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May 29, 2015

The Hon. Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Animal Legal Defense Fund v. LT Napa Partners LLC and Kenneth Frank*
Supreme Court Case No. S225790
First Appellate District, Division 5, Case No. A139625

Dear Chief Justice and Associate Justices:

By letter dated May 4, 2015, the Chamber of Commerce of the United States requested that this Court depublish the Court of Appeal's decision in *Animal Legal Defense Fund v. LT Napa Partners LLC and Kenneth Frank*. In the alternative, the Chamber of Commerce respectfully requests that this Court grant the Petition for Review in this case.

The First Appellate District adopted a test for standing to bring a lawsuit under the Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 et seq. (the "UCL")) that contradicts this Court's precedent and substantially undermines the limitations on UCL standing that California's voters enacted in Proposition 64. Under the Court of Appeal's errant test, an organization can establish standing simply by showing that it has voluntarily chosen to expend funds to "investigate" the defendant's supposed violations of the law and to (unsuccessfully) lobby the local prosecutor to bring a legal action against the defendant.

The Court of Appeal's opinion threatens to expose businesses in California to a flood of lawsuits from advocacy organizations and other self-appointed private attorneys general. Any person or organization with an abstract interest in any subject could manufacture standing by undertaking a similar investigation against almost anyone with respect to any alleged misconduct. The opinion below effectively eschews the requirement that a plaintiff show the defendant's conduct was the proximate cause of an injury to the plaintiff's business or property. That holding should be rejected.

I. Interest of the Chamber of Commerce of the United States

The Chamber of Commerce of the United States is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including in California.

Left uncorrected, the decision below could significantly erode the minimum requirements of statutory standing under the UCL. That threat is of grave concern to the business community because (as this case illustrates) advocacy organizations can unilaterally initiate investigations of, or advocacy against, any large or small business without suffering any actual injury. If such organizations can bring lawsuits without the need to demonstrate any injury beyond the costs of their voluntary investigation or advocacy, businesses will predictably be exposed to an unchecked flood of private enforcement lawsuits, exactly the result that California voters intended to prevent in passing Proposition 64.

II. This Court Should Grant the Petition for Review

The Court of Appeal's decision in this case threatens to return California law to essentially the same place it was before the passage of Proposition 64. As this Court has explained, through Proposition 64 California voters intended "to confine standing to those actually injured by a defendant's business practices." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 321 (2011). Consistent with that intent, a UCL plaintiff must allege an "injury in fact," and the plaintiff's alleged injury must also have been "caused by" the defendant's conduct. *Id.* at 322-23, 326. These basic requirements of standing bar the type of injury alleged by the plaintiff in this case, yet the decision below failed to properly follow this Court's direction.

The first requirement of standing under the UCL, as amended by Proposition 64, is that a plaintiff must allege an "injury in fact," which is defined as a concrete and particularized "invasion of a legally protected interest." *Id.* at 322-323. The question in this case is whether an organizational plaintiff can establish an "injury in fact" based entirely on its decision to spend resources to respond to a defendant's conduct, even when the defendant's conduct would not otherwise have caused any concrete injury to the organizational plaintiff. Courts have consistently rejected such a theory of organizational standing. As the Ninth Circuit has explained under Article III, an organizational plaintiff "cannot manufacture the injury by

incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all. ***It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem.***" *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (emphasis added and citation omitted); *see also Kwikset*, 51 Cal. 4th at 324 (explaining that the UCL's injury-in-fact requirement is narrower than Article III's).

In this case, plaintiff has not asserted any concrete injury that it would have suffered if it had not diverted resources to investigate defendants. Plaintiff merely argues that it could have used the resources it used to investigate defendants on some other organizational purpose instead. That theory fails. As the D.C. Circuit explained in rejecting a virtually identical basis for a claim of organizational standing, "this particular harm is self-inflicted; it results not from any actions taken by [the defendant], but rather from the [plaintiff's] own budgetary choices. ... [T]he [plaintiff] and its programs would have been totally unaffected if it had simply refrained from making the re-allocation." *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994). California state cases, prior to the Court of Appeal's decision in this case, have followed the same reasoning. A leading precedent is *Two Jinn, Inc. v. Gov't Payment Serv., Inc.*, 233 Cal. App. 4th 1321 (2015), which expressly rejected the theory that pre-litigation costs to investigate the putative defendant's conduct are sufficient to create UCL standing. "[P]roof that [plaintiff] spent money to investigate [defendant's] activities would not show that those allegedly unfair business activities had any independent economic impact on [plaintiff's] ... business." *Id.* at 1335. *Two Jinn*, *id.* at 1336, quotes *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 815 (2007), which stated that funds expended independently of the litigation "may" establish Article III injury in fact. But that does not mean that pre-litigation expenditures are automatically sufficient. Neither *Two Jinn* nor *Buckland* suggest that a person may manufacture injury simply by choosing to expend funds to "investigate" before filing a lawsuit. *See also Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999) ("Plaintiff cannot manufacture standing by first claiming a general interest in lawful conduct and then alleging that the costs incurred in identifying and litigating instances of unlawful conduct constitute injury in fact.").

Plaintiff's answer to the petition for review erroneously asserts that a "litany of cases" supports its theory of injury in fact, but those cases are readily distinguishable. Plaintiff largely relies on *Havens Realty v. Coleman*, 455 U.S. 363 (1982), and its progeny. In *Havens*, the alleged injury was not the cost of investigation or advocacy. Rather, the plaintiff organization provided counseling and referral services to actual victims of discrimination, and the defendant's discriminatory practices impaired their ability to provide those services. The United States Supreme Court found that the impairment of the organization's ability to provide services constituted injury in fact. *Havens*, 455 U.S. at 379. Most of the cases cited by plaintiff simply applied *Havens* to similar facts, in which an organization had no choice but to divert resources to address a defendant's conduct because the defendant's conduct was interfering

directly with the organizational plaintiff's ability to pursue its mission. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (noting that organizational plaintiff had been forced to "respond[] to citizen complaints" against defendant and defendant's conduct caused plaintiff "to suffer injury to its ability to provide outreach and education (i.e., counseling)"); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (noting that organizational plaintiff that provided direct legal services for victims of housing discrimination had "started new education and outreach campaigns" to counteract defendant's allegedly discriminatory conduct); *Sisemore v. Master Financial, Inc.*, 151 Cal. App. 4th 1386, 1426 (2007) (describing facts as being "similar to those" in *Havens*). By contrast, courts have found no standing where the only alleged injury is the plaintiff's decision to incur the cost of investigating the defendant, and have expressly distinguished *Havens* and its progeny on that basis. *See City of Lake Forest*, 624 F.3d at 1088 (holding that organizational plaintiff's decision to spend money counteracting defendant's conduct was insufficient to confer standing, and distinguishing *Havens* because organization in *Havens* "could not avoid suffering" injury due to defendant's conduct); *Fair Employment Council*, 28 F.3d at 1277 (distinguishing *Havens* on the basis that organizational plaintiff in *Havens* "did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs").

Both plaintiff's answer to the petition and the Court of Appeal's decision rely heavily on *Southern Cal. Housing Rights Ctr. v. Los Feliz Towers Homeowners Ass'n*, 426 F. Supp. 2d 1061, 1069 (C.D. Cal. 2005). But *Southern Cal. Housing* is not persuasive authority for the question here. First, that case only has one sentence describing the plaintiff's alleged injury, which does not provide sufficient factual detail even to clarify the precise basis for the court's finding of organizational standing. *Id.* Second, even if the district court in *Southern Cal. Housing* meant to suggest that a plaintiff can confer standing on itself merely by initiating an investigation of a defendant, that holding has been overruled by the Ninth Circuit's subsequent decision in *City of Lake Forest* that "[a]n organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." 624 F.3d at 1088 n. 4. Third, *Southern Cal. Housing* relied on *Havens*, which is distinguishable for the reasons noted.

The causation requirement in Proposition 64 likewise bars the plaintiff's suit: plaintiff has not shown that the defendant's conduct proximately caused plaintiff's alleged injury. "Proposition 64 requires that a plaintiff's economic injury come 'as a result of'" the defendant's allegedly unlawful conduct, which "requires a showing of causal connection." *Kwikset*, 51 Cal. 4th at 326. By using the phrase "as a result of," Proposition 64 "imposes a causation requirement" that is equivalent to "the causation element of a negligence cause of action." *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 & n.2 (2008). This means that a plaintiff must show that the defendant's conduct was the proximate cause of the asserted injury. *See, e.g., Am. Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 586 (1978) (explaining that plaintiff must prove "proximate cause" to recover damages sustained "as a result of" a tortfeasor's

conduct); 4 Witkin, Cal. Proc. 5th Pleading § 576, p. 701 (2008) (equating "as a result of" with "proximate or legal cause").

A central aspect of proximate cause is the requirement that a plaintiff demonstrate "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). There is no such direct relationship between defendants' conduct and plaintiff's injury in this case. Because the defendants' conduct would not have caused plaintiff any injury but for the plaintiff's own decision to divert its resources, plaintiff's actions were an intervening cause. In such a case, the law does not recognize proximate cause unless a plaintiff can show that the intervening cause "was within the scope of the reasons imposing the duty" upon the defendant. *Lugtu v. California Highway Patrol*, 26 Cal. 4th 703, 725 (2001); *see also id.* ("If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, ... then that hazard is within the duty."). That condition is not satisfied here. The plaintiff cannot plausibly contend that the foie gras ban was put in place to shield organizations like the plaintiff from the consequences of their resource allocation decisions, and so plaintiff cannot establish that defendants' conduct was the proximate cause of its alleged injuries.

The Court of Appeal's decision also conflicts with *Two Jinn* on the causation issue. In *Two Jinn*, the court held that the "pre-litigation" costs of investigating a defendant's conduct "do not establish standing to bring a UCL claim because they are not an economic injury ***caused by*** the business practices that [the plaintiff] characterizes as unlawful." 233 Cal. App. 4th at 1334 (emphasis added). Plaintiff's "longstanding interest in effective enforcement" of California's ban on foie gras, relied upon by the court below, is immaterial. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (holding that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to confer standing on an organization). If an organizational plaintiff could establish injury by claiming an abstract interest in enforcement of a generally applicable law, and by choosing to spend its resources to investigate supposed violations of that law, then the limitations on standing would be all but eliminated. *See Two Jinn*, 233 Cal. App. 4th at 1334 (distinguishing between a "concrete and demonstrable injury to the organization's activities" and a "setback to the organization's abstract social interests") (quoting *Havens*, 455 U.S. at 379).

Enforcing Proposition 64's standing requirements will hardly require advocacy organizations "to sit idly by while businesses act in ways that frustrate their mission," as plaintiff worries. It will ensure that only organizations with a concrete injury caused by a defendant's conduct will undertake their efforts through the courts. The Court of Appeal's decision, however, renders illusory the limitations on UCL standing adopted by California's voters. Any person could choose to spend resources investigating a violation of the law, and then file suit on that basis. Not only is this result contrary to the text and purpose of Proposition 64, but it creates confusion by conflicting with the limitations on standing recognized by other California courts as

well as by the federal courts. Accordingly, this Court should grant the petition for review of the Court of Appeal's decision and reverse.

Very truly yours,

Henry Weissmann by PJK

Henry Weissmann

HW:v

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 355 South Grand Avenue, Suite 3500, Los Angeles, CA 90071.

On May 29, 2015, I served true copies of the following document described as on the interested parties in this action as follows:

U.S. CHAMBER OF COMMERCE REQUESTING THAT THE COURT

GRANT THE PETITION FOR REVIEW

See Attached Service List

BY FedEx: I enclosed the document(s) in a sealed FedEx envelope addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is schedule for pickup in the ordinary course of business with FedEx, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 29, 2015, at Los Angeles, California.

Vivian S. Rodriguez

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