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Supreme Court of California
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S269212

FILED WITH PERMISSION

IN THE SUPREME COURT 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.
Defendants-Respondents.

ON PETITION FOR REVIEW OF A DECISION BY THE COURT OF APPEAL

SECOND APPELLATE DISTRICT, CASE NO. B304217

APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHEFS KEN FRANK AND SEAN "HOT" CHANEY IN SUPPORT OF RESPONDENTS

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APPLICATION TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Chefs Ken Frank and Sean "Hot" Chaney (the "Chefs") respectfully request permission to file the attached brief as amici curiae supporting Respondents in this case. This application is timely based on the Court's order of April 27, 2022, extending the time to serve and file amicus briefs to June 15, 2022.

While perhaps unlikely participants in a California Supreme Court case, the Chefs have direct experience as small business owners who have had to defend against abusive cases brought by advocacy organizations claiming standing under the Unfair Competition Law (the "UCL"). Indeed, among other cases, Chef Ken Frank and his restaurant (La Toque) were the defendants in *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) Cal.App.4th 1270 (*ALDF*), which resulted in the flawed opinion on which Petitioner relies here. The Chefs' amici curiae brief also presents a point about basic economics that, to their knowledge, has not been asserted by any of the parties but that is foundational to understanding the fallacy that an advocacy organization's alleged "diversion of resources" somehow constitutes "lost money or property."

The Chefs' perspective will assist the Court in appreciating how the "diversion of resources" theory under which some lower courts have fabricated a finding of UCL standing not only defies the voters' express will in Proposition 64 but also is devastating to small businesses. The Chefs' counsel has over 25 years' experience handling appeals, has litigated these issues for nearly

a decade (for the Chefs and others), and is intimately familiar with the leading cases and many others that have resulted in findings of standing that make a mockery of the law.

Pursuant to Rule 8.520(f), no party or counsel for a party has authored the attached amicus brief in any part or made any monetary contribution intended to fund its preparation or submission.

June 15, 2022

THE OFFICE OF MICHAEL TENENBAUM, ESQ.

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INTEREST OF AMICI CURIAE

Chef Ken Frank and Sean "Hot" Chaney (the "Chefs") are chefs as well as owners of the restaurants in which they cook. Chef Frank's restaurant (La Toque) in Napa is Michelin-starred; Chef Chaney's most recent restaurant, in Hermosa Beach, served tacos and burgers (including a version topped with foie gras). Both chefs have had to defend against lawsuits filed by advocacy organizations against their small businesses in which the groups claimed standing under the Unfair Competition Law (the "UCL") and were allowed to proceed.

While the Chefs ultimately prevailed in their cases, the costs in terms of time and money — including having to hire counsel to defend them — were extraordinary for entrepreneurs operating local businesses on lean margins. The Chefs have a strong interest in seeing this Court correctly determine the issue of UCL standing for advocacy organizations in accordance with both the intent of the electorate in passing Proposition 64 and common sense.

Notably, Chef Ken Frank and the company that operates his restaurant were the defendants in *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) Cal.App.4th 1270 (*ALDF*), which resulted in the published opinion on which Petitioner relies here and which remains deeply flawed. (Chef Frank petitioned this Court for review some seven years ago, but his petition was denied.) The Chefs would like to see this Court set the law straight — and disapprove the opinion in *ALDF* as necessary to reach the right result for future cases.

INTRODUCTION

This case presents an increasingly recurring but unsettled issue of fundamental importance to all California businesses who have faced lawsuits under the UCL from any advocacy organization that decides to target them. Simply put, the law cannot be that an organization that opposes a business practice can generate standing for itself to bring a UCL lawsuit whenever it decides to use its resources to, for example, "investigate" a targeted business or "educate" its members about a business practice it may disfavor. A ruling from this Court that would confer standing on an organization in such cases would open the floodgates to any activist entity that anoints itself to police a business or industry it opposes.

Proposition 64 was a statewide voter initiative specifically aimed at ending lawsuits against businesses where the plaintiff was not truly injured by having actually "lost money or property" in dealing with the business. *See* text of Prop. 64, § 1(c) (declaring that "unfair competition laws are being misused" where plaintiffs "have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant"). There are countless advocacy organizations in California. Some favor abortion; others oppose it. Some favor guns; others oppose them. Some favor meat and poultry products; others oppose even those (and are missing out). But none of them should be given carte blanche to sue whenever they voluntarily use their resources to go after a business they dislike.

Beyond this case, allowing an advocacy organization to generate standing for itself to sue merely by "diverting resources" out of an interest in a business it opposes — and then to call that an *injury* so it can drag the targeted business into court — would have massive ramifications for every business in this state, from the largest multinational corporations to the kinds of mom-and-pop merchants who were victimized under the UCL prior to the passage of Proposition 64. This Court should not do that.

The Chefs submit this brief to make two simple points: (1) that courts have taken conflicting rulings about organizations' standing under the UCL to an extreme, such that this Court should construe the doctrine as the voters intended in passing Proposition 64; and (2) that the notion that an organization's "diversion of resources" somehow constitutes an "injury" in the form of "lost money or property" cannot be correct as a matter of Economics 101.

ARGUMENT

I. Giving Advocacy Organizations Standing to Sue Based Merely on an Alleged "Diversion of Resources" Defies the Voters' Express Will in Proposition 64 — and Is Devastating to Small Businesses.

Before the voters passed Proposition 64 in 2004, enterprising lawyers set up advocacy organizations such as "Citizens for Fair Business Practices" that sued businesses over claimed violations that government regulators deemed insufficient to prosecute. *See*, *e.g.,* California Attorney General press release of Feb. 26, 2003 (describing abuses of UCL before Proposition 64), available at http://goo.gl/z3S4sw.

Proposition 64 thankfully changed all that by amending section 17204 of the Business and Professions Code. (Prop. 64, § 3.) Now the law requires that the plaintiff be someone "who has suffered injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. & Prof. Code § 17204; *Clayworth v. Pfizer* (2010) 49 Cal.4th 758, 788. As this Court explained in *Kwikset v. Superior Court*, "[T]he intent of this change was to confine standing to those actually injured by a defendant's business practices[.]" (2011) 51 Cal.4th 310, 321. The voters "clearly intended to restrict UCL standing" and to preserve it only "for those who had *had business dealings with* a defendant and lost money or property as a result." *Id*. (emphasis added). "It is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the

UCL." *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1362.

The Chefs will not repeat here, but instead urge the Court to consider carefully and adopt, the analysis in the amicus brief of the Chamber of Commerce of the United States. Instead, the Chefs can uniquely speak to the ways in which they have been subjected to lawsuit abuse under the UCL because lower courts posited that any "diversion of resources" by an advocacy organization that learns about a business practice it opposes somehow constitutes "lost money or property" for purposes of conferring standing.

A. *ALDF*

In the *ALDF* case itself, an animal rights organization learned that Chef Frank — who had publicly debated ALDF's Director of Litigation over the bill that became California's ban on the sale of foie gras — was protesting the ban by serving sample portions of foie gras for free, at his discretion, just as chefs in nicer restaurants sometimes send a dish to a table unsolicited. As Chef Frank put it, giving away a costly ingredient like foie gras in the face of a ban on collecting any money from its sale was his way of "throwing tea into the Boston harbor." He even printed protest cards explaining why he was doing so.

But ALDF was determined to make the chef pay for his point of view. So it sued him. ALDF claimed it had UCL standing based on having paid a private investigator to dine at La Toque on three occasions — on which the investigator and his companion had to virtually beg their server to receive a gift of

foie gras (including pretending to be celebrating a special occasion).

ALDF alleged that its "paid staff" — mostly young lawyers — "diverted their attention from other ALDF projects to analyze the facts obtained during the investigation." ALDF said it then "expended significant staff time and resources to share its investigation findings with Napa law enforcement authorities." Under the statute at issue, prosecution of a violation is limited to the district attorney or city attorney in the county or city where a violation occurs. Cal. Health & Safety Code § 25983(c). But ALDF failed to convince the Napa City Attorney to prosecute La Toque. Indeed, after meeting with Chef Frank, the Napa police told him there was nothing unlawful about what he was doing.

Nonetheless, within just days after its investigator's third visit to the restaurant, ALDF filed its own lawsuit against Chef Frank. The principal allegation of standing in ALDF's complaint was its conclusory statement that "[a]s a result of Defendants' refusal to follow the California Health and Safety Code Sections 25980, *et seq*., *ALDF cannot engage in other activities that would better further its organizational mission*." ALDF alleged that "it is compelled to expose and stop illegal sales of products harming animal welfare" and that La Toque's alleged "continuing violations . . . cause ALDF to lose money, due to diverted staff time and resources." (*Id*.)

The trial court denied every form of request to dismiss ALDF's complaint for lack of standing under the UCL, and — as evidenced by the Court of Appeal opinion in the *ALDF* case — went out of its way to hear argument and issue a published

opinion in a moot case, holding: "That the expenditure of resources in investigating defendants' alleged lawbreaking was wholly consistent with plaintiff's mission does not mean the resources were not in fact diverted from other activities as a result of defendants' conduct." *ALDF*, 234 Cal.App. 4th at 1283. The court rejected Chef Frank's argument that ALDF could not have suffered an "injury" because the very "purpose of [ALDF's] existence is to invest [its] resources in litigation activities." Instead — based only on illogic and a federal court opinion from the District of Columbia — the Court of Appeal concluded, "Where the economic injury is diversion of resources, the proper focus of the inquiry is not the 'voluntariness or involuntariness' of the expenditures." *Id.* (citation omitted).

Never mind that ALDF — i.e., the Animal Legal Defense Fund — is a group of *lawyers* that does not actually defend any animals from prosecution but, rather, uses the legal system to file lawsuits whenever it wishes. In its own words, it pursues its very mission by "filing high impact lawsuits." *See* https://tinyurl.com/y34ywwc2 (ALDF's IRS form 990 for2020 at PDF p. 3). Indeed, at oral argument in *ALDF*, in a reference to the kinds of groups like "Citizens for Fair Business Practices" that Proposition 64 was expressly intended to prevent from suing businesses at will, Chef Frank's counsel told the Court of Appeal that, if an organization is deemed to have UCL standing any time it decides to "divert resources" to investigate a business as part of its mission, then there would be nothing to stop any lawyer from setting up an organization called "Lawyers Against Illegality" to sue any business whenever it so much as suspects that a business

has done anything unlawful — in other words, whenever it wishes.

The Court of Appeal in this case should not have had to try to distinguish the facts of *ALDF* to reach the correct result it did. It wrote: "The mission and very purpose for being of the plaintiff in *ALDF* — to prevent animal cruelty — were directly injured by the defendants' violation of the ban on sales of foie gras." *CMA,* 63 Cal.App.5th at 668. But this only perpetuates the fallacy that any time a business may be suspected of breaking a law that an organization likes, the voters somehow wanted to authorize the organization to sue. This Court should hold even organizational plaintiffs to a higher standard.

* * *

Chef Frank was ultimately able to obtain a dismissal of ALDF's case. But that was only after 6.5 *years* of litigation and legal fees in the six-figures (and only when a new trial judge finally recognized that ALDF could not even state a cause of action). No business, big or small, should have to endure that from any advocacy organization. Accordingly, this Court should hold — consistent with Proposition 64 — that a "diversion of resources" does not confer standing on anyone to sue. It should also disapprove of all contrary language in the opinion of the Court of Appeal in this case that could otherwise be read to provide a basis for similar lawsuits in the future.

B. *People for the Ethical Treatment of Animals v. Hot's Restaurant Group, Inc.* ("*PETA*")

In a case that fortunately did not make it into any

published Court of Appeal decision, Chef Chaney — who had also public remonstrated against the foie gras ban — was the victim of a lawsuit from an organization that believed he was violating a California statute by serving foie gras at no additional charge atop an $8 burger. (Good luck finding a burger in a proper restaurant for that price even *without* any foie gras.)

In *People for the Ethical Treatment of Animals v. Hot's Restaurant Group, Inc.*, Los Angeles Sup. Ct. Case No. YC068202, filed Nov. 28, 2012, the radical animal rights group PETA sued Chef Chaney's business, Hot's Kitchen, after noticing an Internet post about the restaurant's foie gras giveaway. PETA claimed that, by virtue of having learned of this practice, it was "required" — by Hot's conduct — to buy $1,600 video cameras for a couple of its members to conduct an amateur investigation into Hot's sale of a hamburger. PETA even alleged that it "diverted consultant and staff time and resources in learning how to properly install and operate the cameras." Like in *ALDF*, the local police reviewed PETA's complaint but were unpersuaded that the restaurant had violated the law. But PETA — whose president and founder has publicly admitted, "We are complete press sluts," and, "Everything we do is a publicity stunt," Ingrid Newkirk, in *The New Yorker*, Apr. 14, 2003, and *USA Today*, Sep. 3, 1991, at p. 03.A — sued anyway.

Hot's demurred on the ground that PETA lacked standing under the UCL because it had not "lost money or property" as a result of anything the restaurant had done to it — especially since PETA is an organization ideologically opposed to even purchasing the hamburgers Hot's sold (with or without foie gras).

Spending $1,600 or $16 on cameras — or $0 for that matter, for anyone with a camera on their mobile phone — was entirely PETA's choice, just as it was for PETA to choose to "investigate" Hot's in the first place. But the trial court refused to dismiss PETA's lawsuit at the pleading stage. At oral argument, when Hot's counsel asked, rhetorically, whether PETA's payment of "gas money" to its ersatz investigators to drive to Hot's to buy a burger they had no plans to eat would give it standing to sue under the UCL, the trial judge replied, "Why not?" In its order overruling Hot's demurrer, the trial court wrote: "An advocacy group, such as Plaintiff, may allege injury in fact when it challenges a business practice and expends resources in doing so."

Like the court in *ALDF*, the court in *PETA* was no doubt looking for some legal argument on which to hang its hat. But the one it reached is untenable as a matter of law and policy, lest the Court wants to foment more frivolous litigation. Hot's was ultimately able to prevail in the case. But its victory was bittersweet, as it came only after more than two years of litigation and legal fees in the tens of thousands of dollars, which is enough to affect whether a small business succeeds or fails.

C. *Campbell v. Feld Entertainment Inc.*

The cases reflecting courts' confusion when it comes to UCL standing for advocacy organizations are legion and cited in other briefs before the Court. *See, e.g., Animal Legal Defense Fund v. HVFG LLC* (N.D. Cal. Jun. 25, 2013) 2013 WL 3242244, No. C 12-05809, at *3 (recognizing that "such an extension would

effectively take us back to the 'any person' standing problem that Proposition 64 sought to cure. On the other hand, if a competitor has standing by reason of money or property spent to combat a proscribed business practice, as a competitor surely does, then why should a public interest organization not have standing for the same reason?"); *but see Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 144 (ruling that ALDF had no standing to sue calf ranchers for alleged cruelty and rejecting ALDF's argument that "[t]hose who receive special value from policy-based statutes have standing to bring a civil action").[1]

Yet among the many other problematic cases not called to the Court's attention until now, one example stands out for the absurdity of the current line of cases leading to *ALDF*. In

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[1] Meanwhile, other federal courts have rightly held that "voluntary expenditures do not confer standing." In *Paws v. U.S. Dep't of Agric. Animal and Plant Health Inspection Serv.*, 1996 WL 524333 (E.D. Pa. Sept. 9, 1996), an animal rights group alleged that it had made voluntary expenditures to "rescue" allegedly mistreated elephants from certain exhibitors. *Id.* at *2. But the court recognized this as insufficient to form the basis of Article III standing. It held that "voluntary expenditures do not confer standing." *Id.*; *see also Int'l Primate Protection League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 936-38 (4th Cir. 1986) (rejecting notion that animal rights group's financial contribution towards support of 17 experimental monkeys could confer standing because "this expenditure represented a voluntary offer to help the Maryland authorities"); *but see Animal Legal Defense Fund v. Great Bull Run, LLC* (N.D. Cal. Jun. 6, 2014) 2014 WL 2568685, No. 14-cv-01171-MEJ at *6 (finding UCL standing for ALDF and PETA without ever discussing how their voluntary expenditure of money and time to "witness and record" the bull run was somehow *caused by* defendant, other than to note that event was "inimical to their missions").

Campbell v. Feld Entertainment Inc. (N.D. Cal. Apr. 7, 2014) 2014 WL 1366581, No. 12-CV-4233-LHK, an animal rights activist and member of the group "Humanity Through Education" took it upon herself to videotape the arrival of circus elephants in San Francisco "with the purpose of educating the public" about how they are treated. *Id*. at *1. Campbell alleged that, "[a]s a direct result of [Defendants'] harassment," she "ha[d] been required to keep her camera turned on for extended periods of time in order ... to capture and document Defendants [sic] assaults upon her and other antics." *Id*. at *10. She further alleged that, as a result, she "ha[d] been forced to purchase significantly larger, and significantly more expensive memory cards for her camera."

The district court concluded that the activist had standing under the UCL to sue the circus. "Campbell's need to keep her camera on for an extended period of time and her need to purchase additional and better memory cards to sustain videotaping for that length of time were the result of Defendants' alleged unlawful actions. The Court finds that Campbell's allegations suffice to support a finding of standing under Section 17200." *Id*. at 11 (footnote omitted).

This case involving the parade of elephants is a real-world example of the parade of horribles that businesses face in the current legal framework for organizational standing under the UCL. The Court needs to decide whether to allow this regression to a culture of "anyone-can-sue-anyone-for-anything" or — as the Chefs and other amici urge — will get the clarification and relief that the courts and business owners desperately deserve.

II. The Notion that a "Diversion of Resources" Constitutes "Lost Money or Property" for an Advocacy Organization Ignores the Basic Economic Concept of Opportunity Cost — and Will Continue to Lead to Absurd Results.

The Chefs' second point should be a simple one to digest. As seen above and in the other cases cited to this Court, for purposes of organizational standing under the UCL, the bench and bar have been consumed with whether a plaintiff organization has "diverted resources" as a consequence of the defendant's allegedly unlawful business practice. But that reflects a failure to appreciate basic economics.

"Economic choice is a conscious decision to use scarce resources in one manner rather than another." *See* any economics text book, including *Basic Economic Concepts* at https://tinyurl.com/2ayfhwkb. "The most basic understanding about economic choice is that all choices have a cost. Economists see the real cost, or opportunity cost, of any decision in terms of what was foregone, or given up, if resources are used one way rather than another." *Id*.

One reason a "diversion of resources" cannot serve as the doctrinal basis for an organization to obtain standing to sue is that organizations are constantly choosing to use their resources in one way rather than another. No organization has unlimited resources. A decision by an organization like ALDF or PETA or any other — including CMA in this case — to spend resources doing anything means that it is diverting resources from doing everything else. And, if the organization chooses to use its

resources consistently with its mission, it is sophistry to claim that it has somehow "lost money or property" as a result of any such "diversion."

How did Aetna's letters to its own member physicians in this case purportedly "injure" only CMA? Was every other medical group, whether non-profit or for-profit group, not also forced to divert resources in response to the letters? And did all the other organizations just opt to let their injuries go unredressed?[2] By the same token, how did the Chefs in their cases cause only ALDF and PETA to "divert resources" — but not the literally countless other animal rights organizations in California who oppose foie gras to suffer the same fate?

* * *

Consider this: under the crude "diversion of resources" theory, each court that hears a UCL case — including even *this Court* in this case — has suffered a cognizable "injury" at the hands of the defendant business. (And it thus could not be viewed as able to act with impartiality.) How? Because, as a result of the defendant's allegedly unlawful business practice, the Court itself is having to "divert resources" to this case when it

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[2] CMA declares "its mission to promote the science and art of medicine, protection of public health, the betterment of the medical profession, and to achieve health equity and justice." *See* https://www.cmadocs.org/about. The American Medical Association, for example, states its own mission in almost the same terms: "to promote the art and science of medicine and the betterment of public health." *See* https://www.ama-assn.org/about.

could be doing work on *other* cases, just like every plaintiff organization alleges about its own work.

After all, the Court "is charged with interpreting the laws of the State of California," *see* https://www.courts.ca.gov/7318.htm, so having to interpret another California law as a result of allegedly unlawful conduct by a business — consistent with the Court's mission — means the Court's resources are diverted and the Court itself thus "injured" by the business. Or at least that is the logical but ridiculous result of a test for UCL standing that has plagued businesses in this State for too long and that this Court should now disavow.

CONCLUSION

The Court should affirm the judgment — and, in doing so, should hold, consistent with Proposition 64, that a "diversion of resources" does not confer standing on anyone to sue. It should expressly disapprove of all contrary language in the opinions of the Courts of Appeal in this case and in *ALDF*.

June 15, 2022

THE OFFICE OF MICHAEL TENENBAUM, ESQ.

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CHEFS KEN FRANK AND SEAN "HOT" CHANEY

CERTIFICATE OF WORD COUNT

(Cal. R. Ct. 8.504(d)(1))

The text of this brief consists of 3,779 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: June 16, 2022

Michael Tenenbaum

PROOF OF SERVICE

I, Michael Tenenbaum, declare that I am over 18 years of age and not a party to this action. My business address is 1431 Ocean Ave., Ste. 400, Santa Monica, CA 90401.

On June 16, 2022, I served true copies of the following document(s):

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Pursuant to the Office of Attorney General's instructions and section 17209 of the California Business and Professions Code, I also served a copy of the document electronically through the following website: https://oag.ca.gov/services-info/17209-brief/add.

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Dated: June 16, 2022

/s/ Michael Tenenbaum
Michael Tenenbaum

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/22/2022 by Florentino Jimenez, Deputy

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**

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The Office of Michael Tenenbaum, Esq.
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