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8 SUPERIOR COURT OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN JOAQUIN

10 JOSE A ARIAS, Individually, and acting in the)
11 interest of other current and former employees,)
12 Plaintiff,)
13 v.)
14 ANGELO DAIRY, a California business)
15 organization, form unknown, LUIS M. ANGELO,)
16 MARIA D. ANGELO and JOE ANGELO,)
17 individuals, LUIS M. ANGELO, MARIA D.)
18 ANGELO and JOE ANGELO dba ANGELO)
19 DAIRY; and DOES 1 through 20, inclusive)
20 Defendants.)

Case No. CV028612

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO STRIKE
CAUSES OF ACTION
(CCP §435; §436(b))

(THIS CASE HAS BEEN ASSIGNED TO JUDGE
CARTER P. HOLLY IN DEPARTMENT 42 FOR ALL
PURPOSES INCLUDING TRIAL)

Date: July 21, 2006
Time: 9:00 a.m.
Courtroom: Dept. 42
Judge: Carter P. Holly

19 I. INTRODUCTION

20 In this action, Plaintiff seeks to recover damages and obtain relief on behalf of
21 himself and for other unnamed but allegedly similarly situated employees and former employees
22 of Angelo Dairy, but has failed to comply with the procedural requirements for a class action
23 complaint.

24 Plaintiff attempts to bring certain causes of action under Business and Professions
25 Code §§17200 *et. seq.*, with himself as the representative of the interests of unnamed parties. But
26 Plaintiff ignores that Proposition 64, which took effect on November 3, 2004, requires that such
27 a case comply with the class action requirements under CCP §382. In addition, Plaintiff brings
28 ///

1 other causes of action without reference to the UCL on behalf of unnamed parties, again, without
2 complying with CCP §382 as required by California law.

3 California Rule of Court 1851 sets forth specific pleading requirements for class
4 actions, and the First Amended Complaint does not comply with such requirements. Accordingly,
5 Defendants request that the court strike the Seventh through Eleventh Causes of Action pursuant
6 to CCP §436(d).

7 **II. FACTS**

8 Plaintiff Jose A. Arias ("Plaintiff") filed the First Amended Complaint in this
9 matter on April 19, 2006, and through his counsel agreed to allow an extension for Defendants
10 to respond until June 19, 2006. In the First Amended Complaint (FAC), Plaintiff alleges that he
11 "brings this action under California's Unfair Competition Law ("the UCL")(Business and
12 Professions Code §§17200, *et. seq.*) **individually and acting for the interests of other current
13 and former employees of Defendants** to enforce California labor laws and regulations." (FAC
14 ¶1, emphasis added). Plaintiff seeks injunctive relief, restitution, and other damages on behalf
15 of himself "and for all others who have a common interest," seeking alleged unpaid wages,
16 penalties, and other damages.

17 Plaintiff's First through Sixth Causes of Action are brought solely on his own
18 behalf. Plaintiff also brings a number of other causes of action on behalf of unnamed parties
19 without reference to the UCL. These causes of action are the Seventh Cause of Action (Tortious
20 Breach of the Warranty of Habitability), Eighth Cause of Action (Breach of Contract), and
21 Eleventh Cause of Action. (Labor Code §§2698 *et. seq.*) His Ninth and Tenth Causes of Action
22 are brought on his own behalf, and "in the interest of other current and former employees" under
23 the UCL.

24 The FAC does not identify this action as a class action, nor does it contain
25 allegations to support class certification under CCP §382.

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1 **III. THE COURT MAY STRIKE A COMPLAINT THAT DOES NOT COMPLY WITH**
2 **PLEADING REQUIREMENTS**

3 The court may strike out all or any part of any pleading not drawn or filed in
4 conformity with the laws of this state, a court rule, or an order of the court. CCP §436(b).
5 California Rule of Court 1851 requires a complaint in a class action to include the designation
6 "CLASS ACTION" in the caption, and requires the complaint to include a separate heading
7 entitled "CLASS ACTION ALLEGATIONS" under which the plaintiff must describe how the
8 requirements for class certification are met. Plaintiff's claims on behalf of unnamed parties under
9 the UCL require that this case be treated as a class action, thereby triggering the requirements of
10 CRC 1851. (B&P Code §17203). CCP §382 requires generally that claims brought on behalf of
11 those who are not named as parties to a lawsuit be treated as class actions, also triggering the
12 requirements of CRC 1851.

13 Plaintiff in this case has not complied with either of these requirements, and the
14 court should strike the Seventh through Eleventh Causes of Action for failure to comply with
15 CRC 1851.

16 **IV. PROPOSITION 64 REQUIRES REPRESENTATIVE ACTIONS UNDER THE**
17 **UCL TO BE CLASS ACTIONS**

18 Before Proposition 64 passed in November of 2004, an individual could bring an
19 action under the UCL on behalf of unnamed parties without the necessity of complying with
20 California law addressing class action procedures. On November 2, 2004, the people of the State
21 of California enacted Proposition 64, designed in part to control the proliferation of
22 "representative" actions under the UCL. Ballot initiatives take effect the day following the
23 election, unless a contrary intention is stated in the measure. California Constitution, Art. II,
24 §10(a). Thus, Proposition 64 took effect on November 3, 2004.

25 In the Voter Information Guide supplied by the Secretary of State, voters were told
26 that one of the purposes of Proposition 64 was to require private plaintiffs pursuing representative
27 actions under the UCL to "comply with procedural requirements applicable to class action
28 lawsuits." (Voter Information Guide, Page 1, available at www.ss.ca.gov, attached hereto as
Exhibit "A" for the convenience of the court). The Voter Information Guide informed the voters

1 that, if Proposition 64 passed, the law would require "... that unfair competition lawsuits initiated
2 by any person, other than the Attorney General and local public prosecutors, on behalf of others,
3 meet the additional requirements of class action lawsuits." (*Id.* at page 2).

4 Proposition 64 made UCL lawsuits brought on behalf of unnamed parties class
5 actions by amending B&P §17203 with the following language:

6 Any person may pursue representative claims or relief on behalf of others only if
7 the claimant meets the standing requirements of Section 17204 and complies with
8 Section 382 of the Code of Civil Procedure, but these limitations do not apply to
9 claims brought under this chapter by the Attorney General, or any district attorney,
10 county counsel, city attorney, or city prosecutor in this state.

11 CCP §382 codifies and authorizes class action lawsuits under California law as follows:

12 If the consent of any one who should have been joined as plaintiff cannot be
13 obtained, he may be made a defendant, the reason thereof being stated in the
14 complaint; and when the question is one of a common or general interest, of many
15 persons, or when the parties are numerous, and it is impracticable to bring them
16 all before the court, one or more may sue or defend for the benefit of all.

17 The California Supreme Court has explained that class actions are a product of the court
18 of equity, and are codified under California law in CCP §382. (*City of San Jose v. Superior*
19 *Court* (1974) 12 Cal.3d 447, 458.) There, the Court embraced the class certification procedure
20 under Federal Rule of Civil Procedure 23, requiring a motion for class certification wherein the
21 party seeking certification must demonstrate that the action meets the requirements for a class
22 action as set forth in CCP §382. Thus, the incorporation of CCP §382 into B&P Code §17203
23 clearly requires that an action under the UCL where a private plaintiff seeks to represent the
24 interest of unnamed parties, such as this case, must be treated as a class action. To conclude
25 otherwise is to ignore the clear intent of the voters in enacting Proposition 64.

26 Accordingly, the court should strike Plaintiff's Ninth and Tenth Causes of Action for
27 failure to comply with CRC 1851.

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PROPOSITION

64

LIMITS ON PRIVATE ENFORCEMENT OF
UNFAIR BUSINESS COMPETITION LAWS.

Competition Laws, Initiative Statute.

- Limits individual's right to sue by allowing private enforcement of unfair business competition laws only if that individual was actually injured by, and suffered financial/property loss because of, an unfair business practice.
- Requires private representative claims to comply with procedural requirements applicable to class action lawsuits.
- Authorizes only the California Attorney General or local government prosecutors to sue on behalf of general public to enforce unfair business competition laws.
- Limits use of monetary penalties recovered by Attorney General or local government prosecutors to enforcement of consumer protection laws.

Summary of Legislative Analyst's Estimate of Net State and Local Government
Fiscal Impact:

- Unknown state costs or savings depending on whether the measure significantly increases or decreases court workload related to unfair competition lawsuits and the extent to which funds diverted by this measure are replaced.
- Unknown potential costs to local governments depending on the extent to which funds diverted by this measure are replaced.

ANALYSIS BY THE LEGISLATIVE ANALYST

BACKGROUND

California's unfair competition law prohibits any person from engaging in any unlawful or fraudulent business act. This law may be enforced in court by the Attorney General, local public prosecutors, or a person acting in the interest of itself, its members, or the public. Examples of this type of lawsuit include cases involving deceptive or misleading advertising or violations of state law intended to protect the public well-being, such as health and safety requirements.

Currently, a person initiating a lawsuit under the unfair competition law is not required to show that he/she suffered injury or lost money or property. Also, the Attorney General and local public prosecutors can bring an unfair competition lawsuit without demonstrating an injury or the loss of money or property of a claimant.

Currently, persons initiating unfair competition lawsuits do not have to meet the requirements for class action lawsuits. Requirements for a class action lawsuit include (1) certification by the court

of a group of individuals as a class of persons with a common interest, (2) demonstration that there is a benefit to the parties of the lawsuit and the court from having a single case, and (3) notification of all potential members of the class.

In cases brought by the Attorney General or local public prosecutors, violators of the unfair competition law may be required to pay civil penalties up to \$2,500 per violation. Currently, state and local governments may use the revenue from such civil penalties for general purposes.

PROPOSAL

This measure makes the following changes to the current unfair competition law:

- *Restricts Who Can Bring Unfair Competition Lawsuits.* This measure prohibits any person, other than the Attorney General and local public prosecutors, from bringing a lawsuit for unfair competition unless the person has suffered injury and lost money or property.

LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS
COMPETITION LAWS. INITIATIVE STATUTE.

64

ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

- *Requires Lawsuits Brought on Behalf of Others to Be Class Actions.* This measure requires that unfair competition lawsuits initiated by any person, other than the Attorney General and local public prosecutors, on behalf of others, meet the additional requirements of class action lawsuits.
- *Restricts the Use of Civil Penalty Revenues.* This measure requires that civil penalty revenues received by state and local governments from the violation of unfair competition law be used only by the Attorney General and local public prosecutors for the enforcement of consumer protection laws.

FISCAL EFFECTS

State Government

Trial Courts. This measure would have an unknown fiscal impact on state support for local trial courts. This effect would depend primarily on whether the measure increases or decreases the overall level of court workload dedicated to unfair competition cases. If the level of court workload significantly decreases because of the proposed restrictions on unfair competition lawsuits, there could be state savings. Alternatively, this measure could increase court workload, and therefore state costs, to the extent there is an increase in class action lawsuits and their related requirements. The number of cases that would be affected by this measure and the corresponding state costs or savings for support of local trial courts is unknown.

Revenues. This measure requires that certain state civil penalty revenue be diverted from general state purposes to the Attorney General for enforcement of consumer protection laws. To the extent that this diverted revenue is replaced by the General Fund, there would be a state cost. However, there is no provision in the measure requiring such replacement.

Local Government

The measure requires that local government civil penalty revenue be diverted from general local purposes to local public prosecutors for enforcement of consumer protection laws. To the extent that this diverted revenue is replaced by local general fund monies, there would be a cost to local government. However, there is no provision in the measure requiring the replacement of diverted revenues.

Other Effects on State and Local
Government Costs

The measure could result in other less direct, unknown fiscal effects on the state and localities. For example, this measure could result in increased workload and costs to the Attorney General and local public prosecutors to the extent that they pursue certain unfair competition cases that other persons are precluded from bringing under this measure. These costs would be offset to some unknown extent by civil penalty revenue earmarked by the measure for the enforcement of consumer protection laws.

Also, to the extent the measure reduces business costs associated with unfair competition lawsuits, it may improve firms' profitability and eventually encourage additional economic activity, thereby increasing state and local revenues. Alternatively, there could be increased state and local government costs. This could occur to the extent that future lawsuits that would have been brought under current law by a person on behalf of others involving, for example, violations of health and safety requirements, are not brought by the Attorney General or a public prosecutor. In this instance, to the extent that violations of health and safety requirements are not corrected, government could potentially incur increased costs in health-related programs.

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LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE.

ARGUMENTS IN FAVOR OF PROPOSITION 64

PROTECT SMALL BUSINESSES FROM FRIVOLOUS LAWSuits. Here's why "YES" on Proposition 64 makes sense.

dollars from small businesses that can't afford to fight in court. Here's the little secret these lawyers don't want you to know. **MOST OF THE TIME, THE LAWYERS OR THEIR FRONT GROUPS KEEP ALL THE MONEY!**

No other state allows this. It's time California voters stopped it. For years, Sacramento politicians, flush with special interest lawyer money, have protected the lawyers at the expense of California consumers, taxpayers, and small businesses.

Yes on Proposition 64 will stop thousands of frivolous shakedown lawsuits like these:

- Hundreds of travel agents have been shaken down for not including their license number on their website.
- Local homebuilders have been sued for using 'APR' in advertisements instead of spelling out 'Annual Percentage Rate.'

HERE'S WHAT ACTUALLY HAPPENED TO ONE SMALL BUSINESS VICTIM:

"My family came to this country to pursue the American Dream. We work hard to make sure our customers like the job we do. One day I got a letter from a law firm demanding \$2,500. The letter didn't claim we broke the law, just that we might have and if we wanted to stop the lawsuit, we needed to send them \$2,500. I called a lawyer who said it would cost even more to fight, so we sent money even though we'd done nothing wrong. It's just not right."

Humberto Galvez, Santa Ana

"Public Prosecutors have a long, distinguished history of protecting consumers and honest businesses. Proposition 64 will give those officials the resources they need to increase enforcement of consumer protection laws by designating penalties from their lawsuits to supplement additional enforcement efforts, above their normal budgets."

Michael D. Bradbury, Former President
California District Attorneys Association

Vote Yes on Proposition 64: Help California's Economy Recover

"Frivolous shakedown lawsuits cost consumers and businesses millions of dollars each year. They make businesses want to move to other states where lawyers don't have a legal extortion loophole. When businesses leave, taxpayers who remain pick up the burden. Proposition 64 closes this loophole and helps improve California's business climate and overall economic health."

Larry McCarthy, President
California Taxpayers Association

Vote Yes on Proposition 64. Close the frivolous shakedown lawsuit loophole.

RAY DURAZO, Chairman
Latin Business Association

MARTYN HOPPER, State Director
National Federation of Independent Business

MARYANN MALONEY
Citizens Against Lawsuit Abuse

THE BUSINESS AND CONSUMER GROUPS THAT SUPPORT PROPOSITION 64

Small business???

The Associated Press reported:

"Here are some of the companies that have made donations to the campaign to pass Proposition 64 and some of the lawsuits that have been filed against them under California's unfair competition law:

- Blue Cross of California. Donation: \$250,000. Unfair competition suits have accused the health care company of... discriminating against non-company emergency room doctors and underpaying hospitals.
- Bank of America. Donation: \$100,000. A jury found the bank misrepresented to customers that it had the right to take Social Security and disability funds from their accounts to pay overdraft charges and other fees.
- Microsoft. Donation: \$100,000. Suit... accuses the computer giant of failing to alert customers to security flaws that allow hackers to break into its computer systems by gaining some personal information.
- Kaiser Foundation Health Plan. Donation: \$100,000. One suit accused the health care provider of false

advertising for claiming that only doctors, not administrators, made decisions about care...

—State Farm. Donation: \$100,000. A group of victims of the 1994 Northridge earthquake accused the company of reducing their quake coverage without adequate notice. State Farm reportedly was forced to pay \$100 million to policyholders."

Quoting the Attorney General's senior consumer attorney in the Department of Justice, the *Los Angeles Times* reports: "The initiative 'goes unbelievably far.'... 'Throwing the baby out with the bathwater is not the best thing'... the (current) law has been used successfully to protect the public from polluters, unscrupulous financing schemes and religious discrimination."

ELIZABETH M. IMHOLZ, Director
Consumers Union, West Coast Office
SUSAN SMARTT, Executive Director
California League of Conservation Voters
DEBORAH BURGER, RN, President
California Nurses Association

LIMITS ON PRIVATE ENFORCEMENT OF UNFAIR BUSINESS COMPETITION LAWS. INITIATIVE STATUTE.

64

Proposition 64 LIMITS THE RIGHTS OF CALIFORNIANS TO ENFORCE ENVIRONMENTAL, PUBLIC HEALTH, PRIVACY, AND CONSUMER PROTECTION LAWS.

The Attorney General's Official Title for the Proposition 64 petition read: "LIMITATIONS on Enforcement of Unfair Business Competition Laws."

Across California headlines warn the public about this special interest initiative. San Francisco Chronicle: "Measure would limit public interest suits"; Ventura County Star: "Consumers love if initiative succeeds"; Orange County Register: "Consumer lawsuits targeted"; San Francisco Examiner: "Bank of America's shakedown: Unfair-competition law under fire from businesses."

Look who is supporting Proposition 64. Consider why they want to limit California's 71-year-old Unfair Business Competition Law.

Chemical companies support Proposition 64. They want to stop environmental organizations from enforcing laws against polluting streams, rivers, lakes, and our coast.

Oil companies support Proposition 64. They want to stop community organizations from suing them for polluting drinking water supplies with cancer-causing MTBE.

Credit card companies support Proposition 61. They want to stop consumer groups from enforcing privacy laws protecting our financial information.

IF A CORPORATION PROFITS FROM INTENTIONALLY POLLUTING OUR AIR AND WATER, OR INVADING OUR PRIVACY, WE SHOULD BE ABLE TO STOP IT.

The Los Angeles Times reports: "The measure would weaken a state law that allows private groups and government prosecutors to sue businesses for polluting the environment and for engaging in misleading advertising and other unfair business practices. . . . If voters approve the measure, the current law would be drastically curtailed."

Tobacco companies support Proposition 64. They want to block health organizations from enforcing the laws against selling tobacco to children.

Banks support Proposition 64. They want to stop elderly and disabled people who sued them for confiscating Social Security funds.

Insurance companies and HMOs support Proposition 64. They don't want to be held accountable for fraudulent marketing or denying medically necessary treatment to patients.

Energy companies support Proposition 64. They ripped off California during the "energy crisis" and want to block ratepayers from attacking energy company fraud.

Since 1933, the Unfair Business Competition Laws have protected Californians from pollution, invasions of privacy, and consumer fraud. Here are examples of cases successfully brought under this law:

- Supermarkets had to stop changing the expiration date on old meat and reselling it.
- HMOs had to stop misrepresenting their services to patients.
- Bottled water companies had to stop selling water that hadn't been tested for dangerous levels of bacteria, arsenic, and other chemicals.

The Los Angeles Times editorialized: "(Proposition 64) would make it very difficult for citizens, businesses, and consumer groups to file justified lawsuits."

Proposition 64 is strongly opposed by:

- AARP
- California Nurses Association
- California League of Conservation Voters
- Consumers Union
- Sierra Club California
- Congress of California Seniors
- Center for Environmental Health
- California Advocates for Nursing Home Reform
- Foundation for Taxpayer and Consumer Rights

Please join us in voting NO on Proposition 64. Don't let them limit your right to enforce the laws that protect us all.

ELIZABETH M. IMHOLZ, *Director*
Consumers Union, West Coast Office
SUSAN SMARTY, *Executive Director*
California League of Conservation Voters
DEBORAH BURGER, RN, *President*
California Nurses Association

The argument against Proposition 64 is a trial lawyer smokescreen. Read the official title and the law yourself.

- Nowhere is Environment, Public Health, or Privacy mentioned!
- California has dozens of strong laws to protect the environment, public health, and privacy, including Proposition 65, passed by voters in 1986, the California Environmental Quality Act and the California Financial Information Privacy Act.
- Proposition 64 doesn't change any of these laws.
- Proposition 64 would permit ALL the suits cited by its opponents.

"... the trial attorneys who benefit from the current system are going bonkers, and misrepresenting what (Prop. 64) will do. They claim that (Prop. 64) ... will somehow undermine the state's environmental laws. That's patently untrue."

Orange County Register

Here's what 64 really does:

- Stops Abusive Shakedown Lawsuits
- Stops fee-seeking trial lawyers from exploiting a loophole in California law—A LOOPIHOLE NO OTHER STATE HAS—that lets them "appoint" themselves Attorney General and file lawsuits on behalf of the People of the State of California.

- Stops trial lawyers from pocketing FEE AND SETTLEMENT MONEY that belongs to the public.
- Protects your right to file suit if you've been harmed.
- Permits only real public officials like the Attorney General or District Attorneys to file lawsuits on behalf of the People of the State of California.

Join 700+ groups, small businesses, and shakedown victims, including:

California Taxpayers Association
California Black Chamber of Commerce
California Mexican American Chamber of Commerce
Vote YES on 64—now yeson64.org

JOHN KEHOE, *Founding Director*
Senior Action Network
ALLAN ZAREMBERG, *President*
California Chamber of Commerce
CHRISTOPHER M. GEORGE, *Chairman of the Board of Governors*
Small Business Action Committee