constitution—and "there remains no further separate class standing requirement *in the constitutional sense*." (1 Newberg on Class Actions (4th ed. 2002) § 2:5, p. 75, emphasis altered.)

That does *not* mean that the standing requirements that apply to the named plaintiff (or that would apply to any individual plaintiff suing in his or her own right) do not ultimately demarcate the claims that may be asserted on behalf of absent class members. On the contrary, the very treatises that the Court cites go on to explain that, by operation of the general class action requirements of Federal Rule of Civil Procedure 23, "the class representative *must share standing with class members*." (1 Newberg on Class Actions, *supra*, § 2:7, p. 97, italics added; *ibid.* ["'*The class should consist only of those who stand in the same position as plaintiff*,'" citation omitted; italics added]; see generally 7AA Wright, Miller & Kane, Federal Practice and Procedure (3d ed. 2005) § 1785.1, p. 390 ["[T]o avoid a dismissal based on a lack of standing, the court must be able to find that *both the class and the representatives have suffered some injury* requiring court intervention."].)

In reaching a contrary conclusion about federal class action principles, the Court's opinion places dispositive reliance on a federal district court case that was not cited by any party and that ***was ultimately vacated by the Fifth Circuit.*** (Typed opn., pp. 20-21, citing *Vuyanich v. Republic National Bank of Dallas* (N.D.Tex. 1979) 82 F.R.D. 420, 428 [reaffirming class certification order], *vacated on appeal from final judgment* (5th Cir. 1984) 723 F.2d 1195 [vacating class certification].) In vacating the district court's class certification in *Vuyanich*, the Fifth Circuit held—in contrast to the district court analysis cited by this Court—that "a class representative must 'possess the same interest *and suffer the same injury' as the class members.*" (723 F.2d at p. 1199, italics added.)

In their briefs in this Court, Respondents cited overwhelming federal case law establishing that—as the Fifth Circuit held in vacating *Vuyanich*—federal class action principles require the named plaintiffs and the absent class members to share the same standing. Specifically, Respondents made this point on pages 18-19 of their Answer Brief on the Merits and on pages 9-12 of their Answer to Briefs of Amici Curiae, and they cited numerous federal authority in support of this analysis.[1] (See also *Amchem Products,*

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[1] See, e.g., *Oshana v. Coca-Cola Co.* (7th Cir. 2006) 472 F.3d 506, 514 [affirming denial of class certification because "[c]ountless members of Oshana's putative class" could not satisfy the standing-to-sue requirement of the Illinois Consumer Fraud and Deceptive Practices Act because they "could not show any damage, let alone damage proximately caused by Coke's alleged deception"]; *Denney v. Deutsche Bank AG* (2d Cir. 2006) 443 F.2d 253, 264 [agreeing with Newberg that Article III did not itself impose a standing requirement on absent class members, but noting that, under class action principles, "*no class may be certified that contains members lacking Article III standing,*" italics added]; *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (S.D.N.Y. 2003) 244 F.Supp.2d 289, 334 [noting that "each member of the class must have standing with respect to injuries suffered as a result of defendants' actions"]; *O'Neill v. Gourmet Systems of Minn. Inc.* (W.D.Wis. 2002) 219 F.R.D. 445, 453 ["class

Inc. v. Windsor (1997) 521 U.S. 591, 625-626 ["[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members," citations omitted]; *In re TJX Cos. Retail Security Breach Litig.* (D.Mass. 2007) 246 F.R.D. 389, 392 ["It is well-established that members of a plaintiff class must all have the legal right to bring suit against the defendant on their own; inclusion of those without such standing renders the class overbroad"], *aff'd in part and vacated in part on other grounds* (1st Cir. 2009) 564 F.3d 489, 501 [declining to reach any class certification issues, but noting that the "district court showed an enviable mastery of class action law and analysis"].)

These numerous federal authorities make clear why the standing requirements of Proposition 64 apply to all members of the class (as they unquestionably would if each absent class member sought to bring an individual suit). Just as Rule 23's requirements ensure that the absent class members must share the same standing that must be met by the named plaintiffs (and by any individual plaintiff asserting his or her own claim), the same result obtains here: because the UCL imposes standing requirements directly on the named plaintiffs (and imposes those same requirements on any individual claim), the analogous requirements of

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certification must be denied on the grounds that plaintiff has not defined an appropriate class and that the proposed class lacks standing"]; *Adashunas v. Negley* (7th Cir. 1980) 626 F.2d 600, 604 [class certification properly denied where it was not clear "that the proposed class members have all suffered a constitutional or statutory violation warranting some relief"]; *Zelman v. JDS Uniphase Corp.* (N.D.Cal. 2005) 376 F.Supp.2d 956, 966 [class must be limited "to those ascertainable individuals who have standing to bring the action"]; *In re Copper Antitrust Litigation* (W.D.Wis. 2000) 196 F.R.D. 348, 353 ["Implicit in [Fed. R. Civ. P.] 23 is the requirement that the plaintiffs and the class they seek to represent have standing."]; accord *Clay v. American Tobacco Co.* (S.D. Ill. 1999) 188 F.R.D. 483, 490; *McElhaney v. Eli Lilly & Co.* (D.S.D. 1982) 93 F.R.D. 875, 878 (*McElhany*).

"Section 382 of the Code of Civil Procedure" similarly ensure that all class members must share that same standing. In both instances, it is the operation of long-standing class action principles that makes standing requirements applicable to the members of a putative class—in precisely the same way they would apply if the absent class member brought suit individually.

Beyond relying on the vacated opinion in *Vuyanich*, the federal authorities cited by the Court stand only for the proposition that Article III's constitutional standing requirements, *of their own force*, apply only to the named plaintiffs. As explained above, that proposition does not speak to the question whether federal class action principles extend those requirements to the entire class. On this latter point, the Court's opinion fails to account for the overwhelming federal case law establishing that the requirements of Rule 23 serve to ensure that the absent class members must also share that same standing to prosecute the underlying claims in their own right and that the named plaintiffs must likewise have. (Typed opn., pp. 20-21, 25-27.) By relying on inapposite or invalid authority, the Court erred in its critical analysis of federal class-action law.[2]

The Court should grant rehearing to reconsider its unprecedented holding that a class may include absent class members who lack standing to sue in their own right.

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[2] Moreover, as the dissent properly noted in this case, *McElhaney*, *supra*, 93 F.R.D. 875, and *Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, cannot be distinguished as "ascertainability" cases because the "premise upon which the 'ascertainability' conclusions in *Collins* and *McElhaney* proceed is that the class *may include only* those persons who *have* suffered injury and could thus bring suit in their own behalves." (Typed opn. of Baxter, J., dissenting, at p. 6, fn. 3, original italics.) The same is true of *Clay v. American Tobacco Co.*, *supra*, 188 F.R.D. at p. 490, cited at Typed opn., pp. 19-20.

II. The Court's Analysis Improperly Allows the Class Action Device to Alter the Individual UCL Claims It Aggregates

By authorizing a procedure in which a class action may include members who lack the ability to bring suit in their own right, the Court's decision improperly allows the purely procedural device of a class action to transform the individual claims it aggregates. Respondents are aware of no decision in the history of American jurisprudence in which the class action device has been allowed, in aggregating individual claims, to completely shear off an element that concededly *would* apply to an individual claim, and the Court's opinion does not cite any. On the contrary, the settled law in this State, as elsewhere, has consistently rejected the view that the class action device can effect this sort of change in the claims it aggregates. (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 ["Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going"]; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1018 [because a class action is merely a "procedural device for collectively litigating substantive claims," if a claim "'is foreclosed to claimants as individuals, it remains unavailable to them even if they congregate into a class,'" citations omitted]; see generally *Amchem Products, Inc. v. Windsor*, *supra*, 521 U.S. at p. 613 [explaining that a class action cannot "abridge, enlarge or modify any substantive right"].)

In particular, the decision in *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, does *not* support the view that a class may contain members who cannot sue in their own right. In *Fletcher*, the class action device was being applied *in light of the UCL's then-existing lax standing requirements*, which did not require the sort of showing of reliance and injury that this Court properly held are now required to maintain any action under Proposition 64. (*Fletcher*, at p. 450 & fn.4.) In

Fletcher, the aggregation of individual pre-Proposition 64 UCL claims thus did not alter the claims it was aggregating. Under Proposition 64's revised standing provisions, by contrast, an individual may no longer maintain a UCL cause of action unless he or she has "suffered injury in fact and has lost of money or property as a result of" the challenged conduct. (Bus. & Prof. Code, § 17204.) Because the class action device must not alter the underlying requirements (including standing) of the individual claims it aggregates, these issues of injury and causation must now be considered in determining the suitability of class treatment of UCL claims under the traditional criteria of Code of Civil Procedure section 382.

As a result, the Court's opinion was wrong in suggesting that the drafters of Proposition 64 were obligated specifically to state that the sort of claim-aggregation upheld in *Fletcher* would no longer apply under the amended UCL. (Typed opn., pp. 22-23.) The result in *Fletcher* was based critically on an aspect of the UCL—its previously lax standing requirements for bringing a UCL suit (individually or otherwise)—that was unquestionably eliminated by Proposition 64.

CONCLUSION

The Petition for Rehearing should be granted.

Dated: June 2, 2009

Respectfully submitted,

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[*] Pursuant to a substitution of counsel filed on June 1, 2009, Reed Smith was substituted as counsel for The Council For Tobacco Research – U.S.A., Inc., in lieu of Loeb & Loeb LLP.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.536, 8.268(b)(3), and 8.204(c) of the California Rules of Court, the enclosed Respondents' Petition for Rehearing is produced using 13-point Roman type including footnotes and contains approximately 2,158 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: June 2, 2009

Signed: Daniel Collins/bag

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PROOF OF SERVICE VIA U.S. MAIL

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

On June 2, 2009, I served the foregoing document described as

RESPONDENTS' PETITION FOR REHEARING

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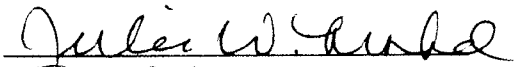

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