S269212

IN THE SUPREME COURT OF CALIFORIA

CALIFORNIA MEDICAL ASSOCIATION,

Plaintiff and Appellant,

v.

AETNA HEALTHCARE OF CALIFORNIA, INC. D/B/A AETNA U.S. HEALTHCARE INC.; AETNA HEALTH OF CALIFORNIA, INC.,

Defendants and Respondents.

After a Decision by the Court of Appeal
Second Appellate District
Case No. B304217
(Los Angeles County Superior Court No. BC487412)

PLAINTIFF/APPELLANT'S PETITION FOR REVIEW

Service on the Attorney General and District Attorney required by Bus. & Prof. Code § 17209 and Cal. Rules of Court, Rule 8.29

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The published Opinion of the Second District Court of Appeal, Division Eight, *California Medical Association v. Aetna Health of California, Inc.*, (2021) 63 Cal.App.5th 660 ("Opinion"), attached hereto as Ex. 1, raises at least five issues supporting this Court granting review:

1. If a membership organization such as the California Medical Association suffers "injury in fact and a loss of money or property" in the diversion of organizational resources under the standing requirements of Article III of the U.S. Constitution, can that organization seek public injunctive relief as a "person" pursuant to Cal. Bus. & Prof. Code Section 17203?

2. Do the standards for "organizational standing" differ from the standards for "associational standing" discussed in *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, (2009) 46 Cal. 4th 993 ("*Amalgamated Transit*")?

3. Does the Opinion conflict with the holding in *Animal Legal Defense Fund v. LT Napa Partners LLC*, (2015) 234 Cal. App. 4th 1270, *review denied* June 10, 2015 ("*ALDF*"), that organizations demonstrating diversion of organizational resources have standing to seek public injunctive relief under the UCL, such that there is a split between two District Court of Appeal decisions on the issue of the organizational standing?

4. Is an action seeking solely "public injunctive relief" a "representative action" under Cal. Bus. & Prof. Code Section 17200 *et seq.* ("UCL") as defined by the California Supreme Court, such as in *McGill v. Citibank*, N.A., (2017) 2 Cal. 5th 945 ("*McGill*")?

5. Does the Opinion raise significant public interest concerns as it could thwart the efforts of non-profit public interest groups throughout California to obtain public injunctive relief for the benefit of a wide variety of constituents?

INTRODUCTION

The Opinion raises two primary issues that need to be reviewed and corrected by this Court. First, there are two different potentially applicable standing standards for groups such as CMA: (1) organizational standing, and (2) associational standing. The Court of Appeal's Opinion here fails to distinguish between these two independent standards. Instead, the Opinion blurs the distinction between associational and organizational standing by creating an unprecedented, artificial and unclear distinction between membership associations pursuing direct member interests and associations (that may or may not have members) pursuing more abstract indirect member interests. This distinction has no support in the jurisprudence of Article III standing principles, or the purposes that animated the amendment of the UCL pursuant to Proposition 64 to require Article III standing for persons asserting claims under the UCL.

Second, the Opinion rests its conclusion in part on the forced assumption that CMA could only be viewed as bringing a

"representative action" for purposes of standing analysis simply because CMA's goals in this litigation could benefit its members. However, the injunctive relief requested by CMA would also benefit non-members of CMA as well as serve CMA's broader mission to protect the art and science of medicine for the benefit of patients and the public health (a point the Court also appeared to ignore), and CMA is not seeking any form of monetary relief. CMA is therefore not bringing a "representative action" as that term has been used by this Court, and there was no evidence to the contrary, which this Court has stated is relevant in determining whether C.C.P. Section 382 applies. Yet the Opinion forces a standing analysis for representative actions on CMA (which are categorically barred under Prop 64) and, if left to stand, would spell the end of the ability of organizations that have members to seek public injunctive relief under the UCL.

Based on the potentially wide-ranging impact of the reasoning and conclusion of the Opinion, and to ensure uniformity of decisions on these critical threshold issues, the Court should grant this Petition.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff/Appellant California Medical Association ("Appellant" or "CMA") is a 165-year-old organization established to advance the art and science of medicine for the benefit of physicians, patients, and the public health. Appellant joined a lawsuit in July 2012 against Defendants/Appellees Aetna Healthcare of California, Inc. d/b/a/ Aetna U.S. Healthcare Inc., and Aetna Health of California, Inc. (collectively "Appellees" or "Aetna"). Appellant alleges Aetna sells health insurance plans to individuals in California by representing they may obtain their healthcare from physicians of their choice through Aetna Preferred Provider Organization ("PPO") and Point of Service ("POS") plans. These PPO and POS plans typically differentiate between coverage for medical treatment provided by in-network ("INET") providers, who negotiate discounted rates with companies such as Aetna, and out-of-network ("ONET") providers. Joint Appendix of Record ("JA"), 4, 9, 373, 958.

Under both the terms of Aetna's standard provider agreements with INET physicians and California law, an INET physician may recommend to an Aetna member with PPO or POS benefits that he or she may elect to have their surgeries or other

services performed at ONET ambulatory surgery centers ("ASCs") if it is "consistent with sound medical judgment" of the physician to do so. JA, at 218-19, 255, 383, 388, 412, 422. Physicians obtain patient consent prior to referring members with ONET benefits to ONET providers and ASCs. *Id.* at 206-08, 253, 375-76, 420, 465, 483, 659, 741.

However, under Aetna's "Non-Par Intervention Policy" ("NIP"), which was implemented in 2008 and revised in 2011, Aetna attempted to illegally restrict or eliminate such ONET referrals. Aetna began sending a series of letters threatening INET physicians with termination and/or actually terminating them from being in Aetna's physician network for utilizing and/or referring patients to ONET providers or ASCs, even based on just a few ONET referrals. JA at 4, 7, 11-14, 48-51, 118-132, 205-208, 214-17, 223-225, 393-95, 1182-88. Appellees also threatened patients who had already elected to use their ONET benefits, sending them letters trying to convince them to change their election. JA at 38, 163, 224-26, 376, 394-96. As a result, the NIP did not simply adversely impact CMA members, as claimed at *5 of the Opinion. As CMA's corporate representative Jodi Black stated in her deposition, stopping implementation of the NIP

would also benefit CMA non-members, future providers and patients who were effectively prevented from using the ONET benefits they paid for and who received threatening letters from Aetna regarding their choice to do so. JA at 1145-64.

Years prior to joining the litigation, CMA undertook significant efforts to combat the impacts of the NIP, interacting with Aetna independent of litigation. Aetna ignored those efforts. When these efforts failed CMA, along with several other county medical associations and physicians, challenged the NIP as violating the UCL. They alleged how Aetna's implementation of the NIP violated both standard health care insurer practices, several provisions in Aetna's form provider agreements and various California laws that prohibit Appellees from interfering with physicians' exercise of their medical professional judgment regarding the health care services provided to their patients. In doing so, Aetna illegally interfered with both INET physicians' exercise of sound medical judgment and their patients' informed consent. JA at 376-400, 1086, 1090-94, 1160-1162, 1182-88.

After years of litigation, by agreement of the parties this lawsuit was to proceed to trial only on CMA's claims under the UCL. In exchange, Aetna would dismiss its retaliatory claims filed

against the two physicians that similarly sought to stop implementation of the NIP and were sued by Aetna for doing so. Demonstrating CMA was proceeding in its own right and not solely derivatively through the claims of its members by assignment or otherwise, CMA agreed it would only seek injunctive relief that would benefit the public, and no monetary relief. JA at 545-569. In the Stipulation of Dismissal reflecting the parties' agreement (JA 564-65 and 571), CMA stated it was intending to pursue "its claim for injunctive relief" under the UCL and not claims for restitution, and that CMA was not dismissing its individual claims against Aetna to obtain injunctive relief under the UCL (JA 558).

On August 6, 2019, the parties filed and thereafter fully briefed cross-motions for summary judgment or summary adjudication of issues as to the merits of the action. JA at 590-1430. CMA presented significant evidence of the direct "injury in fact and a loss of money or property" it suffered based on the Declaration of Mr. Francisco Silva, the General Counsel and Senior Vice President of CMA, summarizing the results of CMA's investigations and expenditures of resources (JA 957-60); Ms. Black's deposition testimony (JA 1145-66) and CMA's interrogatory responses (JA 1361-1420) providing similar

information; the Termination Resource Guide prepared by CMA (JA 1164); and CMA's eight-page letter to the California Department of Insurance and the California Department of Managed Health Care (JA 1182-88) advising them of the results of CMA's investigation and requesting they "investigate and take appropriate action to ensure that Aetna complies with California law". Aetna did not file any objections as to the admissibility of CMA's evidence on the standing issue and asserted in response to CMA's Statement of Undisputed Facts that numerous material facts as to CMA's standing were "disputed". JA at 1314-16.

After two separate hearings (*see* Reporter's Transcript of Proceedings ("RT") at 1, 31), on November 25, 2019, the trial court granted Aetna's Motion for Summary Judgment. It did so solely on the grounds that, after seven years of litigation and based on this Court's ruling in *Amalgamated Transit*, CMA had no standing as a matter of law to seek public injunctive relief under the UCL – despite the evidence presented by CMA as to its diversion or organizational resources independently of litigation to combat the effects of the NIP. The trial court refused to rule whether CMA could establish it met the UCL's "injury in fact and loss of money or property" standing requirement by showing it had expended and

diverted organizational resources, independent of litigation, in attempting to counteract the impact of the NIP. Nor did the trial court address the sufficiency of the evidence submitted by CMA or Aetna's response thereto as to CMA's standing based on its diversion of organizational resources. Nor did the Court decide whether CMA had presented material facts showing it had suffered the requisite injury for organizations to seek relief, recognized for years in case law. When Appellant pointed out such a ruling would irreconcilably conflict with the Court of Appeal's decision in *ALDF*, the trial court opined that ruling could not be reconciled with *Amalgamated Transit*. RT at 44; JA at 1542-43.

The Court of Appeal affirmed the decision of the trial court. Making the same error as the trial court, the Court ignored the unchallenged evidence in the record that CMA had suffered injury in fact, instead asserting that *Amalgamated Transit* controlled the outcome of this appeal – even though another Court of Appeal in *ALDF* had reached the exact opposite conclusion based on similar evidence. The Opinion held that because CMA was bringing claims as an association and because (contrary to the record evidence) it was bringing a "representative action" only on behalf of its members, it could never assert claims that would

benefit its members - even if such relief would also benefit CMA non-members and further its mission to protect the art and science of medicine, Aetna patients and the public. Opinion at *5. The Court summarized its reasoning in the Opinion as follows:

> This brings us to the question whether CMA produced evidence of direct economic injury to CMA itself. CMA argues we should rely upon Animal Legal Defense Fund v. LT Napa Partners LLC (2015) 234 Cal.App. 4th 1270 (ALDF) to find diversion of its resources is a sufficient injury to confer standing under the UCL. In its analysis, the ALDF court discussed Kwikset at length, concluding the plaintiff in ALDF spent resources it would not have spent but for defendants' illegal conduct. (ALDF, at pp. 1283-1284.)
>
> Plaintiff in ALDF was an organization that advocated for a ban on the sale of foie gras and engaged in a campaign to inform legislators and the public that producing foie gras involves animal cruelty because birds are forcibly overfed. The plaintiff sued to enjoin defendants under the UCL for selling foie gras in their restaurant in violation of the ban on its sale. (ALDF, supra, 234 Cal.App. 4th at p. 1275.) Defendants filed a special motion to strike under Code of Civil Procedure section 425.16, arguing the lawsuit arose from protected activity, and that the plaintiff could to demonstrate a probability of prevailing on the merits because it lacked standing under the UCL. (ALDF, at p. 1278.)
>
> To show it had standing, the plaintiff produced evidence that it diverted significant organizational resources to combat the defendants' continuing illegal sales of foie gras. The plaintiff had lobbied in support of the ban and after it became law. The plaintiff paid a private investigator to dine at the restaurant where

he was served foie gras three times after the ban became law. The plaintiff spent significant staff time and resources over the course of three months to share its investigation findings with local law enforcement authorities and try to persuade them to enforce the ban. The plaintiff itself was harmed by having to spend money that would have been unnecessary to spend if the defendants had not violated the ban (ALDF, supra, 234 Cal.App.4th at pp. 1279-1282; id. at p. 1282 ["Plaintiff, thus, has presented evidence of a genuine and long-standing interest in the effective enforcement of the [statutory ban on foie gras] an in exposing those who violate it. Plaintiff's evidence provides a basis to conclude that defendants' alleged violations of the statute tended to frustrate plaintiff's advocacy for an effective ban on the sale of foie gras in California, and tended to impede plaintiff's ability to shift its focus on advocacy efforts in, for example, other states and at the federal level."].)

CMA says the declaration of Mr. Silva and other evidence it produced show the same type of injury that ALDF held was sufficient to show a likelihood of success in proving the plaintiff had standing under the UCL, and Aetna did not object to any of CMA's evidence.

We find ALDF is distinguishable and does not apply here. *The key factual and procedural distinction is the plaintiff in ALDF did not bring a representative action, as CMA did in this case.* ALDF was not advocating on behalf of or providing services to help its members deal with their loss of money or property. The ALDF opinion does not even say whether ALDF had members or who they might be. (ALDF, supra, 234 Cal.App. 4th at pp. 1279-1280.) We can guess if ALDF has members, they support ALDF's mission to prevent animal cruelty. *The mission and very purpose for being of the plaintiff in ALDF-to prevent animal*

cruelty-were directly injured by the defendants' violation of the ban on sales of foie gras. (Id. At pp. 1282-1283.)

Unlike the facts in ALDF, the evidence here was that CMA was founded to advocate on behalf of its physician members. The staff time spent here in response to Aetna's termination and threats to terminate physicians was typical of the support CMA provides its members in furtherance of CMA's mission. *If we were to apply ALDF to this case, then any organization acting consistently with its mission to help its members through legislative, legal and regulatory advocacy could claim standing based on its efforts to address its members' injuries. The 2004 amendments to the UCL eliminated such representational standing.* (Amalgamated Transit, supra., 46 Cal.4th at p. 1005.)

We now turn to the key legal distinction between ALDF and this case. The court in ALDF did not distinguish Amalgamated Transit or explain how its decision was either consistent with, or created an exception to, or extended the rationale and holding of Amalgamated Transit, which, like this case, was a representative action seeking to rectify injury to its aggrieved members. The likely reason for this is because ALDF did not bring a representative action on behalf of aggrieved members like the union in Amalgamated Transit, or CMA in this case. *Unlike the union in Amalgamated Transit, CMA does not acknowledge that only its members, and not CMA itself, suffered actual injury, but we have rejected CMA's position. Just like the union in Amalgamated Transit, CMA brought this representative action to rectify injury to its aggrieved physician members. Like the trial court below, we see no way to square the opinion in ALDF with the on-point Supreme Court Decision in Amalgamated Transit.*

> CMA also relies on McGill v. Citibank, N.A. (2017) 2Cal.5th 945, which held a private person or association may seek injunctive relief for the benefit of the general public, so long as the plaintiff has standing. (Id. At p. 259 ["We conclude that these provisions do not preclude a private individual who has 'suffered injury in fact and has lost money or property as a result of a violation of the UCL or the false advertising law (Bus. & Prof. Code, §§ 17204, 17535) – and who therefore has standing to file a private action – from requesting public injunctive relief in connection with that action."].) *Assuming without deciding CMA seeks to benefit the general public, and not just its members, McGill is of no use to CMA because it did not suffer injury in fact or lose money or property as a result of the UCL violations it alleges here.*
>
> As explained at the outset, it is unnecessary to address and discuss the other California cases CMA cites (e.g., Raven's Cove Townhomes, Inc. v. Knuppe Development Co., supra, 114 Cal.App.3d at pp. 793-796, and cases cited thereon), holding an association may maintain a representative, nonclass action on behalf of its members, *because none of those cases involved claims under the UCL or another statute that expressly limited the right to sue those persons who suffered direct injury in fact and lost money or property.*

Opinion at *4-*5 (emphasis added).

For the reasons stated below, this Court should review the Opinion to secure uniformity of decisions between it and *ALDF*, and to settle important questions of law and address issues of significant public interest. (Cal. Rules of Court 8.500(b).)

DISCUSSION

I. The Opinion Ignores the Precedents of Both This Court and the United States Supreme Court By Effectively Eliminating "Organizational Standing" To Bring UCL Claims.

CMA is asserting organizational standing in its own right to seek injunctive relief under the UCL against Aetna. To be sure, the undisputed evidence showed that CMA diverted resources and expended staff time and resources independent of litigation to address Aetna's UCL violations. While such efforts were in part driven to protect CMA members, they also were required to meet CMA's mission to advance the practice of medicine as a profession, which includes preserving physician independence and medical judgment free from profit-motives. Notwithstanding these facts, the Opinion found CMA had no standing to assert a UCL claim for injunctive relief. The Opinion reaches this result by collapsing the independent constitutional concept of "organizational standing" into "associational standing", thereby creating a new, high bar that is virtually impossible for organizations like CMA to meet in order to seek redress in the courts for direct harm to themselves.

No court has ever suggested that membership associations can never bring a UCL claim as "persons" with standing under the

UCL. Yet that appears to be what the Opinion concludes. The Opinion thus is in conflict with decisions from this Court. Justice Werdegar's unanimous opinion in *Californians for Disability Rights v. Mervyn's LLC*, (2006) 39 Cal. 4th 223, n.4, notes this Court's position that associations have standing as "persons" to seek relief under the UCL so long as they meet the standing requirements applicable to them. And as Justice Werdegar noted in her concurrence in *Amalgamated Transit*, 46 Cal. 4th at 1005, the Court in that case was *not* holding that an organization that *has* suffered injury in fact and suffered loss of money or property may not represent its members in a UCL action, or that associations cannot bring such claims.

The Opinion erroneously suggests that such groups do not have standing, based on *Amalgamated Transit*. However, such groups can show they have standing, just in a different way than the examples referenced in the Opinion at *3-4 from Justice Werdegar's opinion in *Kwikset Corp. v. Superior Court*, (2011) 51 Cal. 4th 310, 323 (see also n. 6, referencing numerous decisions finding associations had suffered injury in fact). For organizational standing the question is whether the organization diverted resources independent of litigation, based on the line of

authority derived from *Havens Realty Corp. v. Coleman*, (1982) 455 U.S. 363, 379, 102 S. Ct. 1114. *See ALDF*, 234 Cal. App. 4th at 1281. By contrast, for associational standing, the entirely separate question is whether the association can act in a purely representative capacity on behalf of its members under the test set forth in *Hunt v. Washington Apple Advertising Comm'n*, (1977) 432 U.S. 333, 343, 97 S. Ct. 2434.

The Opinion also asserts that *Amalgamated Transit* alone controls the outcome of this standing issue. However, the Court in *Amalgamated Transit* is not determinative, as it did not discuss or rely on the *Havens* line of cases discussing the standards for establishing injury in fact for an organization. Rather, the Court focused on the *Hunt* line of cases that address a different standard for standing. In *Amalgamated Transit,* 46 Cal. 4th at 1001, the union made no allegations or offered any proof that it diverted resources to investigate and counteract Defendants' illegal conduct. In addition, unlike CMA in this case, the plaintiff in *Amalgamated Transit* was seeking a monetary recovery for its members, was acting by virtue of an assignment of claims, and specifically disclaimed standing to sue under the UCL in its own right, supporting the finding that it was a maintaining

a "representative action" under the UCL. *Id.* at 998-99. Thus, that decision involved an admittedly uninjured association admittedly bringing a "representative" action on behalf of its members only seeking monetary and injunctive relief under "associational standing" principles. As Justice Kennard concluded in citing *Hunt*, the issue in that case was "may a plaintiff labor union *that has not suffered actual injury under the unfair competition law* … nevertheless bring a representative action (1) as the assignee of employees who have suffered actual injury or (2) as an association whose members have suffered actual injury". *Id.* at 998 (emphasis added). The Court held the UCL requires a plaintiff to have suffered injury resulting from an unlawful action, and that since "[h]ere, plaintiff unions concede they do not satisfy these requirements" a "representative action under the UCL must be brought as a class action." *Id.* at 1001.

The Court's discussion in *Amalgamated Transit* of the doctrine of "associational standing" for a union to bring an action on behalf of its members only applies under the circumstance where the organization is not seeking purely injunctive relief but also monetary relief, "when the association would not otherwise have standing" and "where the plaintiff itself has not suffered

actual injury but is seeking to act solely on behalf of its members who have sustained such injury." *Id.* at 1004. That is not what CMA is claiming in terms of injury or what it seeks in terms of relief.

CMA understands this distinction. In 2001 (prior to the adoption of Proposition 64) the Court of Appeal in *CMA v. Aetna* (2001) 94 Cal.App. 4th 151, addressed a UCL claim asserted by CMA. In that case, CMA brought such claims *as an assignee* of certain physicians and medical groups (*id.* at 156), which was the associational standing standard under which the union sought relief under the UCL in *Amalgamated Transit*. Despite the fact CMA expressly is *not* proceeding solely in that capacity in this case (the *Hunt* standard) but instead based on its own direct diversion of organizational resources (the *Havens* standard), the Court of Appeal's Opinion here fails to distinguish between these two independent standards.

Instead, the Court of Appeal devised a new standard that is virtually impossible to meet in order to determine whether organizations have standing under the UCL to seek injunctive relief. Under the Opinion's reasoning, a membership association like CMA would *never* be able to bring a UCL action, even if it

shows it has standing to do so in its own right applying Article III standards, if its mission is in part to serve the interests of its members in ways that would directly help its members (and others). The Opinion held that membership organizations like CMA always serve the interests of their members and always act in a representative capacity, even when they suffer direct injury in fact. Following this reasoning, the Opinion's announced standard suggested that, by contrast, if an organization's mission is in part to serve the interests of its members but only indirectly, such as environmental or animal rights issues, but the relief sought would not directly benefit those members (such as in *ALDF*), they *would* have standing to do so under the UCL. This new standard is inconsistent with the reasoning of the numerous decisions cited herein, and no Court has ever determined standing exists or does not exist based on such an artificial distinction.

To find, as the Opinion did, that there are virtually no circumstances where a membership association like CMA would have standing, even if it expended resources investigating claims of members and taking actions to counteract a defendants' illegal conduct (as the record demonstrated here) reads the word "association" for groups such as CMA out of the definition of

"persons" who have standing under Bus. & Prof. Code Section 17203 based on this distinction. A court should never interpret a statute to read out an express word within the statute. *Levin v. Winston-Levin*, (2019) 39 Cal. App. 5th 1025, 1036 ("our high court has repeatedly stressed that 'interpretations that render statutory terms meaningless as surplusage are to be avoided.'") (citing *People v. Hudson* (2006) 38 Cal.4th 1002, 1010); *Vasquez v. State of California*, (2008) 45 Cal.4th 243, 253 ("In construing [a] statute, our office is simply to ascertain and declare what the statute contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does.")

CMA is not asserting that associations are exempt from the UCL's statutory standing requirements, but merely that there are different standards that apply depending on the circumstances. This case presents the opportunity to clarify what *Amalgamated Transit* could not because of the concessions made by appellant in that case -- the difference between the standards for organizational and associational standing and how they interplay within the UCL. In order to provide guidance to both courts and litigants on this important threshold issue, this Court should grant review to

determine if the unprecedented standard set forth in the Opinion is consistent with the law on this point.

II. The Opinion Not Only Conflicts with Decisions of Other Appellate Districts, But Also Those of This Court.

Based on a misapplication of this Court's decision in *Amalgamated Transit,* the Opinion also disagrees with *ALDF,* suggesting it is of dubious validity as it did not address *Amalgamated Transit,* even though it is a post-Proposition 64 decision and applied those principles. Opinion at *5. The Opinion claimed *Amalgamated Transit* applied, not *ALDF*, and that *ALDF* did not properly consider the impact of *Amalgamated Transit*. Both cannot be correct, and only this Court can resolve which is right. The Opinion is not distinguishable from *ALDF* – it is completely at odds with *ALDF*. By erroneously extending the doctrine of associational standing to any organization no matter the facts, the Opinion unduly limits who can assert claims under the UCL.

The Court of Appeal in *ALDF* stated that the question presented was whether ALDF would prevail on the threshold question of standing to assert a UCL claim in its capacity as an organization "because it had diverted significant organizational

resources to combat defendants' continuing illegal acts" (*ALDF*, 234 Cal. App. 4th at 1279-80). It held at pp. 1283-84 that ALDF had standing under UCL because as an organization it suffered injury in fact as it "undertook expenditures in response to and to counteract the effects of defendants' misconduct rather than an in anticipation of litigation." This is the *Havens* standard, not the *Hunt* standard relied on in *Amalgamated Transit*.

The Plaintiff in *ALDF* was seeking injunctive relief only in a direct capacity and presented evidence, primarily in the form of a declaration of its executive director (just as CMA did here) that ALDF had standing in its own right. *ALDF*, 234 Cal. App. 4th at 1279-80. The plaintiff in *Amalgamated Transit* was seeking a monetary recovery for its members, specifically disclaimed standing in its own right and stated it was only acting through its members and an assignment of claims. *Amalgamated Transit*, 46 Cal.4th at 1001.

The Opinion also conflicts with several other Court of Appeal decisions that reached the same conclusion as *ALDF* – that an organization may be able to establish standing to assert claims under the UCL by showing that it diverted resources to identify or counteract a defendant's allegedly illegal conduct.

Hall v. Time, Inc., (2008) 158 Cal.App 4th 847, 854, which was cited with approval by Justice Werdegar as providing examples of the appropriate standards for determining UCL standing in *Kwikset*, 51 Cal. 4th at 323, cited the *Havens* line of cases as examples of evidence of what must be shown to establish standing under the UCL. *Hall* expressly cited *Southern Cal. Housing v. Los Feliz Towers Homeowners Assoc.*, (C.D. Cal. 2005) 426 F. Supp. 2d 1061, 1069, on this UCL standing point, which similarly relied on *Havens*. *See also Buckland v. Threshold Enterprises*, (2007) 155 Cal. App. 4th 798, 814-16 (disapproved on other grounds in *Kwikset,* 51 Cal. 4th at 337), which also cited federal organizational standing cases as providing the appropriate standard for an injury in fact standing analysis under the UCL.

As noted in Section I, *supra*, the Opinion attempts to avoid the clear conflict it created by making a distinction between cases filed by organizations that seek relief that would benefit its members directly and those that would not benefit their members directly, but rather only benefit the organization's mission that their members support. Opinion at *5. This is a distinction without a difference with no support in the case law. According to ALDF at https://aldf.org/about-us/#:~:text=The%20Animal%

20Legal%20Defense%20Fund's,animals%20through%20the%20legal%20system, ALDF accomplishes its stated mission by "filing high-impact lawsuits to protect animals from harm." They have a member center and claim to have over 300,000 members and supporters. *Id*. Thus, ALDF necessarily and properly diverts its organizational resources for the purpose of investigating and bringing high-impact lawsuits.

There is no logical distinction in the case law that supports the conclusion: (1) if an organization diverts resources to investigate the claims of its members and combat Defendant's illegal practices independent of litigation in a way that would benefit both members and non-members it does not have standing, but (2) if it does so as an organization, even ostensibly in part to support litigation efforts, but not in a way that directly benefits its members but instead advances the organization's mission supported by its members, it does have standing.

While the Opinion discusses the intent of Proposition 64 and appears to assert that *ALDF* is in tension with that intent, it omits a key finding discussed in that legislative history – that the intent was only to eliminate standing for those who could not meet the U.S. Constitution's Article III standing requirements.

See Amalgamated Transit, 46 Cal. 4th at 1004. "The text of Proposition 64 establishes expressly that in selecting this phrase the drafters and voters intended to incorporate the established federal meaning." *Kwikset,* 51 Cal. 4th at 322. Here, the undisputed record evidence set forth above shows that, applying the *Havens* line of authority as discussed in *ALDF*, CMA meets the standing requirements under Article III for organizations.

Finally, as Justice Werdegar noted in her *Amalgamated Transit* concurrence, this Court has never addressed if an organization complies with C.C.P. Section 382 when it seeks to benefit its members and diverts organizational resources doing so, which is where the standing cases such as *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.,* (1981) 114 Cal. App. 3d 783, come into play for purposes of alleging compliance with C.C.P. Section 382. While the Opinion claims those opinions do not apply because they are non-UCL cases, that misses the point because they are cases construing C.C.P. Section 382. There would have been no reason for Justice Werdegar to have cited those decisions in both the unanimous decision in *Mervyn's* and in her clarifying concurrence in *Amalgamated Transit* if that were a meaningful distinction. This Court should also grant

review to clarify that this line of decisions applies to UCL cases and forms a separate basis for finding organizational standing that was never addressed in *Amalgamated Transit*.

CMA is not solely proceeding under an "associational standing" theory as applied in *Amalgamated Transit*. The Opinion thus directly conflicts with *ALDF* and would be inconsistent with *Mervyn's*, *Kwikset*, *Hall* and *Buckland*, all because of its misapplication of *Amalgamated Transit* based on facts not presented here. Thus, the Court should grant review of the Opinion to determine whether it is consistent with Proposition 64 to find that organizations such as CMA have standing under the UCL if they make the correct showings required under the *Havens* standard.

III. The Opinion Is Based on a Misunderstanding of Ninth Circuit Precedent on the Organizational Standing Standard.

The Opinion also suggested at *6 that Ninth Circuit authority on the standing issue is not persuasive because those opinions did not address the particular standing requirements of the UCL. However, the Ninth Circuit in *Friends of the Earth v. Sanderson Farms*, (9th Cir. 2021) 992 F.3d 939 – which the Opinion failed to cite -- made clear shortly before the Opinion was

issued that federal organizational standing rulings equally apply to determining standing under the UCL.[1] The failure to cite to *Sanderson Farms* when asserting that Ninth Circuit authority has not addressed the standing requirements for UCL actions is yet another decision that conflicts with the Opinion.

The Court in *Sanderson Farms* found the issue of UCL standing for organizations involves a determination whether the organization took unique actions in response to the conduct in question, such as expending organizational resources to address the particular practices at issue, or in the words of the Court in *Sanderson Farms:* "'alter[ed] their resource allocation to combat these challenged practices,'" or "'expended additional resources that they would not have otherwise expended, and in ways that they would not have expended them'", instead of engaging in business as usual. *Id.* at 942 (quoting *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, (9th Cir. 2019) 938 F.3d 1147, 1154 and *Nat'l Council of La Raza v. Cegavske*, (9th Cir. 2015) 800 F.3d 1032, 1040 respectively). This is essentially the *Havens* standard, which is consistent with the state court decisions referenced above.

[1] Appellant filed a Notice of Additional Authority referencing *Sanderson Farms* with the Court of Appeal on April 6, 2021.

While the Opinion claimed at *6 that these federal cases did not apply as the organization was not representing clients or involved pre-Proposition 64 decisions, expending resources to help members and clients is not a distinguishing factor. In *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, (9th Cir. 1991) 959 F. 2d 742, 748, the organization stated that its diversion of resources was to represent its refugee clients in combatting the illegal practices at issue, and that was found to establish standing. *Los Feliz Towers*, 426 F. Supp. at 1068-69, a post-Proposition 64 case, reached a similar conclusion. In light of the Ninth Circuit's ruling in *Sanderson Farms*, which cited these decisions, there was no basis to conclude these decisions as to the standards for organizational UCL standing would be different post-*Amalgamated Transit* and *Kwikset*, as the Opinion suggests at *6.

IV. The Opinion Also Cannot Be Harmonized With Cases Holding That An Action Seeking Public Injunctive Relief Is Not A "Representative Action".

Another error that necessitates this Court granting review is the Opinion's conclusion at *5 that CMA was bringing a "representative action", when this Court has defined that term materially different than as used in the Opinion. In *McGill*, 2 Cal.

5th at 959-61, the Supreme Court held a claim for injunctive relief brought by an plaintiff who meets the UCL's standing requirements but that benefits the plaintiff only in an ancillary way (having already been exposed to the practice) and that also benefits the public is *not* a "representative action" – thereby avoiding the question of the application of C.C.P. Section 382 when seeking relief that may benefit others. A person who seeks "public injunctive relief" as a substantive statutory remedy is thus not the same as a person maintaining an action "pursuing representative claims or relief" or a "representative action" under the UCL. Contrary to the Opinion, this is not *per se* a "representative action" – another reason *Amalgamated Transit* does not apply or control the outcome of this appeal. Simply saying that CMA is bringing a "representative action" without a discussion of what a "representative action" is does not answer this question. In so holding, the Opinion completely ignores – and creates an irreconcilable conflict with – this Court's controlling decision in *McGill*. This Court should review that ruling.

The Court in *McGill,* 2 Cal. 5th at 959-961, held that a person does not need to bring a claim for public injunctive relief under the requirements of C.C.P. Section 382, because, in the

words of Justice Chin, such claims are *not* "representative actions." This conclusion was based on the definition of a claim for "public injunctive relief" set forth in *Broughton v. Cigna Healthplans of California*, (1999) 21 Cal.4th 1066, 1079-80, and *Cruz v. Pacificare Health Systems, Inc*., (2003) 30 Cal. 4th 303, 315-16. Additionally, the term "representative action" was referred to in *Kraus v. Trinity Management Services, Inc*. (2000) 23 Cal.4th 116, 126, fn. 10, as involving an action where the plaintiff sought restitution and disgorgement -- which is not the case here. And while the Opinion stated that *McGill* did not apply because CMA did not suffer the requisite injury in fact, as detailed above the controlling authorities are to the contrary.

Review of the Opinion is thus necessary to ensure uniformity with not one, but at least four, of this Court's decisions *(McGill, Broughton, Cruz* and *Kraus)* defining and discussing what is a "representative action".

V. The Opinion's Interpretation of What Constitutes "Public Injunctive Relief" Is Also not Consistent With This Court's Precedent.

Finally, while saying it was "assuming but not deciding" the issue, the Opinion suggests the form of injunctive relief sought by CMA that the trial court could order was not necessarily "public",

as it benefits CMA members. While the scope of any injunctive relief should have been for another day, as the NIP was applied by Aetna across the board throughout the State to CMA members and non-members alike, its abandonment would affect persons far beyond CMA members. As the evidence CMA proffered and summarized above showed, the relief it sought would not only benefit CMA's members but non-members and patients as well, both present and in the future, because Aetna could no longer interfere with the professional medical judgment of physicians at the expense of patient care. It would also benefit patients, who are the ones effectively denied the ability to use the ONET benefits they paid for provided by the physician of their choice. It could also benefit employers, who in some instances are paying for a benefit that physicians are thwarted from providing.

In *Cruz*, 30 Cal 4th at 308, similar to CMA's allegation as to the impact of the NIP, the allegation was that PacifiCare "has been aggressively engaged in implementing undisclosed systemic internal policies that are designed, inter alia, to discourage PacifiCare's primary care physicians from delivering medical services and to interfere with the medical judgment of PacifiCare healthcare providers". This Court found that relief under the UCL

that would stop such practices was "clearly for the benefit of customers and the public" and thus "public" injunctive relief. *Id.* at 315. *See also Broughton*, 21 Cal. 4th at 1080 (injunctive relief under the CLRA "accrue to … the general public in danger of being victimized by the same deceptive practices.").

This case does not present an isolated issue involving an organization representing medical care providers who are CMA members, but as in *Cruz* seeks relief that would impact a significant number of diverse interests. This Court should also grant review to clarify what it means to seek "public" injunctive relief.

VI. The Opinion Raises Significant Public Interest Concerns That Must Be Resolved.

Without guidance from this Court, future courts may treat the Opinion as controlling authority in any cases implicating an association bringing a claim under the UCL. Litigants and courts trying to thread the needle between the Opinion ng and *ALDF* may find it impossible to do so. The importance of the Opinion thus extends far beyond CMA and its members. Rather, it presents an issue affecting the rights of organizations and individuals in a wide variety of contexts to seek relief under the

UCL. As shown in decisions such as *Los Feliz Towers, ALDF* and *El Rescate*, legitimate public interest groups throughout California whose missions is to represent victims of discrimination, refugees, immigrants, persons facing issues with securing housing, consumers, environmental and animal rights advocates all could have their rights as "persons" to seek public injunctive relief under the UCL undermined or eliminated unless the Supreme Court intervenes to resolve this split of authority.

Granting this Petition is thus necessary to protect and preserve the ability of non-profit organizations to divert resources and undertake efforts in furtherance of their mission to advocate for their constituents, who otherwise may be either fearful or powerless to take on large corporate business interests. As was the situation in this case, individuals who proceed with claims against large corporations such as Aetna can face threats of retaliation and reprisal for bringing such claims, or even retaliatory lawsuits. Although individuals or small businesses impacted by a corporation's illegal policy or practice would have standing to seek public injunctive relief under *McGill*, they may have little incentive to bring such claims in face of such concerns of retaliation. Legitimate public interest organizations should be

permitted to step in to assist in addressing these concerns without fear of reprisal or retaliation.

The Court should thus also grant review to address an important issue of law involving a matter of significant public interest, and provide guidance to courts throughout this State and elsewhere on this important standing issue.

CONCLUSION

As this Court stated in *Kwikset*, 51 Cal. 4th at 324 (quoting Justice Alito), "injury-in-fact is not Mount Everest". The Opinion makes standing under the UCL a virtually impossible mountain to climb for a whole host of legitimate non-profit organizations, including CMA, who desire to seek injunctive relief to stop illegal conduct, where efforts to do so independently of litigation have failed.

The Second District is now in conflict with this Court. It is also in conflict with at least one other decision of the First District in *ALDF*. To leave the Opinion intact would leave in place a ruling that would directly conflict with *ALDF* and would be inconsistent with a litany of other Supreme Court and Court of Appeal decisions. The Second District failed to adequately harmonize

these decisions, in part because they cannot be harmonized. They simply cannot all be correct.

This Court should intervene to resolve these conflicts and address these issues of public importance by granting the Petition.

June 7, 2021

Respectfully submitted,

/s/Alan M. Mansfield

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief is produced using 13-point Century Schoolbook type, including footnotes, and contains 7,294 words, as counted by Microsoft Word, which is within the 8,400 words permitted.

By: */s/Alan M. Mansfield*
Alan M. Mansfield

PROOF OF SERVICE

I, Suzanne Perry York declare: I am a citizen of the United States and employed in Jefferson County, Alabama. I am over the age of eighteen years and not a party to this action. My business address is 2001 Park Place North, Suite 1000, Birmingham, Alabama 35203. On June 7, 2021, I served a copy of the Plaintiff/Appellant's Petition for Review on the interested parties in this action by placing a true copy thereof, via U.S. Mail enclosed in a sealed envelope, postage pre-paid, addressed as follows:

The Honorable Elihu Berle
Los Angeles Superior Court
Department 003
312 North Spring Street
Los Angeles, California 90012

Jackie Lacey
Los Angeles County District Attorney
211 West Temple Street
Suite 1200
Los Angeles, California 90012

Pursuant to the Office of Attorney General's instructions I served a copy of the Plaintiff/Appellant's Petition for Review electronically through the Office website at https://oag.ca.gov/services-info/17209-brief/add.

In addition, all counsel of record in this matter have been concurrently served with the foregoing via the True Filing service as required by this Court.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 7, 2021 at Birmingham, Alabama.

/s/ Suzanne Perry York

Exhibit 1

63 Cal.App.5th 660
Court of Appeal, Second
District, Division 8, California.

CALIFORNIA MEDICAL
ASSOCIATION, Plaintiff and Appellant,
v.
AETNA HEALTH OF CALIFORNIA
INC., Defendant and Respondent.

B304217
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Filed 4/28/2021

Synopsis

Background: Professional medical association brought action against healthcare insurer seeking an injunction for alleged violations of the Unfair Competition Law (UCL). The Superior Court, Los Angeles County, No. BC487412, Elihu M. Berle, J., entered summary judgment for insurer. Association appealed.

[Holding:] The Court of Appeal, Grimes, J., held that association lacked standing to pursue representative action under the UCL.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1] **Judgment** Presumptions and burden of proof

The party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. Cal. Civ. Proc. Code § 437c(p)(2).

[2] **Judgment** Existence or non-existence of fact issue

A "triable issue of material fact" exists for summary judgment purposes where the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. Cal. Civ. Proc. Code § 437c(p)(2).

[3] **Judgment** Nature of summary judgment

Summary judgment is a particularly suitable means to test the sufficiency of the plaintiff's or defendant's case. Cal. Civ. Proc. Code § 437c(p)(2).

[4] **Appeal and Error** De novo review

On appeal of grant of summary judgment, the Court of Appeal takes the facts from the record that was before the trial court and reviews the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. Cal. Civ. Proc. Code § 437c(p)(2).

[5] **Antitrust and Trade Regulation** Private entities or individuals

Associations Particular Claims and Contexts

An association must produce evidence that it itself, and not just its members, lost money or property in order to have standing to sue under the Unfair Competition Law (UCL). Cal. Bus. & Prof. Code §§ 17200, 17204.

[6] **Antitrust and Trade Regulation** Private entities or individuals

Corporations and Business Organizations Persons entitled to sue; standing

Professional medical association's alleged diversion of resources related to healthcare insurer's policy that restricted or eliminated patient referrals by its in-network physicians to out-of-network physicians was insufficient evidence of direct injury to association itself, and thus, association lacked standing to pursue representative action on behalf of its physician members under the Unfair Competition Law (UCL); time spent by association in response to insurer's termination or threats to terminate association members' contracts for making patient referrals to out-of-network was typical of the support that association provided its members in furtherance of its mission. Cal. Bus. & Prof. Code §§ 17200, 17204.

Witkin Library Reference: 13 Witkin, Summary of Cal. Law (11th ed. 2017) Equity, § 139 [Standing Not Established Under Proposition 64.]

APPEAL from a judgment of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC487412)

Attorneys and Law Firms

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Opinion

GRIMES, Acting P. J.

***1** Defendant and respondent Aetna Healthcare of California, Inc. (Aetna), doing business as Aetna U.S. Healthcare Inc. and Aetna Health of California, Inc., provides health insurance to its subscribers through a network of physicians who are contracted to provide services for discounted rates. Subscribers may receive services from these in-network physicians, or from out-of-network physicians at a higher share of the cost. Aetna implemented a policy to restrict or eliminate patient referrals by its in-network physicians to out-of-network physicians. Plaintiff and appellant California Medical Association (CMA) and others sued Aetna, seeking among other claims, an injunction for alleged violations of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200). The trial court granted Aetna's motion for summary judgment, finding CMA lacked standing under the UCL because it was not directly injured by Aetna's policy.

California courts have permitted associations like CMA to bring a nonclass representative action on behalf of their members and others under Code of Civil Procedure section 382 where such an action is justified by considerations of necessity, convenience, and justice. (See, e.g., *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 793–796, 171 Cal.Rptr. 334, and cases cited therein.) None of the cases recognizing representational standing under section 382 involve UCL claims.

The law recognizing an association's standing to bring a nonclass representative action developed many years before the electorate passed Proposition 64 in 2004, which changed the requirements for standing to bring a UCL claim. Proposition 64 amended the UCL to limit standing to bring a private enforcement action only to one " 'who has suffered injury in fact and has lost money or property as a result of the unfair competition.' " (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1000, 95 Cal.Rptr.3d 605, 209 P.3d 937

(*Amalgamated Transit*); see also Bus. & Prof. Code, § 17204.)

This appeal presents two issues. First, we must decide if the body of law permitting an association to bring a nonclass representative action bestows standing upon CMA to seek an injunction against Aetna under the UCL, whether or not CMA individually suffered injury in fact and lost money or property. We find the answer to that question is "no." Next, we must decide whether CMA's evidence that it diverted substantial resources to assist its physician members who were injured by Aetna's policy created a material disputed fact as to whether CMA itself suffered injury in fact and lost money or property. We find the answer to that question also is "no" and affirm the trial court's grant of summary judgment on that basis.

BACKGROUND

An in-network physician commenced this action as a class action against Aetna in 2012. The complaint was amended in 2013 to add more plaintiffs, including individual physicians, their medical practices, and medical associations, including CMA. The putative class action alleged breach of contract, tort claims, violation of the UCL, and other claims. No motion for class certification was ever filed. After several years of litigation and mediation, the parties stipulated to dismiss the class claims and to dismiss all plaintiffs except CMA, which would proceed as the only plaintiff with a single cause of action against Aetna for injunctive relief under the UCL.

***2** The operative fifth amended complaint alleged Aetna's insurance plans were marketed to physicians and subscribers as permitting subscribers to use out-of-network providers and facilities without limitation, albeit at a higher share of the cost. But the agreements between Aetna and its member physicians required the physicians to use in-network providers to the "fullest extent possible, consistent with sound medical judgment." Aetna sent letters to member physicians threatening that "[u]se of [out-of-network] facilities may be considered non-compliance with your physician agreement in which you agree to use contracted, participating network facilities." Aetna also told its member physicians that continued referrals to out-of-network providers would result in publication of a warning to subscribers about out-of-network costs on the physician's "DocFind" profile on Aetna's website.

CMA alleged Aetna unlawfully interfered with its member physicians' exercise of their independent medical judgment and treatment of patients in violation of various California statutes, including Business and Professions Code sections 510 and 2056, Insurance Code section 10133, and Health and Safety Code section 1367, and other statutes.

Regarding standing, the complaint alleged CMA "is a non-profit, incorporated professional organization that represents over 37,000 physicians throughout the state of California," and CMA "supports its members and carries out its mission through legislative, legal, regulatory, economic, and social advocacy." CMA alleged it was "forced to expend significant time and resources including but not limited to investigation and review of [Aetna's] wrongdoing, discussion and strategizing within their Executive Committee and Board of Director Meetings, and devoting time responding to physician inquiries about [Aetna's] wrongdoing."

Aetna, relying on *Amalgamated Transit*, moved for summary judgment, or in the alternative, summary adjudication, contending there was no material dispute that CMA lacked standing to bring a UCL claim because it was not directly harmed by Aetna's alleged wrongdoing. Aetna provided evidence that its challenged policy did not apply to CMA, which had no contract with Aetna, and CMA primarily claimed injury to its physician members for loss of patients and revenue. Aetna argued CMA's claim that it diverted resources to address Aetna's policy was insufficient to establish that CMA sustained direct injury and loss of money.

In opposition, CMA provided the declaration of Francisco Silva, its general counsel and senior vice president of legal, policy, and economic services, who testified that "preventing conduct that interferes with the physician-patient relationship" is part of CMA's core mission. He testified CMA has been "especially active in advocacy and education on issues involving heath insurance companies' interference with the

sound medical judgment of physicians providing care to their enrollees."

Mr. Silva explained in 2010, CMA heard about Aetna terminating or threatening to terminate its physician members from its network for referring patients to out-of-network providers. CMA "diverted ... staff time from other CMA projects and duties that would otherwise have been devoted to serving our membership to investigate Aetna's business practice ...." CMA's investigation determined that Aetna's conduct interfered with its members' exercise of their sound medical judgment, and therefore Aetna's conduct was frustrating CMA's purpose of protecting physicians and the public. The investigation was not undertaken for the purpose of bringing a lawsuit, but to advise CMA's members and the public about how to deal with Aetna's threats. Mr. Silva estimated that CMA diverted 200 to 250 hours of staff time addressing Aetna's conduct.

The trial court granted the motion and entered judgment for Aetna, finding *Amalgamated Transit* controlled on the issue of standing to bring UCL claims and CMA had not shown direct injury or loss of money or property. This timely appeal followed.

DISCUSSION

1. Standard of Review

***3** [1] [2] "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 107 Cal.Rptr.2d 841, 24 P.3d 493 (*Aguilar*).) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to [that] cause of action ...." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.) The party opposing summary judgment "shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists ...." (§ 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

[3] [4] Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542, 213 Cal.Rptr.3d 764, 389 P.3d 1; *Aguilar, supra*, 25 Cal.4th at p. 854, 107 Cal.Rptr.2d 841, 24 P.3d 493.) It is no longer called a "disfavored" remedy. (*Perry*, at p. 542, 213 Cal.Rptr.3d 764, 389 P.3d 1.) "Summary judgment is now seen as a 'particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Ibid.*) On appeal, "we take the facts from the record that was before the trial court .... ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' " (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037, 32 Cal.Rptr.3d 436, 116 P.3d 1123, citation omitted.)

2. An Association Must Sustain Direct Economic Injury to Itself and Not Just Its Members to Bring a UCL Claim.

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice ...." (Bus. & Prof. Code, § 17200.) In 2004, the California electorate amended the UCL to provide that private enforcement actions may be brought only by one who has suffered direct economic injury. (*Amalgamated Transit, supra*, 46 Cal.4th at p. 1000, 95 Cal.Rptr.3d 605, 209 P.3d 937; see also Bus. & Prof. Code, § 17204 ["Actions for relief pursuant to this chapter shall be prosecuted exclusively ... by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition."].) This standing requirement replaced the former standing provision which allowed a UCL claim to be brought " 'by any person acting for the interests of itself, its members or the general

public.' " (*Amalgamated Transit*, at p. 1000, 95 Cal.Rptr.3d 605, 209 P.3d 937.)

In *Amalgamated Transit*, a union plaintiff sought to assert UCL claims against defendant employers. The union conceded it had not suffered direct injury under the UCL and claimed standing as the assignor of the claims of employees and former employees. The Supreme Court held that "[t]o allow a noninjured assignee of an unfair competition claim to stand in the shoes of the *original, injured claimant* would confer standing on the assignee in direct violation of the express statutory requirement in the unfair competition law, as amended by the voters' enactment of Proposition 64, that a private action under that law be brought *exclusively* by a 'person who has suffered injury in fact and has lost money or property as a result of the unfair competition.' " (*Amalgamated Transit*, *supra*, 46 Cal.4th at p. 1002, 95 Cal.Rptr.3d 605, 209 P.3d 937.) The court concluded that "all unfair competition law actions seeking relief on behalf of others ... must be brought as class actions." (*Id.* at p. 1005, 95 Cal.Rptr.3d 605, 209 P.3d 937.)

Two years after deciding *Amalgamated Transit*, the Supreme Court again held that, to have standing to bring a claim under the UCL after the 2004 amendments, a plaintiff must be able to show he personally sustained economic harm and that he lost money or property caused by the defendant's misconduct. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 317, 120 Cal.Rptr.3d 741, 246 P.3d 877 (*Kwikset*) ["Proposition 64 should be read in light of its apparent purposes, i.e., to eliminate standing for those who have not engaged in any business dealings with would-be defendants ..., while preserving for actual victims of deception and other acts of unfair competition the ability to sue and enjoin such practices...."].) The plaintiff in *Kwikset* was a consumer who bought a Kwikset lockset that was misrepresented as "Made in U.S.A." He would not have bought the lockset but for the misrepresentation. (*Id.* at p. 319, 120 Cal.Rptr.3d 741, 246 P.3d 877.) The Supreme Court found "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue." (*Id.* at p. 317, 120 Cal.Rptr.3d 741, 246 P.3d 877.)

***4** **[5]** We find the decisions in *Amalgamated Transit* and *Kwikset* require an association such as CMA to produce evidence that CMA itself, and not just its members, lost money or property in order to have standing to sue under the UCL; and the cases recognizing an association may have standing to assert its members' *non*-UCL claims do not apply here. (See, e.g., *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.*, *supra*, 114 Cal.App.3d at pp. 793–796, 171 Cal.Rptr. 334; *Kwikset*, *supra*, 51 Cal.4th at pp. 317–319, 120 Cal.Rptr.3d 741, 246 P.3d 877.)

3. Evidence That an Association Diverted Resources to Investigate Its Members' Claims of Injury and Advocate for Their Interests Is Not Enough to Show Standing Under the UCL.

This brings us to the question whether CMA produced evidence of direct economic injury to CMA itself. CMA argues we should rely upon *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 184 Cal.Rptr.3d 759 (*ALDF*) to find diversion of its resources is a sufficient injury to confer standing under the UCL. In its analysis, the *ALDF* court discussed *Kwikset* at length, concluding the plaintiff had standing because, like the plaintiff in *Kwikset*, the plaintiff in *ALDF* spent resources it would not have spent but for defendants' illegal conduct. (*ALDF*, at pp. 1283–1284, 184 Cal.Rptr.3d 759.)

Plaintiff in *ALDF* was an organization that advocated for a ban on the sale of foie gras and engaged in a campaign to inform legislators and the public that producing foie gras involves animal cruelty because birds are forcibly overfed. The plaintiff sued to enjoin defendants under the UCL for selling foie gras in their restaurant in violation of the ban on its sale. (*ALDF*,

supra, 234 Cal.App.4th at p. 1275, 184 Cal.Rptr.3d 759.) Defendants filed a special motion to strike under Code of Civil Procedure section 425.16, arguing the lawsuit arose from protected activity, and that the plaintiff could not demonstrate a probability of prevailing on the merits because it lacked standing under the UCL. (*ALDF*, at p. 1278, 184 Cal.Rptr.3d 759.)

To show it had standing, the plaintiff produced evidence that it diverted significant organizational resources to combat the defendants' continuing illegal sales of foie gras. The plaintiff had lobbied in support of the ban and after it became law. The plaintiff paid a private investigator to dine at the restaurant where he was served foie gras three times after the ban became law. The plaintiff spent significant staff time and resources over the course of three months to share its investigation findings with local law enforcement authorities and try to persuade them to enforce the ban. The plaintiff itself was harmed by having to spend money that would have been unnecessary to spend if the defendants had not violated the ban. (*ALDF*, *supra*, 234 Cal.App.4th at pp. 1279–1282, 184 Cal.Rptr.3d 759; *id.* at p. 1282, 184 Cal.Rptr.3d 759 ["Plaintiff, thus, has presented evidence of a genuine and long-standing interest in the effective enforcement of the [statutory ban on foie gras] and in exposing those who violate it. Plaintiff's evidence provides a basis to conclude that defendants' alleged violations of the statute tended to frustrate plaintiff's advocacy for an *effective* ban on the sale of foie gras in California, and tended to impede plaintiff's ability to shift its focus on advocacy efforts in, for example, other states and at the federal level."].)

CMA says the declaration of Mr. Silva and other evidence it produced show the same type of injury that *ALDF* held was sufficient to show a likelihood of success in proving the plaintiff had standing under the UCL, and Aetna did not object to any of CMA's evidence.

***5** We find *ALDF* is distinguishable and does not apply here. The key factual and procedural distinction is the plaintiff in *ALDF* did not bring a representative action, as CMA did in this case. ALDF was not advocating on behalf of or providing services to help its members deal with their loss of money or property. The *ALDF* opinion does not even say whether ALDF had members or who they might be. (*ALDF*, *supra*, 234 Cal.App.4th at pp. 1279–1280, 184 Cal.Rptr.3d 759.) We can guess if ALDF has members, they support ALDF's mission to prevent animal cruelty. The mission and very purpose for being of the plaintiff in *ALDF*—*to* prevent animal cruelty—were directly injured by the defendants' violation of the ban on sales of foie gras. (*Id.* at pp. 1282–1283, 184 Cal.Rptr.3d 759.)

[6] Unlike the facts in *ALDF*, the evidence here was that CMA was founded to advocate on behalf of its physician members. The staff time spent here in response to Aetna's termination and threats to terminate physicians was typical of the support CMA provides its members in furtherance of CMA's mission. If we were to apply *ALDF* to this case, then any organization acting consistently with its mission to help its members through legislative, legal and regulatory advocacy could claim standing based on its efforts to address its members' injuries. The 2004 amendments to the UCL eliminated such representational standing. (*Amalgamated Transit*, *supra*, 46 Cal.4th at p. 1005, 95 Cal.Rptr.3d 605, 209 P.3d 937.)

We now turn to the key legal distinction between *ALDF* and this case. The court in *ALDF* did not distinguish *Amalgamated Transit* or explain how its decision was either consistent with, or created an exception to, or extended the rationale and holding of *Amalgamated Transit*, which, like this case, was a representative action seeking to rectify injury to its aggrieved members. The likely reason for this is because ALDF did not bring a representative action on behalf of aggrieved members like the union in *Amalgamated Transit*, or CMA in this case. Unlike the union in *Amalgamated Transit*, CMA does not acknowledge that only its members, and not CMA itself, suffered actual injury,

but we have rejected CMA's position. Just like the union in *Amalgamated Transit*, CMA brought this representative action to rectify injury to its aggrieved physician members. Like the trial court below, we see no way to square the opinion in *ALDF* with the on-point Supreme Court decision in *Amalgamated Transit.*

CMA also relies on *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 216 Cal.Rptr.3d 627, 393 P.3d 85, which held a private person or association may seek injunctive relief for the benefit of the general public, so long as the plaintiff has standing. (*Id.* at p. 959, 216 Cal.Rptr.3d 627, 393 P.3d 85 ["We conclude that these provisions do not preclude a private individual who has 'suffered injury in fact and has lost money or property as a result of' a violation of the UCL or the false advertising law (Bus. & Prof. Code, §§ 17204, 17535)—and who therefore has standing to file a private action—from requesting public injunctive relief in connection with that action."].) Assuming without deciding CMA seeks to benefit the general public, and not just its members, *McGill* is of no use to CMA because it did not suffer injury in fact or lose money or property as a result of the UCL violations it alleges here.

As explained at the outset, it is unnecessary to address and discuss the other California cases CMA cites (e.g., *Raven's Cove Townhomes, Inc. v. Knuppe Development Co., supra*, 114 Cal.App.3d at pp. 793–796, 171 Cal.Rptr. 334, and cases cited therein), holding an association may maintain a representative, nonclass action on behalf of its members, because none of those cases involved claims under the UCL or another statute that expressly limited the right to sue to those persons who suffered direct injury in fact and lost money or property.

4. The Federal Authorities CMA Cites Are Neither Binding on This Court Nor Instructive.

***6** We recognize that in amending the UCL in 2004, the drafters and electorate intended to incorporate federal requirements for standing. "[Proposition 64] declares: 'It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been *injured in fact under the standing requirements of the United States Constitution*.' " (*Kwikset, supra*, 51 Cal.4th at p. 322, 120 Cal.Rptr.3d 741, 246 P.3d 877.) However, *Kwikset* also acknowledged that UCL standing requirements are far more stringent than the federal standing requirements. " 'Whereas a federal plaintiff's "injury in fact" may be intangible and need not involve lost money or property, Proposition 64, in effect, added a requirement that a UCL plaintiff's "injury in fact" specifically involve "lost money or property." ' " (*Kwikset*, at p. 324, 120 Cal.Rptr.3d 741, 246 P.3d 877.) We do not find the federal authorities CMA cites are instructive in deciding the issue of an association's standing to bring a representative action under the UCL.

Most of the federal authorities cited in CMA's briefs discuss organizational or associational standing to bring *non*-UCL claims. (See, e.g., *Fair Housing Council v. Roommate.com, LLC* (9th Cir. 2012) 666 F.3d 1216, 1219 [addressing an organization's standing to seek relief under California Fair Employment and Housing Act]; *Fair Housing of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899, 902–905 [analyzing standing in the context of fair housing claims]; *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review* (9th Cir. 1991) 959 F.2d 742, 748 [addressing standing to assert claims for violations of immigration law].) None of these cases is helpful as they do not consider the stringent requirements for UCL standing after the Proposition 64 amendments became effective in 2004.

Southern California Housing Rights Center v. Los Feliz Towers Homeowners Assn. (C.D.Cal. 2005) 426 F.Supp.2d 1061, does address UCL standing. That case held the Housing Rights Center had UCL standing after the 2004 amendments because the center presented "evidence of actual injury based on loss of financial resources in investigating this claim and diversion of staff time from other cases to investigate the allegations here." (*Southern California Housing Rights Center*, at p. 1069.) That

case predates *Amalgamated Transit* and *Kwikset* by four and six years, respectively. The case offers little guidance since there is now current, binding California law that governs UCL standing to bring a representative action. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126, 17 Cal.Rptr.2d 365, 847 P.2d 45 [federal law is not binding on this court in its interpretation of state law].)

Because we have found that CMA did not demonstrate a material factual dispute as to standing, we affirm the judgment and do not address the parties' remaining arguments on appeal, as to whether the judgment may be affirmed on other grounds.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

WE CONCUR:

STRATTON, J.

WILEY, J.

All Citations

--- Cal.Rptr.3d ----, 63 Cal.App.5th 660, 2021 WL 1660614, 21 Cal. Daily Op. Serv. 3989, 2021 Daily Journal D.A.R. 4188

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