No. D049983

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

THOMAS E. TROYK,

Plaintiff and Respondent,

v.

FARMERS GROUP, INC., D/B/A FARMERS UNDERWRITERS ASSOCIATION, and FARMERS INSURANCE EXCHANGE,

Defendants and Appellants,

PREMATIC SERVICE CORPORATION (CALIFORNIA) and PREMATIC SERVICE CORPORATION (NEVADA),

Real Parties in Interest and Appellants.

SUPPLEMENTAL BRIEF OF APPELLANTS FARMERS GROUP, INC. AND FARMERS INSURANCE EXCHANGE IN RESPONSE TO COURT'S ORDER DATED JULY 25, 2008

On Appeal From the Superior Court of California, County of San Diego
The Hon. Jay M. Bloom, Judge Presiding
Superior Court Case No. GIC 836844

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SERVICE ON ATTORNEY GENERAL AND SAN DIEGO COUNTY DISTRICT ATTORNEY REQUIRED BY BUS. & PROF. CODE § 17209 and CRC 8.29(b)

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Defendants/Appellants Farmers Group, Inc. ("FGI") and Farmers Insurance Exchange ("FIE") submit the following Supplemental Brief in response to the Court's order dated July 25, 2008, which directed additional briefing on the following issues: "(1) Did plaintiff and respondent Thomas E. Troyk have standing under Business and Professions Code section 17204 to bring this action?" and "(2) Was the issue of standing raised in the trial court by appellants ... [and] [i]f not, has the issue been waived?"

I.
INTRODUCTION AND SUMMARY OF ARGUMENT

This class action, which seizes upon a highly technical and tenuous alleged statutory violation that caused no harm, is precisely the type of attorney-driven litigation that the voters intended to prohibit when they adopted Proposition 64 by an overwhelming margin in the 2004 election. Each of Plaintiff/Respondent Thomas E. Troyk's claims rests upon a strained and incorrect interpretation of a discrete subsection of the Insurance Code for which there is no private right of action, and the Superior Court's rulings exacerbated that error into a massive class judgment notwithstanding the patent lack of deception, harm, damages, injury in fact, or lost money or property.

The undisputed factual record establishes that Troyk was not misled, received exactly what he expected and what he paid for, and understood the terms of his arrangement. He also does not dispute that he would do it all over again despite the alleged violation. Thus, among the many other deficiencies discussed in FIE and FGI's prior briefing, Troyk and the class he represents lack standing under the amended Unfair Competition Law, Bus. & Prof. Code, § 17200 et seq. (the "UCL"), because they did not and could not prove that they "suffered injury in fact and ... lost money or

property as a result of the unfair competition." (Bus. & Prof. Code, § 17204.)

Troyk's lack of standing provides a narrow and straightforward basis for deciding this appeal, and it compels reversal of the Superior Court's $136 million judgment on this basis alone:

First, Troyk and the class have not suffered any "injury in fact," even accepting the erroneous proposition that FIE violated Insurance Code Section 381(f). As Troyk himself conceded, he: (a) received real value and exactly what he paid for—the benefit of being able to make monthly payments on a six-month insurance premium—in exchange for the Prematic service charge (Clerk's Transcript ("CT") 793); (b) received disclosure of the service charges in his Prematic Agreement and on more than 150 monthly Prematic invoices (e.g., CT-15, 1099); and (c) optionally paid the service charges and enjoyed the benefits of his monthly payment plan for 13 years before bringing this suit (CT-1299-1302, 1993). In light of these undisputed facts, Troyk cannot establish any injury.

Second, even if Troyk had succeeded in establishing an ephemeral "injury in fact" as a result of the alleged noncompliance with Section 381(f), he did not and could not establish any economic harm. Simply having paid money for the services he received—insurance coverage from FIE in exchange for his insurance premium, and the right to pay that premium over time in exchange for the Prematic service charge—is not sufficient to establish his "loss of money or property" pursuant to the standing requirements of the UCL. Troyk has a separate and legally enforceable agreement with Prematic, so even if he were able to establish a violation of Section 381(f) (which FIE and FGI vigorously dispute), he still would have a continuing and valid legal obligation to pay this amount to

Prematic, and these charges could not be the "lost money or property" required by the UCL. Given the limited monetary relief available in a UCL claim, the "lost money or property" required for standing is the same loss of "money or property" recoverable as restitution. Troyk did not and could not establish a right to this relief.

Third, even if Troyk had somehow established a legally cognizable "injury in fact" and "lost money or property," he did not and could not establish a causal link between this alleged harm and the challenged business practices. In fact, Troyk does not contend that he would have altered his conduct in any way had the Prematic service charge been disclosed as "premium" in the "policy"—after all, it still would have "made sense to pay monthly." (CT-1296.) He continued to pay his FIE premium in installments, plus a monthly service charge to Prematic, even after filing this lawsuit. (CT-1299.) And because causation and harm are necessary elements of Troyk's sole additional cause of action for breach of contract, the foregoing analysis also compels a reversal of the judgment on that cause of action.

Finally, as discussed below (*post*, at pp. 25-28), there should be no debate over the parties' response to the second question identified by the Court. FIE and FGI raised Troyk's lack of standing at *every* stage of the proceedings—by demurrer, affirmative defense in their answer, motion for summary judgment, post-judgment motion to vacate, and again in their Opening and Reply briefs in this appeal. In fact, FIE and FGI raised this objection so often in the Superior Court that Troyk complained that they were "re-argu[ing]" the issue in their post-judgment briefing. (CT-3214.) In any event, as the Supreme Court of California explained in its first decision involving Proposition 64, a plaintiff's lack of standing is

jurisdictional and courts may adjudicate this issue at any stage of the proceedings.

In short, Troyk elected to enter into the Prematic Agreement, fully understanding that this arrangement obligated him to pay the monthly service charges to Prematic. The disclosure of these Prematic service charges in the Prematic Agreement and more than 150 monthly invoices—as opposed to a single annual disclosure of those charges as "premium" on the "policy" (as Troyk alleges Section 381(f) requires)—did not cause Troyk any harm. Because they suffered no injury in fact and lost no money or property as a result of the alleged violation of Insurance Code Section 381(f), Troyk and the class lacked standing to pursue their UCL claims and could not establish the necessary elements of their breach of contract claim. FIE and FGI respectfully request that the Court reverse the judgment in favor of Troyk and direct a new judgment in their favor.

II.
DISCUSSION

As detailed in extensive prior briefing, Troyk premised both of his causes of action on an alleged violation of Section 381(f) of the Insurance Code. Specifically, he argued, and the Superior Court agreed, that this subsection required FIE to disclose the Prematic charges as "premium" on the "policy." In fact, Troyk identified this as the sole legal issue presented by his claims. (See, e.g., CT-1394 ["[T]he success of each Class member's claims hinges on one legal issue—whether the 'service charges' the Class pays constitute 'premium' under Insurance Code § 381(f) and, as a result, must be specified in the policy."].)

While FIE and FGI dispute the Superior Court's determination that the Prematic charges are "premium" that FIE was required to disclose on

the "policy" pursuant to Section 381(f) of the Insurance Code (as opposed to the monthly Prematic invoices),[1] there is another basis for reversing the judgment that does not require the Court to resolve this issue. Troyk acknowledged that he does not have standing to enforce Section 381 directly, and that the statute does "not provide[] a private right for its enforcement." (Respondent's Brief ("RB"), at p. 13.) Accordingly, Troyk had to produce sufficient evidence to establish each of the elements of his two claims, including satisfaction of the standing requirements of the UCL. As discussed below, Troyk did not introduce such evidence, nor could he establish that he has standing to pursue his UCL claim. This analysis compels a reversal of the entire judgment, because harm and causation also are necessary elements of the breach of contract claim.

Of course, that conclusion does not undermine the purpose or scope of Section 381(f). The Department of Insurance ("DOI") has the exclusive

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[1] FIE and FGI previously briefed this and several additional grounds for reversing the judgment, including: (1) the judgment conflicts with this Court's interpretation of Section 381(f) in the substantially similar, other case brought by Troyk's counsel, *Interinsurance Exchange of the Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, review den. June 27, 2007 [2007 Cal. LEXIS 6957] ("*Auto Club*") (Appellants' Opening Br. ("AOB"), at pp. 15-20; Appellants' Reply Br. ("ARB"), at pp. 11-16); (2) FIE actually and/or substantially complied with the Superior Court's reading of Section 381(f) (AOB, at pp. 28-35; ARB, at pp. 22-30); and (3) the judgment violates due process because it is punitive, not compensatory, and disconnected from any rational benchmark (such as actual harm or a statutory penalty) (AOB, at pp. 49-51; ARB, at pp. 47-49). In addition, as Prematic argued, there was no evidence (let alone undisputed evidence sufficient to award summary judgment) to support a finding that Prematic's collection of a monthly service charge represented FIE's collection of additional "premium," or to support disgorgement of Prematic's fees from FIE. (Real Parties in Interest's Opening Br. at pp. 21-24.)

authority to enforce Section 381 directly in proceedings against insurers if it determines that there is a violation. As the DOI recently acknowledged, however, it has not done so because it has historically classified monthly service charges separately from premium. (AOB 20-23; CT-1165, 2289.) But private parties must plead and prove that they satisfy the standing requirements of the UCL if they attempt to use Section 381(f) as a basis for a UCL claim. Troyk has not and cannot do so.

A. Troyk Lacks Standing To Pursue His UCL Claim Because He Did Not And Cannot Establish Any Of The Required Elements Of Injury In Fact, Lost Money Or Property, And Causation

In November 2004, California voters, faced with a fiscal crisis and a hostile business climate fostered (at least in part) by "shakedown" lawsuits and high-profile abuses in consumer class and representative actions,[2] overwhelmingly approved Proposition 64 and repealed the statutory authority of private plaintiffs to prosecute actions seeking class-wide relief pursuant to the UCL unless the plaintiff "has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof.

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[2] (See *People ex. rel Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1316-1317 [describing abuses of the UCL that fueled Proposition 64, including attorney-manufactured claims generated by "scour[ing] public records on the internet for what are often ridiculously minor violations of some regulation or law."]; see also *Graham v. DaimlerChrysler Corp.* (2005) 34 Cal.4th 553, 602-603 (dis. opn. of Chin, J.) [observing that in the current political climate, "Californians are increasingly concerned about extortionate lawsuits against businesses, large and small, and worried that the legal climate in California is so unfriendly to businesses that many are leaving the state and others are deterred from coming here in the first place"]; *Stop Youth Addiction v. Lucky Stores* (1998) 17 Cal.4th 553, 586-593 (dis. opn. of Brown, J.) [criticizing the expansive and "universal standing" of the pre-Proposition 64 UCL, which led to "vexatious and frivolous litigation"].)

Code, § 17204; see also *id.*, § 17203 [requiring private plaintiffs seeking injunctive relief or restitution on behalf of others to comply with "the standing requirements of Section 17204"].)

This initiative "restrict[ed] previously broad standing requirements for a private right of action ..., stating in the preamble to the measure that the broader standard had encouraged frivolous litigation, had been abused by attorneys who were motivated only by private financial gain, and negatively had affected many businesses." (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 178, fn.10, citing Prop. 64, § 1, subds. (b), (c) & (e), as enacted at Gen. Elec. (Nov. 2, 2004).) In passing Proposition 64, the voters found and declared, *inter alia*, that: (a) the State's "unfair competition laws are being misused by some private attorneys who ... [f]ile lawsuits where no client has been injured in fact"; (b) "[f]rivolous unfair competition lawsuits clog our courts and cost taxpayers"; and (c) "[i]t is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Prop. 64, § 1, subds. (b)(2), (c), (e), quoted in *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 813, fn.6, review den. Jan. 16, 2008 [2008 Cal. LEXIS 630].)

By approving this initiative, voters aligned California with other states' consumer protection laws to require actual "injury in fact" and "lost money or property" caused by the alleged violation. (Bus. & Prof. Code, § 17204.) The Supreme Court has held that these new standing requirements apply to cases, such as this action, pending at the time voters approved the initiative. (*CDR v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) Troyk did not and cannot establish any of the three requirements for

standing in Proposition 64: (1) "injury in fact"; (2) "lost money or property"; and (3) causation ("...*as a result of* the unfair competition.").

1. *Troyk Did Not Suffer Any Injury In Fact*

First, even if Troyk were correct that the Prematic service charge should have been disclosed on the FIE policy instead of up front in the Prematic Agreement and on the more than 150 monthly invoices that Troyk received, he did not and cannot establish that paying this fully disclosed fee in exchange for the benefit of an optional monthly payment plan caused him any "injury in fact."

Section 17204's use of "injury in fact" reflects specific voter intent to incorporate Article III standing requirements for UCL claims. (*Buckland, supra*, 155 Cal.App.4th at p. 814 ["In approving Proposition 64, the voters declared their intent 'to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact *under the standing requirements of the United States Constitution*.'"], quoting Prop. 64, § 1, subd. (e).) The Article III standing requirements of the United States Constitution require plaintiffs to plead and prove a "distinct and palpable injury" suffered "as a result of the defendant's actions," "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." (*Ibid.*, quoting *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363, 372, and *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560 [internal citations and quotations omitted]; see also *Associated Builders & Contractors v. San Francisco Airports Comm'n* (1999) 21 Cal.4th 352, 362 [reciting this "federal 'injury in fact' test"].)

In particular, a private plaintiff cannot establish Article III standing by simply alleging a technical statutory violation. (*Waste Mgmt. of N. Am.*,

Inc. v. Weinberger (9th Cir. 1988) 862 F.2d 1393, 1397-1398 ["[I]t is not enough that a litigant alleges that a violation of federal law has occurred .... Absent injury, a violation of a statute gives rise merely to a generalized grievance but not to standing."]; see also *Cronson v. Clark* (7th Cir. 1987) 810 F.2d 662, 664 ["A plaintiff, in order to have standing in a federal court, must show more than a violation of law...."], citing *Allen v. Wright*, 468 U.S. 737, 754 (1984).) But that is all that Troyk is able to muster in this case—a technical violation of Section 381(f) in which FIE failed to disclose Prematic's service charges biannually as "premium" on the "policy," as opposed to making disclosure in the Prematic Agreement and the monthly Prematic invoices. Whatever theoretical injury resulted from this alleged statutory violation, it is not legally cognizable "injury in fact" sufficient to satisfy the Article III or Proposition 64 requirements.

Following Proposition 64, several published appellate decisions in California also concluded that private plaintiffs like Troyk do not suffer "injury in fact" sufficient for standing to assert UCL claims if they received the benefit of their bargain and/or the defendant disclosed the price of the good or service. For example, in *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, the plaintiff claimed that the defendant's practice of invoicing customers for books received during a promotional free trial period violated the UCL. The Court of Appeal held that the plaintiff did not and could not establish actual "injury in fact," because while he paid money to the defendant, he also "received a book in exchange" and he "did not allege he did not want the book, the book was unsatisfactory, or the book was worth less than what he paid for it." (*Id.* at p. 855; see also *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 141, 146-147, review den. May 14, 2008 [2008 Cal. LEXIS 5617] [holding that plaintiffs'

complaint—which alleged that they assumed that the defendant's milk "products were being produced in accordance with California law[,]" "that the individual dairies providing the milk were treating their calves in accordance with California law," and that plaintiffs were denied the benefit of their bargains—did not allege sufficient economic injury to support post-Proposition 64 UCL standing].)

Medina v. Safe-Guard Products, Int'l, Inc. (2008) 164 Cal.App.4th 105, is even more closely analogous to this action. Like Troyk, the plaintiff in *Medina* brought a UCL action challenging his purchase of a vehicle service contract from a company that was not a licensed insurer. The Court of Appeal held that notwithstanding the asserted violation of the Insurance Code, the plaintiff had not suffered any injury in fact and therefore lacked standing to enforce the UCL. Despite the technical violation (which the court assumed to be true for purposes of its analysis, *id.* at p. 108, fn.1), plaintiff "has not alleged that he didn't want wheel and tire coverage in the first place, or that he was given unsatisfactory service or has had a claim denied, or that he paid more for the coverage than what it was worth because of the unlicensed status of [defendant]." (*Id.* at p. 114, citing *Hall, supra*, 158 Cal.App.4th at p. 855.)[3]

The plaintiffs in *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, alleged that the defendant, a cellular phone vendor, was

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[3] The Insurance Code provision at issue in *Medina*, like Section 381(f), does not authorize the remedy of voiding the insurance policy in the event of a violation. (*Id.* at p. 110 ["Conspicuously missing, however, from the listed penalties and remedies in the statute is the automatic voiding of any insurance contracts already issued by the unlicensed insurer."]; see also AOB, at pp. 34, 41-42 & fn.22; ARB, at pp. 38-39.)

not licensed to sell insurance plans for its products or receive a commission for the sale of the plans. Plaintiffs argued that they could establish sufficient "injury in fact" "because they paid the alleged unlawful commission that was illegally retained or received by defendant as a percentage of plaintiffs' insurance payments." (*Id.* at pp. 1590-1591.) But the Court of Appeal disagreed, because plaintiffs "received the benefit of their bargain, *having obtained the bargained for insurance at the bargained for price.*" (*Id.* at p. 1591, italics added.) Similar to the plaintiff in *Hall v. Time*, they also failed to "allege they were dissatisfied with the insurance or were uninformed of its price"—in fact, "plaintiffs acknowledged defendant disclosed to them 'the price and extent of the insurance coverage.'" (*Id.* at p. 1592.)[4]

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[4] The court in *Peterson* distinguished *Aron v. U-Haul Co. of Cal.* (2006) 143 Cal.App.4th 796, which held that the plaintiff alleged sufficient "injury in fact" based on a refueling charge because the defendant did not provide a precise measurement of the fuel consumed during the rental period (thus forcing consumers to "overfill the fuel tank" to avoid paying the charge). (*Id.* at pp. 800-803.) The court in *Peterson* explained that "[t]here is a difference and it is a decisive one" in *Aron* (*Peterson*, *supra*, 164 Cal.App.4th at p. 1591), because while that plaintiff suffered injury in fact by "pa[ying] more to refuel the truck than required under the rental agreement" or than he would have paid "had U-Haul employed an accurate measuring system," the plaintiffs in *Peterson* "do not allege they could have bought the same insurance for a lower price either directly from the insurer or from a licensed agent" and "they received the benefit of their bargain." (*Ibid.*)

Here, too, Troyk cannot possibly show (nor did he even bother to allege) that he could have received the same benefit—the ability to make monthly payments on his six-month FIE premium—without first entering into the Prematic Agreement and agreeing up front to pay the Prematic service charges. Nor did he (or could he) establish that he could have received this benefit for a lower price. In fact, FIE and FGI

[Footnote continued on next page]

Like the plaintiffs in these cases, Troyk suffered no injury in fact because:

a. He received the privilege of paying his insurance premium over time "in exchange" for the Prematic service charge, and he "did not allege he did not want the [monthly payment option], the [monthly payment option] was unsatisfactory, or the [monthly payment option] was worth less than what he paid for it." (*Hall*, *supra*, 158 Cal.App.4th at p. 855.)

b. Troyk "has not alleged that he didn't want [the monthly payment option] in the first place, or that he was given unsatisfactory service ..., or that he paid more for the coverage than what it was worth because of the" alleged technical violation of the Insurance Code. (*Medina*, *supra*, 164 Cal.App.4th at p. 114.)

c. He "received the benefit of [his] bargain, having obtained the bargained for insurance at the bargained for price" (*Peterson*, *supra*, 164 Cal.App.4th at p. 1591), *and* the bargained-for privilege of paying all of his auto insurance premiums on a monthly basis through Prematic. (CT-793.)

d. Nowhere has Troyk contended that he was "dissatisfied with the [monthly payment option] or [was] uninformed of its price...," and in fact he "acknowledged defendant disclosed to [him] 'the price and extent of the [monthly payment option].'" (*Peterson*, *supra*, 164 Cal.App.4th at p. 1592.) Specifically, Troyk received disclosure of the service charges on more than 150 monthly Prematic invoices (e.g., CT-15, 1099)—substantially more disclosure than is required by his interpretation of

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[Footnote continued from previous page]
demonstrated in their prior briefing that the flat Prematic service charge at issue here is less expensive than the interest-based charges upheld in *Auto Club*. (AOB, at p. 18; ARB, at p. 16.)

Section 381(f).

e. He contracted separately with Prematic, up front, to pay the service charges in exchange for Prematic's services (CT-1311-1312; see also CT-1296-1299, 1302, 1967), optionally paid them, and enjoyed the benefits of his monthly payment plan for 13 years before bringing this suit. (CT-1299-1302, 1993.) Indeed, Troyk has continued to make monthly payments on his six-month FIE premium, plus a monthly service charge to Prematic, even after filing this lawsuit. (CT-1299.)

In short, the undisputed evidence demonstrated that Troyk received, and continues to receive, the full benefit of his bargain, and there certainly was no evidence (let alone undisputed evidence to justify summary judgment in his favor) that he suffered any legally cognizable harm or "injury in fact." (See *Hall, supra*, 158 Cal.App.4th at p. 855 [no "injury in fact" because the plaintiff received exactly what he paid for]; *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 339 ["The fact remains ... that once the cards were purchased and used, the members of the public received *exactly what they paid for*."].)

Troyk has not offered and cannot offer evidence to establish any "injury in fact." In response to the Court's questions at oral argument regarding injury in fact necessary to establish Proposition 64 standing, Troyk's counsel argued *for the very first time* that "the cost of billing and collection was already included in the price of the policy." Troyk's counsel could point to no evidence in the record that supported this new assertion—and in fact no such evidence exists. To the contrary, as FIE and FGI established, the evidence that Troyk's counsel cited establishes precisely the opposite. (CT-1305 [Green Decl.: "The premiums disclosed on FIE's Declarations pages are specifically derived from the DOI-approved rates

and do not include service charges collected by Prematic"], 1328 [Hammond Decl., explaining how "FIE properly distinguishes earned premiums from service charges" on various DOI-mandated annual forms].) Troyk's belated and factually unsustainable argument was a desperate attempt to argue "injury" and to somehow distinguish this case from *Auto Club*.

The lack of injury in fact is a sufficient basis to conclude that Troyk lacks standing and reverse the judgment, but he also did not and could not satisfy the remaining elements of Proposition 64.

2. *Simply Because He Paid Money To FIE And Prematic Does Not Mean That Troyk "Lost Money Or Property" Pursuant To Proposition 64*

In addition to "injury in fact," Section 17204 also requires private plaintiffs to plead and prove that they have "lost money or property" as a result of the alleged violation of the UCL. (Bus. & Prof. Code, § 17204 [requiring "injury in fact *and* ... lost money or property as a result of the unfair competition"], italics added.) Troyk did not introduce sufficient evidence to establish this element.

First, the requirement of "lost money or property" is distinct from "injury in fact," and private plaintiffs must satisfy both requirements. (See, e.g., *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1098, review den. Aug. 29, 2007 [2007 Cal. LEXIS 9448].) Even if Troyk could articulate some ephemeral but legally cognizable "injury" based on an alleged statutory violation (and he cannot for the reasons discussed in the prior section), he still would not have standing because he cannot establish "lost money or property." "This language discloses a clear requirement that injury must be economic, at least in part, for a plaintiff to have standing under" the UCL. (*Animal Legal Defense Fund, supra*, 160 Cal.App.4th

at p. 147.) Any injury that Troyk suffered from the alleged failure to disclose the Prematic service charge as "premium" in the insurance policy is not economic. (*Ibid.* [holding that the plaintiffs received "the benefit of their bargain" and could not establish "injury in fact" and "lost money or property" because "[a]ny injury they suffered upon learning 'the truth' about industrial dairy farming was not economic."].)

FIE and FGI obviously do not dispute that Troyk paid money to FIE (the premium for his insurance coverage) and to Prematic (the monthly service charge). But the requirement of "lost money or property" is not satisfied by money or property no longer being in the possession of the plaintiff, because such a construction would "encompass[] every purchase or transaction where a person pays with money," and the UCL provides very limited monetary remedies. (*Peterson*, *supra*, 164 Cal.App.4th at p. 1592.) Consequently, Troyk's payment of money to FIE and Prematic does not, without more, establish that he suffered "lost money or property" sufficient to satisfy the UCL standing requirements, because it is equally beyond dispute that Troyk always understood that he was receiving something of value in return—the right to pay his six-month insurance premium on a monthly basis. As he testified, "[d]id I sign the [Prematic] agreement understanding that I was going to be charged $5 a month? ... Yes." (CT-1302.) In short, he received the benefit of his bargain and cannot use this action to avoid his contractual obligations and retain all of the benefits, even if he believes that FIE violated Section 381(f). (See, e.g., *Spiegler v. Home Depot U.S.A., Inc.* (C.D.Cal. 2008) 552 F.Supp.2d 1036, 1048, fn.4 ["[A]lthough plaintiffs ... spent money, ... they do not allege that they did not want the merchandise or that the installation services, the merchandise or the installation services were unsatisfactory."].)

Second, even if there were a basis to conclude that FIE or FGI violated Section 381(f) (and there is not), Troyk cannot establish "lost money or property" here because he had a separately enforceable obligation to pay it to Prematic. Troyk and the class cannot "lose" money that they are contractually obligated to pay to Prematic, which was not a party to the Superior Court proceedings.

Third, because the UCL's monetary remedies are limited, the "lost money or property" required for purposes of Section 17204 is the same loss of "money or property" that is required to obtain restitution pursuant to Section 17203.[5] The only monetary remedy authorized by the UCL is restitution. The statute does not authorize an award of damages. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144 ["A UCL action is equitable in nature; damages cannot be recovered."].) The Supreme Court of California has explained that UCL "restitution" is limited to the return of "money or property that defendants *took directly from* plaintiff" or "money or property in which [plaintiff] has a *vested interest*," such as earned wages that are due and payable. (*Id.* at p. 1149, italics added.) As demonstrated in prior briefing, Troyk did not and cannot establish as a matter of law that he is entitled to restitution:

a. Troyk and the class are not entitled to restitution of the

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[5] (See, e.g., *Walker v. Geico Gen. Ins. Co.* (E.D.Cal. Feb. 12, 2007, No. 06-1703) 2007 U.S. Dist. LEXIS 10652, at p. 8 ["[T]he 'lost money or property' that can be restored pursuant to section 17203 and the 'loss of money or property' required by section 17204 should be consistently interpreted."]; *Walker v. USAA Cas. Ins. Co.* (E.D.Cal. 2007) 474 F.Supp.2d 1168, 1172 [same]; see also *Clayworth v. Pfizer* (2008) 165 Cal.App.4th 209, 243 [no standing to enforce the amended UCL if plaintiffs "suffered no monetary loss" and cannot seek restitution].)

Prematic service charges from FIE and FGI because they did not pay this money directly to FIE or FGI. (AOB, at pp. 42-43; ARB, at pp. 43-45; see also *Sanbrook v. Office Depot, Inc.* (N.D.Cal. May 5, 2008, No. 07-05938) 2008 U.S. Dist. LEXIS 40322, at pp. 11-15 [holding that plaintiffs lack standing to seek UCL restitution because they paid money to an independent third party].)

b. The *$136 million* award was not restitutionary but an unauthorized order of complete disgorgement of all Prematic's service charges. (AOB, at pp. 42-43; ARB, at pp. 45-46.)

c. There was no equitable basis to award restitution in this case, and the massive class judgment represented a disgorgement "disproportionate to the wrong" and resulted in "a totally unwarranted windfall" to the plaintiff. (*Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 48, 50, quoting *Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1215; see also AOB, at pp. 43-44; ARB, at p. 46.)

d. The award of complete disgorgement failed to offset the value of the services received by Troyk and the class. (AOB, at pp. 43-46; ARB, at pp. 46-47.)

Troyk thus failed to satisfy the "lost money or property" element of UCL standing post-Proposition 64.

3. *FIE's Alleged Failure To Disclose The Prematic Service Charges As "Premium" Did Not Cause Any Harm To Troyk*

Even if Troyk were able to establish "injury in fact" and "lost money or property" (and he cannot for the reasons discussed in the preceding sections), he did not and cannot establish the third necessary requirement—a causal link between the challenged business practices and the asserted harm. As several Courts of Appeal have explained, "the phrase 'as a result

of' in the UCL imposes a causation requirement; that is, the alleged unfair competition must have caused the plaintiff to lose money or property." (*Hall*, *supra*, 158 Cal.App.4th at p. 849; see also *Daro*, *supra*, 151 Cal.App.4th at p. 1099 ["In short, there must be a causal connection between the harm suffered and the unlawful business activity."]; see also *In re Firearm Cases* (2005) 126 Cal.App.4th 959, 979 ["Because the acts of the lender did not deceive the borrowers, causation was absent and the practice could not be deemed unfair."].) Numerous federal decisions have applied the same analysis. (See, e.g., *Doe v. Texaco, Inc.* (N.D.Cal. July 21, 2006, No. 06-02820) 2006 U.S. Dist. LEXIS 53930, at p. 9 [amended UCL requires causation and reliance]; *Laster v. T-Mobile United States, Inc.* (S.D.Cal. 2005) 407 F.Supp.2d 1181, 1194 ["The language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is *required* as to each representative plaintiff."].)[6]

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[6] (See also *In re Yahoo Litig.* (N.D.Cal. Apr. 21, 2008, No. 06-2737) 2008 U.S. Dist. LEXIS 33999, at p. 49 [post-Proposition 64 UCL requires causation]; *Ironworkers Local Union No. 68 v. Amgen, Inc.* (C.D.Cal. Jan. 22, 2008, No. 07-5157) 2008 U.S. Dist. LEXIS 8740, at p. 17 ["[T]he language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is required as to each representative plaintiff."]; *Cattie v. Wal-Mart Stores* (S.D.Cal. 2007) 504 F.Supp.2d 939, 947-949 [UCL requires causation; rejecting *Anunziato v. eMachines, Inc.* (C.D.Cal. 2005) 402 F.Supp.2d 1133]; *United Food & Commercial Workers Cent. Penn. v. Amgen, Inc.* (C.D.Cal. Nov. 13, 2007, No. 07-3623) 2007 U.S. Dist. LEXIS 85148, at p. 16 ["Thus, the language of the UCL, as amended by Proposition 64, makes clear that a showing of causation is required as to each representative plaintiff."]; *Thomson v. Home Depot, Inc.* (S.D.Cal. Sept. 18, 2007, No. 07-1058) 2007 U.S. Dist. LEXIS 68918, at p. 7 ["While Plaintiff alleges he was required to fill out a form which prompted him to provide personal identification, he does not allege

[Footnote continued on next page]

The only sensible interpretation of the phrase "as a result of" is that the amended UCL requires proximate or legal causation. This is the settled legal meaning of this phrase in other applications of California law. (See generally 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 537, at p. 624 [requirement that a negligence plaintiff show that his or her injury occurred "as a result of" the defendant's breach means that the plaintiff must show "proximate or legal cause"].) Notably, courts have concluded that the same language ("as a result of") also requires causation in the standing provision of the CLRA, the other primary consumer-protection statute in California that Proposition 64 did not amend. (See Civ. Code, § 1780, subd. (a); see, e.g., *Mass. Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292 ["as a result of" language in CLRA requires causation]; *Buckland, supra*, 155 Cal.App.4th at p. 809 [same].) It is a settled "principle of statutory construction that legislation framed in the language of an earlier enactment on the same or an analogous subject that has been judicially construed is presumptively subject to a similar construction ...." (*Snukal v. Flightways Mfg.* (2000) 23 Cal.4th 754, 766; see also *People v. Weidert* (1985) 39 Cal.3d 836, 845-846.) Courts have construed other states' consumer protection statutes containing identical language the same

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filling out the form caused him to lose any money or property—as required to make out a claim under the UCL."]; *Brown v. Bank of Am.* (D.Mass. 2006) 457 F.Supp.2d 82, 89 [applying California law and granting summary judgment on UCL claim because "even if Plaintiffs can establish that the on-machine notice [disclosing ATM service fees] is defective under state law, they cannot establish loss causation because the click-through screen breaks the casual connection between the defective notice and the payment of the fee."].)

way.[7]

To establish standing to enforce the UCL after Proposition 64, therefore, private plaintiffs must show that the challenged conduct *caused* their injury in fact and loss of money or property. As discussed above, Troyk cannot do so. Any failure by FIE to disclose Prematic's service charges as "premium" on the "policy" (as opposed to disclosure in the Prematic Agreement and more than 150 monthly invoices) did not cause any harm to Troyk or the class. Troyk agreed to pay the optional service charges in exchange for Prematic's services, and it is undisputed that his agent fully informed him of the service charges and Troyk optionally paid and enjoyed the benefits of them, as Prematic administered his monthly payment plan without interruption for more than a dozen years before he brought this lawsuit. (*Supra*, at pp. 12-13; see also CT-793, 1299-1302.)[8]

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[7] (See, e.g., *Oliveira v. Amoco Oil Co.* (Ill. 2002) 776 N.E.2d 151, 155 (Oliveira) ["The 'as a result of' language in ... [the Illinois consumer protection statute] imposes an obligation upon a private individual seeking actual damages under the Act to 'demonstrate that the fraud complained of proximately caused' those damages in order to recover for his injury."]; *Feitler v. The Animation Celection, Inc.* (Or.Ct.App. 2000) 13 P.3d 1044, 1047 [holding that "as a result of" in the standing requirements of Oregon's Unlawful Trade Practices Act requires proof of "causation"]; *Abrahams v. Young & Rubicam* (Conn. 1997) 692 A.2d 709, 712 ["The language 'as a result of' [in the Connecticut Unfair Trade Practices Act] requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff."].)

[8] As FIE and FGI established in their prior briefing, several cases preceding Proposition 64—including cases decided by this Court—hold as a matter of law that a fully disclosed fee cannot serve as a basis for a UCL claim. (AOB, at pp. 47-48; ARB, at pp. 40-41 [citing *Searle v. Wyndham Internat., Inc.* (2002) 102 Cal.App.4th 1327, 1334-1336; *S. Bay Chevrolet v. GMAC* (1999) 72 Cal.App.4th 861, 878, 886-889; *Plotkin v. Sajahtera, Inc.* (2003) 106 Cal.App.4th 953, 966; *Wayne v.*

[Footnote continued on next page]

In fact, Troyk effectively concedes that *he would not have altered his conduct in any way* had the Prematic service charge been disclosed as "premium" in the "policy" (AOB, at p. 36; ARB, at p. 31), because it still would have "made sense to pay monthly." (CT-787, 788-790.) In the face of this testimony, he cannot possibly establish legal causation. (See *Medina*, 164 Cal.App.4th at p. 115 ["Here, there is no allegation that Medina *relied* on Safe-Guard's having a license as required by the vehicle service contract statutes, or that Safe-Guard's unlicensed status *caused* him to part with the money he paid for the tire and wheel contract."]; *Hall*, *supra*, 158 Cal.App.4th at p. 857 [no causation because plaintiff "did not allege he did not want the book or Time's alleged acts of unfair competition induced him to keep a book he otherwise would have returned during the free trial period"]; *Laster*, *supra*, 407 F.Supp.2d at p. 1194 [no causation or reliance because plaintiff was not deceived by the advertising into making the purchase]; *Cattie*, *supra*, 504 F.Supp.2d at pp. 947-949 [same]; *Brown*, *supra*, 457 F.Supp.2d at p. 89 [no causation because defendant required plaintiffs to consent to additional fee through on-screen ATM disclosure].)

Nor can Troyk establish justifiable reliance. He does not dispute that it still would have "made sense to pay monthly" *even if* the Prematic service charge had been disclosed as "premium" in the "policy" (CT-1296), and he continues to pay this charge even after learning of his attorneys' construction of Section 381(f) (CT-1299). (See *Medina*, *supra*, 164 Cal.App.4th at p. 115; *Hall*, *supra*, 158 Cal.App.4th at p. 859 ["[T]he

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Staples, Inc. (2006) 135 Cal.App.4th 466, 483-484; *Shvarts v. Budget Group* (2000) 81 Cal.App.4th 1153, 1156, 1160; *Brown*, *supra*, 457 F.Supp.2d at pp. 84-85, 89-90].)

representative UCL plaintiff must plead he or she suffered an injury in fact caused by, or in justifiable reliance on, the alleged acts of unfair competition"].)

As this Court is well aware, the Supreme Court of California granted review of *In re Tobacco II Cases* (2006) 142 Cal.App.4th 891, review granted 146 P.3d 1250, to consider two questions: (1) whether each class member must suffer "injury in fact" or whether "it [is] sufficient that the class representative comply with that requirement"; and (2) whether "every member of the class [must] have actually relied on the manufacturer's representations." While Troyk's lawsuit also implicates these other issues, a resolution of them is not necessary to dispose of FIE and FGI's appeal, or to address the issues identified by this Court in its July 25 order.[9]

4. *The Lack Of Harm And Causation Alone Provides Sufficient Grounds For Reversing The Judgment, As In* **Sheldon v. American States Preferred Insurance Co.**

Just a few years ago, in *Sheldon v. American States Preferred Insurance Co.* (Wash.Ct.App. 2004) 95 P.3d 391, the Washington Court of

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[9] The Supreme Court has granted review and deferred briefing in several other appeals in which the courts of appeal held that the amended UCL requires reliance and causation. (See *Pfizer Inc. v. Superior Court* (2006) 141 Cal.App.4th 290, 296, 305, review granted, 146 P.3d 1250; *Meyer v. Sprint Spectrum L.P.* (2007) 150 Cal.App.4th 1136, 1144, review granted 166 P.3d 1; *O'Brien v. Camisasca Auto. Mfg., Inc.* (2007) 161 Cal.App.4th 388, review granted, 2008 Cal. LEXIS 8247.) Nonetheless, it also denied review in at least one case holding that "as a result of" in the amended UCL requires legal causation (*Daro, supra*, 151 Cal.App.4th at p. 1099), and other decisions reaching the same conclusion remain published. (*Medina*, 164 Cal.App.4th at p. 115; *Hall, supra*, 158 Cal.App.4th at p. 849.) Undersigned counsel is aware of no published appellate authority in California holding that the amended UCL does *not* require causation and/or reliance.

Appeals confronted the same core issue presented by this Court's supplemental briefing order, and that court rejected a virtually identical claim premised on an insurer's alleged failure to disclose a monthly "service charge" as "premium" in an auto insurance policy. Like Troyk, the plaintiff/insured in that case contended that the defendant/insurer was required to, but did not, identify the "service charges" as "premium" in the insurance policy. (*Id.* at p. 392.) As in the present action, it was undisputed in *Sheldon* that (a) the insured knowingly agreed to pay these service charges, (b) the insurer fully disclosed them, and (c) the insured received the benefit of his bargain because he paid for his insurance on a periodic basis rather than up front and in full. (*Id.* at p. 393.) But unlike the trial court here, the court of appeals in *Sheldon* rejected the breach of contract and consumer protection claims because it could not even fathom "the possibility of" harm or injury resulting from a fully disclosed service charge: "[W]e cannot agree with [the plaintiff's] contention that a violation causing no harm to policyholders must result in forfeiture of an otherwise legal and reasonable fee." (*Id.* at p. 394.)

The facts of this case compel the same result, and, like the court in *Sheldon*, this Court need not revisit the issue decided in *Auto Club* that the service charges are not "premium." (*Id.* at p. 393, fn.10; *Auto Club*, *supra*, 148 Cal.App.4th at p. 1230 [holding that "premium" is "the amount paid for certain insurance for a certain period of coverage," and that service charges for the convenience of making payments in installments fall outside of this definition].)[10]

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[10] Troyk's only purported basis for distinguishing *Sheldon* rests on a misreading of the decision. He argued that "the *Sheldon* court

[Footnote continued on next page]

B. Troyk's Sole Remaining Claim For Breach Of Contract Fails For Similar Reasons

Troyk does not and cannot dispute that harm and causation are essential elements of his breach of contract claim. (See, e.g., *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal.App.4th 1038, 1061, citing *Vu v. Cal. Commerce Club* (1997) 58 Cal.App.4th 229, 233; AOB, at pp. 36-37; ARB, at pp. 30-33.) His breach of contract claim thus fails for the same reasons discussed above in connection with his UCL claims, namely, that Troyk: (1) understood and optionally agreed to pay the Prematic service charges (CT-1311-1312); (2) received more than 150 monthly statements from Prematic since 1991 that included specific disclosure of the applicable monthly "Service Charge" (e.g., CT-15, 1099); (3) did not dispute that it still would have "made sense to pay monthly" *even if* the Prematic service charge had been disclosed as "premium" in the "policy" (CT-1296); (4) continued to pay the monthly service charge to Prematic even after filing this action (CT-1299); and (5) received the full benefit of his bargain (as did the class). (CT-

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recognized that under California law, surcharges on installment payment plans ... are premium." (RB, at p. 37.) As a preliminary matter, this Court already distinguished those "gross premium" taxation decisions as "factually and legally inapposite" and held that they "do not persuade us to reach a different conclusion in this case." (*Auto Club*, *supra*, 148 Cal.App.4th at p. 1235; see also AOB, at pp. 25-27; ARB, at pp. 12-14.) Moreover, even if Troyk's reading were correct, he offered no response to the next logical step in *Sheldon*'s analysis—*even if* the payments are deemed "premium" that was required to be disclosed pursuant to a statute, this technical statutory violation caused no harm because the plaintiff "was not misled and indeed received value for his money." (*Sheldon*, *supra*, 95 P.3d at p. 393.) The same is true here.

793.)[11]

C. FIE/FGI Raised Troyk's Lack Of Standing In The Trial Court At Each Opportunity, And Even Had They Not Done So, They Could Not Waive This Challenge

This Court also requested that the parties discuss whether FIE and FGI raised the issue of standing in the Superior Court and whether they have waived this issue. Though they do not agree on very much, the parties ought to agree on their response to these questions—FIE and FGI previously and repeatedly challenged Troyk's lack of standing in the proceedings below. In any event, this defense is jurisdictional and cannot be waived.

1. FIE and FGI raised Troyk's lack of standing at every procedural opportunity in the Superior Court. In fact, the first papers they filed in this action requested that the Superior Court dismiss Troyk's claims on the pleadings because he did not and could not satisfy the new standing requirements of Proposition 64. In their demurrer—filed only eleven days after voters approved Proposition 64—FIE and FGI argued that "Plaintiff's cause of action under Section 17200 has no merit because *Plaintiff has personally suffered no injury* which, under Proposition 64, is a prerequisite for a Section 17200 claim." (CT-19, italics added; CT-36 [citing new language in Section 17204].) FIE and FGI briefed this issue again in their demurrer to Troyk's amended complaint. (CT-165-166, 186-187

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[11] While Troyk's Respondent's Brief argued that the "Monthly Payment Agreement" endorsement vitiated his agreement to pay the monthly service charge (RB, at pp. 17-18, 59), the undisputed record establishes otherwise. It was only *after* Troyk signed the Prematic Agreement and agreed to pay the service charge that FIE issued the endorsement. (AOB, at pp. 7, 27-28; ARB, at pp. 2-3, 5-6, 9, 23, 33.)

[Demurrer to First Am. Compl.], 412-414 [Reply].)

After the Superior Court overruled their demurrer, FIE and FGI answered the First Amended Complaint. The sixteenth affirmative defense in their Answer averred that Troyk "does not have standing" to pursue his claims. (CT-429.)

Next, FIE and FGI also briefed Troyk's lack of UCL standing in their summary judgment papers. (CT-2431 ["Troyk does not have standing to pursue a UCL claim unless he has suffered 'injury in fact *and* has lost money or property as a result of [] unfair competition.'"]; CT-2432 ["Troyk admits that he was fully aware of the charges before he agreed to pay them and has voluntarily paid them on a monthly basis for nearly fifteen years without protest."]; *ibid.* ["Because he has not suffered any cognizable injury in fact or monetary harm, he is not entitled to equitable relief under the UCL."]; CT-2830-2831 [same].)

After the entry of judgment, FIE and FGI moved to set aside or vacate the judgment. In that briefing, they contended once again (for at least the fifth time) that "Proposition 64 required ... plaintiffs to have suffered actual injury and the loss of money or property as a result of the alleged unfair business practice to have standing." (Mot. to Augment Record, July 11, 2007, Ex. 1, at p. 6.)[12] FIE and FGI specifically noted that Troyk "does not even suggest that he might have done anything differently had Defendants included a more specific reference to the agreed-upon service charges or that he, somehow, would be in a different position

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[12] This Court granted FIE and FGI's unopposed Motion to Augment and accepted this exhibit into the record on appeal by order dated July 31, 2007.

financially had that occurred." (*Ibid.*; see also CT-3238-3250 [Reply in Supp. of Mot. to Vacate].) In opposing this motion, Troyk acknowledged that FIE and FGI had already briefed the standing issue. He complained that the Motion to Vacate "*re-argues* that plaintiff and the class did not suffer 'injury in fact' or 'lost money or property as a result of [the] unfair competition.'" (CT 3214, italics added.)

Finally, FIE and FGI identified Troyk's failure to satisfy the elements of Section 17204 in their prior appellate briefing to this Court as a separate basis for reversing the judgment. (See AOB, at pp. 36-37, 47; ARB, at pp. 30-33.)

2. Even if FIE/FGI had not raised Troyk's lack of standing at every opportunity in the trial court, however, they could not waive this issue, and their challenge on this appeal would be sufficient. The courts of this State consistently hold that a plaintiff's standing or lack thereof cannot be waived because it goes to the heart of the court's jurisdiction. (See, e.g., *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361; *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90; Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 8:273.5, p. 8-153 ["[L]ack of standing may be raised at any time in the proceeding, including for the first time on appeal."]; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 862, p. 320.)

As the Supreme Court of California held in its first decision considering Proposition 64—in connection with the very issue presented here (whether a private plaintiff satisfied the new standing requirements of the amended UCL)—"contentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223,

233, quoting *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438.) The Court explained that "[f]or a lawsuit properly to be allowed to continue, standing must exist at all times until judgment is entered and not just on the date the complaint is filed." (*Id.* at pp. 232-233.) The defendant in *Mervyn's* did not (and could not) raise the standing issue until the appeal, but the Court nevertheless considered it. Surely the facts of this case—in which FIE and FGI raised standing only *eleven* days after the passage of Proposition 64 and again at every stage in the Superior Court and again on appeal—compel a consideration of the standing argument.

Federal decisions construing a litigant's constitutional, Article III standing reach the same conclusion, and these decisions are particularly apt considering the voters' declared intent to align UCL standing requirements with constitutional constraints in passing Proposition 64. (*Supra*, at pp. 7, 8.) For example, in *Lewis v. Casey* (1996) 518 U.S. 343, the United States Supreme Court held that Article III "standing ... is jurisdictional and not subject to waiver." (*Id.* at p. 349, fn.1; see also *DaimlerChrysler Corp. v. Cuno* (2006) 547 U.S. 332, 340 ["We have 'an obligation to assure ourselves' of litigants' standing under Article III."]; *Pandrol USA, LP v. Airboss Ry. Prods.* (Fed. Cir. 2003) 320 F.3d 1354, 1367 [holding that despite the defendants' waiver of other defenses they could not waive their challenge to plaintiffs' Article III standing because "'standing ... is jurisdictional and not subject to waiver'" and "[i]t is well-established that any party, and even the court *sua sponte*, can raise the issue of standing for the first time at any stage of the litigation, including on appeal."], quoting *Lewis*, *supra*, 518 U.S. at p. 349, fn.1.)

In sum, FIE and FGI did not and could not waive their challenge to Troyk's lack of standing.

III.
CONCLUSION

Troyk did not and cannot establish injury in fact and lost money or property, or that FIE and FGI caused harm to him or to any class members. As such, he lacks standing to pursue his UCL claim, and he cannot establish the essential elements of his breach of contract claim. For these reasons, and all of the additional grounds stated in their Opening and Reply Briefs, FIE and FGI respectfully request that this Court reverse the windfall $136 million judgment of the Superior Court and all associated orders and direct the entry of a new judgment in their favor, or, in the alternative, reverse the judgment and remand the action for a trial on the merits.

DATED: August 25, 2008

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the foregoing **SUPPLEMENTAL BRIEF OF APPELLANTS FARMERS GROUP, INC. AND FARMERS INSURANCE EXCHANGE IN RESPONSE TO COURT'S ORDER DATED JULY 25, 2008**, is produced using 13-point Roman type and contains 8,823 words, including footnotes, which is less than the 14,000 words permitted by the foregoing Rule. Undersigned counsel relies in part on the word count feature of the computer program used to prepare this Brief.

DATED: August 25, 2008

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100506626_1.DOC

CERTIFICATE OF SERVICE

I, Janet Faragher, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071-3197, in said County and State. On August 25, 2008, I served the **SUPPLEMENTAL BRIEF OF APPELLANTS FARMERS GROUP, INC. AND FARMERS INSURANCE EXCHANGE IN RESPONSE TO COURT'S ORDER DATED JULY 25, 2008** on the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service as indicated on **ATTACHMENT "A"**:

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☑ I am employed in the office of Christopher Chorba, a member of the bar of this Court, and that the foregoing document was printed on recycled paper.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 25, 2008.

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Janet Faragher

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