S269212

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA MEDICAL ASSOCIATION,

Petitioner,

v.

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

Respondents.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B304217

(LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC487412)

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER WATCHDOG IN SUPPORT OF PETITIONER CALIFORNIA MEDICAL ASSOCIATION

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), Consumer Watchdog, a 501(c)(3) non-profit charitable organization, respectfully seeks permission to file the accompanying amicus brief in support of Plaintiff and Petitioner California Medical Association. Counsel for proposed amicus are well acquainted with the statutes and case law that are at issue in the matter.[1] The proposed amicus brief is intended to assist the Court by addressing the construction and interpretation of Proposition 64 and its interplay with the important doctrine of direct organizational standing. The doctrine of direct organizational standing, as applied to claims under the Unfair Competition Law ("UCL"), is consistent with the text and purpose of Proposition 64. Furthermore, there is overwhelming agreement amongst California state courts and the U.S. Court of Appeals for the Ninth Circuit that an organization's UCL standing is properly analyzed pursuant to the well-established doctrine of direct organizational standing.

The Court of Appeal's decision below, if left undisturbed, will have a wide-ranging impact on organizations seeking to bring both UCL and non-UCL claims alike, effectively precluding membership organizations from ever bringing direct suit over injuries personally suffered in responding to and assisting their members. Respondents would have this Court go even further, arguing that the doctrine of direct organizational standing is incompatible with Proposition 64, which would preclude all organizations, membership or not, from seeking redress under the UCL for harms they suffer when a defendant frustrates their organizational mission.

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[1] Among other matters, Consumer Watchdog jointly filed an amicus brief in the key post-Proposition 64 UCL standing case *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, discussed at length in the appellate decision and briefing before this Court. Consumer Watchdog's attorneys also regularly litigate actions for UCL violations.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Consumer Watchdog is a non-profit, non-partisan charitable citizen organization incorporated in California. Founded in 1985, Consumer Watchdog operates a unique model of citizen advocacy on behalf of the vast majority of Americans whose interests as consumers are otherwise unrepresented. It deploys a team of public interest attorneys, policy experts, strategists, and grassroots activists all working together in the courts, before government agencies, legislative bodies and Congress, and in the public arena through news and social media to expose, confront, and redress injustice. Consumer Watchdog has saved Americans billions of dollars and protected countless lives. The staff of Consumer Watchdog includes some of the nation's foremost advocates and experts.

Consumer Watchdog's Legal Project attorneys advocate on behalf of consumers before regulatory agencies, the legislature, and the courts. Over the course of three decades, Consumer Watchdog attorneys have represented consumers in numerous class actions, civil lawsuits, and administrative complaints. Consumer Watchdog also brings litigation as a plaintiff organization on behalf of the public. The Legal Project specializes in highly complex litigation to address civil rights violations, consumer abuses in the marketplace, and political corruption. As noted *supra*, Consumer Watchdog previously filed an amicus brief in the *Kwikset* case, and as a consumer protection organization, it has a continued interest in ensuring that courts are properly interpreting and applying the UCL, including this Court's precedent. That interest is heightened further here, where the doctrine of direct organizational standing is under assault.

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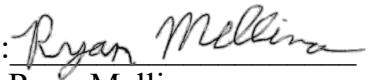
Dated: June 10, 2022

Respectfully submitted,

CONSUMER WATCHDOG

By: 
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AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF DISCUSSION

This case will decide important issues concerning the impact of Proposition 64, passed in 2004, on the availability of direct organizational standing under the Unfair Competition Law. This Court should find that direct organizational standing is entirely compatible with the post–Proposition 64 UCL standing requirements. In fact, permitting direct organizational standing is consistent with the text and purpose of Proposition 64 and serves the broader purposes of the UCL. Rather than counseling *against* its availability, as the Court of Appeal incorrectly concluded, Proposition 64 supports finding that direct organizational standing, as shown when an organization diverts resources in response to a frustration of its mission, is sufficient for UCL standing. The Court of Appeal, in applying its interpretation of the effects of Proposition 64 to Petitioner California Medical Association's ("CMA") claimed injury, incorrectly concluded that CMA's action was representative in nature, and erroneously determined that CMA's evidence that it diverted resources to address conduct frustrating its mission was insufficient to establish standing under the UCL, despite contrary precedent. This outcome is consistent with this Court's decision in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310; *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945; and other post–Proposition 64 cases interpreting the scope and application of the UCL. We respectfully urge this Court to reverse the opinion in its entirety.

Petitioner challenges whether its "evidence that it diverted substantial resources to assist its . . . members who were injured by [Respondent] Aetna's policy created a material disputed fact as to whether [Petitioner] itself suffered injury in fact and lost money or property." (*California Medical Assn. v. Aetna Health of California Inc.* ("*CMA*") (2021) 63 Cal.App.5th 660, 663.) The trial court erred in granting summary

judgment because, based on longstanding and applicable case law, Petitioner sufficiently produced factual evidence to create a triable issue of material fact as to whether Petitioner had in fact "lost money or property." The Court of Appeal, citing no precedent in support of its conclusion, held that a membership organization that diverts resources to assist its members cannot use that direct organizational injury as a basis for UCL standing. That conclusion, however, ignores state and federal authority to the contrary.

Errors aside, the Court of Appeal correctly did not (1) call into question or undermine the doctrine of organizational standing; (2) find that organizations cannot have direct standing to bring UCL claims; or (3) hold that a "diversion of resources" could never be sufficient to show "lost money or property."

However, Respondents urge this Court to go much further than even the Court of Appeal did and foreclose the well-settled doctrine of direct organizational standing, which has developed over four decades in accordance with the U.S. Supreme Court decision *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363. (Resp. Br. 15–16.) Such a holding would be contrary not only to state and federal precedent, but also to the Court of Appeal's decision below, which noted that an organization producing evidence of economic injury to itself would have UCL standing. (*CMA*, *supra*, 63 Cal.App.5th at p. 667.)

Respondents' core argument—that "CMA's theory of standing would permit what [Proposition 64] voters forbade," even with Petitioner's "purported safeguards in place"—is unavailing. (Resp. Br. 22–23.) In fact, Proposition 64 was targeted at a "specific abuse of the UCL . . . its use by unscrupulous lawyers who exploited the generous standing requirement of the UCL to file 'shakedown' suits to extort money from small businesses." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 316.) Neither the effective

text of nor the ballot pamphlet for Proposition 64 makes a single mention of "organizational standing." There is no indication that Proposition 64 voters believed they were foreclosing a well-recognized form of standing based on direct economic injury when they added a direct economic injury requirement to UCL standing.

The UCL, as amended by Proposition 64, is entirely compatible with direct organizational standing doctrine. Prior to 2004, the UCL had permitted any party to file suit on its own behalf, on its members' behalf, or on the public's behalf, without a showing of injury. Proposition 64, as passed by voters in 2004, amended the UCL's standing requirements by requiring plaintiffs to show a personalized economic injury-in-fact ("lost money or property") caused by the defendant's UCL violation. Proposition 64 did this by incorporating into the UCL the federal meaning of the phrase "injury-in-fact" (which the UCL had not previously required for standing), by adding a "lost money or property" (economic injury) requirement, and by specifying that such economic injury occur "as a result of" the defendant. CMA is not asserting that these standards do not apply to it, and neither is Consumer Watchdog.

Pursuant to *Havens*, an organization shows an injury sufficient for standing when it diverts resources because of a frustration of its organizational mission. Numerous cases have found that this injury is economic in nature. Because such a diversion of resources is a personalized economic injury, it is sufficient for UCL standing after Proposition 64.

This Court need not strain to find a case properly applying direct organizational standing to a UCL claim: *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270 ("*ALDF*"). As Petitioner argued to the Court of Appeal, *ALDF* properly analyzed the requirements of organizational standing under the UCL, finding that the organizational plaintiff had standing on materially indistinguishable facts as here. The

Court of Appeal's (and Respondents') efforts to differentiate *ALDF* from the case here, however, are both legally and factually unpersuasive. What Respondents denigrate as "purported safeguards" are, in fact, the standards developed by the Ninth Circuit to address direct organizational standing—standards that are not in tension with UCL standing requirements. (Resp. Br. 23.) And these "safeguards" that have been widely utilized by the Ninth Circuit were endorsed by the Court of Appeal in *ALDF* (see *ALDF*, *supra*, 234 Cal.App.4th at pp. 1281–84). This Court should follow that precedent and affirm *ALDF*'s conclusions.

There is extensive case law finding that membership organizations can establish direct organizational standing on materially indistinguishable facts – that such organizations have members is irrelevant to those analyses. The Court of Appeal's conclusion that the evidence presented by Petitioner, regarding its diversion of resources, was insufficient to show direct injury was predicated on the erroneous belief that an organization can never suffer direct injury when it acts to help its members. That conclusion is at odds with the weight of authority and the plain language of the UCL. Its decision should be reversed.

The Court of Appeal further erred in finding that federal case law addressing direct organizational standing in a non-UCL context was irrelevant, despite acknowledging that Proposition 64 incorporated federal standing requirements—which allow for organizational standing—into the UCL. According to the Court of Appeal, this jurisprudence was inapposite given what it termed the "far more stringent" requirements of UCL standing. But such a distinction is not supported by this Court's precedent. As previously held in *Kwikset*, *supra*, 51 Cal.4th at pp. 323–24, the only difference between UCL standing and Article III standing is that a UCL plaintiff must show they personally "lost money or property"; i.e., that they suffered an "economic injury." And as *Kwikset* further held, a plaintiff need

only produce an "identifiable trifle" of economic injury to have standing. Federal case law involving direct organizational standing similarly asks whether an organization has "diverted resources" in response to a frustration of mission, which is unto itself an economic injury. The Court of Appeal's refusal to consider federal organizational standing case law is reversible error in light of the incorporation of federal standing requirements into the UCL. Under bedrock Supreme Court and Ninth Circuit precedent, which this Court should properly view as persuasive authority here just as it has in other UCL cases, the facts evidenced by Petitioner were more than sufficient to establish direct standing.

Additionally, Respondents invite this Court to further compound the errors of the Court of Appeal by finding that Proposition 64 imposed a "business dealings" requirement on plaintiffs in order to have UCL standing. Requiring a plaintiff to enter into a business transaction with a defendant in order to have UCL standing is contrary to both the text and purpose of the UCL. This argument, despite being rejected in both state and federal courts, has lingered on, largely due to a misinterpretation of Proposition 64 ballot pamphlet language quoted by the Supreme Court of California. This Court should confirm that there is no requirement of business dealings as a predicate to UCL standing.

Though the Court of Appeal's decision did not reach any causation issues, as the Court based its holding on the absence of injury-in-fact, should this Court decide to evaluate causation sua sponte, Petitioner's injury was clearly caused by the actions of Respondents. The Court should reject Aetna's arguments to the contrary.

In light of the error of the Court of Appeal, Amicus urges this Court to approve of *ALDF* and remand to the lower court with directions to deny the motion for summary judgment.

ARGUMENT

I. UCL Standing After Proposition 64

A. UCL Standing Requires a Personal Economic Injury Caused by Defendant

This Court has found that the "UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services," and its "scope is broad." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949, as modified (May 22, 2002).) "In service of that purpose, the Legislature framed the UCL's substantive provisions in broad, sweeping language." (*Kwikset*, *supra*, 51 Cal.4th at p. 320 [quotations omitted]; see also *Tobacco II*, *supra*, 46 Cal.4th at p. 317 [UCL has "broad remedial purpose"]; *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 716 [noting the "broad mandate of the California UCL"].) This Court has further found that the "primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction." (*Tobacco II*, *supra*, 46 Cal.4th at p. 319.)

Before Proposition 64 was passed in 2004, the UCL had "authorized 'any person acting for the interests of itself, its members or the general public' (former § 17204)[2] to file a civil action for relief. Standing to bring such an action did not depend on a showing of injury or damage." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228.) In *Kwikset*, *supra*, 51 Cal.4th at p. 322, this Court found that Proposition 64 made two changes to the previous standing requirements: "a party must now (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim."

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[2] All statutory references are to the California Business and Professions Code unless otherwise noted.

Kwikset held that "[i]f a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact." (*Id.* at p. 325.) Proposition 64 did not alter the "substantive reach" of the UCL; it only changed the "universe of those who may enforce" it. (*Id.* at p. 320.) As relevant here, Proposition 64 added language restricting standing to sue for injunctive relief to one "who has suffered injury in fact and has lost money or property as a result of such unfair competition." (Prop. 64, § 1(e).)

This Court has found that Proposition 64 was directed at a "specific abuse of the UCL . . . its use by unscrupulous lawyers who exploited the generous standing requirement of the UCL to file 'shakedown' suits to extort money from small businesses," and rejected constructions of Proposition 64 not "necessary to address the very specific abuse of the prior UCL standing provision at which Proposition 64 was directed." (*Tobacco II*, *supra*, 46 Cal.4th at pp. 315–16.) The quintessential example of such abuse of the UCL was by attorneys who "'scour[ed] public records on the Internet for what [were] often ridiculously minor violations of some regulation or law by a small business, and sue[d] that business in the name of [a] front organization,'" before "'contact[ing] the business (often owned by immigrants for whom English is a second language)'" to urge settlement. (*Id.* at p. 316 [quoting *People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317].) Proposition 64 was therefore aimed at attorneys who "[f]ile lawsuits where no client has been injured in fact." (*Ibid.* [quoting Prop. 64, § 1].) Proposition 64 did not "curb the broad remedial purpose of the UCL"—rather, it "targeted only the specific abuse described above." (*Id.* at p. 317.) Thus, in *Tobacco II*, this Court rejected a construction of Proposition 64 not "necessary to address the very specific abuse of the prior UCL standing provision at which Proposition 64 was directed." (*Id.* at p. 315.)

As this Court has recently held, following Proposition 64, an individual or organization that has suffered economic harm as a result of a defendant's activity may still bring an action for injunctive relief on behalf of the general public without complying with the class action procedures of Code Civ. Proc. section 382. (*McGill*, *supra*, 2 Cal.5th at p. 959 ["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—and who therefore has standing to file a private action—from requesting public injunctive relief in connection with that action"] [internal citations omitted].) Here, the Court of Appeal "assum[ed] without deciding" that the relief CMA sought was "public injunctive relief" intended to "benefit the general public, and not just [CMA's] members . . . ." (*CMA*, *supra*, 63 Cal.App.5th at p. 669.)[3]

B. Proposition 64 Incorporated the "Established Federal Meaning" of the Phrase "Injury-in-Fact" into the UCL

The Court of Appeal refused to rely on federal cases finding direct organizational standing in a non-UCL context because those cases did "not consider the stringent requirements for UCL standing after . . . Proposition 64[.]" (*CMA*, *supra*, 63 Cal.App.5th at p. 670.) However, as this Court made clear in *Kwikset*, while UCL standing was "substantially narrower" after Proposition 64, it was narrower only in requiring a direct economic injury-in-fact. (*Kwikset*, *supra*, 51 Cal.4th at p. 324.) Proposition 64 did not require a showing of any specific type or degree of economic injury. (*Ibid.*)

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[3] Respondents argue that CMA's theory "would give organizations the broad standing to sue on behalf of the public that Proposition 64 reserved to the 'Attorney General and local public prosecutors.'" (Resp. Br. 22.) This Court, in *McGill*, *supra*, 2 Cal.5th at p. 959, already held they could do so. So long as a party has "standing to file a private action" under the UCL, that party can "request[] public injunctive relief in connection with that action." (*Ibid.*)

Federal cases finding direct economic injury-in-fact, such as those cited by Petitioner, are therefore necessarily applicable under *Kwikset*.

As *Kwikset* noted, the "text of Proposition 64 establishes expressly that in selecting th[e] phrase [injury-in-fact] the drafters and voters intended to incorporate the established federal meaning."[4] (*Id.* at p. 322.) Accordingly, courts assessing the UCL's injury-in-fact requirement necessarily rely on federal case law. (See, e.g., *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 814, as modified (Oct. 22, 2007), disapproved of on other grounds by *Kwikset*, *supra*, 51 Cal.4th 310 [examining federal case law, specifically *Havens*, to "interpret the term 'injury-in-fact'"]; *ALDF*, *supra*, 234 Cal.App.4th at p. 1281 ["Cases addressing the federal standing requirement . . . are relevant as explained in *Kwikset* . . . ."].) Despite "sound reasons to be cautious in borrowing federal standing concepts, born of perceived constitutional necessity, and extending them to state court actions where no similar concerns apply . . . Here . . . the electorate has expressly directed courts to do so." (*Kwikset*, *supra*, 51 Cal.4th at p. 322, fn. 5.) Thus, when *Buckland* and *Kwikset* interpreted "injury-in-fact," they did so primarily through citation to federal case law. Respondents' contention that "Proposition 64 [Did] Not Silently Import Broader Federal Standing Rules for Organizations" (Resp. Br. 25) is misguided.

As *Kwikset* held, the "plain import of [Proposition 64's 'lost money or property' language] is that a plaintiff now must demonstrate some form of economic injury." (*Kwikset*, *supra*, 51 Cal.4th at p. 323.) This Court was clear that "lost money or property" is the functional equivalent of "economic injury," stating, for instance, "lost money or property—

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[4] See also *ibid.* (noting that the federal meaning of "injury-in-fact" was "well-settled").

economic injury—is itself a classic form of injury in fact," and referring to the "lost money or property provision" as the "economic injury requirement." (*Id.* at pp. 323–24.) Indeed, even the section of *Kwikset* discussing this issue is titled "'Lost Money or Property': Economic Injury." (*Id.* at p. 323.) Additionally, *Kwikset* was explicit in finding that "[t]here are innumerable ways in which economic injury from unfair competition may be shown," and that "[n]either the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of 'lost money or property,' nor can or need we supply an exhaustive list of the ways in which unfair competition may cause economic harm." (*Ibid*.) Furthermore, the "text of Proposition 64 [establishes] that the quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact . . . ." (*Id.* at p. 324.) Therefore, "it suffices for federal [and thus UCL] standing purposes to 'allege[ ] some specific, 'identifiable trifle' of injury.'" (*Id.* at p. 325 [quoting *Danvers Motor Co., Inc. v. Ford Motor Co.* (3d Cir. 2005) 432 F.3d 286, 294 (Alito, J.)].) Ultimately, "[i]f a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact." (*Id.* at p. 325.)

Thus, *Kwikset* was clear that (1) Proposition 64's "lost money or property" requirement meant that a plaintiff must allege an economic injury-in-fact, (2) such injury can be shown in "innumerable ways," and (3) the degree of economic injury need only be a "specific, identifiable trifle." (*Id.* at pp. 323–25; see also *East Bay Sanctuary Covenant v. Biden* (9th Cir. 2021) 993 F.3d 640, 664 ["The [plaintiff] Organizations are not required to demonstrate some threshold magnitude of their injuries; one less client that they may have had but-for the Rule's issuance is enough. In other words, plaintiffs who suffer concrete, redressable harms that amount to pennies are still entitled to relief"].)

II. Diversion of Resources Caused by Frustration of Mission Is an Economic Injury Sufficient for UCL Standing

State and federal case law both recognize that an organization suffers economic injury when it has to divert resources to prevent its organizational mission being frustrated. An organization diverts resources when it "expend[s] additional resources that [it] would not otherwise have expended, and in ways that [it] would not have expended them." (*National Council of La Raza v. Cegavske* (9th Cir. 2015) 800 F.3d 1032, 1040.) An organization's mission is frustrated when it is "perceptibly impaired [in its] ability to carry out [its] mission." (*Valle del Sol Inc. v. Whiting* (9th Cir. 2013) 732 F.3d 1006, 1018–19.) The California Supreme Court implicitly recognized this in *Kwikset*, which cited approvingly to *Hall v. Time* (2008) 158 Cal.App.4th 847, 854–55, as "cataloguing some of the various forms of economic injury."[5] (*Kwikset*, *supra*, 51 Cal.4th at p. 323.)

In *Hall*, the Court of Appeal cited approvingly to the diversion of resources injury found sufficient in *Southern California Housing Rights Center v. Los Feliz Towers Homeowners Assn.* (C.D. Cal. 2005) 426 F.Supp.2d 1061, 1068–69 ("*So. Cal. Housing*") when it concluded that "[c]ases decided since Proposition 64 changed the language of Business and Professions Code section 17204 have concluded a plaintiff suffers an injury in fact for purposes of standing under the UCL when he or she has . . . expended money due to the defendant's acts of unfair competition." (*Hall*, *supra*, 158 Cal.App.4th at p. 854.) *So. Cal. Housing*, in turn, found the plaintiff organization had UCL "standing because it presents evidence of actual injury based on loss of financial resources in investigating this

[5] See also *Martinez v. Welk Group, Inc.* (S.D. Cal. 2012) 907 F.Supp.2d 1123, 1137–1138 (identical breakdown as in *Hall* of "[c]ases decided since Proposition 64 [that] have concluded that a plaintiff suffers an injury in fact for purposes of standing under the UCL").

claim and diversion of staff time from other cases to investigate the allegations here." (*So. Cal. Housing*, *supra*, 426 F.Supp.2d at p. 1069.)

Rather than calling into question the *Hall* court's reliance on *So. Cal. Housing*, *Kwikset* affirmatively cited *Hall*'s conclusions. Moreover, nothing in *Kwikset* indicates that diversion of resources stopped being an acceptable form of economic injury following Proposition 64. In *ALDF*, the California Court of Appeal recognized that both *Kwikset* and federal case law supported the conclusion that an organization's diversion of resources constituted an economic injury-in-fact sufficient for UCL standing. (*ALDF*, *supra*, 234 Cal.App.4th at pp. 1280–81.)

Similarly, federal cases awarding damages for the costs plaintiff organizations incur in diverting resources because of a frustration of mission further establish that this injury is economic in nature. In *Fair Housing of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899, 902, defendant was found liable at the district court, in part, under UCL section 17203. On appeal, defendant challenged both the plaintiff organization's standing and the damages award. (*Ibid.*) The Ninth Circuit held that plaintiff had "direct standing to sue because it showed a drain on its resources from both a diversion of its resources and frustration of its mission." (*Id.* at p. 905.) The court upheld damage awards for both "diversion of resource damages" and "frustration of mission" damages. (*Ibid.*)

In *Southern California Housing Rights Center v. Krug* (C.D. Cal. 2007) 564 F.Supp.2d 1138, 1152 (citations omitted), the court analogized "diversion of resource damages" to the "'opportunity costs' or the activities [plaintiff organization] had to forego to address defendant's action." As directly applicable here, examples of "diversion of resources damages" included "the staff time spent investigating Defendants' discriminatory practices at the subject property; the costs of conducting on-site tests and phone tests; and the cost of [an] on-site survey." (*Ibid.*; see also *Project*

Sentinel v. Komar (E.D. Cal., Apr. 12, 2021, No. 119CV00708DADEPG) 2021 WL 1346025, at *15, report and recommendation adopted *sub nom. Sentinel v. Komar* (E.D. Cal., June 4, 2021, No. 119CV00708DADEPG) 2021 WL 2284462, on reconsideration in part *sub nom. Project Sentinel v. Komar* (E.D. Cal., July 20, 2021, No. 119CV00708DADEPG) 2021 WL 3051991 [citing cases to find that "staff time," "testing expenses," and "community outreach expenses" constituted "diversion of resource damages" and upholding damage awards]; *Petconnect Rescue, Inc. v. Salinas* (S.D. Cal., Nov. 8, 2021, No. 20-CV-00527-H-DEB) 2021 WL 5178647 at *4 [finding that plaintiffs had UCL standing because "Organizational Plaintiffs incurred economic injury when they fielded inquiries from the public as the organizations' staff would otherwise be dedicated to the organizations' ordinary activities"]; *National Coalition Government of Union of Burma v. Unocal, Inc.* (C.D. Cal. 1997) 176 F.R.D. 329, 342 [characterizing plaintiff organization's diversion of resources as a "financial injury"]; *Carijano v. Occidental Petroleum Corp.* (9th Cir. 2012) 686 F.3d 1027, 1032 (mem.) (conc. opn. of Wardlaw, J., denying rehg. en banc) [stating that plaintiff organization could show "economic harm" sufficient for UCL standing by "produc[ing] evidence of the manner in which [defendant's] conduct forced it to divert resources from its central mission . . . ."].[6]) Critically, none of these decisions required an organization to spend money outside the organization, or to

[6] Judge Wardlaw wrote the original majority opinion in *Carijano v. Occidental Petroleum Corp.* (9th Cir. 2011) 643 F.3d 1216, as well as a subsequent concurrence denying rehearing en banc. (See *Shepherd v. Unknown Party, Warden, FCI Tucson* (9th Cir. 2021) 5 F.4th 1075, 1077–78 [court cited concurrence in denial of rehearing en banc as persuasive authority where the concurrence was written by the author of the original majority opinion].)

quantify the amount of staff time spent into some dollar amount in order to establish organizational standing.

Defendants attempt to sidestep the weight of this authority by focusing on the fact CMA employees are paid on salary rather than hourly. Respondents' theory, which is at odds with the holding in *Kwikset*, is that because Petitioner's claimed loss of resources was salaried staff time, "which would have been expended anyway," Petitioner's injury was non-economic, as "CMA did not lose a single cent." (Resp. Br. 32.) This misunderstands the nature of the "lost money or resources" inquiry and is contrary to organizational standing jurisprudence.[7] *Kwikset* specifically refused to incorporate an "out-of-pocket loss damages rule" into the requirements of UCL standing. (*Kwikset*, *supra*, 51 Cal.4th at p. 335.) The *Kwikset* defendants and dissent had argued that the locksets purchased by the plaintiffs, despite being misrepresented as "Made in USA," contained no other defects, and the lack of "objective 'functional' differences" meant the plaintiffs had not suffered "cognizable economic harm." (*Id.* at p. 331.) However, as there are "innumerable ways in which economic injury from unfair competition may be shown" (*id.* at p. 323), the majority correctly rejected this as too narrow an interpretation of UCL standing, concluding that the expenditure of resources (money to purchase the locksets) that was caused by the defendant's unfair business practice (misrepresenting the locksets as made in USA) was a "real economic harm" (*id.* at pp. 331–32).

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[7] See *Faith Action for Community Equity v. Hawaii* (D. Hawaii, Feb. 20, 2015, No. CIV. 13-00450 SOM) 2015 WL 736171, at *3–4 (since the "very nature of a diversion of resources contemplates a change in the organization's planned use of resources," court held that salaried staff time that had been diverted was a "sufficient resource for purposes of the organizational standing test," citing multiple other cases holding that the "diversion of staff time can support standing").

In other words, lost staff time is a compensable economic injury, regardless of whether those staff were salaried and would have been paid the same amount. As *Kwikset* found, the "economic injury that an unfair business practice occasions may often involve a loss by the plaintiff without any corresponding gain by the defendant, such as, for example, *a diminishment in the value of some asset a plaintiff possesses*." (*Id.* at p. 336, emphasis added.) That is the situation here—Aetna's policy, the unfair business practice, caused Petitioner to "los[e] the expected value of its staff's labor and institutional assets . . . ." (See Pet. Rep. Br. 20, quotation omitted.) As Petitioner correctly described, Respondents cited only inapposite cases involving individuals losing their own time, not organizations losing staff time. (Pet. Rep. Br. 18.)

III. Proposition 64 Did Not Eliminate or Preclude Direct Organizational Standing When an Organization Suffers Economic Injury

With this background, it is implausible to find that Proposition 64 was intended to eliminate or preclude direct organizational standing, as Respondents argue. (Resp. Br. 25–31.) The doctrine of organizational standing derives from the Supreme Court case *Havens*, which directly addressed the Article III injury-in-fact requirement that voters expressly incorporated into the UCL. Both before and after Proposition 64, the UCL has permitted suit to be brought by a "person," (UCL § 17204), where "person" is defined by UCL section 17201 to "mean and include natural persons, corporations, firms, partnerships, joint stock companies, *associations and other organizations of persons*" (emphasis added). Had Proposition 64 been intended to eliminate or preclude direct organizational standing, Proposition 64's amendments would have been an extremely odd way to do so, given that Proposition 64 never refers to direct organizational standing.

Indeed, despite Respondents' protestations (see Resp. Br. 19–24), there is nothing inherently strange or improper about direct organizational standing in the UCL context. The UCL expressly gives "persons" (both individuals and organizations) a private right of action when they suffer lost money or property as a result of a defendant's UCL violation. The strange result here would be finding that the doctrine of direct organizational standing—which requires a showing of economic injury—"diversion of resources"—caused by the defendant's conduct—"frustration of mission" —is for some reason incompatible with UCL standing after Proposition 64, even though the amended statutory language simply requires a direct economic injury caused by the defendant. Despite Respondents' contention that organizations are "subject[ed] to 'different standards' for standing than other private plaintiffs," (Resp. Br. 19), there is no basis for making that claim in the statutory language or ballot materials supporting Proposition 64, or in any cases applying a direct organizational standing inquiry. The courts in those cases are uniformly clear that they are "conduct[ing] the same inquiry as in the case of an individual . . . ." (*East Bay Sanctuary*, *supra*, 993 F.3d at p. 662, internal quotation and citation omitted.) Ultimately, whether a plaintiff is an individual or an organization, UCL standing requires the same thing: an economic injury caused by the defendant.

IV. California Court of Appeal and Ninth Circuit Case Law Have Consistently Applied Direct Organizational Standing Analysis in UCL Claims

A thorough review of published California appellate decisions discussing direct organizational standing under the UCL strongly supports finding that the doctrine is properly applied in that context. Nothing in any of those decisions indicates that the courts saw any issue with relying on direct organizational standing analysis in the UCL context. This section

details several UCL cases applying the doctrine of direct organizational standing, which emerged from the United States Supreme Court case *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363.

In *Havens*, the court was faced with the question of whether the plaintiff organization ("HOME") had shown the "Art. III minima of injury-in-fact— that . . . as a result of the defendant's actions [it] has suffered" injury. (*Havens*, *supra*, 455 U.S. at p. 372.) HOME specifically alleged that it had "been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services," and that it "has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." (*Id.* at p. 379.) *Havens* ultimately held that the "perceptible impairment" in HOME's ability to provide its services, along with its resource expenditures trying to counteract the defendants' practices, constituted a "concrete and demonstrable injury" that was "far more than simply a setback to the organization's abstract social interests."[8] (*Ibid.*)

A. This Court Should Adopt the Reasoning of *Animal Legal Defense Fund*

The most notable post-Proposition 64 California appellate case on diversion of resources is *ALDF*, which concerned a ban on the sale of foie gras. (*ALDF*, *supra*, 234 Cal.App.4th at p. 1275.) Plaintiff organization ALDF argued it suffered economic injury sufficient to establish UCL standing solely as a result of the organization's diversion of resources to combat the defendant's frustration of its mission. (*Id.* at pp. 1279–80.)

[8] See, e.g., *Buckland*, *supra*, 155 Cal.App.4th at p. 815 (describing *Havens*' holding: HOME "had alleged an injury in fact under Article III in asserting that the defendants' steering practices forced it to divert resources from its mission of providing counseling and referral services . . . and counteracting the defendants' racially discriminatory practices").

Examples of ALDF's diverted resources[9] included that ALDF (1) wrote letters of support for the bill banning foie gras sales, (2) performed public outreach regarding the bill's effective date, (3) paid an investigator to see if defendant was unlawfully selling foie gras, (4) diverted the attention of paid staff to defendant's unlawful sales after receiving the investigation results, (5) shared its findings with law enforcement, and (6) over the course of several months, diverted time and attention of staff attorneys to try to persuade law enforcement to enforce the ban. (*Id.* at p. 1280.) ALDF further argued that the defendant's unlawful behavior harmed ALDF's organizational mission by causing ALDF "'to postpone projects that would reach new media markets, reach new people, better develop [the] organization, and advance its mission.'" (*Ibid.*)

The *ALDF* court found that *Kwikset* "express[ed] some approval" that the expenditures of resources made by ALDF "constitute[d] injury in fact under the UCL." (*Id.* at p. 1281.) The court then found that "[c]ases addressing the federal standing requirement . . . also support the proposition that the plaintiff's claimed diversion of resources can constitute injury in fact," citing *Havens*, *supra*, 455 U.S. at p. 379, and *Combs*, *supra*, 285 F.3d at pp. 903–05. (*Ibid.*) The court recognized a distinction between "costs . . . incurred solely to facilitate [UCL] litigation," which are insufficient to establish standing, and "funds expended independently of the litigation to investigate or combat the defendant's misconduct [which] may establish an injury in fact." (*Id.* at pp. 1281–82 [quoting *Buckland*, *supra*, 155 Cal.App.4th at p. 815].) Accepting ALDF's allegations as true, the court found that the declaration submitted by ALDF's executive director was

[9] The evidence was provided in a "detailed declaration from [ALDF's] executive director, Stephen Wells, outlining plaintiff's advocacy against foie gras in general and in favor of California's ban on the sale of foie gras in particular." (*Id.* at p. 1280.)

"sufficient to make a prima facie showing of standing to sue." (*Id.* at p. 1283.) The *ALDF* decision correctly applies Proposition 64 to direct organizational standing. This Court should adopt its analytical approach.

Moreover, the Court of Appeal below failed to distinguish *ALDF* from the facts here. The evidence presented by CMA here is materially indistinguishable from the evidence found sufficient in *ALDF*—CMA, *inter alia*, diverted staff time to conduct an investigation of the defendant that was independent of litigation, urged state agencies to take action against defendant's unlawful conduct, and created public educational resources. (Pet. Br. 16.) The Court of Appeal sought to distinguish *ALDF* because the organization there "was not advocating on behalf of or providing services to help its members deal with their loss of money or property." (*ALDF*, *supra*, 63 Cal.App.5th at p. 668.) But in diverting resources to address a frustration of its mission, CMA itself suffered direct injury.

Respondents' attempts to distinguish *ALDF* are similarly unavailing. Respondents repeat their incorrect argument that federal standing cases have no relevance here (Resp. Br. 28), an argument foreclosed by *Kwikset* and other relevant precedent. Respondents also argue (citing *Kwikset*) that *ALDF* is in error because it "never explained why Proposition 64's 'substantially narrower' standing rules . . . would import the 'diverted resources' theory," and that *ALDF* "failed to address . . . textual and voter-intent arguments." (*Ibid.*) In fact, *ALDF* extensively quoted and relied on *Kwikset* to reach its conclusion, indicating that far from the decisions being in tension, the *ALDF* court properly found that a showing of direct organizational standing was sufficient for UCL standing pursuant to *Kwikset*.

B. Other UCL Direct Organizational Standing Case Law

Several other California Court of Appeal decisions, while not engaging in a full direct organizational standing analysis like *ALDF*,

support the conclusion that direct organizational standing is sufficient for the UCL.[10] In *Silvaco Data Systems v. Intel Corp.*, a UCL case, the Court of Appeal assessed federal standing requirements in light of Proposition 64's directive and found that the plaintiff organization there "satisfied the federal [standing] test," citing *Havens* in support. (*Silvaco* (2010) 184 Cal.App.4th 210, 243, as modified on denial of rehg. (May 27, 2010), disapproved of on other grounds by *Kwikset*, 51 Cal.4th 310.)[11] In *Buckland*, another UCL case, the Court of Appeal primarily relied on *Havens* to interpret the federal meaning of "injury-in-fact," and ultimately rejected the plaintiff's claim because, "[u]nlike the organizations in *Havens* and [*So. Cal.*] *Housing,* [plaintiff] Buckland does not allege any comparable diversion of resources." (*Buckland*, *supra*, 155 Cal.App.4th at pp. 814–16.) And in *Two Jinn, Inc. v. Government Payment Service, Inc.*, also a UCL case, the Court of Appeal characterized the injury in *Havens* as an "actual economic injury," distinguishing *Havens* from the case at bar because the plaintiff organization failed to show evidence of any resource expenditures independent of litigation. (*Two Jinn* (2015) 233 Cal.App.4th 1321, 1335.)[12]

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[10] Another published decision, *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1424–26, adopted *Havens*' standing analysis for an FEHA state law claim and found that the plaintiff organization had standing because it had "alleged that it [had] been required to divert scarce resources to address [defendant's] alleged wrongful conduct."

[11] *Silvaco* ultimately denied the plaintiff organization standing under the theory that "lost money or property" narrowly referred to that which could be recovered in restitution (*Silvaco*, *supra*, 184 Cal.App.4th at pp. 244–45), a position this Court specifically rejected a year later in *Kwikset*, *supra*, 51 Cal.4th at p. 337.

[12] *ALDF* specifically distinguished *Two Jinn*, finding that the declaration provided by ALDF's executive director, "which aver[red] the investigation and enforcement efforts with Napa authorities had a purpose independent of the lawsuit, as well as harm from the diversion of resources and the frustration of plaintiff's advocacy efforts, provide[d] the evidence absent in

The Ninth Circuit also found it proper to apply direct organizational standing analysis in the UCL context in *Friends of the Earth v. Sanderson Farms, Inc.* (9th Cir. 2021) 992 F.3d 939, 941, a case involving suit by two public interest organizations. The court did not question whether organizations *could* establish direct UCL standing, but instead focused its standing inquiry on whether the organizational plaintiffs' "activities were 'business as usual' and a continuation of existing advocacy, or whether they were an affirmative diversion of resources to combat [defendant's] representations." (*Id.* at p. 943.) The court ruled against the plaintiffs because, after they learned about defendant's misleading advertisements, "they simply continued doing what they were already doing," rather than taking any specific action in response to the advertisements. (*Ibid.*) Ultimately, the court found that "[a]fter nearly two years and mountains of discovery, the [organizational plaintiffs] could meaningfully offer only a single conclusory, contradictory, and uncorroborated statement as evidence of diverted resources." (*Id.* at p. 945.)

In contrast to *Friends of the Earth*, in *Valle del Sol*, *supra*, 732 F.3d at pp. 1018–19 (a non-UCL direct organizational standing case), the plaintiff organization's executive director's declaration was sufficient to establish standing where it detailed how the organization's activities were frustrated by the defendant's conduct and averred a diversion of staff and resources to address the frustration. The court rejected the defendant's "arguments that the organizational plaintiffs' statements of injury [we]re too vague to sustain standing [because] we have found organizational standing on the basis of similar organizational affirmations of harm." (*Ibid.*)

Two Jinn and establishe[d] a prima facie case of standing." (*ALDF*, *supra*, 234 Cal.App.4th at p. 1283.)

Thus, the amount of evidence required to establish UCL standing pursuant to a "diversion of resources" theory of injury lies somewhere between the "single conclusory, contradictory, and uncorroborated statement" found insufficient in *Friends of the Earth*, and the "detailed declaration" found sufficient in *ALDF*. Given that the quantum of injury that must be shown here is a mere "identifiable trifle," Petitioner's evidence here—a declaration by its executive director describing how its organizational activities and missions were frustrated and detailing multiple ways it had diverted resources in response to Respondents' conduct—is sufficient for UCL standing purposes.

V. There Is No "Business Dealings" Requirement for UCL Standing

Courts construing an initiative's meaning should be guided by the "formal, operative text of an initiative," where possible, rather than language in the accompanying ballot pamphlets, because "[t]o prefer language in ballot pamphlets to the formal, operative text of an initiative renders the initiative process susceptible to bait-and-switch tactics. To do so even once without the plainest compulsion sets a potentially dangerous precedent." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 991 (conc. opn. of Werdegar, J.) [discussing Proposition 64].) Despite this, Respondents raise one UCL standing issue that has arisen almost entirely as a result of lower courts misconstruing this Court's prior opinions that quoted language from the Voter Information Guide for Proposition 64 ("Voter Guide"). Respondents assert to this Court that a plaintiff must have had "business dealings" with a defendant in order to have standing under the UCL after Proposition 64. (See Resp. Br. 12, 21–22, 25, 30.) However, an analysis of Proposition 64 and relevant case law makes clear that the UCL does not have a "business dealings" requirement to show standing. This Court should take this opportunity to so hold.

The statutory text amended by Proposition 64 does not refer to a "business dealings" requirement. Ultimately, this should be the end of the inquiry. If Proposition 64 was meant to add such a requirement to the UCL, it would have been reflected in the amended statutory language. However, primarily because of language used in prior decisions of this Court, which quoted the Voter Guide's reference to "business dealings," some lower state and federal courts have erroneously concluded that this reference in the Voter Guide created a "business dealings" requirement.

Specifically, in *Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 228, this Court quoted from the Voter Guide, which criticized the pre-Proposition 64 UCL as being "'misused by some private attorneys who'. . . '[f]ile lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, *or had any other business dealing with the defendant*.'" (Quoting Prop. 64, § 1, subd. (b)(3), emphasis added.) This language was subsequently quoted in *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788, and *Kwikset*, *supra*, 51 Cal.4th at p. 321. Some lower courts have repeated the language of these Supreme Court cases in finding that the UCL requires a plaintiff to have some sort of "business dealing" with a UCL defendant in order to have standing. (See, e.g., *Wehlage v. EmpRes Healthcare, Inc.* (N.D. Cal. 2011) 791 F.Supp.2d 774, 783–84 ["Plaintiff's UCL claims fail [because h]er allegations do not suggest that she had any business dealings with these Defendants"]; *Beraze v. Wilshire Landmark, LLC* (Cal.Ct.App., Feb. 26, 2014, No. B243782) 2014 WL 729216, at *13 [Plaintiffs "were not subjected to this alleged unfair business practice because they did not give [defendant] any money or property that was supposed to be used to complete the project; indeed, they did not engage in any business transaction with [defendant] whatsoever"]; *Zamora v. CVS Pharmacy, Inc.* (Cal.Ct.App., Feb. 5, 2021, No. B299375) 2021 WL 405898, at *11, review den. (May 12, 2021).)

Those lower courts have misinterpreted the Supreme Court decisions as making legal holdings that "business dealings" are required for UCL standing, when in fact this Court's prior decisions were simply quoting language from the Voter Guide to emphasize that under Proposition 64, plaintiffs must themselves suffer an economic injury of some kind.[13]

Other California state and federal cases have correctly rejected the mistaken conclusion that Proposition 64, or the above cases, added a "business dealings" UCL standing requirement. In *Law Offices of Mathew Higbee v. Expungement Assistance Services* (2013) 214 Cal.App.4th 544, 563, the Court of Appeal directly addressed language from *Clayworth*, stating that "we do not believe the court intended to engraft upon section 17204 a requirement that all plaintiffs must, in every event, have engaged in business dealings with a defendant in order to demonstrate UCL standing." It then found that the language of UCL section 17204 was "clear on its face and contain[ed] no requirement that the plaintiff must have engaged in business dealings with the defendant." (*Ibid.*) While the *Higbee* court purported to limit its findings to UCL suits between "business competitors," its finding that the plain language of section 17204 does not require business dealings is equally applicable in suits between consumers and businesses. (*Id.* at p. 565.)

In accord with *Higbee*, the Federal Circuit in *Allergan, Inc. v. Athena Cosmetics, Inc.* (2011) 640 F.3d 1377, 1383 also found that

> Proposition 64 did not add a "business dealings requirement" to standing under section 17204. The only amendment Proposition 64 made to section 17204 required that a private person bringing an action pursuant to the UCL must have "suffered injury in fact and ... lost

[13] "[T]he intent of California voters in enacting Proposition 64 was to limit such abuses by prohibit[ing] private attorneys from filing lawsuits for unfair competition *where they have no client who has been injured in fact*." (*Californians for Disability Rights*, *supra*, 39 Cal.4th at p. 228, emphasis added.)

> money or property as a result of such unfair competition." (Cal. Prop. 64 § 3.) Reading this amendment to encompass a business dealings requirement would contradict the plain language of the statute and improperly elevate one purpose of Proposition 64 over the language of the statute.

The *Allergan* defendants based their argument that Proposition 64 added a "business dealings requirement" to standing under section 17204 on language from the Voter Guide, as supposedly "approved of" in *Kwikset*. (*Ibid.*) The court rejected the defendants' stance, finding that their argument "disregard[ed] the focus of *Kwikset*, which held that the *only* requirements to establish standing under section 17204 are that (1) the plaintiff suffered an injury in fact from the loss of money or property; and (2) that this injury was caused by the defendant's unfair business practice." (*Ibid.*)

Allergan found that *Kwikset* could not be read to establish a "business dealings" requirement, as *Kwikset* itself had stated there were "'innumerable ways' to show economic injury from unfair competition and [] the *Kwikset* court did not 'supply an exhaustive list of ways in which unfair competition may cause economic harm.'" (*Ibid.*) In fact, *Kwikset* had approvingly cited to a case wherein the plaintiff had no business dealings with the defendant as an example of an economic injury under the UCL. (*Ibid.* [citing *Overstock*, *supra*, 151 Cal.App.4th at p. 716].) The *Allergan* court concluded by reaffirming its initial stance: "[S]tanding under section 17204 is not restricted by a direct business dealings requirement. The only standing requirements under 17204 are those in the language of the statute . . . ." (*Ibid.*)

Overstock exemplifies why, as a practical matter, the UCL cannot be read to limit standing to only those who have "business dealings" with a defendant. In *Overstock*, the plaintiff organization alleged that it had suffered injury as a result of one of the defendants publishing defamatory

reports about the plaintiff on behalf of the other defendant. (*Overstock*, *supra*, 151 Cal.App.4th at p. 715.) Although the plaintiff had no "stock transactions" with defendants, and its "purported damage [did] not stem from reliance on, or deception by, the [defendant's] reports," the court found, consistent with *Kwikset*, that the "diminution in value of [plaintiff's] assets and decline in its market capitalization and other vested interests [met] the [UCL] statutory requirement of 'injury in fact' resulting from defendants' misconduct." (*Id.* at pp. 715–16.) Clearly, this is the sort of fact pattern to which the UCL is meant to apply, where unfair/unlawful business practices cause economic injury to a plaintiff despite the plaintiff's lack of "business dealings" with a defendant. *Allergan* explicitly affirmed what *Kwikset* found by implication: there is no business dealings standing requirement under the UCL. (See also *Obesity Research Institute, LLC v. Fiber Research International, LLC* (S.D. Cal. 2016) 165 F.Supp.3d 937, 948 ["There is no requirement that there be allegations of business dealings between the parties"].)

In sum, as a matter of plain statutory interpretation, case law analysis, and simple logic, there is no "business dealings" requirement for UCL standing. This Court should reject Respondents' atextual and illogical interpretation.

VI. Causation Requirement of UCL Standing

While the Court of Appeal's decision here did not turn on the issue of causation, should this Court reach the issue, it is clear that Petitioner's injury was caused by Aetna's policy.[14] The Court should reject Aetna's arguments to the contrary. (Resp. Br. 16–18.)

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[14] There has been some confusion as to whether there is a "reliance" requirement, as opposed to merely a "causation" requirement, under the "unfair" and "unlawful" prongs of the UCL. Generally, reliance is required under those prongs when the theory of injury is that the "defendant engaged

As established in *Kwikset*, Proposition 64 made two key changes to UCL standing requirements: a plaintiff must show/allege economic injury, and that economic injury must be the "result of, i.e., *caused by,* the unfair business practice . . . that is the gravamen of the claim." (*Kwikset*, *supra*, 51 Cal.4th at p. 322.) *Kwikset* goes on to state: "The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection . . . ."[15] (*Id.* at p. 326, internal quotation omitted.) Here, Petitioner's diversion of resources was as a result of and in response to Aetna's allegedly unlawful policy. The causal connection is clear, and Petitioner's alleged injury results from Respondents' noncompliance with the law.

The Court of Appeal directly addressed the UCL's causation requirement in the organizational standing context in *ALDF*. There, the defendants argued that ALDF's injury was not "caused by" their conduct because the "'purpose of [plaintiff's] existence [wa]s to invest [its] resources in litigation activities.'" (*ALDF*, *supra*, 234 Cal.App.4th at p. 1283.) Rejecting this argument, the court held that just because ALDF's "expenditure of resources in investigating defendants' alleged lawbreaking was wholly consistent with [its] mission [did] not mean the resources were

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in misrepresentations and dece[ptions]," i.e., fraud. (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 919.) Otherwise, a "plaintiff must simply show that the alleged [UCL] violation caused or resulted in the loss of money or property." (*Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, 12, as modified on denial of rehg. (Apr. 16, 2012).) Here, the proper standard is simple causation.

[15] A "causal connection" is sufficient for direct organizational standing. (See *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* (9th Cir. 2011) 657 F.3d 936, 943 [After finding injury-in-fact, court stated: "Because there is a causal connection between [defendant's conduct] and [plaintiff's] injury, and [plaintiff's] injury would be redressable by a favorable decision, we conclude that [plaintiff] has standing to bring this appeal"].)

not in fact diverted from other activities as a result of defendants' conduct." (*Ibid.*) *ALDF* clarified that the "proper focus [of the UCL's causation requirement] is on whether the plaintiff 'undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged [misconduct] rather than in anticipation of litigation.'" (*Id.* at pp. 1283–84 [quoting *Equal Rights Center v. Post Properties, Inc.* (D.C. Cir. 2011) 633 F.3d 1136, 1140].)

Respondents' argument that "CMA's theory is premised on the idea that UCL standing can arise from a plaintiff's 'choice' to advocate against a practice with which it disagrees" mischaracterizes CMA's theory and the nature of the direct organizational standing inquiry, and ignores the safeguards responsive to its argument. (Resp. Br. 16.) Direct organizational standing requires an organization to show a "perceptible impairment" in its ability to perform its services or activities because of the defendant's conduct. (*Valle del Sol*, *supra*, 732 F.3d at pp. 1018–19.) Furthermore, as *ALDF* found, the "'voluntariness or involuntariness'" of a diversion of resources is irrelevant—what matters is whether that diversion was "'in response to, and to counteract, the effects of the defendants' alleged [misconduct].'" (*ALDF*, *supra*, 234 Cal.App.4th at pp. 1283–84 [quoting *Equal Rights Center*, *supra*, 633 F.3d at p. 1140].) This is because, as "*Havens* and similar cases recognize[,] the diversion of resources to avoid injury to [an] organization's interests is not truly voluntary for the purposes of injury." (*East Bay Sanctuary Covenant v. Trump* (N.D. Cal. 2018) 349 F.Supp.3d 838, 852, affd. (9th Cir. 2020) 950 F.3d 1242, and affd. *sub nom. East Bay Sanctuary Covenant v. Biden*, *supra*, 993 F.3d 640.) If an organization's mission is not being frustrated by a defendant, no amount of diverted resources will suffice to grant it direct organizational standing. Contrary to Respondents' representations, these "safeguards" sufficiently address Respondents' concerns. (Resp. Br. 22–23.) Thus, an organization

must show that, because of something a defendant is doing, the organization's mission is being "perceptibly impaired."[16]

VII. A Membership Organization Can Establish Standing When It Diverts Resources Because Its Mission Was Frustrated

Contrary to the implication of the Court of Appeal's ruling, a membership organization can establish direct organizational standing on the same grounds as any other plaintiff, which includes non-membership organizations. The UCL, section 17201, permits "organizations" to bring suit—there is no distinction made in this statute between membership and non-membership organizations as far as having direct standing to proceed. For example, the plaintiff in *ALDF* is an organization with "more than 300,000 members and supporters."[17] ALDF's membership status was no more a reason to deny standing than CMA's membership status is a reason to deny standing.

Ninth Circuit cases have applied the same direct organizational standing analysis to membership organizations as to non-membership organizations. In *Valle del Sol*, *supra*, 732 F.3d at p. 1018, the court found that "because of [one plaintiff organization's] members' overwhelming concerns about the effects and requirements of S.B. 1070, [that plaintiff] has been forced to divert staff and resources to educating their members about the law." A different organizational plaintiff "had to divert resources to educational programs to address its members' and volunteers' concerns about the law's effect." (*Ibid.*) Rather than disregarding the plaintiffs' arguments that they suffered direct injury because they were acting in

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[16] Accord *La Asociación de Trabajadores de Lake Forest v. Lake Forest* (9th Cir. 2010) 624 F.3d 1083, 1088 (organization "cannot manufacture [an] injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all").
[17] "About Us," Animal Legal Defense Fund, https://aldf.org/about-us/ (accessed June 9, 2022).

response to members' concerns (as the Court of Appeal did in *CMA*), the Ninth Circuit found that the plaintiff organizations had standing because they had "shown that their missions have been frustrated and their resources diverted as a result of" defendant's action. (*Id.* at pp. 1018–19; see also *Center for Food Safety v. Perdue* (N.D. Cal. 2021) 517 F.Supp.3d 1034, 1041 [plaintiff organization that was "forced to take action on behalf of their members and consumers" sufficiently alleged direct organizational standing]; *National Fair Housing Alliance v. A.G. Spanos Const., Inc.* (N.D. Cal. 2008) 542 F.Supp.2d 1054, 1063 ["Organizational standing is separate from the standing of the organization's members, turning instead on whether the organization itself has suffered an injury in fact"] [internal quotation omitted].)

Here, CMA has a personalized interest in not having to divert resources because its mission was frustrated. (Pet. Br. 30–31.) Respondents' argument that an organization lacks standing where it acts to address or respond to member concerns is unsupported by case law or the text of Proposition 64. Respondents argue that if voters had intended membership organizations to have UCL standing, "they would have used language permitting standing whenever a plaintiff 'diverted resources to advocate against the unfair competition on behalf of its members or the general public.'" (Resp. Br. 18.) But the text of the UCL, as amended by Proposition 64, permits organizations to bring suit, with no distinction made between membership and non-membership organizations. Thus, the opposite of what Respondents argue is true here: if voters had intended to preclude membership organizations from bringing suit for their own injuries, "they would have used language" so stating.

CONCLUSION

For all the foregoing reasons, Consumer Watchdog respectfully asks this Court to reverse the Court of Appeal's decision and (1) affirm that the doctrine of direct organizational standing is sufficient for standing under the UCL; (2) affirm the direct organizational standing analysis applied in *ALDF*; (3) clarify that there is no business dealings requirement for UCL standing; and (4) clarify that whether an organization has "members" is irrelevant to the question of whether the organization has standing under the UCL.

Dated: June 10, 2022

Respectfully submitted,

CONSUMER WATCHDOG

By: _____
Jerry Hanagan

Attorneys for Amicus Curiae Consumer Watchdog

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to rule 8.204(c)(1) of the California Rules of Court, the attached Amicus Curiae Brief is proportionally spaced, uses a typeface of 13 points, and contains 9,939 words, as determined by a computer word count.

Dated: June 10, 2022

Respectfully submitted,

CONSUMER WATCHDOG

By: Ryan Mellino
Ryan Mellino

Attorneys for Amicus Curiae Consumer Watchdog

PROOF OF SERVICE

STATE OF CALIFORNIA

Re: *California Medical Association v. Aetna Healthcare of California, et al.,* Cal. Sup. Ct. No. S269212, 2DCA No. B304217, LASC No. BC487412

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 6330 San Vicente Blvd., Suite 250, Los Angeles, California 90048. My electronic mail address is kaitlyn@consumerwatchdog.org.

On June 10, 2022, I served the foregoing document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CONSUMER WATCHDOG** on all appropriate parties in this action, as listed on the attached Service List, by the method stated:

☒ If Electronic Filing Service (EFS) is indicated, I electronically filed the document(s) with the Clerk of the Court by using the EFS/TrueFiling system as required by California Rules of Court, rule 8.70. Participants in the case who are registered EFS/TrueFiling users will be served by the EFS/TrueFiling system. Participants in the case who are not registered EFS/TrueFiling users will be served by mail or by other means permitted by the court rules.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this is executed on **June 10, 2022**, at Los Angeles, California.

Kaitlyn Gentile

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Supreme Court of California

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Case Number: **S269212**
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1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ryan.m@consumerwatchdog.org**

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

6/10/2022

Date

/s/Kaitlyn Gentile

Signature

Mellino, Ryan (342497)

Last Name, First Name (PNum)

Consumer Watchdog

Law Firm