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.	Supreme Court Case No. S269212

Petition for Review of a Decision of the Court of Appeal
Second Appellate District, Case No. B304217

RESPONDENT'S BRIEF

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INTRODUCTION

In 2004, Proposition 64 amended the Unfair Competition Law ("UCL") to limit standing to "a person who has suffered injury in fact and has lost money or property as a result of [a violation]." Cal. Bus. & Prof. Code § 17204. The amendment ensured that a plaintiff suing under the UCL must *personally* have lost money or property as a direct result of the defendant's conduct, *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011), and cannot sue to redress someone else's loss of money or property, *Amalgamated Transit Union, Local 1756 v. Superior Court*, 46 Cal. 4th 993, 998 (2009).

The Court of Appeal's decision was a straightforward application of those principles. Plaintiff-Appellant California Medical Association ("CMA") challenges an Aetna policy that CMA admits does not govern CMA in any way. Instead, the policy impacted some of CMA's *members*: physicians in Aetna's preferred-provider networks who routinely used out-of-network facilities to increase their personal profits at the expense of patients and health plans. But organizations, like all other UCL plaintiffs, cannot rely on harm to others as a basis for standing.

Lacking any argument that it personally suffered injury as a result of Aetna's policy, CMA mischaracterizes (Br. 17) the Court of Appeal's opinion as holding that CMA and other membership organizations "can never pursue any claims for relief under the UCL." That is inaccurate. The Court of Appeal repeatedly stated that CMA, like every other plaintiff, must "produce evidence that CMA itself, and not just its members, lost

money or property in order to have standing to sue under the UCL." Court of Appeal Opinion ("Op.") 9.[1]

To evade that rule, CMA asks this Court to adopt "different standards" to allow organizations to obtain UCL standing in ways no one else can. Pet'n for Rev. at 20. CMA argues that it can manufacture standing by choosing to help its physician-members in their private, contractual disputes with Aetna's policy. As the Court of Appeal and the trial court both held, Proposition 64 forecloses CMA's theory. There is no basis in Proposition 64's text for standing based on a would-be plaintiff's voluntary choice to advocate against a practice. CMA's theory is also contrary to the voters' clear intent when they passed Proposition 64 for the express purpose of ending "shakedown suits by parties who had never engaged in *any* transactions with would-be defendants." *Kwikset*, 51 Cal. 4th at 335 n.21 (emphasis in original).

Nor does CMA offer any principled basis to distinguish between membership organizations and any other private plaintiff under the UCL. Indeed, CMA admits that the UCL's standing requirements apply equally to any "person," Cal. Bus. & Prof. Code § 17204, which is defined to include all possible private plaintiffs, including associations and individuals, Cal. Bus. & Prof. Code § 17201.

CMA's proposed rule would mean that plaintiffs could sue under the UCL merely by advocating against a practice they later

[1] All citations to the Court of Appeal opinion are to the pages of the opinion as issued by that court, rather than the version that was published at 63 Cal. App. 5th 660.

challenge in court. This would allow creative plaintiffs to manufacture standing in each of the cases that Proposition 64 was intended to foreclose. Under CMA's theory, the result in many of this Court's prior UCL standing cases, including *Amalgamated Transit*, would be different. The Court should reject CMA's attempt to undermine Proposition 64.

Additionally, CMA has not demonstrated standing even under the rule it espouses. Under CMA's theory, standing is available only if the challenged practice directly "impair[ed]" the organization's "ability to provide . . . services" it normally provides. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). But CMA admits that Aetna's policy does not govern CMA at all. In addition, CMA cannot show any *economic* injury from its claimed diversion of resources because the sole injury it asserts is a loss of time by salaried staff members, which would have been expended anyway. CMA cannot identify a single cent of lost "money or property" to support UCL standing.

Finally, the Court should reject CMA's misguided attempt to obtain review of a legal issue concerning the appropriate remedy. That issue was not decided by any court below, and CMA did not include the issue in its Petition for Review in this Court. If the Court nevertheless reaches the issue, it should affirm the Court of Appeal's judgment on the alternative ground that CMA cannot obtain the type of injunction it is seeking. While CMA now purports to seek a "public" injunction, it is actually seeking only private injunctive relief to benefit its physician-members in their contractual disputes with Aetna.

Such relief for the benefit of others is unavailable where, as here, the plaintiff has never even sought class certification.

STATEMENT OF THE CASE

A. Preferred Provider Organization Health Plans

Since 1982, California law has explicitly sanctioned Preferred Provider Organization ("PPO") health plans. *See Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc.*, 148 Cal. App. 4th 1130, 1133 (2d Dist. 2007). Health insurers like Aetna maintain their PPO networks by "contract[ing] with hospitals and providers of medical services for alternative rates of payment for those services, thus permitting insurers to create panels of 'preferred providers' for the insurer's subscribers." *Id.* Aetna thereby "provides health insurance to its subscribers through a network of physicians who are contracted to provide services for discounted rates." Op. 2. At all times, "[s]ubscribers may receive services from these in-network physicians, or from out-of-network physicians at a higher share of the cost." Op. 2.

The PPO framework benefits insurers, patients, employers, and providers. Insurers, patients, and self-insured employers benefit from the lower rates they pay for health care services from in-network providers. Patients nonetheless may still access out-of-network treatment, albeit at a higher cost. Meanwhile, "[t]he [in-network] providers agree to discount their rates in part because they are guaranteed a defined pool of patients who have an economic incentive to use a preferred provider." *Lori Rubinstein*, 148 Cal. App. 4th at 1136. These incentives combine

to control healthcare costs and ensure that quality healthcare is accessible to patients.

As a condition of entering Aetna's PPO network, a health care provider must sign a contract with Aetna setting forth each party's rights and obligations. Op. 4. Although the form of that contract has changed over time, it consistently has required physicians to use in-network facilities for procedures they perform, whenever possible consistent with their sound medical judgment. Op. 4. To ensure that in-network physicians were complying with this obligation—and that patients with Aetna PPO plans were not being subjected to surprise bills for out-of-network rates—"Aetna implemented a policy to restrict or eliminate" improper out-of-network referrals. Op. 2.

B. Aetna's Network Intervention Policy

In the mid-2000s, Aetna began receiving complaints from members that they had been treated by in-network *physicians*, but were later surprised to receive large bills because the in-network physicians had used out-of-network *facilities*, typically ambulatory surgery centers or "ASCs." Respondent's Court of Appeal Appendix ("R.A.") 73, 272, 446–47. Commonly the in-network physician had an ownership interest in the out-of-network ASC, such that the physician profited from the high out-of-network ASC charges. R.A. 272. Self-insured employers and facilities that participated in Aetna's network also began to complain that they were bearing high costs or losing business because of these unexpected out-of-network referrals. R.A. 73, 92–94, 272, 446–47.

Aetna developed the Network Intervention Policy (the "Policy") to ensure that its members and self-insured employers would not be surprise-billed from out-of-network facilities, and to protect its in-network facilities from unfair competition from self-referring physicians. R.A. 74, 96–100, 447. The evidence showed that the Policy was designed to educate in-network providers about the benefits of in-network services and the costs of going out-of-network, and to encourage in-network providers to abide by their contractual obligation—essential to the survival of a PPO network—to use in-network facilities so long as consistent with their medical judgment. R.A. 74, 96–100, 447.

To do this, the Policy established a multi-step process for communicating with physicians. During this process, Aetna sent letters to physicians who used out-of-network facilities reminding them that this "may be considered non-compliance with your physician agreement in which you agree to use contracted, participating network facilities." Op. 4.[2] If a physician persisted in making unjustified and costly out-of-network referrals after this process, Aetna terminated the physician from its network.

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[2] The details of each step under the Policy are not relevant to the standing issue on appeal. In brief, they included multiple informational letters from Aetna to physicians, telephone and other communications, requests for information regarding why the physician used out-of-network facilities, attempts by Aetna to resolve any gaps in its network, and a multi-step reconsideration and appeal process for physicians found to have repeatedly engaged in abusive and unjustified out-of-network referrals. R.A. 74–75, 78, 86, 89–90, 96–100, 102, 104, 109–10, 112–14, 116, 118–121, 127, 129–30, 139, 144, 146–51, 153–60, 250–55, 265–66, 272–73, 448–452.

R.A. 96–100, 126, 451. Since the Policy went into effect in 2009, Aetna has terminated fewer than 100 physicians under it. R.A. 463; Joint Court of Appeal Appendix ("J.A.") 820–21.

Providers who did not have a financial interest in the out-of-network facilities generally were quick to stop making out-of-network referrals unless there was a specific medical reason to use the out-of-network facility. R.A. 265, 272, 459. These medical judgments were left to the provider, subject to review by Aetna's medical director (a physician). R.A. 88, 450.

Providers with a financial interest in the out-of-network facilities receiving referrals often behaved differently. They were far more likely to insist upon using their own facilities. R.A. 265, 272, 459. And many patients had no idea and were upset about being referred to an out-of-network facility owned by their physician without their knowledge, as shown by member feedback in the record. R.A. 87, 179–95, 460.

Before the Policy went into effect, Aetna submitted it to the California Department of Managed Health Care ("DMHC"). R.A. 268–69, 457. In response, the DMHC posed questions about the Policy, including whether it complies with the need "to assure that medical decisions are rendered by medical providers, unhindered by fiscal and administrative management" and whether it may "place an undue burden on the provider." R.A. 457. Aetna submitted a written response, explaining its "increasing[] concern[s] about routine referrals by certain network providers to non-participating providers, particularly to ambulatory surgery centers," which "often charge exorbitant

rates compared to a participating facility performing a similar procedure," and which sometimes "are made to facilities in which the network provider has an ownership/financial interest." R.A. 162–70, 269, 458. Thereafter, on March 14, 2008, the DMHC notified Aetna that "the Department has no objection to implementation of the changes described in the Amendment." R.A. 172–73, 458. Aetna then submitted the Policy to the California Department of Insurance ("DOI") on April 5, 2008. R.A. 175–77, 269, 458. The DOI assigned a reviewer to the filing and ultimately took no action. R.A. 269, 458.

Aetna also submitted an amended version of the Policy to the DMHC and the DOI in 2011. R.A. 203–06, 269, 462. The DMHC reviewed and closed the filing in 2011, while the DOI acknowledged and closed the filing in 2012. R.A. 269, 462.

Aetna temporarily suspended enforcing the Policy pending the outcome of this litigation. J.A. 1551. Aetna intends to resume applying the Policy once this litigation concludes, consistent with its rights under physician contracts and State law. J.A. 1551.

C. Procedural Background

The underlying litigation began in 2012 as a putative class action filed by an in-network physician, and then broadened in 2013 to include additional plaintiffs, including CMA. Op. 3. Aetna demurred to the Fourth Amended Complaint, arguing among other things that none of the plaintiffs had standing under the UCL. J.A. 270–96. The trial court found that the physician-plaintiffs had alleged standing through "loss of the contractual relationship" and "the general loss of patients." J.A.

341. Having found that some plaintiffs had standing under the UCL, the trial court did not address CMA's claim of standing at that time.

"No motion for class certification was ever filed," and all plaintiffs except CMA dismissed their claims voluntarily in 2019, leaving no physician or health care provider as a party in the case. Op. 3. The case thus narrowed to a single plaintiff, CMA, asserting a single claim "for injunctive relief under the UCL." Op. 3

Discovery ran from 2014 until November 2, 2019. J.A. 547. Discovery made clear that Aetna's Policy "did not apply to CMA, which had no contract with Aetna," Op. 5; R.A. 466, unlike the physician-plaintiffs whom the trial court found properly had alleged standing. CMA therefore "primarily claimed injury to its physician members for loss of patients and revenue." Op. 5. CMA argued that it had standing because it is an "organization that represents over 37,000 physicians throughout the state of California," and took action to "support[] its members" against Aetna. Op. 4. But CMA was unable to identify or quantify any money the organization spent as a result of the Policy, R.A. 214–15, 223, 228–29, 236, 466–67, 478–79; J.A. 1386–89, 1423–24, and CMA admitted that any "resources" it expended to support its members were in the form of time spent by salaried employees who would have received the same salaries regardless of the work they did, R.A. 213, 224–27, 236, 465–66.

Aetna moved for summary judgment and summary adjudication arguing, among other things, that CMA lacked

standing under the UCL. Op. 5. On November 25, 2019, the Superior Court granted Aetna's motion on the ground that CMA lacked standing because it "had not shown direct injury or loss of money or property." Op. 6. CMA appealed and, on April 28, 2021, the Court of Appeal affirmed on that same ground. Op. 3. The Court of Appeal reached this conclusion by applying two of this Court's precedents. *First*, under *Kwikset*, 51 Cal. 4th 310, "to have standing to bring a claim under the UCL after the 2004 amendments, a plaintiff must be able to show he personally sustained economic harm and that he lost money or property caused by the defendant's misconduct." Op. 8. *Second*, under *Amalgamated Transit*, 46 Cal. 4th at 993, an organization like CMA must "produce evidence that CMA itself, and not just its members, lost money or property in order to have standing to sue under the UCL." Op. 9.

Based on those settled principles, the Court held that CMA's theory that it had lost money or property by "diverting resources" to help its members in their contractual disputes with Aetna could not establish the requisite economic injury to CMA. Op. 9–12. Because CMA's theory of standing failed as a matter of law, the Court of Appeal (like the Superior Court) had no occasion to reach any of Aetna's other arguments, including that CMA lacked evidence of standing even under its own theory, that the approval of the Policy by California regulatory agencies precludes a claim under the UCL, and that CMA cannot obtain the injunction that it seeks.

CMA sought this Court's review of the Court of Appeal's decision. Pet'n for Rev. CMA listed five "issues presented for review," each of which related to the Court of Appeal's rejection of CMA's theory of standing. *Id.* at 1–2. None of the five issues concerned the viability under the UCL of the particular remedy CMA is seeking, a "public" injunction. The Court granted review on July 28, 2021.

ARGUMENT

I. PROPOSITION 64 FORECLOSES CMA'S THEORY OF STANDING

Proposition 64 amended the UCL to require a showing that the plaintiff "lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. In prior cases, this Court has drawn two principles from that statutory text: *First*, every UCL plaintiff must show that he or she personally lost money or property. *See Kwikset*, 51 Cal. 4th at 323. *Second*, UCL plaintiffs cannot evade this rule by trying to redress someone else's loss of money or property—by asserting representational standing. *Amalgamated Transit*, 46 Cal. 4th at 998. CMA lacks standing under those principles because it is not affected by Aetna's Policy at all, and cannot base its standing to sue on claimed harm to its members.

Rather than dispute these principles, CMA asks this Court to exempt it from them. CMA proposes that organizations (but not other UCL plaintiffs) can create a loss of money or property for themselves whenever they choose to advocate against a cause they disagree with. But there is no statutory basis for such an exemption, and CMA's reading would nullify the intent of the

voters who passed Proposition 64 and would make dead letters of this Court's prior UCL standing precedents.

A. Proposition 64 Requires UCL Plaintiffs To Show They Personally Lost Money or Property

Prior to the 2004 amendments to the UCL, "a plaintiff did not have to show any actual injury." *Amalgamated Transit*, 46 Cal. 4th at 1000. Proposition 64 changed that by requiring UCL plaintiffs to show that they "lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. Thus, "in sharp contrast to the state of the law before passage of Proposition 64," this Court has held that "a private plaintiff filing suit now must establish that he or she has *personally* suffered such harm." *Kwikset*, 51 Cal. 4th at 323 (emphasis added). As the Court of Appeal put it, Proposition 64 means "that private enforcement actions may be brought only by one who has suffered *direct* economic injury." Op. 7 (emphasis added). The 2004 amendments therefore "eliminate standing for those who have not engaged in any business dealings with would-be defendants." *Kwikset*, 51 Cal. 4th at 317; *accord Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 788 (2010).

CMA lacks standing under these rules. CMA admitted that it neither competes with Aetna nor does any business with Aetna. R.A. 470. CMA also admitted that the Policy does not apply to its activities at all, as opposed to its member-physicians who have contracted with Aetna. R.A. 466. In other words, there is no dispute that CMA "ha[s] not engaged in any business dealings with" Aetna. *Kwikset*, 51 Cal. 4th at 317. Proposition 64 was intended "to eliminate standing" under these exact

circumstances. *See id.*; *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 135 (2007) (UCL does not apply where plaintiffs are "neither competitors nor powerless, unwary consumers").

CMA misleadingly argues that this conclusion is inconsistent with the trial court's earlier ruling on standing at the demurrer stage. Br. 15, 17. The trial court's opinion did not discuss CMA's claimed standing. It found standing for the *physician-plaintiffs*, who had alleged standing through "loss of the contractual relationship" with Aetna and "the general loss of patients." J.A. 341. Unlike the physicians, CMA has neither contracts with Aetna nor patients to lose.

B. Proposition 64 Forbids UCL Plaintiffs from Relying on Someone Else's Economic Injury

Prior to the 2004 amendments to the UCL, "any person" could sue under the UCL to "act[] for the interests of itself, its members or the general public." *Amalgamated Transit*, 46 Cal. 4th at 1000 (quoting Cal. Bus. & Prof. Code § 17204 (1977)). "The law now requires that a representative claim, that is, a claim seeking relief on behalf of others, may be brought only by a 'person who has suffered injury in fact and has lost money or property as a result of the unfair competition.'" *Id.* (quoting Cal. Bus. & Prof. Code § 17204). And such a "private representation claim[]" may "be brought only by those" who also "compl[y] with Code of Civil Procedure section 382," *id.*, which provides the rules for certifying a class action. For those reasons, an organization "that has *not* suffered actual injury under the unfair competition law" may not sue in an individual action "as an association whose

members have suffered actual injury." *Id.* at 998 (emphasis in original). Otherwise, the UCL's requirement that a plaintiff suffered a personal loss of money or property "would be nullified." *Id.* at 1002.

CMA seeks to do exactly what Proposition 64 forbids, premising its case on claims that Aetna's Policy harmed CMA's physician-members, and that CMA's "injuries derive from its efforts to serve its members." Br. 49. As both the trial court and Court of Appeal held, such a theory cannot be "square[d]" with *Amalgamated Transit*, in which this Court held that a labor union could not establish standing from trying "to rectify injury to its aggrieved members," because "[t]he 2004 amendments to the UCL eliminated such representational standing." Op. 11–12; *see also* J.A. 1558 (trial court finding CMA's theory could not be "square[d]" with *Amalgamated Transit*).

CMA claims that the Court of Appeal held that CMA and other membership organizations "can never pursue any claims for relief under the UCL." Br 17; *see also id.* at 9–10, 18–22, 48–53. The Court of Appeal never said that. Rather, it made clear that CMA, like every other plaintiff, must "produce evidence that CMA itself, and not just its members, lost money or property in order to have standing to sue under the UCL." Op. 9. Thus, an organization may establish standing under the UCL if it purchased a product it would not have purchased but for the challenged practice, *Kwikset*, 51 Cal. 4th at 317, was subject to fees or charges as a result of the challenged practice, *Aron v. U-Haul Co.*, 143 Cal. App. 4th 796, 803 (2d Dist. 2005), or suffered

"damage to real property and personal property," *Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1262 (4th Dist. 2005).

To the extent CMA suggests (Br. 38, 48) that the law is somehow different for a plaintiff seeking "public injunctive relief" under *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), it is wrong. *McGill* dealt with an entirely unrelated question under the UCL: whether an arbitration provision is enforceable when it would foreclose a UCL plaintiff from seeking public injunctive relief. *See id.* at 951–52. *McGill*'s only mention of the UCL's *standing* rules was to restate the proposition this Court recognized in *Amalgamated Transit* and *Kwikset*: a UCL plaintiff "has standing" if it "suffered injury in fact and . . . lost money or property." *Id.* at 959 (quotation marks omitted). That is why the Court of Appeal held that even "[a]ssuming without deciding CMA seeks to benefit the general public, and not just its members, *McGill* is of no use to CMA because it did not suffer injury in fact or lose money or property as a result of the UCL violations it alleges here." Op. 12. *McGill* provides no support for the idea that a membership organization (or any other type of UCL plaintiff) can establish standing some other way.

C. Proposition 64 Does Not Allow Plaintiffs To Create Standing by Choosing to "Divert Resources"

Lacking any argument for standing in the wake of *Kwikset* and *Amalgamated Transit*, CMA claims that Proposition 64 silently created an exception to allow organizations to sue based on their own decisions to "divert resources" to advocate against a

practice they later challenge in court. The text and history of Proposition 64 foreclose such a rule.

1. Proposition 64's Text Bars CMA's Theory

CMA's interpretation of Proposition 64 finds no basis in the statutory text, which is "the first and best indicator of intent." *Kwikset*, 51 Cal. 4th at 321. Proposition 64 amended the UCL by deleting authorization for a plaintiff to sue when "acting for the interests of itself, its members or the general public," Cal. Bus. & Prof. Code § 17204 (1993), and requiring instead that all private plaintiffs show that they "lost money or property as a result of the unfair competition," Cal. Bus. & Prof. Code § 17204 (2022). CMA's interpretation (a) fails to give effect to Proposition 64's "as a result of" language, (b) ignores Proposition 64's deletion of language authorizing private suits to vindicate "the interests of" others, and (c) infers an unwritten exception from Proposition 64 for certain private plaintiffs.

a. CMA's theory is premised on the idea that UCL standing can arise from a plaintiff's "choice" (Br. 30) to advocate against a practice with which it disagrees. But Proposition 64 makes no mention of voluntary advocacy. To the contrary, it allows standing only for those who lose money or property "as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. This language "imposes a causation requirement" that is akin to the "causation element of a negligence cause of action." *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 855 & n.2 (2008); *see also Kwikset*, 51 Cal. 4th at 326 (language "connotes an element of causation (i.e., plaintiff lost money because of defendants' unfair competition)" (quotations, alterations, and emphases omitted)).

In other words, the statute imports a "proximate cause" requirement. *See Am. Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 586 (1978) (negligence requires proof of "proximate cause"); 4 Witkin, Cal. Proc. 6th Pleading § 581 (2021) (phrase "as a result of" implies "proximate or legal cause").

A plaintiff who chooses to advocate against a practice with which it happens to disagree, assuming it lost money at all when advocating, did so because of that choice, not because of the defendants' alleged conduct. CMA's "choice," in other words, is an intervening cause that breaks any chain of causation. *Akins v. Sonoma Cty.*, 67 Cal. 2d 185, 199 (1967) (intervening cause may break the chain of proximate causation "where the injury was brought about by a later cause of independent origin"); *see also Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010) ("common-law foundations" of proximate cause "require[] 'some direct relation between the injury asserted and the injurious conduct alleged'" and "[a] link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient" (quoting *Holmes v. Sec. Inv. Protection Corp.*, 503 U.S. 258, 271, 274 (1992)));[3] *Cal. Med.*

[3] Under a similar standing analysis under the federal RICO law, the United States Supreme Court has rejected attempts to establish standing via similarly independent causes. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457–58 (2006) (rejecting business's theory that its loss of customers was connected to a competitor's "defrauding the New York tax authority" because the competitor was able to "us[e] the proceeds from the fraud to offer lower prices designed to attract more customers"); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 271 (1992) (rejecting theory of standing based on third parties' inability to repay what they owed the plaintiff, allegedly as a result of the defendant's conduct

Ass'n v. Blue Shield of Cal., 2011 WL 5910115, at *8 (Sup. Ct. Alameda Cty. Mar. 23, 2011) (rejecting CMA's "diverted resources" theory of UCL standing because it relied on an injury "derive[d] solely from [CMA's] choice to fight this initiative").[4] Nor is there anything incongruous about preventing CMA from manufacturing a cognizable injury. This Court has already recognized that "Proposition 64 might also be viewed as defeating [an organization's] civic or philosophical interest in enforcing the UCL as an uninjured, volunteer plaintiff." *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 233 (2006).

b. As the Court of Appeal noted, CMA's rule would permit "any" membership organization to "claim standing based on its efforts to address its members' injuries." Op. 11. Indeed, CMA admits that its goal is to permit an organization to sue when its "injuries derive from its efforts to serve its members." Br. 49. If the voters meant to permit this, 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."

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having "first injured the [third parties] and left them without the wherewithal to pay customers' claims").

[4] CMA previously suggested that this opinion from CMA's prior case should not be cited under California Rule of Court 8.1115(a), Court of Appeal Br. 56, but that is a provision of the appellate rules related to "an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published." *Blue Shield* was not an appellate decision. In any case, *Blue Shield* is uniquely relevant because it reflects CMA itself attempting to manufacture UCL standing in contravention of the 2004 UCL amendments.

But Proposition 64 *deleted* language that previously allowed a UCL plaintiff to sue whenever it was "'acting for the interests of itself, its members or the general public.'" *Kwikset*, 51 Cal. 4th at 321 (quoting Cal. Bus. & Prof. Code § 17204 (1993)). This is strong evidence of intent to foreclose standing for an entity solely "acting for the interests of . . . its members or the general public." *See, e.g.*, *People v. Mendoza*, 23 Cal. 4th 896, 916 (2000) ("As a general rule, in construing statutes, we presume the Legislature intends to change the meaning of a law when it alters the statutory language, as for example when it deletes express provisions of the prior version." (quotation marks and alterations omitted)).

c. CMA's theory also subjects organizations to "different standards" for standing than other private plaintiffs. Pet'n for Rev. at 20; *see also id.* at 15 (arguing rule would allow organizations to show standing "in a different way"). Nothing in Proposition 64 allows such disparate treatment. To the contrary, *every* private plaintiff must show a personal loss of money or property. An individual must establish standing in his own right and cannot sue to vindicate harm suffered only by another. *See Pfizer Inc. v. Superior Court*, 182 Cal. App. 4th 622, 633 (2010) (class representative must personally "have standing under Proposition 64"). A union cannot base its standing on claimed harm to union members. *Amalgamated Transit*, 46 Cal. 4th at 1004–05. An advocacy group claiming that a defendant's conduct harmed its members and its mission "lack[s] standing in a representative capacity to sue under California's UCL on behalf

of its members." *Ctr. for Sci. in Pub. Interest v. Bayer Corp.*, 2010 WL 1223232, at *2 (N.D. Cal. Mar. 25, 2010). And, as the Court of Appeal held, "an association such as CMA" must "produce evidence that CMA itself, and not just its members, lost money or property in order to have standing to sue under the UCL." Op. 9.

The sole UCL plaintiffs that are subject to different rules under Proposition 64 are "*only* the California Attorney General and local public officials," who are "authorized to file and prosecute actions on behalf of the general public." Proposition 64 § 1(f), Voter Information Guide, Ex. A to CMA Mot. for Judicial Notice ("Voter Information Guide") (emphasis added); *see* Cal Bus. & Prof. Code § 17204. But CMA's "diverted resources" theory would allow organizations to establish standing in a way that no other private plaintiff can. *See* Br. 27–28 (seeking rule that "allow[s] organizations to establish standing by demonstrating that they devoted organizational resources to combatting the alleged harms caused by a defendant's challenged policies or practices"). Had the voters intended to create special standing rules for plaintiffs other than the Attorney General and local public officials, they would have done so. *See People v. Cole*, 38 Cal. 4th 964, 980 (2006) ("[A]s amicus curiae CMA notes," the existence of express exceptions "show[s] that where the Legislature wants to" create an exemption "it clearly knows how to do so" (quotation marks omitted)).

CMA emphasizes (Br. 22) that the UCL allows suit by any "person" who meets Proposition 64's standing requirements. Cal. Bus. & Prof. Code § 17204. To be sure, a "person" is defined to

include every possible private plaintiff, including associations. *See* Cal. Bus. & Prof. Code § 17201 ("natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons"). But that is only further support for *Aetna's* argument that all "persons" should be treated the same for purposes of UCL standing. Unlike CMA, the statute does not distinguish between "persons" who are organizations and "persons" who are not.

2. Proposition 64's Intent Bars CMA's Theory

CMA's "diverted resources" theory is also contrary to "extrinsic sources" of voter intent. *Kwikset*, 51 Cal. 4th at 321. Such materials are not needed here because the text of Proposition 64 is not "ambiguous" and does not "support[] multiple interpretations." *Id.* Regardless, the materials provided to the voters in the Voter Information Guide support Aetna's interpretation. CMA's theory of standing (a) would nullify the voters' intent to limit standing to those who suffered economic harm because they were subjected to the alleged unfair competition, and (b) if taken to its logical conclusion, would effectively repeal Proposition 64 by allowing any plaintiff to manufacture standing by advocating a position before suing.

a. Proposition 64 required a personal loss of money or property as a way to limit standing to those who were actually injured. The "voters focused on curbing shakedown suits by parties who had never engaged in any transactions with would-be defendants." *Id.* at 335 n.21. The voters' "Findings and Declarations of Purpose" showed that they were concerned that the UCL "had been 'misused by some private attorneys who' . . .

'file 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,' and 'file lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.'" *Mervyn's*, 39 Cal. 4th at 228 (quoting Proposition 64 § 1(b)(2)–(4) (alterations omitted)).

CMA's theory of standing would permit what the voters forbade. Organizations could create standing for themselves by choosing to advocate against any practice the organization disagrees with. Thus, an organization with no connection to a would-be defendant could create standing by choosing to spend "resources" writing the defendant letters about a challenged practice, advising the organization's members about the practice, or "investigat[ing]" the practice. Br. 31. The resulting lawsuit would be exactly what the voters wanted to stop: A "lawsuit[] 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." Proposition 64 § 1(b)(3); *see also id.* § 1(b)(4) (declaring intent to end ability to "[f]ile" UCL "lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision"). In effect, CMA 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." Voter Information Guide at 6; *see also id.* at 38 (official summary of Proposition 64 stating that it "[a]uthorizes only the California Attorney General or local

government prosecutors to sue on behalf of general public to enforce unfair business competition laws"); *id.* at 41 (ballot argument in favor of Proposition 64 stating that it "[p]ermits only real public officials like the Attorney General or District Attorneys to file lawsuits on behalf of the People of the State of California").

CMA's purported "safeguards" (Br. 28–30) do nothing to stop this. CMA would require that the organization (1) did not just act "in furtherance or anticipation of litigation," Br. 28, but that (2) the "challenged activities" caused "frustration of" the organization's "mission," *id.* at 28–29, and (3) the organization did not merely "continue[]" its "existing operations without change," *id.* at 29. Any organization with a broadly defined "mission" that advocates for causes could easily evade these "safeguards." "Californians for Fair Competition" or "Californians for Consumer Protection" could rise up with broad missions that would allow them to create standing for wide swaths of potential UCL litigation. All that would be required would be a brief stint of advocacy against the practice to be challenged. CMA's safeguards therefore do nothing to prevent a return of the "shakedown suits by parties who had never engaged in any transactions with would-be defendants," that Proposition 64 forbids. *Kwikset*, 51 Cal. 4th at 335 n.21.

Nor would any lawyer need to form a new organization to circumvent these "safeguards." Under CMA's theory, the result in many of this Court's prior UCL standing cases would be different. The union in *Amalgamated Transit* would have

standing whenever it took non-litigation steps to support union members. *Amalgamated Transit*, 46 Cal. 4th 993; *see also* Op. 12 (finding "no way to square" CMA's theory with *Amalgamated Transit* because, "[j]ust like the union in *Amalgamated Transit*, CMA brought this representative action to rectify injury to its aggrieved physician members"). And the organization in *Mervyn's* would have standing whenever it took non-litigation steps to advocate for the enforcement of laws regarding access to retail stores. *Mervyn's*, 39 Cal. 4th 223.

b. CMA's interpretation would further nullify Proposition 64 because it would inevitably extend "diverted resources" standing to individuals as well. As discussed above, nothing in the text of Proposition 64 provides a basis for distinguishing among different classes of private plaintiffs. *See supra* at 19–21. Indeed, CMA admits (Br. 22) that the UCL's standing provision *requires* equal treatment of *all* private plaintiffs because it allows suit by any "person" who meets Proposition 64's standing requirements. Cal. Bus. & Prof. Code § 17204; *see supra* at 20–21.

For that reason, CMA's "diverted resources" theory of standing for organizations would require California courts to allow individuals to create standing under the UCL solely by "diverting resources" to advocate against practices they dislike. That would allow any creative plaintiff's attorney to create standing for any conceivable UCL plaintiff. An individual "who ha[s] not used the defendant's product or service" and whom the voters intended to deprive of standing, Proposition 64 § 1(b)(3),

could sue by diverting resources to advocate against the use of that product or service by others (say, by diverting charitable contributions or personal volunteer time). The same applies for any "person" who "ha[s] not . . . viewed the defendant's advertising, or had any other business dealing with the defendant," again notwithstanding the voters' express intent to deprive such plaintiffs of standing. Proposition 64 § 1(b)(3). Every single UCL claim that Proposition 64 was meant to foreclose could be brought merely by having the would-be plaintiff expend resources on advocacy against the practice they later challenge.

Aetna's interpretation, by contrast, comports with the text and intent of Proposition 64, *see supra* at 16–24, and applies the same clear and familiar rules to assessing standing for every type of private plaintiff. If an organization "lost money or property as a result of the unfair competition," Cal. Bus. & Prof. Code § 17204, then it has standing like anyone else. *See supra* at 14–15 (listing examples of loss of money or property that could establish standing).

D. Proposition 64 Does Not Silently Import Broader Federal Standing Rules for Organizations

With Proposition 64's text and intent squarely against it, CMA contends (Br. 25–37) that Proposition 64 must have imported ***federal*** case law—outside the UCL context—allowing Article III standing under a "diverted resources" theory. *See*

Havens Realty, 455 U.S. at 379.[5] That contention is groundless, as general federal standing jurisprudence has no bearing on the UCL or Proposition 64. The persuasiveness of federal precedent is "weak[]" when "there are significant differences between federal law and [the California statute]." *McCoy v. Pac. Mar. Ass'n*, 216 Cal. App. 4th 283, 307 (2013) (citing *State Dep't of Health Servs. v. Superior Court*, 31 Cal. 4th 1026, 1040 (2003)). Here, Proposition 64 expressly made UCL standing narrower than federal Article III standing, and applying CMA's preferred federal precedent would eviscerate Proposition 64's reforms.

This Court has specifically held that "the Proposition 64 requirement that injury be economic renders standing under section 17204 *substantially narrower* than federal standing under article III . . ., which may be predicated on a broader range of injuries." *Kwikset*, 51 Cal. 4th at 324 (emphasis added). As the Court of Appeal recognized in this case, "*Kwikset* also acknowledged that UCL standing requirements are far more stringent than the federal standing requirements." Op. 13. Two of these more stringent requirements are (1) *Kwikset*'s requirement that a UCL plaintiff suffer a personal loss of money

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[5] *See also Friends of the Earth v. Sanderson Farms*, 992 F.3d 939 (9th Cir. 2021); *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1134 (9th Cir. 2019); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc); *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *Fair Hous. Of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002); *Walker v. City of Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001).

or property, and (2) *Amalgamated Transit*'s rule that a UCL plaintiff cannot rely on someone else's loss of money or property. *See supra* Parts I.A–I.B.

The "substantial[] narrow[ing]," *Kwikset*, 51 Cal. 4th at 324, brought about by Proposition 64 forecloses the application of federal standing precedents that conflict with these bedrock rules. For that reason, this Court held in *Amalgamated Transit* that Proposition 64 did not "incorporat[e] the federal doctrine of associational standing" because "the amendments that Proposition 64 made to the unfair competition law are inconsistent with the doctrine of associational standing." 46 Cal. 4th at 1004. That federal doctrine would have allowed suit by a plaintiff that "has *not* itself suffered actual injury but is seeking to act on behalf of its members who have sustained such injury." *Id.* (emphasis in original).

The federal "diverted resources" doctrine that CMA invokes would similarly allow suit by a plaintiff that was not personally injured through the loss of money or property as a result of the defendant's conduct. The text of Proposition 64 and the voters' intent foreclose the idea that a UCL plaintiff can skirt Proposition 64's stringent rules by choosing to advocate against the defendant's conduct. *See supra* Part I.C. Indeed, importing the "diverted resources" doctrine would effectively overturn Proposition 64 by allowing anyone who wanted to file a UCL lawsuit to create standing for themselves by engaging in advocacy against a would-be defendant before filing suit. *See supra* at 21–25. The doctrine is therefore just as "inconsistent

with" Proposition 64 as the federal associational-standing doctrine rejected in *Amalgamated Transit*. 46 Cal. 4th at 1004.

CMA focuses (Br. 21, 27) on Proposition 64's intent to bar lawsuits by lawyers who "have no client who has been injured in fact under the standing requirements of the United States Constitution." Proposition 64 § 1(e). But the voters went further, requiring that only a direct loss of money or property could suffice. *See Kwikset*, 51 Cal. 4th at 324 n.6 (cataloging Article III injuries that would not suffice under Proposition 64). Accordingly, there is no basis for CMA's claim (Br. 21) that Proposition 64 "incorporat[ed] federal Article III standing jurisprudence into the UCL."

CMA's principal authority for applying the "diverted resources" theory to the UCL's standing provisions relied on a similar assumption that Proposition 64 silently incorporated certain federal standing cases. The court in *Animal Legal Def. Fund v. LT Napa Partners LLC* ("*ALDF*"), 234 Cal. App. 4th 1270 (2015), reasoned that "[c]ases addressing the federal standing requirement" are "relevant" to Proposition 64, *id.* at 1281–82. But *ALDF* never explained why Proposition 64's "substantially narrower" standing rules, *Kwikset*, 51 Cal. 4th at 324, would import the "diverted resources" theory. Nor did it address any of the textual and voter-intent arguments showing that Proposition 64 forecloses the theory.[6]

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[6] Even if *ALDF* were correct on the law (it is not), CMA cannot meet the standard it set. *ALDF* found standing where the organization had proven that it expended *specifically identified* money and resources that it otherwise would not have spent. *See*

ALDF's only other explanation for importing federal case law was that this Court in *Kwikset* supposedly "express[ed] some approval" for the federal diverted-resources doctrine. 234 Cal. App. 4th at 1281. *Kwikset* said nothing about organizational standing or diverted resources. *ALDF* nevertheless inferred approval for the doctrine by tracing a convoluted series of rabbit holes. *ALDF*'s reasoning was that, in *Kwikset*, this Court cited *Hall*, 158 Cal. App. 4th 847, as "catalogu[ing] some of the various forms of economic injury." 51 Cal. 4th at 323. *Hall*, in turn, cited *S. Cal. Housing v. Los Feliz Towers Homeow.*, 426 F. Supp. 2d 1061, 1069 (C.D. Cal. 2005). And then, *ALDF* noted, *Hall* described *Southern California Housing* as finding UCL standing where an organization "lost financial resources and diverted staff time investigating case against defendants." 158 Cal. App. 4th at 854. This Court in *Kwikset* never quoted or otherwise discussed that parenthetical in *Hall*, but *ALDF* nevertheless assumed that the citation to *Hall* indicates this Court's agreement that voluntary diversion of resources is a sufficient injury under the UCL.

This Court does not impliedly adopt the reasoning of every lower-court decision it cites in an opinion, far less the reasoning of everything *cited* in every decision it cites. In any event, *Hall* does not even support CMA's theory. That decision rejected a

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234 Cal. App. 4th at 1280 (resource diversion where plaintiff gave detailed facts regarding advocacy for statutory "ban on the sale of foie gras," including "pa[ying] a private investigator" to investigate potential violations, and then paying staff to investigate those violations to the exclusion of alternative work). CMA has no such evidence. *See infra* Part II.

plaintiff's claim of standing because he "did not allege he suffered an injury in fact under any of" the "definitions" that California courts had given to the term in the four years since the 2004 amendments had been in existence. 158 Cal. App. 4th at 854–55. CMA's inference that *Kwikset* silently adopted a "diverted resources" theory of standing is particularly unwarranted because it would directly contradict what this Court made explicit in *Kwikset*: Standing under the UCL does not exist "for those who have not engaged in any business dealing with would-be defendants." *Kwikset*, 51 Cal. 4th at 317. *ALDF* never attempted to square the "diverted resources" theory with that rule.

ALDF is also unpersuasive for yet another reason—"*ALDF* did not bring a representation action, as CMA did in this case." Op. 11. Applying *ALDF* to an organization, like CMA, that "diverts resources" to remedy its members' loss of money or property, is impossible to "square" with *Amalgamated Transit*, as it would allow any organization with members to skirt *Amalgamated Transit's* bar on associational standing. *See* Op. 12; J.A. 1558.

Finally, the two other UCL decisions that CMA cites do not support its theory at all. *Buckland v. Threshold Enterps.*, 155 Cal. App. 4th 798, 814–16 (2d Dist. 2007), rejected an individual's argument that he could establish "economic injury" by choosing to spend money in preparing to litigate a UCL claim against the defendant. And *Two Jinn, Inc. v. Gov't Payment Serv., Inc.*, 233 Cal. App. 4th 1321 (2015), rejected a UCL plaintiff's attempt to

rely on organizational standing and the *Havens Realty* case because "proof that [the plaintiff] spent money to investigate [the defendant's] activities would not show that those allegedly unfair business activities had any independent economic impact on [the plaintiff's] bail bond business," *id.* at 1335.

II. THERE IS NO EVIDENCE THAT CMA HAS STANDING EVEN UNDER ITS THEORY

Even under CMA's legal theory, summary judgment still was proper because CMA has no *evidence* to prove the injury it claimed. Affirmance is proper on this alternative ground.

1. CMA's federal authorities limit "organizational standing" to situations in which the challenged practice directly "impaired" the organization's "ability to provide . . . services" it normally provides. *Havens Realty*, 455 U.S. at 379 (recognizing "concrete and demonstrable injury to the organization's activities"). The *Havens* line of cases does not apply where "the only 'service' impaired is pure issue-advocacy." *Ctr. For Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1162 (D.C. Cir. 2005). CMA's own authority follows this distinction and requires an organization to show that it would have suffered "some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores*, 624 F.3d at 1088.

CMA does not claim that Aetna's Policy would have caused it any personal injury "if it had not diverted resources" to advocating against the Policy. *Id.* In fact, CMA admitted that the Policy does not apply to its activities at all. R.A. 466; *see* Op. 5 (the Policy "did not apply to CMA, which had no contract with Aetna"). Thus, even if Proposition 64 imported the *Havens* line of

authority, CMA would still lack standing. *See Two Jinn*, 233 Cal. App. 4th at 1335 (no standing where UCL plaintiff claimed only to have "spent money to investigate" but had no evidence that the "allegedly unfair business activities had any independent economic impact on" it). The Court of Appeal recognized this when it distinguished the plaintiff in *ALDF*, which "was not advocating on behalf of or providing services to help its members deal with their loss of money or property," from CMA, which spent staff time to engage in member support that "was typical of the support CMA provides its members in furtherance of CMA's mission." Op. 11.

2. According to CMA (Br. 30), the "diverted resources" theory finds standing where an organization suffers "tangible economic harm, not just political or other non-economic impact on the organization's stated policies or purposes," as a result of "making the affirmative decision to devote resources that it would otherwise expend on other activities to mitigate an allegedly unlawful practice that is frustrating the organization's mission." CMA provided no evidence of such "tangible economic harm."

CMA couches its theory as one of lost "resources." Br. 25. But the sole "resource" that it claims to have lost is time spent by its staff to communicate with members, Aetna, and California regulators. *Id.* at 30. CMA admits that the staff were all salaried employees who would have been paid the same amount even had Aetna's Policy not existed. R.A. 213, 224–27, 236, 467. Accordingly, CMA did not lose a single cent.

Proposition 64, however, requires "tangible economic harm," Br. 30, in the form of a loss of "money or property," Cal. Bus. & Prof. Code § 17204. It is well-established that "[l]oss of time is not an economic harm." *Knippling v. Saxon Mortg., Inc.*, 2012 WL 1142355, at *2 (E.D. Cal. Mar. 22, 2012) (no UCL standing, despite alleged expenditure of time "dealing with Defendant's multiple phone calls and letters"); *see also, e.g.*, *Ruiz v. Gap, Inc.*, 2009 WL 250481, at *4 (N.D. Cal. Feb. 3, 2009) (no economic injury from time and effort "monitoring one's credit"), *aff'd*, 380 F. App'x 689 (9th Cir. 2010); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 966 (S.D. Cal. 2012) (rejecting UCL standing premised upon "time . . . spent on mitigation of" a "heightened risk of identity theft"). At most, CMA's lost time is precisely the kind of "political or other non-economic impact on the organization's stated policies or purposes" that CMA admits is insufficient. Br. 30.

Nor did CMA provide any evidence that the claimed loss of time "resulted in a measurable" financial impact. *Bontrager v. Showmark Media LLC*, 2014 WL 12600201, at *9 (C.D. Cal. June 20, 2014). CMA admitted below that it had *no information* to quantify the amount of time spent by staff members or its value. R.A. 466–67. In particular, CMA never identified or quantified any money that it spent as a result of the Policy, despite an interrogatory from Aetna seeking such information. R.A. 478–79. And its Persons Most Knowledgeable testified that (1) the organization was not aware of any source "where CMA records or tracks the expenses that it incurs for responding to specific

member inquiries," R.A. 215, and (2) CMA had no information to substantiate the expenditure of funds and, after five years of litigation, was still "working on trying to identify the cost for resources expended," R.A. 223.[7]

CMA cannot avoid these repeated admissions by relying on a "contradictory and self-serving affidavit[]," *Whitmire v. Ingersoll-Rand Co.*, 184 Cal. App. 4th 1078, 1087 (2010) (internal quotation marks omitted), that the organization submitted from its General Counsel for the first time with its opposition brief to summary judgment after discovery closed. "[A] party may not defeat summary judgment by means of declarations or affidavits which contradict that party's deposition testimony or sworn discovery responses." *Minish v. Hanuman Fellowship*, 214 Cal. App. 4th 437, 459–460 (2013); *see also Turley v. Familian Corp.*, 18 Cal. App. 5th 969, 981 (2017) ("court may disregard the declaration" where "a party takes a position under oath in discovery; the opponent moves for summary judgment; and in opposition the party files a declaration that conflicts with its earlier testimony"). In any event, that declaration merely asserts without explanation that 200–250 *hours of time* were spent (by salaried staff), and says nothing about any expenditure *of money*. J.A. 960.

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[7] In a footnote, Br. 37 n.9, CMA asks this Court to reopen discovery. There is no basis to reopen fact discovery when CMA already had more than five years to conduct fact discovery, agreed to the November 2, 2019 date for the close of fact discovery, never asked the trial court to reopen discovery, and did not challenge on appeal any of the trial court's rulings regarding the pre-trial schedule or management of discovery.

III. THE COURT SHOULD NOT ADDRESS CMA'S MUSINGS ON THE APPROPRIATE REMEDY

Toward the end of its brief, CMA engages in an extended discussion (Br. 37–48) of the remedies it believes are available to it. CMA asks the Court to hold that the relief it seeks is "public injunctive relief" and that, even if that is not the case, CMA can obtain an injunction without seeking class certification. The Court should not decide these arguments, which the Court of Appeal and trial court did not reach. To the extent the Court is inclined to decide those arguments, however, they do not help CMA. Rather, they provide an alternative ground for affirmance.

A. The Remedies Available to CMA Are Not Before This Court

Before the trial court, Aetna sought summary judgment on a number of grounds in addition to standing, including that CMA could not obtain the particular injunctive relief it is seeking as a matter of law. R.A. 10–36. The trial court granted summary judgment to Aetna on standing grounds and, thus, had no occasion to reach the issue of remedies. J.A. 1553–1558. The Court of Appeal did the same. The only reference the Court of Appeal made to remedies was to state that it was "[a]ssuming without deciding" that CMA was *correct* that it sought public injunctive relief. Op. 12. The Court of Appeal found only that this assumption did not change the applicable rules for UCL standing, as this Court's decision in *McGill* held that plaintiffs seeking public injunctive relief still must show that they "suffered injury in fact and . . . lost money or property." 2 Cal. 5th at 959. Thus, no court has decided anything about the

remedy that CMA is seeking.

It is therefore unsurprising that CMA did not ask this Court to grant review on any question regarding the viability of the remedy it seeks in this case. *See* Pet'n for Rev. at 1–2 (listing five "issues for review"). CMA is now precluded from seeking review on this issue. *See* Cal. R. Ct. 8.516(b)(1) ("The Supreme Court may decide any issues that are raised or fairly included in the petition or answer."). Indeed, CMA all-but admits it added this issue to its Brief to obtain review of a rule announced by the Ninth Circuit after this Court already had granted review of this case. *See* Br. 43–44 (citing *Hodges v. Comcast Cable Commc'ns, LLC*, 12 F.4th 1108 (9th Cir. 2021)).

B. If the Court Addresses Remedies, It Should Affirm the Court of Appeal on Alternative Grounds

If the Court reaches any issue regarding the remedy that CMA seeks, the Court should affirm the Court of Appeal's judgment. That is because CMA has no viable claim for an injunction, the only remedy it seeks. UCL claims fail as a matter of law where a "plaintiff failed to present a viable claim for restitution or injunctive relief (the only remedies available)." *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 467 (2005). Here, CMA's attempts to formulate a viable injunction suffer from defects similar to those that plague its standing argument: CMA is trying to obtain relief for its members, despite having no personal economic injury to remedy, and it is doing so through an individual action rather than a class action.

1. CMA claims this case seeks "public injunctive relief,"

but it does not; it seeks to further the interests of CMA's physician-members in their personal contractual disputes with Aetna. Public injunctive relief is "relief that by and large benefits the general public" in an attempt "to remedy a public wrong." *McGill*, 2 Cal. 5th at 955, 961. By contrast, "[r]elief that would primarily redress or prevent injury to an individual plaintiff or to a group of individuals similarly situated to the plaintiff is not public injunctive relief." *Torrecillas v. Fitness Int'l, LLC*, 52 Cal. App. 5th 485, 500 (2020). That is so even where the injunctive relief might "incidentally" benefit "the public" as well. *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 315 (2003). Here, CMA's case implicates an exclusively private dispute over the contract rights between Aetna and the physicians in its PPO network. Any injunction would provide redress only for those physicians and is not public injunctive relief. *See Hodges*, 21 F.4th at 542 ("[P]ublic injunctive relief within the meaning of *McGill* is limited to forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public as a whole, as opposed to a particular class of persons, and that do so without the need to consider the individual claims of any non-party.").

2. Because CMA's requested relief is not actually a public injunction but a private injunction, CMA cannot obtain the relief it seeks. Even if CMA had standing to bring a UCL claim (it does not), it may not obtain private injunctive relief for the benefit of others that are not before the court. The injunctive-relief provisions of the 2004 amendments to the UCL "provide that a

private plaintiff may bring a representative action . . . only if the plaintiff . . . 'complies with Section 382 of the Code of Civil Procedure,'" which relates to class actions. *Arias v. Superior Court*, 46 Cal. 4th 969, 977 (2009) (internal quotation marks omitted); *see* Cal. Bus. & Prof. Code § 17203 (provision entitled "Injunctive Relief" stating this requirement). "The official title and summary of Proposition 64," which enacted these amendments, "told the voters that the initiative measure 'requires private representative claims to comply with procedural requirements applicable to class action lawsuits.'" *Arias*, 46 Cal. 4th at 979 (internal quotation marks and brackets omitted). CMA therefore cannot obtain under the UCL a private injunction implicating the private contracts of others without having obtained a certified class. *See Circle Click Media LLC v. Regus Mgmt. Grp.*, 2016 WL 3879028, at *5 (C.D. Cal. July 18, 2016), *aff'd*, 743 F. App'x 883 (9th Cir. 2018).

CMA (Br. 45–48) relies on a series of federal-court precedents describing the scope of injunctive relief available to organizations that prevail on non-UCL claims. *See E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962 (9th Cir. 2020); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996); *Bresgal v. Brock*, 843 F.2d 1163 (9th Cir. 1987). Those decisions say nothing about the specific remedial statute at issue here, Cal. Bus. & Prof. Code § 17203.

3. Regardless of how one classifies CMA's requested injunction (public vs. private), CMA has failed to articulate the terms of any injunction the trial court could lawfully enter.

Despite litigating this case for over seven years, CMA's Persons Most Knowledgeable could not articulate by the end of discovery what Aetna does (or does not do) under the Policy that CMA would like the company to stop (or start) doing. R.A. 468–69. That is to say, CMA could not articulate how it would re-write the Policy to make its terms acceptable. CMA's inability to articulate how a putative injunction would read is yet another reason to affirm the trial court's judgment.

In prior briefing, CMA focused on hypothetical injunctions that all stopped short of enjoining the Policy in its entirety. CMA abandons those proposals on appeal and, now, claims to be seeking an injunction "to prevent Aetna from continuing to enforce its Non-Par Intervention Policy." Br. 45. That would be an improper remedy because any injunction "must be tailored to preclude" the challenged practice. *Huntingdon*, 129 Cal. App. 4th at 1266. CMA has never presented any basis for finding that the Policy is unlawful on its face and in its entirety. At most, CMA has complained about the way the Policy was applied to the cases of six specific physicians' medical practices. R.A. 282–307. An injunction against the entirety of the Policy would hardly be "tailored" to these discrete complaints.

The UCL is not the proper mechanism to redress CMA's complaints anyway, because they are private contract disputes that the physician could fully remedy through a breach of contract claim. "The equitable remedies available under the [UCL] . . . are 'subject to fundamental equitable principles, including inadequacy of the legal remedy.'" *Philips v. Ford Motor*

Co., 726 F. App'x 608, 609 (9th Cir. 2018) (quoting *Prudential Home Mortg. Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1249 (1998)). Unless an injunction can be tailored to address the specific misconduct alleged, injunctive relief is not a viable remedy.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Dated: January 25, 2022

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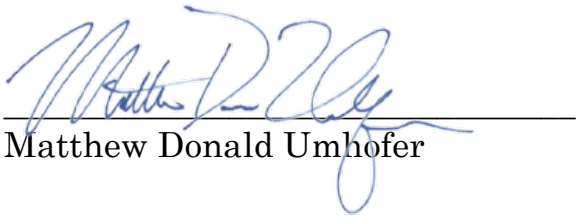
CERTIFICATE OF WORD COUNT

The text of Respondent's Brief consists of 10,421 words, as counted by the word processing program used to generate the brief.



Matthew Donald Umhofer

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Jon E. Powell, declare, I am a citizen of the United States and employed in Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is 615 West 7th Street, Suite 200, Los Angeles, CA 90017.

On January 25, 2022, I served a copy of the

RESPONDENT'S BRIEF

by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail in Los Angeles, California, addressed as set forth below:

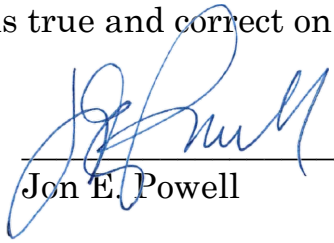
The Honorable Elihu Berle
Los Angeles Superior Court
Department 3
312 North Spring Street
Los Angeles, California 90012

George Gascón
Los Angeles County
District Attorney
211 West Temple Street
Suite 1200
Los Angeles, California 90012

All counsel of record in this matter have been concurrently served with the foregoing via the TrueFiling service required by this Court.

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct on January 25, 2022.



Jon E. Powell

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.

2. My email address used to e-serve: **matthew@spertuslaw.com**

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

1/25/2022

Date

/s/Jon Powell

Signature

Umhofer, Matthew (206607)

Last Name, First Name (PNum)

Spertus, Landes & Umhofer LLP

Law Firm