IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA MEDICAL ASSOCIATION, Plaintiff-Appellant, v. AETNA HEALTHCARE OF CALIFORNIA, INC. D/B/A AETNA U.S. HEALTHCARE INC. and AETNA HEALTH OF CALIFORNIA, INC., Respondents.	Case No. S269212

Second Appellate District, No. B304217
Los Angeles County Superior Court, No. BC487412

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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APPLICATION FOR PERMISSON TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani Cantil-Sakauye and the Associate Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.520(f), the Chamber of Commerce of the United States of America (the "Chamber") hereby requests permission to file the attached brief as amicus curiae supporting Respondents Aetna Healthcare of California, Inc. d/b/a Aetna U.S. Healthcare Inc. and Aetna Health of California, Inc. This application is timely made pursuant to this Court's order dated April 27, 2022, extending the time to serve and file the amicus curiae brief to and including June 15, 2022.

The Chamber is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters that raise issues of concern to American businesses. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Pursuant to California Rule of Court 8.520(f), no party or counsel for a party has authored any part of the attached brief. Likewise, no party or counsel for any party has made a monetary contribution intended to fund the preparation or submission of this brief.

DATED: June 14, 2022

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters that raise issues of concern to American businesses, including in cases addressing private persons' standing to enforce unfair competition laws.

The Chamber has a strong interest in the proper resolution of this case. The voters enacted Proposition 64 to alleviate the strain put on businesses when individuals and organizations who have not engaged in business dealings with the defendant bring lawsuits alleging violations of California's Unfair Competition Law. Petitioner's interpretation of Proposition 64—whereby an organization could manufacture standing by voluntarily spending money to challenge a business practice—undoes the very protection that the voters intended to provide California businesses. The Chamber urges the Court to reject that interpretation and to affirm the judgment of the Court of Appeal.

INTRODUCTION

Before 2004, "any person acting for the interests of itself, its members or the general public" could bring suit to enforce California's Unfair Competition Law ("UCL"). (Bus. & Prof. Code, § 17204 (2004).) That lax standing rule had allowed private attorneys to run amok, suing businesses on behalf of "clients who ha[d] not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." (Prop. 64, § 1, subd. (b)(3) ["Findings and Declarations of Purpose"].)

Seeking to eliminate such "[f]rivolous unfair competition lawsuits," Prop. 64, § 1, subd. (c), the voters of California enacted Proposition 64 to preclude "standing for those who have not engaged in any business dealings with would-be defendants," (*Kwikset Corp. v. Superior Ct.* (2011) 51 Cal.4th 310, 317.) Now, actions to enforce the UCL may be brought only by the government or "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.) This commonsense limitation ensures that persons who were *actually* injured by a business's practices may seek redress, while preventing individuals and organizations from seeking to enforce the UCL as self-appointed private attorneys general.

To "los[e] money or property as a result of . . . unfair competition," Bus. & Prof. Code, § 17204, a person must be engaged in business dealings with the defendant. That is clear from the UCL's structure: Only certain government attorneys are permitted to bring suit "in the name of the people of the State of California," Bus. & Prof. Code, § 17204, while a private "person may pursue . . . relief on behalf of others only if the claimant meets the standing requirements" imposed by Proposition 64, Bus. & Prof. Code, § 17203. Proposition 64's statutory "findings and declarations of purpose," Prop. 64, § 1 (capitalization altered), as well as ballot materials presented to the voters, further confirm that persons may bring suit under the UCL only if they "had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices." (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788.) A plaintiff who chooses to invest resources in challenging a business practice has not "lost money or property as a result of" that practice. (Bus. & Prof. Code, § 17204.) The Petitioner's contrary interpretation would reopen the very same loophole that California voters intended to close by enacting Proposition 64.

Petitioner therefore lacks standing. The Court of Appeal decision so holding should be affirmed.

ARGUMENT

I. PLAINTIFFS MAY BRING SUIT UNDER THE UCL ONLY IF THEIR INJURY ARISES FROM BUSINESS DEALINGS WITH THE DEFENDANT.

In 2004, the voters of California determined that it was no longer wise to allow "any person acting for the interests of itself, its members or the general public" to enforce the UCL. (Bus. & Prof. Code, § 17204 (2004).) As amended by Proposition 64, Section 17204 of the Business and Professions Code now provides that the only persons who may prosecute "[a]ctions for relief" under the UCL—other than certain government attorneys—are people "who ha[ve] suffered injury in fact and ha[ve] lost money or property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.)

"The phrase 'as a result of' in its plain and ordinary sense means '*caused by*' and requires a showing of a causal connection . . . ." (*Kwikset, supra,* 51 Cal.4th at p. 326, emphasis added & citation omitted.) Proposition 64's causation standard is most naturally read to require the plaintiff to have "engaged in . . . business dealings with [the] would-be defendants." (*Id.* at p. 317.) That interpretation is compelled by Proposition 64's structure, purpose, and history, as well as by this Court's precedents.

First, the UCL's statutory structure makes clear that private entities may not manufacture standing by attempting to ameliorate the purportedly unfair practices of businesses with whom they have no business relationship. In contrast to private citizens who may bring UCL claims only if they "ha[ve] lost money or property as a result of . . . unfair competition," Section 17204 specifically authorizes government attorneys to bring "[a]ctions for relief . . . in the name of the people of the State of California." (Bus. & Prof. Code, § 17204.) It is *those* government

attorneys—not self-appointed private organizations—who the UCL authorizes to bring claims on behalf of others.

A comparison between the government and private-enforcement provisions in Section 17204 demonstrates why a private party must have engaged in business dealings with the defendant. A county counsel may file suit to enforce the UCL only if the county contains a city whose population exceeds 750,000, or if counsel is "authorized by agreement with the district attorney in actions involving violation of a county ordinance." (*Ibid.*) A county counsel's decision to dedicate resources to investigating the allegedly unfair business practice does not suffice to confer standing to sue. By contrast, under Petitioner's reading of Section 17204, the UCL would confer standing on any organization that takes it upon itself to "combat[] the effects of [allegedly unfair] conduct on . . . its members." (Reply Br. 27.) In Petitioner's view, therefore, a private organization that diverted resources to investigating a business practice would have standing to sue, while government attorneys who did the very same thing would not. It would do violence to the UCL to read Section 17204 to allow organizations to "act as private attorneys general," *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233, in situations in which *actual* government attorneys could not sue.

Second, in interpreting statutory text, courts "must consider the human problems" that the voters "sought to address in adopting [the statute]—'the ostensible objects to be achieved [and] the evils to be remedied.'" (*Burris v. Superior Ct.* (2005) 34 Cal.4th 1012, 1018 [quoting *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977].) Before Proposition 64 was enacted, "a plaintiff did not have to show any actual injury." (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.* (2009) 46 Cal.4th 993, 1000.) Proponents of Proposition 64 argued that this permissive standing rule had allowed "[s]hakedown lawyers [to] 'appoint' themselves to act like the Attorney General and file lawsuits on behalf of the

people of the State of California," even where "they ha[d] no client or evidence that anyone was damaged." (Voter Information Guide, Gen. Elec. (Nov. 2, 2004) argument in favor of Prop. 64, p. 40.) The Proposition's supporters encouraged voters to "close the shakedown loophole" by "[p]ermit[ting] only real public officials like the Attorney General or District Attorneys to file lawsuits on behalf of the People of the State of California." (*Id.* at pp. 40-41, capitalization altered.)

The voters were persuaded. As laid out in Proposition 64's "findings and declarations of purpose," Prop. 64, § 1 (capitalization altered), the voters found that "the UCL's broad grant of standing had encouraged '[f]rivolous unfair competition lawsuits [that] clog our courts[,] cost taxpayers' and 'threaten[] the survival of small businesses,'" *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 316 (quoting Prop. 64, § 1, subd. (c)). In the voters' estimation, the UCL had been "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*," Prop. 64, § 1, subd. (b) (emphasis added). In enacting Proposition 64, therefore, it was "the intent of California voters . . . to eliminate frivolous unfair competition lawsuits" by "prohibit[ing] private attorneys from filing lawsuits . . . where they have no client who has been injured in fact" and by ensuring that "only the California Attorney General and local public officials [are] authorized to file and prosecute actions on behalf of the general public." (Prop. 64, § 1, subds. (d), (e), (f); see also *Californians for Disability Rights., supra*, 39 Cal.4th at p. 228.)

Proposition 64's statutory findings and declarations of purpose, alongside its "ballot summaries and arguments," demonstrate the voters' intent to "eliminate standing for those who have not engaged in any business dealings with would-be defendants." (*Kwikset, supra,* 51 Cal.4th at pp. 317, 321; see also *People v. Valencia* (2017) 3 Cal.5th 347, 362 ["In considering the purpose of legislation,

statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration.", internal quotation marks omitted].) The UCL's requirement that a plaintiff must have "lost money or property as a result of the unfair competition," Bus. & Prof. Code, § 17204, means that putative plaintiffs must demonstrate financial losses as a result of their business dealings with defendants. Any other interpretation would thwart the voters' intent to "curb[] shakedown suits by parties who had never engaged in *any* transactions with would-be defendants." (*Kwikset, supra,* 51 Cal.4th at p. 335, fn. 21.)

Finally, precedent compels the conclusion that a putative plaintiff must have engaged in business dealings with the defendant before filing suit under California's UCL. As this Court held in *In re Tobacco II Cases*, "because it is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL, [this Court] must construe the phrase 'as a result of' in light of this intention to limit such actions." (46 Cal.4th at pp. 298, 326; see also *Kwikset, supra,* 51 Cal.4th at p. 317 ["Proposition 64 should be read in light of its apparent purposes."].) That is why this Court has consistently recognized that Proposition 64 "restrict[ed] UCL standing" to "those who *had* had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices." (*Clayworth, supra,* 49 Cal.4th at p. 788.)

II. THE UCL DOES NOT CONFER STANDING UPON ORGANIZATIONS THAT VOLUNTARILY DEDICATE RESOURCES TO CHALLENING A BUSINESS PRACTICE

Relying almost exclusively on federal cases, Petitioner argues that "organizational plaintiffs" may establish UCL standing "by demonstrating that they were required to divert institutional resources to counteract the defendant's unlawful actions." (Pet. Br. 25-26; see Reply Br. 15-16.) Under Petitioner's view

(Pet. Br. 27-28, 30), an organization could bring suit under the UCL whenever it "mak[es] the affirmative decision to devote resources" to "combatting the alleged harms caused by a defendant's challenged policies or practices."

That is incorrect. Regardless of whether organizations may "establish *injury* in this manner," as Petitioner suggests (Pet. Br. 26, emphasis added), organizations like Petitioner who voluntarily commit time and resources to opposing the practices of a business with whom they have no business dealings have not "lost money or property *as a result of* " those practices, Bus. & Prof. Code § 17204 (emphasis added). If Petitioner were correct that the voluntary investment of institutional resources is sufficient to confer UCL standing, then any organization could manufacture standing by choosing to assist those who transact with the would-be defendant. Yet Proposition 64 was enacted to preclude precisely this sort of "uninjured, volunteer plaintiff" from enforcing the UCL. (*Californians for Disability Rights, supra*, 39 Cal.4th at p. 233.)

This Court's decision in *Amalgamated Transit Union* shows that the UCL does not authorize suits by those who purport to vindicate others' rights. There, the Court held that "a person claiming actual injury from some unfair business practice" could not "assign that claim to one who has suffered no injury," as permitting assignment of claims would "nullif[y]" the requirement "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 Union, supra*, 46 Cal.4th at p. 1002.) The diversion-of-resources theory that Petitioner proposes is the same sort of impermissible workaround. If someone who has "lost money or property as a result of" an allegedly unfair business practice may not *assign* his claim to an organization, then an organization cannot manufacture standing by choosing to assist the injured person.

The UCL's restriction on representative actions further undermines Petitioner's standing theory. Section 17203 provides that an organization "may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204," Bus. & Prof. Code, § 17203—that is, only if the organization itself "suffered injury in fact and has lost money or property as a result of the unfair competition," *id.* § 17204; see *id.* § 17201 ("the term person shall . . . include . . . organizations"). Under Petitioner's diversion-of-resources theory, however, Section 17203 would impose no meaningful limitation on representative claims: An organization would be permitted to "pursue representative claims or relief on behalf of others," Bus. & Prof. Code § 17203, so long as the plaintiff had dedicated institutional resources to pursuing relief on behalf of others. Such a circular reading must be avoided. (See *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 ["If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.", citation omitted].)

Petitioner suggests that the traditional requirement that a private party have engaged in business dealings with the defendant be diluted, contending that "[i]f a person who views a defendant's misleading advertising can be said to have had a 'business dealing' with that defendant," then so too must "an organization whose central mission is adversely affected by that defendant's wrongful conduct." (Reply Br. 32.) Those situations are not equivalent. In the former scenario, a business has directed a communication at a consumer who was induced thereby to purchase the business's product.[1] That is a quintessential "business dealing." In

[1] To the extent Petitioner suggests that "the causation requirement is satisfied simply by a plaintiff viewing a defendant's misleading advertisements," even in the absence of a subsequent transaction, it errs. (Reply Br. 9.) As this Court (footnote continued)

the latter scenario, an organization chooses to expend resources to advance a position that, in its view, is incompatible with a business's practice. But so long as the organization does not itself transact with the defendant, its expenditure of funds is the "result of" nothing more than its own choices about how to spend its money.

Of course, individuals and organizations remain free to challenge business practices that strike them as unfair through any number of means. They may, for example, advise the parties with whom the defendant has business dealings to bring their own suit, attempt to persuade a government attorney to bring suit, boycott a business's product, or lobby a business to change its policies. One who has not engaged in business dealings with the defendant, however, may not sue under the UCL.

III. PETITIONER'S PROPOSED "SAFEGUARDS" ARE INSUFFICIENT

Implicitly acknowledging that its expansive view of standing threatens the goals of Proposition 64, Petitioner offers several "safeguards . . . to prevent organizations from establishing UCL standing in contravention of . . . voter-approved requirements." (Pet. Br. 28.) Petitioner suggests (Pet. Br. 28-29) that would-be organizational plaintiffs must meet three conditions: their expenditure of resources (1) must not be "in furtherance or anticipation of litigation," (2) must be directed toward conduct that "run[s] counter to the organization's purpose," and (3) must be a change-of-course from prior expenditures (*i.e.*, "in response to the defendant's challenged conduct").

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explained in *Kwikset*, to establish standing in a false-advertising case, "a plaintiff must show that the misrepresentation was an immediate cause" of the plaintiff's loss of money or property—that is, the plaintiff must have actually purchased the product. (*Kwikset, supra,* 51 Cal.4th at p. 327; see also *id.* at p. 330 ["A consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of section 17204 by alleging . . . that he or she would not have bought the product but for the misrepresentation."].)

Petitioner's proposed conditions are illusory and would fail to prevent the very abuses that led to Proposition 64. To meet the conditions Petitioner proposes, one need only form an "organization" whose "mission" relates to an allegedly unfair business practice, expend organizational time and resources doing something germane to that mission, and then "divert" those resources to "pre-litigation" activities designed to challenge or respond to the allegedly unfair practice.

Imagine, for example, an attorney who wishes to sue travel agencies who fail to include their agents' licenses on their websites. The attorney could simply form an "organization" whose mission is to promote transparency in the travel industry and hire a single staff member to maintain a free catalogue of travel agents. Then, after a few weeks, the organization could "divert" that staff member's time to writing letters to travel agencies who have not publicly posted their agents' licenses. Under Petitioner's theory, the organization would then have standing to sue those travel agencies under the UCL, because (1) the letter-writing campaign was not "taken solely in anticipation of litigation," Pet. Br. 33; (2) the travel agencies' conduct "frustrate[ed] . . . [the organization's] mission" of transparency in the travel industry, Pet. Br. 29, and (3) the organization "diverted resources from existing projects to respond to [the travel agencies'] conduct," Reply Br. 28. Yet that is precisely the sort of "frivolous shakedown lawsuit[]" that Proposition 64 was enacted to preclude. (See Voter Information Guide, Gen. Elec. (Nov. 2, 2004) argument in favor of Prop. 64, p. 40 [explaining that "Yes on Proposition 64 will stop thousands of frivolous shakedown lawsuits like" ones in which "[h]undreds of travel agents have been shaken down for not including their license number on their website"].)

Petitioner's proposed solutions only beget more problems. Petitioner first suggests that "any 'brief stint of advocacy' would likely be deemed 'pre-litigation'

and thereby insufficient to establish standing." (Reply Br. 27.) Petitioner, however, fails to provide any workable guidance for determining how brief is too brief. Similarly, Petitioner hypothesizes that a made-for-litigation organization may "have difficulty establishing that it actually diverted resources from existing projects to respond to any particular defendant's conduct." (Reply Br. 28.) Again, it is not clear why that would be so, and Petitioner's invitation to interrogate whether an organization's "activities were 'business as usual,'" Reply Br. 28 (citation omitted), would surely lead to factual disputes that plaintiffs would use to oppose demurrers and motions for summary judgment. Litigation to test plaintiffs' standing is no solution. The costs to defend even frivolous UCL claims is what led to "shakedown" settlements, which in turn prompted the reforms adopted in Proposition 64.

In addition to being unworkable, Petitioner's suggested safeguards find no support in the text of Proposition 64. Instead, Petitioner borrows them from federal standing law. (See Pet. Br. 28-30; Reply Br. 22-24, 27-28 [citing federal cases].)[2] But, as this Court has warned, "[t]here are sound reasons to be cautious

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[2] Almost every case cited by Petitioner is a federal case applying Article III standing principles. (See *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest* (9th Cir. 2010) 624 F.3d 1083, 1087 ["The standing doctrine limits federal court jurisdiction."]; *Rodriguez v. City of San Jose* (9th Cir. 2019) 930 F.3d 1123, 1133 ["We hold that . . . the organizational plaintiffs do not have Article III standing . . . ."]; *Friends of the Earth v. Sanderson Farms, Inc.* (9th Cir. 2021) 992 F.3d 939, 945 [affirming dismissal for lack of federal subject matter jurisdiction]; *E. Bay Sanctuary Covenant v. Biden* (9th Cir. 2021) 993 F.3d 640, 662 [conducting an "Article III standing inquiry"]; *Walker v. City of Lakewood* (9th Cir. 2001) 272 F.3d 1114, 1123 [considering whether organization "meets the minimal requirements of Article III of the Constitution" "to bring retaliation claims" under federal statutes].) The only two California cases cited by Petitioner both found that the plaintiff *lacked* UCL standing—meaning that in neither case did the court have
(footnote continued)

in borrowing federal standing concepts . . . and extending them to state court actions" unless compelled by the statutory text. (*Kwikset, supra,* 51 Cal.4th at p. 322, fn. 5.) That admonition is especially true here, where reading Petitioner's proposed safeguards into the statute would require treating organizations and individuals differently—in direct contravention of statutory command. (*Compare* Bus. & Prof. Code § 17201 ["the term person shall mean and include natural persons, . . . associations and other organizations of persons"], *with* Reply Br. 28 [conceding that "the safeguard requirement of a pre-existing, stated mission would presumably not apply to individual plaintiffs"].)

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occasion to pass on Petitioner's contention that organizations may manufacture diversion-of-resources standing so long as they satisfy Petitioner's three conditions. (See *Two Jinn, Inc. v. Gov. Payment Serv., Inc.* (2015) 233 Cal.App.4th 1321, 1334 [holding that "'pre-litigation' costs do not establish standing to bring a UCL claim because they are not an economic injury caused by the business practices that [the plaintiff] characterizes as unlawful"]; *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 816, 818, mod. (Oct. 22, 2007) [holding that "[b]ecause the [plaintiff's] costs were incurred solely to facilitate her litigation," and because she purchased the product "to establish standing for an action in the public interest," "her purchase does not constitute the requisite injury in fact" and her purchase "cannot reasonably be viewed as 'lost' money or property under the standing requirement"].)

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

DATED: June 14, 2022

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CERTFICATE OF COMPLIANCE

This brief consists of 3756 words as counted by the Microsoft Word Version 2016 word processing program used to generate the brief.

DATED: June 14, 2022

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On ***June 14, 2022***, I served true copies of the following document described below on the interested parties in this action as follows: APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

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BY MAIL: I enclosed the document in a sealed envelope - with postage fully prepaid - addressed to the persons in the Service List and placed the envelope for mailing, following our ordinary business practices. I am readily familiar with the firm's practice for processing mail with the United States Postal Service.

BY ELECTRONIC SERVICE: I electronically filed the document with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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

Executed on ***June 14, 2022***, at Los Angeles, California.

/s/ Vivian S. Rodriguez

Vivian S. Rodriguez

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CALIFORNIA MEDICAL ASSOCIATION v. AETNA HEALTH OF CALIFORNIA**
Case Number: **S269212**
Lower Court Case Number: **B304217**

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

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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.

6/14/2022

Date

/s/Henry Weissmann

Signature

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