No. S224086

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHARON MCGILL,
Plaintiff and Appellant,

v.

CITIBANK, N.A.,
Defendant and Respondent.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Three,
Case No. G049838

From the Superior Court, Riverside County
Case No. RIC1109398, Assigned for All Purposes to
Judge John W. Vineyard, Department 12

SUPPLEMENTAL *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Andrew J. Pincus
(*pro hac vice*)
Archis A. Parasharami
(*pro hac vice*)
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Donald M. Falk (SBN 150256)
MAYER BROWN LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Attorney for Amicus Curiae *the Chamber of Commerce of the United States of America*

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. Its interest in this case is fully described in its initial amicus brief. The Chamber submits this supplemental brief in response to the Court's order of January 24, 2017.[1]

INTRODUCTION

The Court has asked "[w]hether the 2004 amendments to the Unfair Competition Law and the false advertising law, through passage of Proposition 64, eliminated the ability of private plaintiffs to seek public injunctive relief." That is exactly what those amendments did, and what they were explicitly intended to do.

Proposition 64's parallel amendments to the Unfair Competition Law and false advertising law (collectively, "UCL") deleted the authority of private parties to sue on behalf of "the general public," while requiring private lawsuits to seek relief on behalf of other private persons only by satisfying the class-certification strictures of Code of Civil Procedure section 382. The statutory findings declared that actions by private parties brought purportedly "on behalf of the general public" were among the "misuse[s]" the amendments were designed to end. And the voters were told that that, if enacted, the amendments would ensure that only public officials could sue on behalf of the People of California.

By sweeping away the only statutory basis to consider UCL injunctions "public" when they were sought by private parties, Proposition 64 made public relief once again the exclusive province of public officials.

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[1] No party and no counsel for any party in this case authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the amici curiae and their counsel in this case made a monetary contribution intended to fund the preparation or submission of the brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

In light of that clearly expressed statutory intent, there is no basis to describe as "public" claims for injunctions by private parties—whether or not the injunctions benefit a certified class of private parties. The Court should not construe the UCL as if the meaning of the "general public" language survived the deletion of that language, any more than it should insert the same meaning into statutes that never contained that language at all.

ARGUMENT

1. Proposition 64 could not have been clearer in placing public injunctions off limits to private plaintiffs. Proposition 64 deleted only one phrase from the UCL and the FAL: the provision formerly allowing actions under those statutes to be brought "by any person acting for the interests of itself, its members, or the general public." Stats. 2004, p. A-338, § 3 (amending Bus. & Prof. Code § 17204); *id.* at A-339 to A-340, § 5 (amending Bus. & Prof. Code § 17535). By deleting the authority for private parties to "act[] for the interests of ... the general public," Proposition 64 rendered private actions private, and public actions public.

Both the statutory findings and the ballot arguments reinforce the conclusion that "public" injunctions under the UCL are available only at the instance of public officials, not private plaintiffs and their lawyers.

The findings that the voters enacted into law left no doubt that this was the amendments' intent. Among the identified "misuse[s]" of the former UCL were "lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." Stats. 2004, p. A-337, § 1(b)(4). And it was the declared "intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." *Id.* § 1(f).

Nor could the ballot arguments be clearer. California voters were told that Proposition 64 "*[a]llows only the Attorney General, district attorneys, and other public officials to file lawsuits on behalf of the People of the State of California* to enforce California's unfair competition law." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004) argument in favor of Prop. 64, p. 40 [emphasis in original].) And the rebuttal favoring the Proposition stated that the amendments would close "a loophole in California law" that let private lawyers "'appoint' themselves Attorney General and file lawsuits on behalf of the People of the State of California," and would "[p]ermit[] only real public officials like the Attorney General and District Attorneys to file lawsuits on behalf of the People." *Id.*, rebuttal to argument against Prop. 64, p. 41.

The text of the amendments, and the reasons given for them in the statute and ballot arguments, manifest clear intent to preclude private plaintiffs and their lawyers from donning the mantle of the "general public" to endow their private remedies—including private class actions—with special public significance. After Proposition 64, a private action is private whether it is brought only for an individual or for members of a class that has been properly certified—as the amendments now require for any private action seeking "relief on behalf of others." (Stats. 2004, p. A-338, § 2 (amending Bus. & Prof. Code § 17203).) An action brought on behalf of many private parties remains just as private as an action brought for the plaintiff alone.

Until Proposition 64 amended the UCL, the Court had some basis in statutory language to support its conclusion in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, that a species of "public" injunctive relief was available to private parties suing under the old UCL. But Proposition 64 unambiguously expressed the People's intent to separate the private and public spheres of litigation. Because the amendments expressly

stripped the "public" character of private actions out of the statute, they removed any basis to characterize equitable relief at the behest of private parties as "public."

2. The plaintiffs in this case may contend that the creation of a category of public injunctive relief in *Cruz* did not depend entirely on the statutory "general public" language in the UCL, but also depended on the public benefit analysis borrowed from *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066. (See *Cruz*, 30 Cal.4th at 315-16.) *Broughton* addressed a statute—the CLRA—that has never included "general public" language. Whether or not *Cruz* was correct to create public injunctive relief in the absence of statutory language, that does not justify continuing to recognize such relief in the face of express, contrary language. Indeed, viewed in light of Proposition 64, any effort to rely on the reasoning of *Broughton* to preserve the holding in *Cruz* merely underscores why injunctive relief accorded to private parties, including those representing certified classes, is not public.

The remedial provision at issue in *Broughton* merely authorized "an order enjoining the methods, acts, or practices" found to violate the CLRA. (Civ. Code § 1780(a)(2).) The Court nonetheless concluded that "the evident purpose of the injunctive relief provision of the CLRA is not to resolve a private dispute but to remedy a public wrong." (*Broughton*, 21 Cal.4th at 1080.) That conclusion rested on an assessment that, "[w]hatever the individual motive of the party requesting injunctive relief" against a violation of the CLRA, "the benefits of granting injunctive relief by and large do not accrue to that party, but to the general public." (21 Cal.4th at 1080.)

Thus, echoing terms since deleted from the UCL, the Court concluded that a private CLRA plaintiff who sought injunctive relief categorically sought to "enjoin[] future deceptive practices *on behalf of the*

general public." (*Id.* at 1079-80.) But the "general public" language that the People removed from the UCL was never in the CLRA at all. It is a blackletter rule of statutory construction that a court may "not … insert what has been omitted, or … omit what has been inserted.'" (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 573; see Code Civ. Proc. § 1858.) Similarly, "'a court ... may not rewrite the statute to conform to an assumed intention which does not appear from its language.'" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 [quoting *In re Hoddinott* (1996) 12 Cal.4th 992, 1002].) That principle precludes any effort to label UCL injunctions as "public" in the face of the voters' clear intent to create a clear boundary between public and private litigation.

The labeling of private injunctions as "public" in *Broughton* rested on another premise that is no longer supportable: that the Legislature "may express its intention to make a statutory right inarbitrable ... *implicitly* in those rare circumstances in which the fulfillment of the statutory purpose inherently conflicts with arbitration." (*Broughton*, 21 Cal.4th at 1082 n. 7 [emphasis added].) Setting aside whether a state legislature whose enactments are subject to the Supremacy Clause has the power to create exemptions from the Federal Arbitration Act, 9 U.S.C. §§ 1-16—it does not (see Chamber Principal Br. 6-9)—in the interim it has become settled that not even Congress can carve out exceptions to the Act without saying so explicitly.

In *CompuCredit Corp. v. Greenwood* (2012) 565 U.S. 95, decided years after *Broughton* and *Cruz*, the U.S. Supreme Court rejected an effort to infer an exemption from arbitrability from a federal statute's terms and structure. The Court made clear that Congress cannot exempt a federal statutory claim from arbitration unless that intent is expressed with "clarity." (See *id.* at 103-104.) And of the examples of statutory exemptions

from arbitrability recognized by the Court, each used the word "arbitration" in the statutory text. (See *ibid.* (citing 7 U.S.C. § 26n(2); 15 U.S.C. §1226(a)(2); 12 U.S.C. § 5518(b).)[2]

To construe a private remedy as "public" in the absence of statutory authority, and with the explicit goal of excusing a claim from arbitration, would depart from sound principles of statutory construction in service of a goal that is beyond the interpretation's reach.

3. Labeling private parties' UCL injunctions as "public" in the absence of explicit statutory authority is inappropriate for another reason: in light of the statutory silence, it is not clear how injunctive relief in a private action under the UCL is "public" in a way that an injunction enforcing other statutory obligations or legal rights is not. Indeed, following this Court's decisions in *Broughton*, the Court of Appeal extended the "public injunction" label to claims brought by an individual plaintiff under the Unfair Practices Act, Bus. & Prof. Code § 17070. (See *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.* (2000) 83 Cal.App.4th 677, 692.) If injunctive relief can become "public" so long as it is sought under a statute or common-law rule whose enforcement provides some broader public benefit—as many laws surely are intended to do—there is no predictable difference between a public lawsuit and a private one.[3]

The problem does not vanish if courts apply a case-by-case analysis to private parties' requested injunctions under the UCL or CLRA, as the Ninth Circuit did in *Kilgore v. Key Bank, N.A.* (9th Cir. 2013) 718 F.3d

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[2] Of course, in cases where the FAA did not apply, this Court could reach a different conclusion with respect to the relation between a California statute and the California Arbitration Act.

[3] Indeed, as Justice Chin has pointed out, this Court has characterized punitive damages as serving a "purely public" purpose. (*Cruz*, 30 Cal.4th at 331-32 (Chin, J., concurring in part and dissenting in part) [citing *Adams v. Murakami* (1991) 54 Cal.3d 105, 110].)

1052 (en banc). That picking-and-choosing exercise underscores the lack of tethering to statutory terms. The People of California removed the only statutory support for private parties to wield public remedial authority under the UCL. That leaves no room for courts to endow private relief with a public character.

The absence of a textual commitment of a private plaintiff's remedy to the public sphere distinguishes a private party's claim for a UCL injunction from a claim for penalties under the Private Attorney General Act (PAGA), which results in payment to the State, and which this Court therefore characterized as raising "a dispute between an employer and the *state*." (*Iskanian v. CLS Transp. of L.A., LLC* (2014) 59 Cal.4th 348, 386.)[4] The UCL (and the CLRA, for that matter) share none of the statutory characteristics of the PAGA. The actions are not brought in the name of the State, and no part of the proceeds goes to the State. As the Court explained, relief obtained by and for one or more private parties is "tantamount to a private class action, whatever the designation given by the Legislature." (*Id.* at 348, 387-88.) And a private party's action for injunctive relief remains private.

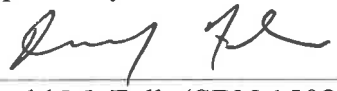
[4] The Chamber continues to believe that the structure of PAGA, while different from that of the UCL, is insufficient to place private parties' PAGA claims beyond the reach of the Federal Arbitration Act. But that issue, decided otherwise in *Iskanian*, is not presented here.

CONCLUSION

Private parties' claims for injunctive relief should not be labeled "public" where the Legislature has withheld the "public" label. But the "public" label surely cannot be applied where the People have removed it. The judgment of the Court of Appeal should be affirmed.

Dated: February 6, 2017

Respectfully submitted.



Donald M. Falk (SBN 150256)
MAYER BROWN LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Attorney for Amicus Curiae *the Chamber of Commerce of the United States of America*

Of Counsel:

Andrew J. Pincus
(*pro hac vice application pending*)
Archis A. Parasharami
(*pro hac vice application pending*)
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000

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According to the word count facility in Microsoft Word 2007, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 2,197 words.

Dated: February 6, 2017

Respectfully submitted.

Donald M. Falk (SBN 150256)
MAYER BROWN LLP

Attorney for Amicus Curiae

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On February 6, 2017, I served the foregoing document(s) described as:

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Glenn A. Danas
Ryan H. Wu
Liana Carter
Capstone Law APC
1840 Century Park East, Suite 450
Los Angeles, CA 90067

Attorneys for Plaintiff-Respondent Sharon McGill

Julia B. Strickland
Marcos D. Sasso
Stroock & Stroock & Lavan LLP
2029 Century Park East, Suite 1800
Los Angeles, CA 90067

Attorneys for Defendant-Appellant Citibank, N.A.

Mary-Christine Sungaila
Haynes and Boone LLP
600 Anton Boulevard, Suite 700
Costa Mesa, CA 92626

Attorneys for Amicus Curiae International Association of Defense Counsel

Mark A. Chavez
Nance Felice Becker
Chavez & Gertler LLP
42 Miller Ave.
Mill Valley, CA 94941

Attorneys for Amicus Curiae Public Citizen, Inc.

Deborah Joyce La Fetra
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Attorneys for Amicus Curiae Pacific Legal Foundation

Lisa Perrochet
John Frederick Querio
Felix Shafir
Horvitz & Levy LLP
3601 West Olive Ave., 8th Floor
Burbank, CA 91505

Attorneys for Amicus Curiae Association of Southern California Defense Counsel

Barbara A. Jones
AARP Foundation Litigation
200 South Los Robles, Suite 400
Pasadena, CA 91101

Attorneys for Amicus Curiae AARP

Leland Chan
California Bankers Association
1303 J Street, Suite 600
Sacramento, CA 95814

Attorneys for Amicus Curiae California Bankers Association

Judge John W. Vineyard, Dept. 12
Superior Court, Riverside County
4050 Main Street
Riverside, CA 92501

Fourth Appellate District, Div. 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

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Kristine Neale