No. 14-15670

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KATIE KANE et al.,
Plaintiffs—Appellants,

v.

CHOBANI, INC.,
Defendant—Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
LUCY H. KOH, DISTRICT JUDGE • CASE NO. 12-CV-02425-LHK

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT—APPELLEE CHOBANI, INC.

[All parties have consented. FRAP 29(a).]

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by amicus curiae Chamber of Commerce of the United States of the following corporate interests:

a. Parent companies of the corporation or entity:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation or entity:

None.

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's leading business federation, representing 300,000 direct members and representing indirectly the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as amicus curiae in cases involving issues of national concern to American business.

Cases raising significant questions about class actions are of particular concern to the Chamber and its members. This case involves the issue of who has standing to bring a class action suit against a business for using truthful but allegedly misleading descriptions of ingredients in a food widely sold throughout the United States. The Chamber's members are often defendants in such lawsuits, which are becoming increasingly prevalent.

The Chamber's members include businesses who were beneficiaries of Proposition 64, the California voter-approved ballot measure that narrowed the class of persons eligible to bring lawsuits for violation of

California's Unfair Competition Law. It is well-suited to provide the Court with guidance in addressing the purpose of Proposition 64 and how that purpose should inform the Court's interpretation of the standing requirement at issue here and in similar cases now pending throughout this Circuit.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

The Chamber obtained consent of the parties to file this brief. Accordingly, this brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Under California's unfair competition law (UCL), private parties may bring suit for injunctive relief and restitution against defendants who have engaged in unlawful, unfair, or fraudulent business practices. But to have standing to sue, the private plaintiff must show that he or she personally suffered an injury in fact and lost money or property "as a result of" the allegedly wrongful conduct. For fraud-based claims, this means the plaintiff must show he or she *actually relied* on the misrepresentation to his or her detriment. Merely pointing out that the defendant said something that was untrue or misleading is *not enough*.

California voters imposed the "as a result of" (i.e., reliance) requirement via Proposition 64. Their goal was to stop attorneys from filing "shakedown" lawsuits to extort settlements from California businesses by suing under the UCL even though their clients were not actually harmed by the purportedly wrongful business practices.

In this suit, plaintiffs claim that the labels on defendant Chobani's products were technically misleading because they used the phrase "evaporated cane juice" to refer to added sugar and described the product as "natural" even though fruit juices and spices were added "for color."

These claims sound in fraud and thus require plaintiffs to plead actual reliance on the purported misrepresentations. The district court determined—correctly—that plaintiffs had not adequately pleaded reliance on these "misrepresentations" because they failed to sufficiently and plausibly explain how they could possibly have understood that (a) "evaporated cane juice" was not an added sweetener, and (b) a product containing ingredients "for color" did not contain color additives.

On appeal, plaintiffs make arguments designed to avoid the reliance requirement. Plaintiffs' arguments should be rejected.

First, this Court should reject plaintiffs' unsupported assertion that "actual reliance" does not have to be "reasonable." The California Supreme Court did not suggest that reliance could be "actual" without also being reasonable and justified, and requiring reasonable reliance is most consistent with Proposition 64's goal of curbing frivolous lawsuits.

Second, this Court should reject plaintiffs' argument that they do not need to plead and prove that they were actually deceived by the misrepresentation as required for fraud-based UCL claims because a misleading label renders a product "misbranded" and "illegal" to buy and sell, and selling contraband is distinct from fraud. This argument is

absurd because the products are not "illegal" vis-à-vis consumers like plaintiffs. More important, this argument should be exposed for what it is: an attempt to create standing to bring a UCL claim without showing anything more than that the defendant made an allegedly false or misleading statement about its products—exactly what the California Supreme Court has said is *not* enough.

Reversing the district court's judgment in this case would result in reverting to the pre-Proposition 64 days; attorneys would scour records to discover any alleged technical violation that might support a profitable lawsuit even though the benefits to the public from the suit were minimal or non-existent. California voters rejected that approach a decade ago. The district court's sound decision to dismiss this suit at the pleading stage correctly accords with the text and purpose of Proposition 64. This Court should affirm the judgment to provide definitive guidance for the dozens of similar suits like this percolating in California federal district courts.

ARGUMENT

I. GENERAL BACKGROUND REGARDING CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 (UCL): PROPOSITION 64 SIGNIFICANTLY ALTERED THE UCL TO REQUIRE PLAINTIFFS TO PLEAD AND PROVE CAUSATION.

A. The UCL's three "prongs"

California Business & Professions Code § 17200 is California's Unfair Competition Law (UCL). Its purpose is "to protect consumers and competitors by promoting fair competition in commercial markets for goods and services." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1359 (2010) (quotation marks and citations omitted).

The UCL defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice." Bus. & Prof. § 17200; *In re Tobacco II Cases* (*Tobacco II*), 46 Cal. 4th 298, 311 (2009). Because the definition is disjunctive, California courts have treated each prong as a distinct claim. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999).

First, the UCL prohibits business acts or practices that are "unlawful" under state and federal statutes and regulations. In other words, California courts have read the UCL to permit claimants to

"borrow" another law and assert that law as the predicate for a UCL violation. *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992).

Second, the UCL prohibits business acts or practices that are "unfair." In cases involving consumers, the test for what constitutes an "unfair" business act or practice is unsettled. *Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 594 (2009). A current trend is to apply the test articulated in *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394 (2006). *Davis*, 179 Cal. App. 4th at 596. Under that test, a practice is "unfair" if (1) the consumer injury is substantial, (2) the injury is not outweighed by any countervailing benefits to consumers or competition, and (3) the injury is one the consumers themselves could not reasonably have avoided. *Davis*, 179 Cal. App. 4th at 597-98. *But see, Graham v. Bank of America, N.A.*, 226 Cal. App. 4th 594, 612-13 (2014) ("unfair" conduct must either be tethered to a violation of a specific constitutional or legal provision, threaten an incipient violation of antitrust law, or violate the spirit of antitrust law).

Third, the UCL prohibits business acts or practices that are "fraudulent." California courts have held that a business practice is

"fraudulent" if it is likely to deceive the public. *Comm. On Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 211 (1983).

Plaintiffs frequently bring UCL claims as class actions. *Tobacco II*, 46 Cal. 4th at 311. Plaintiffs, like those here, will typically invoke all three prongs as separate claims in the hope at least one of them survives.

B. Proposition 64's amendments to the UCL require that a plaintiff must show actual reliance on any challenged misrepresentation in order to have standing.

Before November 2004, the UCL permitted "'any person acting for the interests of itself, its members or the general public'" to bring suit for equitable relief under the provisions described above. *Tobacco II*, 46 Cal. 4th at 314; *Californians For Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 227 (2006). Thus, attorneys could troll the universe of California business practices and sue for anything they could argue was unlawful, unfair, or fraudulent, and extort a settlement from the offending business—even if no actual harm to competition or consumers had occurred. *See Tobacco II*, 46 Cal. 4th at 316.

In November 2004, the voters of California passed Proposition 64, which "worked a sea change in litigation to enforce the unfair competition law." *Tobacco II*, 46 Cal. 4th at 329 (Baxter, J., concurring and

dissenting). Proposition 64 amended the UCL to restrict standing to assert a claim to plaintiffs "'who [have] suffered injury in fact and [have] lost money or property as a result of unfair competition.'" *Mervyn's*, 39 Cal. 4th at 228; *see* Bus. & Prof. § 17204 (a UCL cause of action may be prosecuted only "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition").

The purpose of Proposition 64 was to combat the "abuse by attorneys who used [the UCL] as the basis for legal shakedown schemes and frivolous lawsuits." *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1590 (2008) (internal quotation marks omitted); *see also Tobacco II*, 46 Cal. 4th at 316. As explained in more detail by the California Supreme Court:

> In Proposition 64, as stated in the measure's preamble, the voters found and declared that the UCL's broad grant of standing had encouraged "[f]rivolous unfair competition lawsuits [that] clog our courts[,] cost taxpayers" and "threaten[ ] the survival of small businesses...." (Prop. 64, § 1, subd. (c) ["Findings and Declarations of Purpose"].) The former law, the voters determined, had been "misused by some private attorneys who" "[f]ile frivolous lawsuits as a means of generating attorneys' fees without creating a corresponding public benefit," "[f]ile lawsuits where no client has been injured in fact," "[f]ile lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant," and

> "[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." (Prop. 64, § 1, subd. (b)(1)–(4).) "[T]he intent of California voters in enacting" Proposition 64 was to limit such abuses by "prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact" (*id.,* § 1, subd. (e)) and by providing "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, subd. (f)).

Mervyn's, 39 Cal. 4th at 228.

In the much-anticipated *Tobacco II* decision, *see* 46 Cal. 4th at 306, the California Supreme Court interpreted the meaning of the "as a result of" language that Proposition 64 added to the UCL. The court concluded that "as a result of" required a showing that the defendant's conduct immediately caused the plaintiff to have lost money or property. *Id.* at 327; *see also Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (2011). This meant a UCL fraud plaintiff had to demonstrate reliance, because "reliance is the causal mechanism of fraud." *Tobacco II*, 46 Cal. 4th at 326. Further, the court explained that "because it is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL, we must construe the phrase 'as a result of' in light of this intention to limit such actions." *Id.* Accordingly, the court

specifically concluded that "as a result of" required a showing of "*actual* reliance." *Id.* (emphasis added). Thus, it is not enough that some hypothetical person might be deceived. The plaintiff must have been actually deceived.

Although *Tobacco II* involved the UCL's "fraud" prong, later California decisions confirm that *Tobacco II*'s holding—that plaintiffs must demonstrate "actual reliance" on the defendant's misrepresentation—also applies to the "unlawful" prong where the plaintiff's claims are predicated upon a misrepresentation. *Kwikset*, 51 Cal. 4th at 326, n.9. In other words, where "[t]he theory of the case is that [the defendant] engaged in misrepresentations and deceived consumers," the actual reliance requirement of *Tobacco II* applies regardless of which UCL prong is invoked. *Id.*; *Durell,* 183 Cal. App. 4th at 1363 ("[T]he reasoning of *Tobacco II* [concerning the reliance requirement] applies equally to the 'unlawful' prong of the UCL when, as here, the predicate unlawfulness is misrepresentation and deception."); *Hale v. Sharp Healthcare*, 183 Cal. App. 4th 1373, 1385 & n.6 (2010) (same). In cases involving conduct that is allegedly "unlawful" for some reason *other* than that it violates laws against fraud and misrepresentation, a different mechanism of causation

other than reliance may be more appropriate. *Kwikset*, 51 Cal. 4th at 326, n.9. (*See* Appellee's Brief 43-46 (explaining that the laws plaintiffs claim were violated are fraud and misrepresentation statutes, not laws involving some other type of wrongdoing).) But no matter which prong of the UCL plaintiffs invoke, they must show reliance where their theory is that the defendant misled them, because reliance is the causal mechanism of fraud, and causation must be shown under Proposition 64.

Simply put, under current California law, the only plaintiffs who may sue for any claims arising out of fraud and misrepresentation under the UCL are those who were actually "motivated to act or refrain from action based on the truth or falsity of a defendant's statement." *Kiwkset*, 51 Cal. 4th at 327, n.10. Plaintiffs cannot sue for any claims predicated on fraud and misrepresentation under the UCL if all they can show is that the defendant made a false or misleading statement. *Id.*

C. The fundamental change brought by Proposition 64 provides an important check against coerced settlements.

Courts and commentators have long "noted the risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (citing *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d

672, 677-78 (7th Cir. 2009)). UCL claims, although equitable in nature, give rise to restitutionary remedies that can create exposure in the multiple millions—exposure that companies often feel compelled to avoid. *See, e.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 862-63 (9th Cir. 2012) ($10.6 million settlement of UCL class action, including $2 million for attorney fees and $2.75 million to distribute to class members). Defendants are often compelled to settle class actions because the aggregation of "tens of thousands of potential claimants" makes "the risk of an error . . . unacceptable." *AT&T Mobility*, 131 S. Ct. at 1752. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*

Moreover, the risk of devastating liability is not the only reason that class action defendants face intense pressures to settle. In view of the onerous discovery obligations that class action defendants face even before class certification, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559-60 (2007). The cost of litigating such cases can be so great that settlement can become an economically sensible decision.

As the United States Supreme Court recently observed, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008). And the costs of settling in terrorem class actions do not fall exclusively on individual defendants; the costs necessarily drag down the economy. "No one sophisticated about markets believes that multiplying liability is free of cost." *SEC v. Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (en banc) (Boudin, J., concurring).

Here, as explained in greater detail in the next two sections, Proposition 64's requirement of causation ensures that defendants are exposed to class action suits only when consumers are really harmed.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS BECAUSE THEY DID NOT SUFFICIENTLY ALLEGE RELIANCE.

A. "Actual reliance" must be reasonable.

In arguing that they did actually rely on Chobani's purportedly misleading food labels, plaintiffs contend there is no room for consideration of whether their purported reliance was objectively reasonable because "the standard is not 'reasonable reliance' or 'justifiable

reliance,' but 'actual reliance.'" (Appellant's Opening Brief (AOB) 28.) Plaintiffs provide no authority for their assertion that the reliance required under *Tobacco II* need not be "reasonable." Nor could they, because an examination of *Tobacco II* reveals that the reliance required to have standing to sue must indeed be reasonable.

Tobacco II borrowed the reliance requirement from the ordinary law of fraud, which requires reliance to be *actual and justified*. 46 Cal. 4th at 306, 326 (citing *Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092, 1108 (2009) (elements of fraud include "justifiable reliance")); *see generally* 5 B.E. Witkin, Summary of California Law *Torts* § 808, at 1164 (10th ed. 2005); *id.* § 812, at 1173. Importantly, *Tobacco II* employed the actual reliance requirement because doing so comports with Proposition 64's purpose of limiting lawsuits, including frivolous lawsuits that targeted "'ridiculously minor violations of some regulation or law.'" 46 Cal. 4th at 316, 326. Requiring plaintiffs' reliance on the purported misrepresentation to be reasonable is most consistent with that purpose. Nothing in *Tobacco II* says that reliance that is somehow "actual" but *not* "reasonable" would be sufficient to establish standing under Proposition 64.

Tobacco II further explained that an inference of reliance arises from a showing that the misrepresentation was material. 46 Cal. 4th at 326. "'A misrepresentation is judged to be "material" if "a *reasonable* man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."'" *Id.* (emphasis added); *Kwikset*, 51 Cal. 4th at 333 ("Made in U.S.A." label misleading because "such marketing might sway *reasonable* people in their purchasing decisions") (emphasis added); *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 229, n.3 (2013) ("We use the term 'misrepresentation' in this context to refer to both a false representation and a representation that is likely to deceive a *reasonable* person.") (emphasis added); *Morgan v. AT & T Wireless Services, Inc.*, 177 Cal. App. 4th 1235, 1256 & n.11 (2009) (noting that in holding that the UCL fraud prong does not require proof of "actual falsity and reasonable reliance pleaded with specificity" as normal fraud actions do, the court was referring to the *merits* of the claim and *not* standing under Proposition 64—thus implying that reasonable reliance is required at the standing stage). Thus, courts have recognized that the required reliance does include an element of reasonableness.

B. Plaintiffs do not allege reasonable reliance on any misrepresentation.

Here, the district court ruled that plaintiffs could not reasonably have understood "dried cane syrup" in the list of yogurt ingredients to be an added sweetener and yet understood "evaporated cane juice" not to be. (*See* ER 15.) And it ruled that plaintiffs could not reasonably have believed a yogurt containing concentrated fruit juice "for color" did not contain added colors. (*See id.* at 21-22.) Without facts supporting their actual, reasonable reliance, plaintiffs lacked standing to sue and their case was properly dismissed with prejudice.[1] *See Block v. eBay, Inc.*, 747 F.3d 1135, 1140 (9th Cir. 2014) (dismissal of UCL claim warranted where plaintiff did not plausibly allege he relied on alleged misrepresentation and "a reasonable person in [his] position could not have relied on such a representation.")

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[1] The specific reasons why plaintiffs have failed to plead their reliance adequately under Federal Rules of Civil Procedure 8 and 9(b) is addressed in the Appellee's Brief at pages 22-41.

III. RELIANCE IS ALWAYS REQUIRED WHEN A CONSUMER ALLEGES UCL VIOLATIONS BASED ON PURPORTEDLY MISLEADING FOOD LABELS, REGARDLESS OF WHICH UCL PRONG IS INVOKED.

A. Plaintiffs' claims are based on fraud, not misbranding.

Plaintiffs argue that reliance need not be demonstrated at all because they were harmed simply as a result of acquiring an "illegal" "misbranded" product. Specifically, plaintiffs claim Chobani's yogurt was "illegal" to sell under California Health & Safety Code § 110760 and 21 U.S.C. § 331 because it was "misbranded." (AOB 41.) Plaintiffs then claim they "were harmed because they purchased products that they would not have purchased had they known that the sale was illegal and that it is a criminal offense to sell, hold, deliver, or receive in commerce Chobani's misbranded products." (*Id.* at 10.) Accordingly, plaintiffs argue, they have established they were injured merely "as a result of" having purchased Chobani's "worthless" products, so they have satisfied Proposition 64's causation requirement without having to show their reliance on what the labels said or did not say. (*See id.*) This argument should be rejected.

The only reason plaintiffs offer for describing Chobani's yogurt as illegally "misbranded" is that the labels were supposedly misleading. (*Id.* at 38 (citing Cal. Health & Safety Code § 110660 and 21 U.S.C. § 343(a)).)

The labels were misleading, plaintiffs say, because the labels described the kind of sweetening and coloring ingredients the yogurt contained in a way that did not alert plaintiffs to the true nature of those ingredients. The only conceivable cause of plaintiffs' remorse in buying Chobani's yogurt would be their reliance on the label to buy yogurt with ingredients they did not want. The gravamen of that action is misrepresentation, not the acquisition of an "illegal" and therefore "worthless" product.[2]

[2] Indeed, plaintiffs' argument that the yogurt is "worthless" to them because it is illegal to "hold" is frivolous. The statutes making it criminal to "hold" a misbranded products plainly refer to holding food for sale to the public, not holding it as an ultimate consumer. See *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 92 (1964) (describing criminal offense under 21 U.S.C. §§ 301-399f as involving "holding food (after interstate shipment and before ultimate sale)"); Cal. Health & Safety Code § 110030 (describing scope of statute as relating to sales). Indeed, the purpose of these statutes is to safeguard the consuming public; it would be absurd to interpret them as imposing criminal liability on the very people they are designed to protect. *Wiesenfeld Warehouse Co.*, 376 U.S. at 92 (noting that "the purpose of the legislation" is "to safeguard the consumer from the time the food is introduced into the channels of interstate commerce to the point that it is delivered to the ultimate consumer").

B. The only support plaintiffs provide for their argument that their "illegal sale" theory does not require a showing of actual reliance on the allegedly misleading label is inapposite and questionable case law.

First, plaintiffs cite *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145 (2010), for the proposition that "a UCL claim would exist for purchasers who bought a product that was illegal to sell or possess absent any reliance on product labeling." (AOB 42.) But—in addition to the fact it is not a standing case and was decided prior to *Kwikset* (holding that actual reliance must be shown in any UCL case predicated on fraud)—*Steroid Hormone* involved the sale of Schedule III narcotics. 181 Cal. App. 4th at 149. Such narcotics are illegal to sell and possess without a prescription, independent of what the label says. Here, plaintiffs' only basis for asserting Chobani's yogurt is illegal to sell is that its labels are misleading about the yogurt's ingredients—not because the yogurt itself is contraband. The only way plaintiffs could have been injured "as a result of" Chobani's selling "misbranded" yogurt is if they relied on the descriptions of the ingredients to get a kind of yogurt they did not actually want.

Second, plaintiffs cite *Medrazo v. Honda of N. Hollywood*, 205 Cal. App. 4th 1 (2012) (AOB 42), which involved a motorcycle seller who sold

motorcycles without a legally-required hanger tag disclosing certain charges. The court held that a plaintiff had standing to sue under the UCL "unlawful" prong even without a showing that she relied on the label. *Medrazo*, 205 Cal. App. 4th at 12. But, *Medrazo*, an intermediate Court of Appeal opinion, ignores the unequivocal statement by the Supreme Court in *Kwikset*, 51 Cal. 4th at 326, n.6, that reliance is required even under the "unlawful" prong where the claims arise out of misrepresentation, and incorrectly reads the Supreme Court's opinion in *Tobacco II*, 46 Cal. 4th at 325 & n.17, as holding that the "actual reliance" requirement did not apply to anything other than the "fraud" prong. (In fact, *Tobacco II* said its holding applied to fraud cases and left open the question of what causation must be shown in other cases that did not involve fraud.)

Medrazo is also inapposite because it is best understood as involving a statute that endowed motorcycle purchasers with certain rights to receive information on the hangar tags before deciding to negotiate a sale. *See* 205 Cal. App. 4th at 13. Thus, it was not the content of the label itself that really mattered—it was the plaintiff's right to see that information at a specific time in the negotiating process that mattered. *See id.* Here, in contrast, there is no allegation that the timing of plaintiffs' receipt of

information (no matter what it said) was material to their purchasing decision and that they did not receive the information at the appropriate time; plaintiffs allege solely that the content of the communication on the label was misleading. If the content of the communication is what Chobani allegedly got wrong, plaintiffs must establish the content of the communication caused their injury—and the only way to show that is to show they actually relied on the communication.

C. Plaintiffs' "illegal" product theory is inconsistent with Proposition 64.

At its core, plaintiffs' "illegal sale" theory posits that any person who purchases a food product with a label that can be described as misleading has acquired an "illegal" product and therefore may sue the manufacturer of the product simply for selling it to them. Accepting that theory would be an improper return to the pre-Proposition 64 era and contrary to California law. *See Tobacco II*, 46 Cal. 4th at 325 (rejecting argument that plaintiffs can establish standing under Proposition 64 merely by showing a "factual nexus" between the defendant's conduct and the plaintiff's injury); *U.S. Fid. & Guar. Co. v. Lee Investments LLC*, 641 F.3d 1126, 1133-34 (9th Cir. 2011) (Ninth Circuit is bound by the decisions of the California

Supreme Court in construing California law). As explained, before Proposition 64, plaintiffs could pursue UCL claims simply by showing a misrepresentation was made, regardless of whether they actually relied on that misrepresentation to their detriment. Under Proposition 64, plaintiffs must show more than simply that a misrepresentation was made that might mislead the general public; they instead must show actual reliance. *Kiwkset*, 51 Cal. 4th at 327, n.10. In particular, they have to show they *themselves* were *actually deceived*. Plaintiff's "illegal sale" theory is nothing more than slight-of-hand designed to evade Proposition 64's mandates and return to a regime where private persons can file lawsuits on behalf of the general public—a right Proposition 64 reserves for the California Attorney General and local public officials. *See Mervyn's,* 39 Cal. 4th at 228.

Plaintiffs' "illegal sale" theory has appeared in numerous federal district court cases besides this one,[3] and has been soundly rejected. *E.g.*,

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[3] Indeed, food mislabeling litigation has proliferated in this jurisdiction lately. *See* Paul M. Barrett, *California's Food Court: Where Lawyers Never Go Hungry*, Businessweek (Aug. 22, 2103), http://www.businessweek.com/articles/2013-08-22/californias-food-court-where-lawyers-never-go-hungry. This flood of litigation brought by particular plaintiffs' attorneys who are acting as "self-appointed cops" (*id.*) (continued...)

Wilson v. Frito-Lay N. Am., Inc., 961 F. Supp. 2d 1134, 1144-45 (N.D. Cal. 2013); *Figy v. Frito-Lay N. Am., Inc.*, No. 13-3988 SC, 2014 WL 3953755, at *8-9 (N.D. Cal. Aug. 12, 2014); *Swearingen v. Pac. Foods of Oregon, Inc.*, No. 13-CV-04157-JD, 2014 WL 3767052, at *2 (N.D. Cal. July 31, 2014); *Leonhart v. Nature's Path Foods, Inc.*, No. 5:13-CV-0492-EJD, 2014 WL 1338161, at *8 (N.D. Cal. Mar. 31, 2014); *Thomas v. Costco Wholesale Corp.*, No. 5:12-CV-02908-EJD, 2014 WL 1323192, at *7-8 (N.D. Cal. Mar. 31, 2014); *Swearingen v. Amazon Pres. Partners, Inc.*, No. 13-CV-04402-WHO, 2014 WL 1100944, at *2-3 (N.D. Cal. Mar. 18, 2014); *Figy v. Amy's Kitchen, Inc.*, No. CV 13-03816 SI, 2013 WL 6169503, at *3 (N.D. Cal. Nov. 25, 2013).

This Court should make clear once and for all that claims arising out of allegedly misleading food labels sound in fraud and misrepresentation, and that creative attempts to circumvent Proposition 64 will not be permitted. *See Durell*, 183 Cal. App. 4th at 1363 ("A consumer's burden of pleading causation in a UCL action should hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the

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(...continued)
is precisely the sort of resource-consuming "shakedown" litigation Proposition 64 was designed to curb.

consumer invokes. This is a case in which the 'concept of reliance' unequivocally applies [citation] and omitting an actual reliance requirement when the defendant's alleged misrepresentation has not deceived the plaintiff 'would blunt Proposition 64's intended reforms.'")

CONCLUSION

Which plaintiffs have standing to bring UCL claims based on food labeling is becoming an increasingly important issue. This Court should hold plaintiffs to Proposition 64's requirement that they adequately plead actual, reasonable reliance on the challenged food label. Doing so should emphasize for California federal district courts that the only lawsuits that can proceed are those where plaintiffs have actually been harmed. This Court should reject plaintiffs' "illegal sale" theory and affirm the district court's correct conclusion that plaintiffs alleging mislabeling claims—no

matter how characterized—must show actual reliance on the allegedly misleading label in order to have standing to pursue such claims under the UCL.

November 14, 2014

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I hereby certify that on November 14, 2014, I electronically filed the foregoing BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT—APPELLEE CHOBANI, INC. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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