Case No. 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.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF FIVE LABOR ORGANIZATIONS IN SUPPORT OF PETITIONER

After decision by the Court of Appeal, Second Appellate District, Division Eight, Case No. B304217
Affirming the Judgment of the Superior Court for the County of Los Angeles, Honorable Elihu M. Berle,
Case No. BC487412

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the Service Employees International Union California State Council; International Brotherhood of Teamsters Joint Council 7; Writers Guild of America, West, Inc.; United Food and Commercial Workers Western States Council; and United Farm Workers of America respectfully request permission to file the accompanying amici curiae brief in support of Petitioner.

The Service Employees International Union California State Council ("SEIU California") is comprised of local unions of the Service Employees International Union that represent more than 700,000 California workers throughout the state economy. SEIU California's mission is to secure economic fairness for working people and create an equitable, just, and prosperous California. SEIU California and its affiliated local unions pursue these objectives through means including litigation and have brought claims under California's Unfair Competition Law to challenge unlawful, unfair, or fraudulent business practices in numerous cases over the years.

The International Brotherhood of Teamsters ("IBT") started in 1903 as a merger of two leading team driver associations and has grown to represent workers in virtually every occupation imaginable. IBT advocates for the rights and aspirations of all working men and women, and its mission is to organize and educate workers toward a higher standard of living. Litigation is among the means utilized by IBT to achieve its

objectives. Proposed amicus curiae IBT Joint Council 7 and its affiliated local unions represent more than 100,000 members in 20 local unions throughout California and northern Nevada.

Writers Guild of America, West, Inc. ("WGAW"), is a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television, and new media industries. WGAW's mission is to protect the economic and creative rights of the writers it represents. WGAW has at times pursued litigation in service of its members' interests, including a recent case involving claims under the Unfair Competition Law that sought to enjoin business practices of the major Hollywood talent agencies that were causing injury to both WGAW and its members.

The United Food and Commercial Workers Western States Council is a chartered body within the United Food and Commercial Workers International Union, made up of local unions representing more than 200,000 workers in California, Arizona, and Nevada. Those workers are employed in such areas as agriculture, packing sheds, distribution, manufacture, warehousing, food storage, pharmacy, and retail sales. The Western States Council seeks to improve the lives of workers, families, and communities.

Begun in 1962 by Cesar Chavez, Dolores Huerta, Gilbert Padilla, and others, United Farm Workers of America ("UFW") is the nation's first and largest farm workers union. UFW represents thousands of migrant and seasonal farm workers in various agricultural occupations throughout the country, and has

members of diverse racial, ethnic, and immigration backgrounds throughout the United States, including in California. UFW seeks to improve the lives, wages, and working conditions of agricultural workers and their families through collective bargaining, worker education, state and federal legislation, public campaigns, and litigation.

The Unfair Competition Law, California Business and Professions Code §17200, *et seq.*, is an important tool for labor organizations, which sometimes suffer organizational injuries from unlawful and unfair practices. Specifically, labor organizations sometimes expend financial resources and staff time to identify, investigate, and combat unlawful and unfair practices that jeopardize the unions' missions or spheres of concern, thereby diverting those funds and resources from other organizational priorities and activities. Typically, though not always, members of labor organizations are also injured by these same practices, which is why the labor organizations devote resources to protect their members, at the expense of other organizational activities. A limitation on the ability of organizations to have standing based on their diversion of resources like that in the Court of Appeal decision under review would significantly harm amici and other labor organizations.

The proposed amici curiae brief will assist the Court by supplementing the arguments of the parties and providing the perspective of membership organizations that are not involved in the lawsuit.

Pursuant to Rule 8.520(f)(4)(A) of the California Rules of Court, short portions of the amici curiae brief reiterate statements made in amici's letter in support of the Petition for Review, which was authored by certain current counsel for Petitioner when they were counsel for amici curiae. Pursuant to Rule 8.520(f)(4)(B) of the California Rules of Court, no person or entity other than amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of the amici curiae brief.

For the reasons stated above, the Court should grant leave to file the accompanying amici curiae brief.

Dated: June 15, 2022

Respectfully submitted,

Jonathan Weissglass
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By: */s/* Jonathan Weissglass
Jonathan Weissglass

Attorney for Proposed Amici Curiae

AMICI CURIAE BRIEF

INTRODUCTION

The text of the Unfair Competition Law, California Business and Professions Code §17200, *et seq.*, and basic standing principles readily resolve the legal issues this case presents.

The Unfair Competition Law ("UCL"), as amended by the voters in Proposition 64, sets forth one test for every standing inquiry: whether a plaintiff "has suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code §17204. In brief, if a plaintiff has lost money or property due to the challenged practice, there is standing; if not, there is no standing. The statute does not distinguish between types of losses of money or property. Any attempt to carve out a particular monetary or property loss as not worthy of standing cannot survive the plain language of §17204.

Respondent Aetna relies heavily on other indicia of intent besides the text of §17204. But Aetna completely ignores the ballot argument in which the proponents of the initiative stated that Proposition 64 would still permit suits such as those of health groups seeking to prevent tobacco from being sold to children. The only way such a suit could be brought under the UCL is by the organization having standing because of a diversion of resources that resulted in the loss of money or property. The text of §17204 reflects what the voters who enacted Proposition 64 intended.

Aetna also misinterprets the interplay between standing law and Proposition 64. There can be no question that the

initiative meant to rein in standing. But the same findings and declarations that so provide also permit standing where federal injury requirements are met. Standing based on a loss due to a diversion of resources was part of federal standing doctrine under United States Supreme Court jurisprudence before Proposition 64 was enacted. Diversion of resources standing is just as legitimate as any other standing due to a loss of money or property. That is true whether the use of resources is in the form of money paid to purchase a product or to an outside contractor or due to the use of salaried in-house staff to address the challenged practice. In all of these scenarios, the organization loses resources that could be used for other priorities. Moreover, Aetna has pointed to no abusive litigation as a result of standing due to diversion of resources.

DISCUSSION

I. The Unfair Competition Law Permits Standing Based On Any Loss Of Money Or Property

A. The Law's Text Resolves This Case

The UCL provides: "Actions for relief pursuant to this chapter shall be prosecuted . . . by 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 language alone is dispositive of the issue before the Court. "Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." *People ex*

rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 301 (internal quotation marks omitted; interpolation in original).

The plain text of §17204 shows that the person who brings the lawsuit, rather than someone else, must have suffered the requisite harm. This Court has already so held. *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 323. The parties agree on this limitation. Pet. Opening. Br. 20-21; Resp. Br. 11. That limitation remains true even if the person bringing the lawsuit has members who are harmed. *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 998, 1004. Again, the parties agree with this proposition. Pet. Opening. Br. 25; Resp. Br. 11.

The question on which the parties divide is whether an organization that loses money because it diverts its resources in response to an unlawful or unfair practice – for instance, paying outside contractors to develop a public relations campaign with respect to the practice or paying to place advertisements to counter the practice – has standing.

Aetna appears to argue that such losses do not suffice for standing even through the plain language of §17204 includes any loss of money or property. Aetna reasons that because Proposition 64 deleted language that had permitted a plaintiff to sue whenever it was "acting for the interests of itself, its members or the general public" (Petitioner's Motion for Judicial Notice ("MJN"), Ex. A at 109) and did not add specific text allowing standing based on a diversion of resources, the initiative foreclosed such standing (even when the organization itself lost

money through the diversion of resources). Resp. Br. 18-19. Aetna similarly argues that standing based on a diversion of resources treats organizations differently than individuals. Resp. Br. 19-21.

But these arguments ignore what Proposition 64 actually did: create an across-the-board requirement that any plaintiff have lost money or property. To do that, the initiative necessarily had to eliminate the quoted language in the paragraph above that allowed a plaintiff to sue without such harm, did not have to say anything about diversion of resources or any other method of showing the requisite loss, and did not need to address any differences between organizations and individuals. There is *one, universal test*: whether a plaintiff "has suffered injury in fact and has lost money or property as a result of the unfair competition." Bus. & Prof. Code §17204. Proposition 64's text provides no basis to treat losses due to diversion of resources any differently than other losses.

Aetna also seeks to add a requirement to the text, proffering that there must be proximate cause between the act at issue and the loss of money or property. Resp. Br. 16-18. Aetna bases this argument on §17204's requirement that a loss of money or property "result" from the unfair competition. But as Petitioner California Medical Association ("CMA") points out (Pet. Reply Br. 33), this Court has already ruled that it "is sufficient to allege causation" by pleading that a plaintiff "would not have bought the product but for the misrepresentation."

Kwikset, 51 Cal.4th at 330. Aetna seeks to read into the text a condition that does not exist.

B. Other Sources Support The Textual Analysis

To the extent there is any doubt about how to construe the initiative, the Court should look to the ballot pamphlet for Proposition 64. *See City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-17 (where "statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy") (internal quotation marks omitted); *Lungren*, 15 Cal.4th at 306 (noting in interpreting initiative: "the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language") (internal quotation marks omitted).

The arguments with respect to Proposition 64 support the textual analysis above. Opponents of the initiative argued that it would hamper many suits, including the following: "consumer groups from enforcing privacy laws protecting our financial information" and "health organizations from enforcing the laws against selling tobacco to children." MJN, Ex. A at 41. In response, the proponents of Proposition 64 stated it "*would permit ALL the suits cited by its opponents*." *Id.* (emphasis in original). That statement necessarily reflects that organizations could show standing through a diversion of resources as that is the only way consumer and health organizations would have standing to bring the noted suits under the UCL. After all,

health organizations, for instance, are not themselves harmed from tobacco products except to extent they lose money or property while working on behalf of others.

Aetna nonetheless relies on language from the initiative's findings and declarations that private attorneys have misused the UCL by filing lawsuits on behalf of plaintiffs who did not have "any other business dealing with the defendant." MJN, Ex. A at 109 (Section 1(b)(3)). The Court has previously addressed this language in brief. *Kwikset*, 51 Cal.4th at 317, 321; *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788. But amici are not aware of any instance in which this Court found that a plaintiff did not have standing for lack of a "business dealing." The Court should use this opportunity to clarify that the "business dealing" prefatory language does not set forth a separate test for standing.

In *Kwikset*, the Court construed the UCL to require a plaintiff to meet a "simple" two-part test: "(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." *Id.* at 322 (emphases in original). That is the beginning and end of the test this Court provided – there is nothing more specific as to "business dealing." In other words, the requirement that a person have "lost money or property as a result of the unfair competition" in §17204 was meant to include any "business dealing" requirement. This makes sense as it is hard to see how

a person could lose money or property without having any dealing – at least indirect – with the entity that caused the loss.

Indeed, the "business dealing" language will not bear the weight Aetna places on it. As CMA points out (Pet. Reply Br. 32), the initiative plainly used the phrase "business dealing" broadly as the concept included merely viewing an advertisement. *See* MJN, Ex. A at 109 (Section 1(b)(3)) (discussing problem with filing "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").

Moreover, under Aetna's reading of the "business dealing" language, organizations that the proponents of the initiative conceded in their ballot pamphlet argument could bring suit – such as the health organization suing over tobacco sales discussed above – would generally not be able to bring suit. MJN, Ex. A at 41.

II. Diversion Of Resources Is A Proper Basis For Standing

A. There Is No Ground To Preclude Standing Based On A Diversion Of Resources

Aetna also misunderstands the constraints of standing based on a diversion of resources, claiming that it allows a plaintiff to "manufacture" standing. Resp. Br. 2-3, 21-25. But standing based on diversion of resources is just as real as standing based on any other form of injury. An organization that spends money to combat an unlawful practice aimed at physicians no more manufactures standing than a doctor who

declines to perform a medical procedure due to a law that threatens doctors who perform the procedure with sanctions and therefore loses income. Both make choices based on the situation that presents itself. Both have standing to challenge the reasons for those choices based on the resulting loss.

Moreover, although Aetna relies on portions of Proposition 64's findings and declarations with respect to misuse of the UCL (Resp. Br. 21-22), the findings and declarations also include the statement that a plaintiff must have "been injured in fact under the standing requirements of the United States Constitution." MJN, Ex. A at 109 (Section 1(e)). The ultimate arbiter of the federal Constitution is the United States Supreme Court, which long ago found that under Article III of the Constitution, an organization can show standing through "injury to the organization's activities" and "consequent drain on the organization's resources" – in that case, brought about by the need to divert resources from housing counseling and referral services to combating discrimination. *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 372, 379. *See generally* Pet. Opening Br. 25-26.

This principle remains just as true today. Indeed, the Supreme Court recently rejected an argument similar to Aetna's argument about standing being manufactured, stating: "we have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." *Federal Election*

Commission v. Ted Cruz for Senate (2022) __ U.S. __, __, 142 S.Ct. 1638, 1647 (citing *Havens Realty*).

Given that diversion of resources is a recognized basis for standing under the United States Constitution and that Proposition 64's findings and declarations specifically condone standing permitted by the Constitution's injury requirement, Aetna misplaces reliance on the voters' generalized intent to rein in standing under the UCL. Proposition 64's findings and declarations cannot support the conclusion that the initiative forbade all cases permitted under federal standing requirements given their statement to the contrary. At least some such cases must still be allowed for the findings and declarations to be accurate. For the same reason, Aetna's argument that federal standing law is irrelevant to Proposition 64 is incorrect. *See* Resp. Br. 25-27.

This Court has already analyzed the issue and found that the initiative limited standing to loss of money or property, which precludes certain types of injury that would suffice under federal law but allows others – namely, lost money or property. *Kwikset*, 51 Cal.4th at 324. There is no basis to limit the types of losses of money or property that federal standing law recognizes.

Nor is Aetna correct that any organization could enjoy standing based on diversion of resources and thereby circumvent the limitations Proposition 64 put in place. *See* Resp. Br. 22-24. The leading California case on diversion of resources noted the organization's "evidence of a genuine and long-standing interest in the effective enforcement of the statute and in exposing those

who violate it." *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 1282. The Court of Appeal in that case further required that the diversion of resources be "in response to, and to counteract, the effects of the defendants' alleged [misconduct] rather than in anticipation of litigation." *Id.* at 1283-84 (internal quotation marks omitted; interpolation in original). *See generally* Pet. Opening Br. 28-30; Pet. Reply Br. 22-24, 27-28.

Aetna's claim that standing based on diversion of resources is inconsistent with this Court's decision in *Amalgamated Transit Union* is also incorrect. *See* Resp. Br. 13-14, 23-24. In that case, the Court precluded *associational standing*, which is very different from standing based on diversion of resources.

"Under the doctrine of associational standing, an association that does not have standing in its own right may nevertheless have standing to bring a lawsuit on behalf of its members." *Amalgamated Transit Union*, 46 Cal.4th at 1003. Put another way, the "doctrine applies only when the plaintiff association has *not* itself suffered actual injury but is seeking to act on behalf of its members who have sustained such injury." *Id.* at 1004 (emphasis in original).

Associational standing has nothing to do with an organization that *has itself suffered actual injury* through diversion of resources or otherwise. That the cause of an organization's injury may be money lost protecting its members' interests does not mean that the organization seeks standing

based on its members' injury as under associational standing – it is the injury to the organization itself that creates standing.

The Court of Appeal made the same mistake as Aetna in relying on *Amalgamated Transit Union* and finding that "CMA does not acknowledge that only its members, and not CMA itself, suffered actual injury." *California Medical Ass'n v. Aetna Health of California Inc.* (2021) 63 Cal.App.5th 660, 669. The injury to CMA's members that would be necessary to associational standing under *Amalgamated Transit Union* is irrelevant to CMA's standing based on a diversion of resources.

Amici do not address whether, as a factual matter, CMA has demonstrated it has diverted resources and suggest that question is best decided by the Superior Court on remand. If this Court delves into the issue, even Aetna appears to recognize that certain expenditures can be appropriate grounds for standing. *See* Resp. Br. 28-29 n.6. To the extent the Court addresses the question, the Court should clarify that at least out-of-pocket expenses that would not otherwise have been made such as paying outside personnel to combat the challenged practice and mailing educational materials on the contested practice are sufficient.

In addition, salaries to in-house staff that an organization can show spent time on the challenged practice to the exclusion of other responsibilities also suffice for standing. After all, an organization pays money to its employees in the form of salary. To the extent a challenged practice causes employees to do work besides what they would otherwise do to further the

organization's aims, the organization loses the money it paid due to the practice at issue. Amici curiae do not experience any less of an injury when they are required to respond to an improper practice by allocating existing paid staff time (and thereby losing that time for other priorities) versus spending money on an outside contractor. Labor organizations use both methods of response and finding that one affords standing but not the other would miss the lack of a real-world distinction between the two.

Put in economic terms, "the value of one's own time needed to set things straight is a loss from an opportunity-cost perspective." *Dieffenbach v. Barnes & Noble, Inc.* (7th Cir. 2018) 887 F.3d 826, 828 (Easterbrook, J.) (finding plaintiffs in data breach case have standing based on such injury). As this Court has explained, "[a]n opportunity cost is the benefit forgone by employing a resource in a way that prevents it from being put to another use." *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 640 n.1 (internal quotation marks omitted). The opportunity cost of an employee not being able to work on another organizational priority constitutes a loss no less than the loss of one's own time in responding to a data breach as in *Dieffenbach*.

Further, to avoid the next battle over the extent to which discovery into internal organizational expenditures and practices is permissible, the Court should clarify that there is no need to document the exact amount of expenditures or time spent. If organizations are forced into massive discovery battles that pry into their internal affairs, it will deter meritorious cases.

B. The Unsupported Fear Of Abusive Litigation Does Not Justify Limiting Standing

Aetna also repeatedly raises the specter of abusive litigation – so-called "shakedown suits." Resp. Br. 2, 21-23. But Aetna does not provide even a single example of a purportedly abusive case that was allowed due to diversion of resources standing since Proposition 64 was enacted in 2004. Indeed, it has been seven years since *Animal Legal Defense Fund* upheld standing based on diversion of resources, and were Aetna correct there should have been a rash of abusive litigation by now.

To the contrary, unions and other membership organizations have brought serious cases. For instance, amicus Writers Guild of America, West, Inc., brought UCL claims against Hollywood talent agencies to enjoin those agencies' conflicted practices in their representation of writers – a practice that had resulted in significant downward pressure on the earnings of writers. *See William Morris Endeavor Entertainment, LLC v. Writers Guild of America* (C.D. Cal. Apr. 27, 2020) 2020 WL 2559491, at *1-3. The union based its standing on its own organizational injuries including diversion of resources. *Id.* at 2. The court found standing based on the union's loss of dues revenue attributable to the reduction in its writer-members' compensation. *See William Morris Endeavor Entertainment, LLC v. Writers Guild of America* (C.D. Cal. 2020) 478 F.Supp.3d 932, 942-43.

In another recent case, an affiliated local union of amicus Service Employees International Union California State Council

brought UCL claims challenging employers' health and safety practices that had placed workers at increased risk of contracting COVID-19. *See SEIU-United Healthcare Workers West v. HCA Healthcare* (C.D. Cal. June 7, 2021) 2021 WL 2336947, at *1.

Other membership associations besides labor unions have also relied on the UCL to bring important cases challenging unlawful practices. *See, e.g.*, *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress* (N.D. Cal. Apr. 29, 2020) __ F.Supp.3d __, 2020 WL 2065700, at *10-12, 28 (organization obtained injunction under UCL prohibiting defendants from misrepresenting identities to gain access to Planned Parenthood offices, conferences, or health centers, and from recording Planned Parenthood staff).

To be sure, Aetna concedes that membership organizations can bring *some* UCL cases. Resp. Br. 14-15. The problem is that the line Aetna would draw and that the Court of Appeal's decision drew would significantly limit those cases.

The Court of Appeal limited the ability of membership organizations to bring UCL cases to those circumstances where an organization lost money or property *other than* in advocating for its members. *California Medical Ass'n v. Aetna*, 63 Cal.App.5th at 667-68. Although Aetna avoids expressly defending this position, it appears to want to cabin standing to such circumstances as where an organization purchased a product, was charged money, or suffered damage to property. Resp. Br. 14-15. Either result would significantly limit the

ability of membership organizations, such as amici curiae, to bring UCL claims.

Missing from these attempts to limit standing is that *how* an organization loses money or property is not relevant under Proposition 64 – only that the organization indeed suffers such a loss. The Court should reject the idea that membership organizations that lose money or property because they advocated for their members' interests no longer would have standing to bring UCL claims unless they also lose money or property in the ways Aetna prefers.

CONCLUSION

For the reasons stated above, the Court should reverse the Court of Appeal and permit organizations to bring suits when they have lost money or property, including through the diversion of resources.

Dated: June 15, 2022

Respectfully submitted,

Jonathan Weissglass
Law Office of Jonathan Weissglass

By: /s/ Jonathan Weissglass
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Attorney for Proposed Amici Curiae

CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing document is proportionally spaced, has a typeface of 13 points, and contains 3,620 words, excluding the cover, application, tables, signature block, and this certificate. Counsel relies on the word count of the word-processing program used to prepare this brief.

Dated: June 15, 2022

By: */s/* Jonathan Weissglass
Jonathan Weissglass

PROOF OF SERVICE

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 1939 Harrison Street, Suite 150, Oakland, CA 94612.

On June 15, 2022, I served a copy of the following document:

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Los Angeles, California 90012

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Toyer Grear

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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6/15/2022

Date

/s/Jonathan Weissglass

Signature

Weissglass, Jonathan (185008)

Last Name, First Name (PNum)

Law Office of Jonathan Weissglass

Law Firm