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June 11, 2009

BY COURIER

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *In re Tobacco II Cases*, No. S147345

Dear Chief Justice George and Associate Justices:

The Chamber of Commerce of the United States of America (the "Chamber"), through its attorneys, submits this letter as *amicus curiae* in support of the petition for rehearing filed on June 2, 2009, by Respondents Philip Morris USA Inc., *et al.*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In fulfilling that role, the Chamber has appeared many times before this Court.

Although the Chamber rarely appears at the rehearing stage, the issue presented in this petition for rehearing is of vital importance to the Chamber's members, and the case is among the few that warrants the unusual step of rehearing on the merits. In deciding that unnamed class members may pursue claims under the Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* ("UCL"), when they lack standing to pursue these claims individually, a majority of the Court (but only a plurality of its permanent members) has returned California to the far fringes of American procedural jurisprudence.

Notwithstanding clear contrary direction from the voters in Proposition 64, the majority revived the very "nonclass class action" that Proposition 64 targeted for extinction. For the moment, at least, millions of uninjured persons may be brought into class-wide proceedings in the California courts so long as a single person injured by a

challenged practice may be found and recruited to serve as a class representative. Proposition 64 required private plaintiffs to plead and prove injury in fact as a result of the alleged unfair competition, eliminated nonclass "private attorney general" actions on behalf of the general public, and required that any representative action brought by a private citizen comply with rules governing traditional class actions. That is, Proposition 64 was designed to subject the "representative" action under the UCL to the same strictures as every other class action, not to create yet another California-specific procedural device under which one person with standing could claim a right to multiply his relief by invoking other persons who could not have sued individually. A class that aggregates uninjured persons who would lack standing to pursue their claims individually is fundamentally not a *bona fide* class at all. The unique hybrid created by the majority, in which only one member of a class need have standing to sue, changes the class action from a device that *aggregates* claims that could have been brought independently into a device that simply *multiplies* a single plaintiff's settlement leverage.

Proposition 64 recognized the need to curb the misuse of the UCL as a means of generating attorneys' fees by creating hydraulic pressure to settle where no injury had been demonstrated. Lawsuits that do not address widespread *injury* not only fail to create a corresponding public benefit but create unacceptable public costs: they clog courts at taxpayer expense, and cost California jobs and economic prosperity. They "threaten[] the survival of small businesses and forc[e] businesses to raise their prices or to lay off employees to pay lawsuit settlement costs or to relocate to states that do not permit such lawsuits." Prop. 64 § 1, subd. (c). Permitting class actions to proceed where only *one* class member has standing would eviscerate the reforms in Proposition 64 while leaving in place the greater part of the problems the Proposition was intended to address.

The majority's holding also sharply diverges from federal class-action law and creates uncertainty for companies conducting business in California. As explained in the petition, in federal court, the standing requirements that apply to the named plaintiffs also apply to absent class members. See Petition at 3 & n.1. The majority claimed to follow federal precedent, but relied on a reversed trial court decision that conflicts with ample and uniform federal appellate authority. Because of the conflict between federal procedure and the majority's view of California procedure, a company's potential liability with respect to consumers who were not injured by a challenged practice will depend on the forum hearing a lawsuit.

The burden of the erroneous decision in this case falls on Chamber members and other businesses, who are the primary targets of class actions and often face potentially ruinous liability in such actions. The combination of the risk of substantial liability and high litigation costs often induces companies to settle even unfounded class actions.

Improper extensions of class treatment transform a limited dispute focused on adjudication of the merits to one settled, regardless of the merits, merely from fear. Excessive and unwarranted exposure to the class device forces businesses to pay for spurious claims, damages the business environment, discourages new business enterprises, stunts job growth, and limits consumer choices. That is, the majority's state-law procedural innovation—creating lawsuits that pose class risks but rest on a showing of only a single individual injury—provides the same disincentives for businesses to enter or remain in California that motivated Proposition 64 to restore the balance that the majority has upset.

In light of those significant and adverse practical effects, the Court should not remove California from the mainstream of class-action jurisprudence when the Court's permanent members are equally divided on the issue. Rehearing should be granted and the judgment altered to affirm decertification of the class.

Respectfully submitted,

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CERTIFICATE OF SERVICE
S147345

I, Kristine Neale, declare:

I am over the age of eighteen years and not a party to the within-entitled action. My business address is Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On June 11, 2009, I served a copy of the within document(s):

AMICUS LETTER

☒ By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail at Palo Alto, California addressed as set forth below.

☐ By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an overnight service agent for delivery.

☐ I caused the above listed documents to be served by **PERSONAL DELIVERY** on the following individuals:

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the 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 declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 11, 2009 at Palo Alto, California.

Kristine Neale

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