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BARGER & WOLEN LLP

June 9, 2009

Hon. Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
Room 1295
San Francisco, CA 94102-4797

Re: *Safeco Insurance Co. v. Superior Court of Los Angeles*, Case No.
B213044

**NFIB Small Business Legal Center Amicus Curiae
Letter Supporting Petition for Review**

Dear Chief Justice George and Associate Justices:

The National Federation of Independent Business (NFIB) Small Business Legal Center files this amicus curiae letter pursuant to Rule 8.500(g) of the California Rules of Court. The NFIB Small Business Legal Center respectfully requests that this Court grant the Petitioner's Petition for Review in the above-referenced case.

**I. IDENTITY AND INTEREST OF AMICUS CURIAE NFIB SMALL
BUSINESS LEGAL CENTER**

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of NFIB. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide, including over 21,000 in California. To fulfill its role as

the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses, such as this matter.

NFIB represents small employers who typically have about five employees and report gross sales of \$350,000. NFIB's average member nets \$40,000 to \$50,000. These members are the small businesses that make up the backbone of America's economy. Two-thirds of new job growth comes from small business. NFIB members represent an important segment of the business community – a segment with challenges and opportunities that distinguish them from publicly traded companies.

Small business owners do not have the resources to defend against protracted litigation. This is why NFIB/California worked aggressively to pass Proposition 64 in 2004 to close a loophole in state law that allowed plaintiffs' attorneys to file shake-down lawsuits against small firms. Allowing precertification discovery for plaintiffs will negate Proposition 64's intent to rein in aggressive trial attorneys. Small businesses will once again be forced to pay settlements to plaintiffs bringing meritless claims without standing to avoid protracted, expensive litigation.

II. ALLOWING DISCOVERY BY PLAINTIFFS WITHOUT STANDING VITIATES THE EFFECT OF PROPOSITION 64 AND JEOPARDIZES SMALL BUSINESSES

Proposition 64 requires that the only private persons who may sue under California's unfair competition laws are those who have suffered an injury in fact.¹ Uninjured private persons no longer have standing to bring such suits. The court of appeal's opinion completely negates Proposition 64 by allowing plaintiffs who have not suffered an injury in fact to file unfair competition lawsuits.

In the present case, the plaintiff does not have standing. Nevertheless, the court of appeal granted discovery so that the plaintiff's attorney can attempt to find a substitute plaintiff that has suffered an injury in fact. Granting discovery to plaintiffs without standing in this and similar cases will vitiate the effect of Proposition 64 by permitting attorneys to bring lawsuits without an injured client. When discovery is granted,

¹ *Branick v. Downey Sav. & Loan Ass'n*, 39 Cal.4th 235, 240 (2006).

businesses will find themselves entangled in a lawsuit against a plaintiff with no standing. The cost for these discovery fishing expeditions will be borne by the defendant-businesses. In a perverse turn of events, plaintiffs' attorneys will get paid by a business to find a plaintiff to sue the business. This threat of protracted discovery litigation will provide plaintiffs' attorneys with a hammer to force quick settlements.

These aggressive legal actions will unduly impact small businesses. These firms are least able to defend against a lawsuit, and thus more likely to settle with plaintiffs. Surveys show that legal expenses continue to significantly burden small business owners. A 2005 survey showed that 65 percent of small businesses sought the advice or assistance of attorneys over the course of one year, with 10 percent incurring legal costs of at least \$25,000.² Over a quarter of respondents were involved in at least one legal dispute in the year preceding the survey.³ Unsurprisingly, 47 percent of small business owners were at least "somewhat" concerned that they will be defendants in a liability suit in the next few years.⁴

This Court must uphold the objective of Proposition 64. By passing Proposition 64, voters mandated that the California Attorney General or local government prosecutors bring suits on behalf of the public. Voters further rejected abusive actions by aggressive private plaintiffs' counsel. The court of appeal's decision completely undoes the protections offered by Proposition 64. This Court must overturn the decision to protect rights of the public and the welfare of California's businesses.

III. CONFLICTING COURTS OF APPEALS' OPINIONS THREATEN CALIFORNIA'S BUSINESSES AND ECONOMY

The petition should be granted to reconcile the opinions of courts of appeal and uphold the intent of Proposition 64. Conflicting appellate decisions evidence confusion

² William J. Dennis, Jr., *NFIB National Small Business Poll: Use of Lawyers*, NFIB Research Foundation, Volume 5, Issue 2 (2005), at 2-3, available at http://www.411sbfacts.com/files/UseofLawyers_poll.pdf.

³ *Id.* at 4.

⁴ William J. Dennis, Jr., *NFIB National Small Business Poll: Liability*, NFIB Research Foundation, Volume 2, Issue 2 (2002), at 8-9, available at [http://www.411sbfacts.com/files/liability\[1\].pdf](http://www.411sbfacts.com/files/liability[1].pdf).

over the proper analysis for ruling on a motion to compel precertification discovery when the named plaintiff does not have standing. Trial courts need guidance on the limited circumstances in which plaintiffs – with no standing - can undertake these discovery fishing expeditions.

In the oft-cited case *Parris v. Superior Court*, 109 Cal.App.4th 285 (2003), the court stated that rulings on motions to compel precertification discovery should “expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances.”⁵ Unfortunately, application of the *Parris* test to cases involving plaintiffs without standing has led to unjust outcomes that evidence little consideration for the rights of defendants.

For example, in *CashCall Inc. v. Superior Court*, 159 Cal.App.4th 273 (2008), the court acknowledged that standing remains a threshold issue.⁶ Nevertheless, the *CashCall* court took an illogical step. Rather than just allowing counsel to amend a complaint by replacing or adding a plaintiff with actual standing, the *CashCall* court granted discovery to a plaintiff without standing in order to find a plaintiff with standing.⁷ Allowing amendment of a complaint still presumes the case is in its threshold. However, permitting the case to proceed to the discovery stage moves things far beyond the threshold issue of standing. A plaintiff without standing should not participate in this advanced stage of the proceedings.

CashCall is distinguishable from *Best Buy Stores, L.P. v. Superior Court*, 137 Cal.App.4th 772 (2006), another case the court of appeal cited in support of the precertification discovery order under dispute here. In *Best Buy* the original plaintiff had standing. The court of appeal in this case failed to acknowledge the important distinction between *Best Buy* and *CashCall* in applying the *Parris* test. Again, this balancing test

⁵ 109 Cal.App.4th 285, 301 (2003).

⁶ 159 Cal.App.4th at 284.

⁷ *Id.* at 290.

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requires courts to recognize “potential abuses of the class action procedure” and consider “the rights of the parties.”⁸

Common sense dictates that such abuses are far more likely by plaintiffs with no standing. In fact, in this case the trial and appellate courts acknowledged plaintiff’s exploitation of the class action procedure. She pursued discovery after she knew she had no standing and no interest in the action. Nevertheless, the court of appeal concluded that the rights of theoretical class members outweighed the actual and potential harm to defendants. This represents a shift in the *Parris* test that will exploit class action procedures. In weighing the risk of abuse, the court failed to consider the injury that will result from the precedent-setting effect of its decision. Appellate courts must recognize the potential damage that a decision will render on future litigants. Here the order will allow attorneys to file suit with place-holder plaintiffs and engage in expensive and time-consuming litigation. California businesses, and ultimately California’s consumers, will bear the cost of these hypothetical cases.

CONCLUSION

Because of the real threat presented by the court of appeal’s decision, this Court should grant the Petition for Review.

Respectfully submitted,



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⁸ 109 Cal.App.4th at 301.

SERVICE LIST

***Safeco Insurance Company of America v. Superior Court*
Court of Appeal, 2nd App. District, Civil No. B213044**

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PROOF OF SERVICE
Safeco Insurance Company of America v. Superior Court
Court of Appeal, 2nd App. District, Civil No. B213044

WASHINGTON, DISTRICT OF COLUMBIA

I, the undersigned declare:

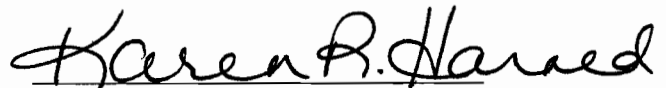
I am employed in the District of Columbia. I am over the age of 18 and not a party to this action. My business address is 1201 F Street, N.W., Suite 200, Washington, D.C. 20004.

On June 9, 2009, I served the document described as The NFIB Small Business Legal Center Amicus Curiae Letter Supporting Petition for Review on the California Supreme Court, by placing true copies of this document in sealed envelopes and addressed as noted on the attached Service List.

I also caused the original and eight copies of the document to be delivered to the California Supreme Court by Federal Express overnight delivery, shipping charges billed to sender.

I declare under penalty of perjury under the laws of the District of Columbia which licenses me as an attorney that the foregoing is true and correct.

Executed in Washington, D.C., on June 9, 2009.



Karen R. Harned